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**PREEMPTION OF STATE LAW CLAIMS AGAINST
AIRLINES IN THE NINTH CIRCUIT: “OPERATION
AND MAINTENANCE” OR “NEGLIGENT RENDITION
OF SERVICE?”**

MICHAEL H. CHANG*

TABLE OF CONTENTS

I. FEDERAL AIRLINE REGULATION	4
II. ADA PREEMPTION	5
III. <i>HARRIS</i> AND ITS PROGENY	6
IV. <i>HARRIS</i> REVISITED	9
A. <i>GEE</i> AND <i>ROWLEY</i>	9
B. <i>GADBURY</i> AND <i>COSTA</i>	10
C. JUDGE O’SANNLAIN’S CONCURRING OPINION ...	13
V. THE IMPLICATION OF <i>GEE</i>	13

AN ACCIDENT occurs while the 737 approaches Los Angeles. A flight attendant fails to latch the door to her service cart, spills a pot of hot coffee on a passenger’s lap, and severely burns that passenger. Can that passenger bring a state law tort action against the airline? Whether such claimant has a remedy remains unclear in light of the most recent pronouncement by the Ninth Circuit Court of Appeals in *Gee v. Southwest Airlines*.¹ *Gee*, an opinion issued on April 4, 1997, involved four separate ac-

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¹ 110 F.3d 1400 (9th Cir. 1997).

tions consolidated for argument.² Appellants sought damages against various airlines based on in-flight events ranging from loathsome behavior by fellow passengers to objects dropping on them from overhead bins. The appellants appealed summary judgment grants to defendant airlines based on the preemption of their state tort claims by the Federal Aviation Authority Authorization Act. The court held that the ADA preempts state law claims relating to an airline's "rendition of services" but not those relating to its "safety and operations."³ However, while its holding may be reasonable, the court may be drawing a distinction that is untenable in practice.

I. FEDERAL AIRLINE REGULATION

The preemption clause of the Federal Aviation Authority Authorization Act⁴ (known and referred to in this article as the Airline Deregulation Act, the ADA or the Act) provides 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 that may provide air transportation under this subpart."⁵ "Service" is not defined in the Act itself.

The rationale behind the ADA, according to the Civil Aeronautics Board (CAB), is to deregulate the economic aspects of interstate transportation.⁶ The preemption clause was specifically designed to prevent states from regulating any economic aspects of air transportation. The CAB explained that "preemption extends to all of the economic factors that go into the provision of the quid pro quo for passenger's fare. . . . [A] state may not interfere with the services that carriers offer in exchange for their rates and fares."⁷

The preemptive scope of the clause has been clarified by two recent Supreme Court opinions. In *Morales v. Trans World Airlines, Inc.*,⁸ the Court held that state guidelines governing air fare advertising were preempted under the ADA.⁹ The Court, in

² See, e.g., *Gee v. Southwest Airlines*, CV-94-03983-CW, 1995 WL 652463 (N.D. Cal. Oct. 31, 1995); *Rowley v. American Airlines, Inc.*, 885 F. Supp. 1406 (D. Or. 1995); *Costa v. American Airlines, Inc.*, 892 F. Supp. 237 (C.D. Cal. 1995).

³ *Gee*, 110 F.3d at 1400.

⁴ 49 U.S.C. § 41713(b) (1994).

⁵ 49 U.S.C. § 41713(b)(1) (emphasis added).

⁶ See 44 Fed. Reg. 9948-49 (1977).

⁷ *Id.*

⁸ 504 U.S. 374 (1992).

⁹ See *id.* at 384.

adopting a broad definition of the phrase “related to,” concluded that advertising was sufficiently “related to the service of an air carrier.”¹⁰ By focusing exclusively on the phrase “relating to,” the Court left the scope of “services” undefined. However, the Court acknowledged that there would be situations where the state action affecting rates, routes, or services would be “too tenuous, remote, or peripheral” to have any preemptive effect.¹¹ Yet, the Court declined to express where it would be appropriate to draw the line.

Then, in *American Airlines v. Wolens, Inc.*,¹² the Court held that American Airlines’ attempt to retroactively modify its frequent flyer program was not preempted by section 41713(b)(1), regardless of whether the program related to the services of the airline.¹³ The Court found, in part, that if the obligations were self-imposed by the airlines in the first place, they did not amount to a state’s enactment or enforcement of a law or regulation and, thus, did not come within the type of claims preempted under the ADA.¹⁴

II. ADA PREEMPTION

The Supreme Court has not specifically addressed the issue of ADA preemption of personal injury claims or the scope of “services” under the preemption statute. However, several circuit courts, including the Ninth Circuit, have spoken on the issue. The majority of circuits that have dealt with the issue have: (1) found that there is no preemption for personal injury actions based on negligence¹⁵ and (2) defined the scope of “services” narrowly, limiting preemption to activity that is based on economic decisions and that relates to the contractual features that are bargained for by passengers.¹⁶

¹⁰ *Id.* at 383.

¹¹ *Id.* at 390 (citing *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100 n.21 (1983)).

¹² 513 U.S. 219 (1995).

¹³ *See id.* at 226.

¹⁴ *See id.* at 228.

¹⁵ There is no provision in the ADA for personal injury or property damage lawsuits. Although the FAA requires airlines to provide “safe and adequate” service to their passengers (49 U.S.C. § 41702 (1994)), both the FAA and the ADA are silent when it comes to a passenger’s private right of action for damages suffered as a result of a violation of this standard. *See Romano v. American Trans Air*, 48 Cal. App. 4th 1637, 1643 n.5, 56 Cal. Rptr. 2d 428 (1996) (statutes and cases cited therein).

¹⁶ *See, e.g., id.*; *Smith v. America West Airlines, Inc.*, 44 F.3d 344 (5th Cir. 1995); *Bieneman v. City of Chicago*, 864 F.2d 463 (7th Cir. 1988); *Moore v. Northwest*

In *Hodges v. Delta Airlines, Inc.*,¹⁷ for example, the Fifth Circuit held that a plaintiff's personal injury claim stemming from a bottle of rum that fell from an overhead compartment onto her head was not preempted by the ADA. This decision was based on the court's view that the use of overhead compartments for luggage storage pertains to decisions regarding the navigation of an air carrier, rather than decisions regarding the service of baggage handling.¹⁸ The service of baggage handling, according to the court, would encompass an airline's policy of permitting passengers to carry certain types of baggage onto the plane, along with other decisions that relate to the contractual bargain between the airline and its passengers—decisions that “do not refer directly to the way in which the aircraft is operated.”¹⁹ The court noted that Congress meant to protect decisions regarding baggage handling, boarding procedures, provision of food and drink, and ticketing from state regulation.²⁰

In addition, the *Hodges* court found that Congress explicitly preserved state law personal injury and property damage claims through the enactment of 49 U.S.C. § 41112(a) (the Savings Clause).²¹ The Savings Clause requires that aircraft carriers maintain insurance to cover liability for personal injury, death, or property damage resulting from the operation of the aircraft.²² Attempting to gauge the intent of Congress, the court noted that complete preemption of state law in personal injury cases would render the Savings Clause unnecessary. Thus, the court reasoned, Congress probably did not intend to preempt actions for personal injury based on negligence in the operation and maintenance of the aircraft.²³

III. HARRIS AND ITS PROGENY

Virtually contemporaneous with—although after—*Hodges*, the Ninth Circuit addressed the preemptive scope of the ADA with respect to personal injury claims and reached a different conclu-

Airlines, Inc., 897 F. Supp. 313 (E.D. Tex. 1995); *Margolis v. United Airlines, Inc.*, 811 F. Supp. 318 (E.D. Mich. 1993).

¹⁷ 44 F.3d 334 (5th Cir. 1995).

¹⁸ *See id.* at 338.

¹⁹ *Id.* at 339.

²⁰ *See id.* at 336; *see also Smith*, 44 F.3d at 346 (“[N]either the language nor the history of the ADA implies that Congress was attempting to displace state personal injury tort law concerning the safety of airline business.”).

²¹ *See Hodges*, 44 F.3d at 336-37, 339.

²² *See* 49 U.S.C. § 41112(a) (1994).

²³ *See Hodges*, 44 F.3d at 336-37.

sion. In *Harris v. American Airlines*,²⁴ the court preempted a passenger's claims against American Airlines where the flight attendant continued to serve a boisterous passenger alcoholic drinks and failed to restrain him from using outrageous and discriminatory insults that offended the plaintiff.²⁵ Plaintiff was a first-class passenger who contended that the flight attendant's failure to protect her was a breach of established airline procedure. The court concluded that the conduct of the flight crew, specifically how they exercised control over intoxicated and rude passengers, related to a "service" through the provision of alcohol.²⁶

The dissent, on the other hand, opined that the majority incorrectly classified serving alcoholic beverages as a "service." Taking into consideration the ADA's purpose of economic deregulation, these "services," Judge William Norris noted, "should be limited to economic decisions regarding the provision of drinks," for example, "whether or not to provide drinks on any flight, and contractual decisions about whether to charge for the drinks or provide them free."²⁷

Despite its recent vintage, *Harris* has been interpreted and applied by numerous district courts. In *Costa v. American Airlines, Inc.*,²⁸ the plaintiff sued American Airlines for injuries she sustained when another unidentified passenger opened an overhead bin and caused a bag to fall on her as she sat in an aisle seat. Plaintiff alleged "American violated its duty of care as a common carrier in several respects, including failure of its flight attendants to stop or identify the other passenger, American's routine destruction of the passenger list shortly after the flight, and the airline's refusal to honor Costa's request for a window seat."²⁹

The court disagreed with the plaintiff and granted American's motion for summary judgment. Reasoning that the Ninth Circuit "necessarily rejected the contractual definition adopted by the Fifth Circuit," Judge Gary Taylor applied *Harris*'s broad definition of "services" to reject plaintiff's claims even though he

²⁴ 55 F.3d 1472 (9th Cir. 1995).

²⁵ See *id.* at 1476-77.

²⁶ See *id.*

²⁷ *Id.* at 1478 (Norris, J., dissenting).

²⁸ 892 F. Supp. 237 (C.D. Cal. 1995). *But see* *Gee v. Southwest Airlines*, 110 F.3d 1400 (9th Cir. 1997).

²⁹ *Id.* at 238.

expressed concern regarding the expanse of *Harris's* holding.³⁰ Indeed, Judge Taylor cited the collected authorities in the *Harris* dissent.

Similar to *Costa*, the district court in *Stone v. Continental Airlines, Inc.*³¹ felt bound by the holding in *Harris* and held (that the ADA) preempted a first class passenger's injury claims based on facts almost identical to those in *Harris*.³²

In *Manning v. Skywest Airlines*,³³ which was decided on a 12(b)(6) motion to dismiss, plaintiff in a small turboprop Fairchild SA-27 alleged that she was thrown violently into a bulkhead and suffered a herniated cervical disc and emotional distress when the pilot temporarily lost control of the aircraft after passing through wake turbulence of a Boeing 747 jet. Noting that *Harris* was "contrary to the weight of authority interpreting ADA preemption," the court determined that plaintiff's state law claim, which stemmed directly from the pilot's negligent operation of the aircraft, was not preempted.³⁴

Holding that the claim did not relate to "service" as defined by the ADA, the court first determined that the plaintiff would be left without a remedy if her actions were preempted because there was no federal action for her to pursue.³⁵ The court then relied on the dicta in *Wolens* to show that the preemption clause could not have been intended to bar all personal injury claims.³⁶ Finally, the court reasoned that Congress's retention of liability insurance requirements for airlines indicates its desire to withhold tort immunity from the airlines.³⁷ "If, as defendant's reading of *Harris* requires, all tort claims are preempted by section 41713(b)(1), then the requirement for liability insurance would be superfluous."³⁸

³⁰ *Id.* at 238-39 ("It seems unlikely [that] either Congress or the Supreme Court would have intended this broad result or the impact it may have on bodily injury claims arising from other kinds of airline services.").

³¹ 905 F. Supp. 823 (D. Haw. 1995).

³² *See id.* at 825 ("[T]he factual distinctions between *Harris* and the instant case are not significant enough to distinguish the holding.").

³³ 946 F. Supp. 767 (C.D. Cal. 1996).

³⁴ *See id.* at 770.

³⁵ *See id.* at 771.

³⁶ *See id.* at 771-72. The dicta suggested that "personal injury claims relating to airline operations" would not be preempted. *American Airlines v. Wolens*, 513 U.S. 219 (1995) (noting that both defendant airline and the United States, as amicus curiae, agreed that safety-related personal injury claims would not likely be preempted).

³⁷ *See id.* at 772 (citing 49 U.S.C. § 41112(a) (1994)).

³⁸ *Id.*

IV. *HARRIS* REVISITED

Gee involved four separate actions consolidated for argument. In each of these actions, the lower court granted summary judgment to the defendant airline based on the view that *Harris* mandated preemption of appellants' state law tort claims and on the "far-reaching" scope of the ADA adopted therein.

A. *GEE* AND *ROWLEY*

Shirley Gee boarded a Southwest Airlines flight from Los Angeles to Oakland and sat behind a wedding party. The wedding party was noisy, and Gee asked some of the members to stop making so much noise. She also complained to a flight attendant and asked the attendant not to serve the group any more alcohol because they appeared to be intoxicated. Nevertheless, the attendant served one beer apiece to three members of the wedding party. Gee claimed that after her complaint, members of the wedding party harassed her with racial slurs, pantomimed cocking and shooting a gun at Gee and her companions, and threatened to "get them" upon landing. She filed suit in California state court against Southwest for a variety of tort actions.³⁹ Southwest removed the case to federal court on diversity grounds. The district court granted Southwest's motion for summary judgment on the grounds that the claims were preempted.⁴⁰

Jan Rowley, who is paralyzed from the chest down and requires a motorized scooter for mobility, advised American Airlines prior to her flight that she would need an aisle chair (a narrow wheelchair that can be rolled between seats) to assist her in moving from the door of the plane to her seat. American assured her that such assistance would be available. American failed to provide the aisle chair in either Dallas or Portland, in violation of the Air Carrier Access Act (ACAA). As a result, Rowley claimed she was forced to make an arduous journey to and from her seat by holding on to seats and overhead compartments while American employees watched. Rowley also re-

³⁹ See *Gee v. Southwest Airlines*, 110 F.3d 1400, 1403 (9th Cir. 1997). These actions included: negligence per se for violation of FAA regulations against boarding or serving intoxicated passengers; negligence; negligent training and supervision; intentional and negligent infliction of emotional distress; respondeat superior; and violating California Code provisions protecting people from threats, harassment, intimidation or assault, including those based on race.

⁴⁰ See *Gee v. Southwest Airlines Co.*, No. C 94-03983 CW, 1995 WL 652463, at *5 (N.D. Cal. Oct. 31, 1995), *aff'd*, 110 F.3d 1400 (9th Cir. 1997).

quested American to return her motorized scooter to the door of the plane in Dallas and Portland, but it failed to do so. In Portland, American also failed to reassemble the scooter for her after it had been disassembled for stowage.

Rowley filed suit for compensatory and punitive damages under the ACAA and asserted several state tort claims for intentional and negligent infliction of emotional distress. The district judge granted American's motion for summary judgment with respect to the tort claims, finding them to be expressly preempted by the ADA. The remaining compensatory damage claim under the ACAA was tried to a jury, which found that American violated the ACAA by failing to provide the aisle chair and failing to return the motorized scooter to Rowley. The jury, however, awarded zero compensatory damages.⁴¹

After reluctantly concluding that it was bound by the holding in *Harris*, even though it was a "far-reaching" decision, the court had no trouble finding Gee's situation to be "virtually identical" to that in *Harris*.⁴² It reasoned that, under *Harris*, Gee's negligence claim against Southwest for emotional distress is "related to" the service of alcoholic beverages to passengers and the crew's in-flight conduct towards unruly passengers. Therefore, it ruled that Gee's claims were preempted under the ADA. Similarly, the court held that Rowley's claim of emotional injury based on the conduct of American employees who failed to provide assistance with her disability was likewise preempted. It found "no real distinction between the *Harris* claims based on the 'in-flight' conduct of the crew, and Rowley's claims based on the pre- and post-flight conduct of the American employees."⁴³ If the provision of drink is an airline "service," then the assistance (or lack thereof) in boarding and deplaning passengers is also a service. Under *Harris*, Rowley's attempt to pursue state tort claims involved activities that "related to" service and are thus preempted.

B. *GADBURY AND COSTA*

Herbert Gadbury was a passenger on a 1993 Delta Air Lines flight who alleged that during takeoff acceleration and banking,

⁴¹ "Rowley also filed a motion in limine regarding the availability of damages under the ACAA, and the district court held that 'federal law permits recovery of compensatory damages for violation of the ACAA, but not punitive damages.'" 110 F.3d at 1403. This holding was appealed as well. *See id.*

⁴² *See id.* at 1406.

⁴³ *Id.*

a door on a service cart swung open and struck his knee. Gadbury brought suit in Oregon state court alleging common law negligence, and Delta removed the case to federal district court. Delta admitted that the door opened after takeoff and that it "was not correctly latched by the flight attendants just prior to takeoff."⁴⁴ The district court granted summary judgment for Delta, upholding a magistrate's finding that Gadbury's claim was preempted.

Donna Costa was a passenger on an American Airlines flight who claimed injuries from another passenger who opened the overhead bin upon landing, causing a suitcase to fall onto her head.

As to the claims of these two plaintiffs, the court found it appropriate to distinguish those claims stemming from "negligent rendition of service," which it held were preempted, and those relating to "operations and maintenance," which it held were not preempted, even though the court admitted that "there is no strict dichotomy between 'operations and maintenance' and 'service.'"⁴⁵ The court distinguished the Gadbury and Costa claims from *Harris* and held that, based on this distinction, those claims were not preempted. "Emotional injury claims stemming from the 'negligent rendition of service' are quite different from safety-related personal injury or death claims concerning airline operations or maintenance."⁴⁶ As in *Manning*, the court also found that Congress's retention of liability insurance requirements for airlines would be superfluous if airlines were immune from all liability stemming from passenger injury claims.⁴⁷

⁴⁴ *Id.* at 1403.

⁴⁵ *Id.* at 1407 (citing *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 339 (5th Cir. 1995)). This aspect of the court's holding is far from revolutionary because it was foreshadowed by the Northern District's holding in *DuCombs v. Trans World Airlines*, 937 F. Supp. 897 (N.D. Cal. 1996) and by *Hodges*. In *DuCombs*, for example, Judge Fern Smith stated that "storing baggage and warning passengers of the dangers of items falling from overhead compartments, though it may be classified as conduct of the flight crew, is not per se a 'service' under *Harris*, as it is not associated with the service of providing food and beverages." *Id.* at 902. In *Hodges*, the court ruled that preemption does not extend to "state tort actions for personal physical injuries or property damage caused by the *operation and maintenance* of aircraft." *Hodges*, 44 F.3d at 336 (emphasis added).

⁴⁶ *Gee*, 110 F.3d at 1406.

⁴⁷ As discussed, the Savings Clause requires that aircraft carriers maintain insurance to cover liability for personal injury, death, or property damage resulting from the operation of the aircraft. See 49 U.S.C. § 41112(a) (1994).

Finally, the court emphasized that the distinction is “harmonious” with results reached in other circuit and district courts.⁴⁸

In *Gadbury*, Delta agreed that the service/operations distinction may be appropriate, but argued that Gadbury’s claim was still preempted because it was more related to “service.” Delta argued that Gadbury was injured by a “serving” cart, and the primary purpose of the cart is to provide on-board services, such as waste collection, to passengers. According to the court, Delta’s rationale would lead to absurd results: If Gadbury had been injured by a loose piece of safety equipment, rather than a loose piece of serving equipment, presumably Delta would admit the claim could proceed. Gadbury’s claim stems from Delta’s negligence in failing to properly latch the door during takeoff. Thus, the court held that “Gadbury’s claim did not relate to airline service but rather was connected with the failure to take appropriate safety measures relating to the operation of the aircraft.”⁴⁹

Costa’s common law tort claims stemmed from luggage falling onto her from the overhead compartment. The court agreed with the Fifth Circuit’s opinion in *Hodges*, which found that “whether luggage may be placed in overhead bins and whether the flight attendants properly monitor compliance with overhead rack regulations are matters that pertain to the safe operation of a flight,” and thus are not preempted.⁵⁰ On the other hand, the court noted that many of Costa’s claims pertained to violations of California civil code provisions that impose a higher duty of care on common carriers. This statutorily imposed standard of care is not a law of “general applicability” that happens to indirectly relate to airline service and, thus, amounts to an attempt by California to impose its own substantive standards on airlines. Accordingly, this civil code standard of care is preempted by the ADA.⁵¹

⁴⁸ See *Gee*, 110 F.3d at 1407 (citing, among others, *Hodges* and *Smith*).

⁴⁹ *Id.*

⁵⁰ *Id.* (citing *Hodges*, 44 F.3d at 339). The court also ruled on Costa’s claim for negligent spoliation of evidence based on American’s destruction of passenger lists despite its notice of the incident was not preempted because maintaining such a list is not a “service’ typically provided to passengers.” *Id.* at 1407-08.

⁵¹ The court directed that while Costa’s tort claims may proceed, these claims should be evaluated under the common law standard of care. See *id.* at 1408.

C. JUDGE O'SCANNLAIN'S CONCURRING OPINION

While Judge Diarmuid O'Scannlain's opinion was labeled a "concurring" one, he declined to embrace the majority's distinction between "service" and "operation and maintenance."⁵² Observing that "the majority constructs a seemingly simple rule," Judge O'Scannlain believed that this rule's "emphasis on a few words taken out of context needlessly muddles" the preemption jurisprudence.⁵³ The preemptive scope of the ADA, reasoned the Judge, should be guided by congressional intent.⁵⁴

According to Judge O'Scannlain, the majority opinion "is no more likely than the *Harris* decision to bring clarity to the airline preemption field."⁵⁵ Instead, he reasons, the courts should examine the regulatory effect of the state tort claim.

The proper inquiry then is whether the state common law tort remedies have the effect of frustrating the purpose of deregulation by interfering with the forces of competition. If the state law does not have the requisite regulatory effect, then it is simply "too tenuous, remote, or peripheral a matter" to have preemptive effect.⁵⁶

V. THE IMPLICATION OF *GEE*

In an apparent effort to retract from the "far-reaching"⁵⁷ preemption holding of *Harris* and bring itself back into line with the majority view, the Ninth Circuit attempted to distinguish the *Harris* holding by drawing a distinction between state law claims relating to the rendition of service and those concerning operations and maintenance. Under this distinction, state law claims based on the following airline conduct are preempted under the ADA because such conduct relates to "services":

- Flight crew's failure to exercise control over intoxicated and rude passengers.⁵⁸
- Flight crew's failure to prevent a battery committed by one passenger against another.⁵⁹

⁵² *Id.* at 1409.

⁵³ *Id.*

⁵⁴ *See id.* at 1410.

⁵⁵ *Id.*

⁵⁶ *Id.* (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992)).

⁵⁷ *See id.* at 1404-06.

⁵⁸ *See id.* at 1400, 1406; *Harris v. American Airlines*, 55 F.3d 1472, 1476 (9th Cir. 1995).

⁵⁹ *See Romano v. American Trans Air*, 48 Cal. App. 4th 1637 (1996).

- Flight crew's failure to provide assistance to disabled passengers.⁶⁰

By contrast, state law claims based on the following conduct are not preempted because such conduct relates to an airline's "operation and maintenance:"

- Passenger being "bumped" from a flight.⁶¹
- Negligent reconfirmation of a reservation.⁶²
- Baggage or other objects falling from overhead storage bins.⁶³
- Pilot's losing control of the aircraft.⁶⁴
- Flight crew's failure to take appropriate safety measures relating to the operation of the aircraft, i.e., latching of service door.⁶⁵
- Airline's "spoliation of evidence" by destroying passenger lists.⁶⁶

Did Congress in drafting the ADA or the Court in *Morales* and *Wolens* intend such a "hodgepodge" of results? Probably not. The distinction between "service" and "operation and maintenance" is unworkable in practice. The pilot's losing control of an aircraft arguably is no more related to the aircraft's "safety" or "operations" than the flight crew's treatment of passengers. Even the court in *Gee* recognized that "it is difficult to imagine a more critical airline *service* than aircraft navigation."⁶⁷ Moreover, a fine line between service and operation simply cannot (and perhaps should not) be drawn with respect to, for example, a flight crew's negligent spilling of a hot beverage on a passenger's lap by letting the container fall through an unlatched service cart door. *Gee's* reasoning suggests that both service and operation may be implicated by the crew's conduct.⁶⁸ In sum,

⁶⁰ See *Gee*, 110 F.3d at 1400, 1406.

⁶¹ See *West v. Northwest Airlines, Inc.*, 995 F.2d 148 (9th Cir. 1993).

⁶² See *Lathigra v. British Airways PLC*, 41 F.3d 535 (9th Cir. 1994).

⁶³ See *Hodges*, 44 F.3d at 334, 339; *Gee*, 110 F.3d at 1400, 1406.

⁶⁴ See *Manning v. Skywest Airlines*, 946 F. Supp. 767, 771 (C.D. Cal. 1996).

⁶⁵ See *Gee*, 110 F.3d at 1400, 1407.

⁶⁶ See *id.* at 1400, 1407-08.

⁶⁷ See *id.* at 1407 (emphasis added).

⁶⁸ This is a hybrid scenario. The crew's conduct relates to both the service of beverages to passengers, as in *Gee*, and the failure to take appropriate safety measures relating to the operation of the aircraft, as in *Gadbury*. Judge O'Scannlain provided other examples:

For example, a damage claim by an airplane passenger hit by an article falling from an overhead bin would be preempted if the flight attendant dropped the article but not if the bin came open because of a latch that had not been properly maintained, or because the plane was jolted by turbulent weather. An airplane pas-

Judge O'Scannlain correctly pointed out that the majority holding "is no more likely than the *Harris* decision to bring clarity to the airline preemption field."⁶⁹ That is not to say, however, that his approach—to examine the regulatory or "competitive" effect of state laws—is a better one. But the fact is that, absent guidance from Congress, courts are relegated to the unenviable role of interpreting the meaning of airline "services."⁷⁰

senger who fell in an aisle would be prohibited from suing if the accident occurred when the passenger slipped on food dropped by a flight attendant, but not if the accident was caused by a sudden banking of the plane.

Id. at 1410 (citing *Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 284 (Tex. 1996)).

⁶⁹ *Id.* (O'Scannlain, J., concurring).

⁷⁰ *See id.* at 1409 ("[T]he only proper framework for evaluating preemption claims is Congressional intent.") (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (holding that the purpose of Congress is the "ultimate touchstone" of the preemption analysis)).

