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Tort Claim Preemption under the Airline Deregulation Act - Courts Still Struggling with the Meaning of Services

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TORT CLAIM PREEMPTION UNDER THE AIRLINE DEREGULATION ACT—COURTS STILL STRUGGLING WITH THE MEANING OF "SERVICES"

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IN *GILL V. JETBLUE AIRWAYS CORP.*, the U.S. District Court for the District of Massachusetts partially denied a motion for judgment on the pleadings by JetBlue Airways Corporation (JetBlue) in a personal injury case alleging negligence by JetBlue's employees.[1] The court held that, although the employees' actions fell within the definition of "services" under the Aviation Deregulation Act (ADA), the plaintiff's tort claim was not preempted by the ADA because any connections between state negligence law and airline services were "too tenuous, remote, or peripheral."[2] While the court ultimately came to the correct conclusion that the ADA did not preempt state law, the employees' actions should not be considered "services" because Congress's intent was only to free the airline industry from state *economic* regulation.[3]

In 2009, George Gill, a quadriplegic who uses a wheelchair, was given permission to begin boarding early on a JetBlue flight from Boston.[4] Two JetBlue employees accompanied Gill down the jetway to the aircraft.[5] Upon reaching the plane, Gill needed to transfer to a narrower "aisle/boarding wheelchair."[6] The employees removed Gill's armrest and raised the armrest of the boarding wheelchair so that he could slide from his wheelchair

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1 836 F. Supp. 2d 33, 35 (D. Mass. 2011).

2 *Id.* at 41, 43.

3 *See* Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1266 (9th Cir. 1998) (en banc).

4 *Gill*, 836 F. Supp. 2d at 36.

5 *Id.*

6 *Id.* at 37.

into the other.[7] After Gill had transferred wheelchairs, the employees found that the armrest on the boarding wheelchair was stuck in the "up" position and could not be lowered.[8] They left the armrest up, over Gill's objection, and continued preparing the wheelchair.[9] As the employees prepared the wheelchair, Gill slid off the seat and fractured his left femur.[10] Gill filed suit against JetBlue in state court for personal injury, alleging negligence and negligent supervision for failing to properly train the employees.[11] JetBlue removed the case to the U.S. District Court for the District of Massachusetts on the basis of federal diversity jurisdiction and moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c).[12]

While it did not determine the outcome of this case, the analysis of whether the employees' assistance to Gill should be considered a "service" under the ADA is nevertheless important because it illuminates a sharp divide between circuit courts.[13]

The ADA, which amended the Federal Aviation Act of 1958, included a preemption provision intended to improve competition and efficiency in the airline industry from an economic standpoint by reducing state regulation of the industry.[14] This provision mandates that a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law *related to* a price, route, or *service* of an air carrier."[15] Therefore, the court in *Gill* had to answer two questions: (1) whether assisting a disabled person board a plane constituted a "service" within the meaning of the ADA; and (2) whether state negligence law, as applied to the personal injury in this case, sufficiently "related to" that service.[16]

Because neither the Supreme Court nor the First Circuit Court of Appeals had settled the issue, the district court considered the conflicting decisions of other circuits to determine the scope of the term "service."[17] In *Charas v. Trans World Airlines,*

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[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *See id.* at 39–41.
[14] Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364, 367–68 (2008) (citing Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 (1992)).
[15] 49 U.S.C. § 41713(b) (2006) (emphasis added).
[16] *Gill*, 836 F. Supp. 2d at 39.
[17] *Id.*

Inc., the Ninth Circuit used a narrow interpretation of the term—which the Third Circuit later adopted[18]—concluding that the term was used "in the public utility sense—i.e., the provision of air transportation to and from various markets at various times"—and did not encompass "the dispensing of food and drinks, flight attendant assistance, or the like."[19] However, the Seventh and Eleventh Circuits followed a much broader construction espoused by *Hodges v. Delta Air Lines*, in which the Fifth Circuit held that because "[s]ervices generally represent a bargained-for or anticipated provision of labor from one party to another," the term includes "items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself."[20] While stopping short of the *Hodges* rule, the Fourth and Second Circuits also avoided a definition as narrow as that of *Charras*.[21] After noting that district courts within the First Circuit had generally used the *Hodges* rule, the court in *Gill* opted to follow it as well.[22]

Finally, the court noted that other portions of the ADA require airlines to obtain insurance policies for injuries "'resulting from the operation or maintenance of the aircraft.'"[23] Because these insurance policies would be unnecessary if Congress intended to preempt all state law tort claims, the court found it "necessary to exclude aircraft operation itself from the definition of 'service' covered by the preemption clause."[24] This distinction between "service" and "operation" also led the Fifth Circuit in *Hodges* to conclude that "the ADA did not preempt state-law personal-injury claims arising from hazardous condi-

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[18] Taj Mahal Travel, Inc. v. Delta Air Lines, Inc., 164 F.3d 186, 194 (3d Cir. 1998).

[19] Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1266 (9th Cir. 1998) (en banc).

[20] Hodges v. Delta Air Lines, Inc., 44 F.3d 334, 336 (5th Cir. 1995) (en banc) (quoting panel opinion) (internal quotation marks omitted); *see* Branche v. Airtran Airways, Inc., 342 F.3d 1248, 1256–57 (11th Cir. 2003); Travel All Over the World, Inc. v. Saudi Arabia, 73 F.3d 1423, 1433 (7th Cir. 1996).

[21] *See* Smith v. Comair, Inc., 134 F.3d 254, 259 (4th Cir. 1998) ("[B]oarding procedures are a service rendered by an airline."); Air Transp. Ass'n of Am. v. Cuomo, 520 F.3d 218, 223 (2d Cir. 2008) (holding that the provision of amenities while a plane was on the ground was a "service" under the ADA).

[22] *Gill*, 836 F. Supp. 2d at 40; *see also* DiFiore v. Am. Airlines, Inc., 646 F.3d 81, 88 (1st Cir. 2011) (adopting a broad definition of "services").

[23] *Gill*, 836 F. Supp. 2d at 40 (quoting 49 U.S.C. § 41112(a) (2006)).

[24] *Id.*

tions onboard aircraft and boarding facilities."[25] Accordingly, the court adopted the view that the term "services" "encompasses all bargained-for or anticipated elements of air travel provided by air carriers except for those related to aircraft operation and maintenance."[26]

The district court, however, erred in adopting the overly expansive *Hodges* interpretation, highlighting an alarming trend among the circuits. The issue in this case was fortunately rendered moot because the state law was not sufficiently "related to" airline "services," and the court ultimately reached the correct conclusion that state negligence law was not preempted;[27] however, the *Hodges* construction may lead to perverse results when applied to different facts and interpreted by different courts. This construction expands the scope of preemption beyond what Congress intended. Furthermore, the "services" versus "operation or maintenance" analysis creates a distinction without a difference in some cases and raises more difficulties than it puts to rest.

Although confusion among courts is understandable due to the vagueness of the term "services," the circumstances surrounding the ADA suggest, at the very least, that basic tasks performed by employees that are only remotely connected to the price of a ticket—such as the tasks performed in *Gill*—should not be considered "services." While courts must first look to the language's plain meaning when interpreting a statute, the term "services," without a statutory definition, is anything but clear.[28] Therefore, courts should look to the circumstances surrounding the statute to determine legislative intent.[29] Preemption provisions are strictly and narrowly construed, and courts "look to

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[25] *Id.* (citing *Hodges*, 44 F.3d at 338–39 (holding that a tort claim was not preempted under the ADA because the failure to maintain overhead bins to prevent falling luggage was a matter of "operations" rather than "service")); *see also* Jiminez-Ruiz v. Spirit Airlines, Inc., 794 F. Supp. 2d 344, 345, 348–49 (D.P.R. 2011) (holding that personal injury claims for negligently failing to keep mobile disembarkation stairs dry and add safety features did not involve "services" and were not preempted under the ADA); Dudley v. Bus. Express, Inc., 882 F. Supp. 199, 202–03, 207–08 (D.N.H. 1994) (holding that claims for dangerous conditions in an aircraft entryway and for failure to warn were not preempted by the ADA because the claims concerned safety issues, not "services").

[26] *Gill*, 836 F. Supp. 2d at 40–41.

[27] *See id.* at 43.

[28] *See* Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1264 (9th Cir. 1998) (en banc).

[29] *See id.*

provisions of the whole law, and to its object and policy."[30] Moreover, it is always presumed that "Congress does not cavalierly pre-empt state-law causes of action," and Congress's purpose is always the ultimate concern in preemption cases.[31]

As the Ninth Circuit explained in *Charas*, Congress passed the ADA to prevent states from imposing economic regulations on the airline industry after the federal government removed its own economic regulations.[32] The Supreme Court further described Congress's goal as helping "assure transportation rates, routes, and services that reflect maximum reliance on competitive market forces, thereby stimulating efficiency, innovation, and low prices, as well as variety and quality."[33] In *Rowe*, the Court stated that, although a state law may be preempted if its impact on rates, routes, or services is indirect, the law must have a "'significant impact'" related to Congress's objectives.[34] Furthermore, courts should examine the language of the statute in context: in referring to airlines, "price" generally means the cost of airfare between two locations, and "route" refers to the course of travel between those locations.[35] When included with these two terms in the context of airline regulation, "service" likely "refers to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided (as in, 'This airline provides service from Tucson to New York twice a day.')."[36] The motivation behind the ADA was certainly not to provide carriers with immunity against ordinary tort claims.[37] However, because the *Hodges* interpretation encompasses most negligent actions performed by an employee, it is easy to imagine a situation where an act governed by tort law is considered a "service" and a court concludes that tort law is preempted because of its impact on airlines.[38]

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[30] *Id.* (quoting Kelly v. Robinson, 479 U.S. 36, 43 (1986)).

[31] *Id.* at 1265 (quoting Medtronic v. Lohr, 518 U.S. 470, 485 (1996)).

[32] *Id.* (citing Am. Airlines v. Wolens, 513 U.S. 219, 230 (1994)).

[33] Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364, 371 (2008) (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 (1992) (internal quotation marks omitted)).

[34] *Id.* (quoting *Morales*, 504 U.S. at 390).

[35] *Charas*, 160 F.3d at 1265.

[36] *Id.* at 1265–66.

[37] *Wolens*, 513 U.S. at 237 (Stevens, J., concurring in part and dissenting in part).

[38] *See id.* at 236.

Additionally, the distinction between "services" and "operation or maintenance" espoused by *Hodges* and followed by the district court is completely unworkable, and the artificial nature of this distinction casts doubt on whether it is really what Congress intended.[39] The requirement that airlines obtain insurance for personal injuries from "operation or maintenance" does indeed show Congress's intent to exempt at least some state laws from being preempted by the ADA; clearly, there would be no purpose for this requirement if a passenger could never sue under state law to recover damages for personal injury.[40] Courts following the narrower interpretation of "service" have concluded that this section conveys Congress's general intent to exempt personal injury claims from preemption.[41] The district court, by contrast, followed the *Hodges* approach and held the phrase "operation or maintenance" to mean that Congress intended for the actual operation of the aircraft and maintenance to be exempt.[42] The district court claimed, therefore, that the term "service" includes "all bargained-for or anticipated elements of air travel provided by air carriers except for those related to aircraft operation and maintenance."[43]

If the issue were not already ambiguous enough, the "service" versus "operations and maintenance" interpretation muddies the water even further. As the Ninth Circuit pointed out in *Charas*, there are many situations where a non-material change in the facts could determine whether a claim is preempted.[44] For example, a passenger hit by the door on a beverage cart could bring a personal injury claim if the door swung open due to a broken latch, but that passenger could not bring a claim for the same injury if the door swung open due to a flight attendant's negligent failure to close the latch.[45]

This distinction becomes even more unworkable in certain tort claims where it is hard to determine whether an incident is the result of "service" or "maintenance." In *Gill*, it seems obvious at first glance that the injury would fall under the category of

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[39] *See Charas*, 160 F.3d at 1263; Gill v. JetBlue Airways Corp., 836 F. Supp. 2d 33, 41 (D. Mass. 2011).

[40] *See Gill*, 836 F. Supp. 2d at 41.

[41] Taj Mahal Travel, Inc. v. Delta Air Lines, Inc., 164 F.3d 186, 194 (3d Cir. 1998); *Charas*, 160 F.3d at 1264.

[42] *See Gill*, 836 F. Supp. 2d at 41–42.

[43] *See id.*

[44] *Charas*, 160 F.3d at 1263.

[45] *Id.*

"service" as defined by *Hodges*. Upon closer inspection, however, the fact that the armrest was stuck in the "up" position seems to be an issue relating to "maintenance."[46] Indeed, as *Gill* noted, courts following the *Hodges* approach have interpreted "maintenance" to include actions taken to ensure safety and prevent hazardous conditions—not just on the plane itself, but also on "boarding facilities" and ancillary equipment; such actions would include, for example, ensuring that disembarkation stairs are dry.[47] Unfortunately, the district court failed to even discuss whether the faulty armrest fell under the category of "maintenance."[48] Suggesting the faulty armrest was not a cause of the accident would be a laughable conclusion; but for the malfunctioning armrest, the employees would have been able to lower the armrest and Gill would not have fallen.[49]

This creates a difficult position for courts. When a court using the *Hodges* interpretation encounters such a tort incident involving one cause relating to "service" and one cause relating to "operation or maintenance," how should the court determine whether the claim is preempted? Should the court decide in which category the *most significant* cause falls and decide whether the claim is preempted accordingly? This would create more problems, requiring in some cases that the court perform a detailed factual analysis simply to decide whether the plaintiff can even bring a claim under the *Hodges* interpretation. Even under this definition, it may be difficult to discern whether an act is a "service," "operation," or "maintenance." The district court pointed to *Jiminez-Ruiz*, in which a court found that personal injury claims alleging negligent failure to keep mobile disembarkation stairs dry and add safety features did not involve "services" and were not preempted under the ADA.[50] A failure to keep stairs dry, however, could be analogized to the failure of the JetBlue employees to lower the armrest; both involve tasks ensuring passenger safety and employee negligence in failing to perform those tasks.[51]

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[46] *See Gill*, 836 F. Supp. 2d at 37, 40–41.

[47] *See id.* (citing Hodges v. Delta Air Lines, Inc., 44 F.3d 334, 336 (5th Cir. 1995) (en banc); Jiminez-Ruiz v. Spirit Airlines, Inc., 794 F. Supp. 2d 344, 345, 348–49 (D.P.R. 2011); Dudley v. Bus. Express, Inc., 882 F. Supp. 199, 207–08 (D.N.H. 1994)).

[48] *See id.*

[49] *See id.* at 37.

[50] *Id.* (citing *Jiminez-Ruiz*, 794 F. Supp. 2d at 345, 348–49).

[51] *See id.* at 37, 40–41; *Jiminez-Ruiz*, 794 F. Supp. 2d at 345, 348–49.

The *Hodges* interpretation of the ADA creates an arbitrary and artificial rule that is unpredictable and unworkable; in some situations, it may even contradict Congress's intent. Judge Jolly of the Fifth Circuit noted the unpredictability and arbitrariness of this test in *Hodges* by emphasizing that the majority and dissent applied the same test but reached opposite conclusions.[52] Therefore, in *Gill*, the district court should have adopted the narrow approach, which looks to "whether a common law tort remedy frustrates deregulation by interfering with competition through public utility-style regulation," because such a focus on competitive market forces leads to a more accurate assessment of congressional intent.[53]

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[52] *Hodges*, 44 F.3d at 342 (Jolly, J., concurring).

[53] *See* Taj Mahal Travel, Inc. v. Delta Air Lines, Inc., 164 F.3d 186, 194 (3d Cir. 1998).

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