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**FEDERAL PREEMPTION IN COMMERCIAL
AVIATION: TORT LITIGATION UNDER
49 U.S.C. § 1305**

STUART J. STARRY*

I. INTRODUCTION

FLIGHT 017 was an hour and ten minutes out of Baltimore when it ran into foul weather. Captain Bill Conrad flipped on the sign instructing passengers to buckle up and commenced a gradual 5000 foot climb out of the storm. The flight crew was just starting dinner service. Passenger Rick Keeton, seated on the aisle, was craning his neck to identify the culinary treat of the day. Plates began to rattle. Suddenly the starboard wing was thrust down by an erratic air current. The L-1011 simultaneously dropped 100 feet, effectively ruining what was left of Rick's appetite. Captain Conrad announced to the passengers that they could expect some turbulence for the next hour of the flight. Still the flight crew continued serving dinner. The turbulence worsened as Rick watched the beverage cart approach his row. Suddenly the aircraft lurched powerfully upward, then dipped. Flight attendants clawed frantically for support. Rick never saw the stainless steel coffee pot that was launched over his seat. The boiling contents of the pot poured out

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onto his scalp, face, neck and shoulders, causing third degree burns. Over a year later, with the benefit of four skin graft operations, Rick is still disfigured. He contacted you for representation in his suit against the airline.

You file a negligence action in state court, knowing that Rick Keeton and the airline are both residents of the same state. Instead of answering your lawsuit and deposing your client, the airline removes your case to federal court, alleging federal question jurisdiction. Two days later you receive a motion to dismiss your case for failure to state a claim upon which relief may be granted.

While it seems farfetched to some, this scenario has been playing itself out in many courts across the country. It is perhaps taken for granted that when an airline passenger suffers personal injury or death as a result of tortious conduct on the part of an airline, he may maintain a state common law or statutory cause of action against the airline. However, in the wake of the Airline Deregulation Act of 1978¹ and certain recent federal cases interpreting that Act, an issue has emerged that has sent shockwaves throughout the airline industry and, at the same time, created a rift among the federal circuit courts. That issue is whether section 105 of the Airline Deregulation Act of 1978² preempts all state common law tort causes of action for wrongful air carrier conduct. The primary aim of this article is to set forth the arguments and strategies on both sides of the preemption issue. It will also consider (1) whether in light of preemption an implied federal statutory remedy should be recognized; and (2) whether in the absence of a statutory remedy the victims of airline negligence should be granted a federal common law cause of action.

Before commencing an analysis of the contrasting legal arguments, it will be helpful to first review the origins of

¹ Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended primarily at 49 U.S.C. §§ 1301-1389 (1988)).

² 49 U.S.C. § 1305 (1988).

federal regulation and the subsequent deregulation of the airline industry.

A. HISTORY OF AIRLINE REGULATION AND DEREGULATION

Airline regulation began fifty-five years ago when Congress promulgated the Civil Aeronautics Act of 1938.³ This Act created the Civil Aeronautics Authority, which was changed to the Civil Aeronautics Board (CAB) in 1940, and charged it with the regulation of commercial aviation.⁴ The Act also contained a "savings clause," which provided that nothing contained in the Act would "abridge or alter the remedies now existing at common law or by statute, but the provisions of [the] Act [would be] in addition to such remedies."⁵ Thus, the state law duties of common carriers, which had been applied to railroads and other means of public transportation of the time, would be the applicable standard for the fledgling airline industry. The Federal Aviation Act of 1958 continued the CAB⁶ and created the Federal Aviation Administration (FAA).⁷ It also left untouched the § 1506 savings clause, thus providing viable common law and statutory remedies for airline negligence.⁸ Finally, in 1978, Congress enacted the Airline Deregulation Act, the purpose of which was to encourage and develop an air transportation system that "relies on competitive market forces to determine the quality, variety and price of air services."⁹ While § 1506 was again left unchanged, Congress enacted

³ 52 Stat. 973 (codified as amended at 49 U.S.C. §§ 1301-1542 (Supp. 1992)).

⁴ *Hughes Air Corp. v. Public Util. Comm'n*, 644 F.2d 1334, 1336 (9th Cir. 1981).

⁵ Ch. 601, § 1106, 52 Stat. 973, 1027 (1938) (current version at 49 U.S.C. app. § 1506 (1988)).

⁶ Pub. L. No. 85-726, § 201, 72 Stat. 744 (1958) (codified as amended at 49 U.S.C. §§ 1301-1542 (1988)).

⁷ *Id.*

⁸ *Id.* § 1506.

⁹ Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified primarily at 49 U.S.C. app. §§ 1301-1389 (1988 & Supp. II 1990)).

a federal preemption provision at § 105 of the Act.¹⁰ This provision is now codified at 49 U.S.C. § 1305 and reads, in pertinent part, as follows:

FEDERAL PREEMPTION

Except as provided in paragraph (2) of this subsection, no state or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.¹¹

Through § 1305, Congress intended that states be prevented from filling the regulatory void created by the Airline Deregulation Act which removed the preexisting utility-type federal regulatory structure.¹² Because a lawsuit can have a regulatory effect on airline conduct, some courts interpret this provision to mean that all state common law claims are preempted, so long as they relate to the rates, routes, or services of an air carrier.¹³ This interpretation seems to be inconsistent with the Airline Deregulation Act's focus on utility-type regulation.¹⁴ It is this preemption provision and its varying interpretations that

¹⁰ *Id.* § 105, 92 Stat. at 1707-08 (codified at 49 U.S.C. app. § 1305 (1988)).

¹¹ 49 U.S.C. § 1305(a)(1) (1988).

¹² Representative Anderson, the chief sponsor of the House Bill and its version at § 1305, presented a section-by-section analysis. Anderson cited the CAB at the hearings on regulatory reform:

The existing declaration of policy, conceived and promulgated in 1938, is a reflection of the times in which it was born. Its orientation is toward the development and protection of an infant industry through public utility-type regulations over entry, exit and pricing With the passage of legislation such as the Air Service Improvement Act [the House version of the Airline Deregulation Act], loosening Federal regulation of airline service and fares, it is possible that some states will enact their own regulatory legislation, imposing restrictive utility type regulation on interstate airline service and fares. The Air Service Improvement Act includes a specific statutory provision precluding state interference with interstate service and fares.

123 CONG. REC. 30,595 (1977) (statement of Rep. Anderson).

¹³ See *infra* part II.

¹⁴ 123 CONG. REC. 30,595 (1977).

gives rise to the controversy which is the subject of this article.

B. POST-AIRLINE DEREGULATION ACT DEVELOPMENTS INVOLVING § 1305

Since the adoption of § 1305, a line of federal decisions has slowly broadened its scope. Under these decisions, § 1305 may possibly apply to any action of an airline. This line of cases begins with *Hingson v. Pacific Southwest Airlines*.¹⁵ In *Hingson*, a blind passenger who was forced to sit in a bulkhead seat filed suit in federal court alleging that the airline's actions constituted unlawful discrimination. His complaint contained fourteen causes of action under both federal and state statutes as well as state common law. Among these causes of action was a claim for intentional infliction of mental distress and a claim under California Civil Code section 54.1 which required that handicapped persons be given "full and equal access" to air carrier accommodations.¹⁶ In preempting the claim under the California statute, the Ninth Circuit rejected the passenger's argument that the California law did not conflict with federal law and stated: "Section 1305(a)(1) preemption is not limited to those state laws or regulations that conflict with federal law. It preempts state laws and regulations 'relating to rates, routes, or services.' Regulation of air carrier seating policies for handicapped passengers involves the regulation of services within the meaning of § 1305(a)(1)."¹⁷ The Ninth Circuit, however,

¹⁵ 743 F.2d 1408 (9th Cir. 1984).

¹⁶ Section 54.1(a) of the California Civil Code provides in relevant part: Blind persons, visually handicapped persons, deaf persons, and other physically disabled persons shall be entitled to full and equal access, as other members of the general public, to accommodations, advantages, facilities, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motorbuses, streetcars, boats or any other public conveyances or modes of transportation, . . . subject only to the conditions and limitations established by law, or state or federal regulation, and applicable alike to all persons.

CAL. CIV. CODE § 54.1(a) (West 1982).

¹⁷ *Hingson*, 743 F.2d at 1415 (citations omitted).

also held that Hingson's common law claims for intentional infliction of emotional distress were not preempted.¹⁸ Thus, *Hingson* can be read as holding that only enforcement of state legislative enactments that impose utility-type regulation are preempted by § 1305, leaving common law tort claims intact.

Three years later in *Anderson v. USAir*,¹⁹ the District of Columbia Circuit was faced with an almost identical set of facts. In *Anderson*, a blind passenger was prohibited by the flight crew from sitting in a row next to an overwing emergency exit. The passenger brought suit against the airline, alleging among other claims, violation of a common law "obligation . . . to provide equal and courteous service to all."²⁰ The court held that, even if applicable in the case at hand, a state common law obligation to give courteous service is expressly preempted by § 1305.²¹ Interestingly, the court did not hold that Anderson's claim of the tort of outrage was similarly preempted, but rather dismissed the claim on its merits.²² Thus, *Anderson* expanded the scope of *Hingson* by interpreting § 1305 to preempt at least some state common law claims.

Finally, in *O'Carroll v. American Airlines Inc.*,²³ a passenger was removed from an aircraft and later jailed because of his unruly behavior and apparent intoxication. He subsequently brought suit against the airline for false imprisonment, assault and battery, and negligence, arising out of his allegedly wrongful exclusion from the flight. On appeal of a \$260,000 verdict, the defendant airline argued

¹⁸ *Id.* at 1416.

¹⁹ 818 F.2d 49 (D.C. Cir. 1987).

²⁰ *Id.* at 56.

²¹ *Id.* at 57.

²² The *Anderson* opinion gives no explanation for this anomaly. There is little distinction between the tort of outrage claim and the duty of courteous service claim, other than the fact that the latter employed the word "service" as it was stated in Anderson's complaint. The court apparently seized on this use of the term "service" when applying the "rates, routes, and services" language of § 1305. If the actions of the flight crew in *Anderson* are part of the air carrier services that § 1305 was designed to prevent states from regulating, then the distinction drawn in *Anderson* seems baseless. See *id.* at 56-57.

²³ 863 F.2d 11 (5th Cir.), *cert. denied*, 490 U.S. 1106 (1989).

that § 1305 preempted any state law claim for wrongful exclusion. The Fifth Circuit agreed and stated that “[i]n view of this explicit manifestation of congressional intent, we conclude that O’Carroll’s common law claims are preempted by § 1305, and thus the district court lacked subject matter jurisdiction over the instant action.”²⁴ All of O’Carroll’s claims were held preempted, and the court vacated the entire lower court proceeding.²⁵ As one might expect, news of this freshly discovered “shield” spread quickly throughout the airline industry.²⁶ Since *O’Carroll*, many courts have held a variety of state law claims preempted,²⁷ including at least one case involving the death of a passenger.²⁸ Because of the seemingly unjust results, courts have not been unanimous in their interpretations of the breadth of § 1305. To fully understand the divergence of judicial interpretations, it is helpful to examine the arguments which have been advanced by both airlines and passengers.

C. AIRLINES’ ARGUMENT

The airlines, in effect, have taken the position that all state law causes of action for tortious conduct by an airline are expressly preempted by the plain language of § 1305.²⁹ They maintain that the Act preempts state law relating to rates, routes, or services of air carriers. The airlines have advanced the plain meaning of the word “services” and have cited such dictionary definitions as “useful labor that does not produce a tangible commod-

²⁴ *Id.* at 13 (citations omitted).

²⁵ *Id.*

²⁶ See Calvin Davison & Lorraine B. Halloway, *The Two Faces of Section 105 Airline Shield or Airport Sword*, 56 J. AIR L. & COM. 93 (1990).

²⁷ *Smith v. America West Airlines*, No. H-91-1550, 1991 WL 55402 (S.D. Tex. Aug. 30, 1991); *Hodges v. Delta Airlines, Inc.*, No. H-90-2276 (S.D. Tex. Sept. 3, 1991); *Garza v. Southwest Airlines Co.*, No. H-91-351 (S.D. Tex. Apr. 3, 1991); *Kiefer v. Continental Airlines, Inc.*, No. 9009353 (Dist. Ct. of Harris County, 129th Judicial Dist. of Texas, July 29, 1991).

²⁸ *Howard v. Northwest Airlines*, 793 F. Supp. 129 (S.D. Tex. 1992).

²⁹ See *O’Carroll*, 863 F.2d at 12.

ity.”³⁰ Thus, any state cause of action for negligence of an airline necessarily “relates” to that airline’s “services,” since it is hard to imagine a single thing done by an airline that does not fall within the plain meaning of the word “services.”

D. PASSENGERS’ ARGUMENT

Opponents of the total preemption argument have interpreted the “plain meaning” approach differently. They maintain that Congress could not possibly have intended to preempt all state tort causes of action by enacting § 1305, since under the airlines’ argument this would effectively leave a passenger injured through the negligent conduct of an airline with no remedy.³¹ Rather, those cases that have extended § 1305 to all state law personal injury claims have interpreted the provision’s preemptive effect in an overly broad manner.

Passengers argue that the primary objective of the Airline Deregulation Act was to increase competition in the airline industry by purposefully creating a void of economic regulation.³² To accomplish this goal, the Act eliminated federal control of the rates airlines charge, the routes airlines fly, and the cities to which the airlines provide service. Congress never intended to protect airlines from all state laws (as supporters of complete preemption contend). Rather, Congress intended to ease the burden of economic regulation while still ensuring passenger safety. The passengers also invoke the savings clause in § 1506, which specifically saves remedies existing at common law from the regulatory effect of the Federal Aviation Act.³³ Even though § 1305 was enacted subsequently to § 1506, the application of both provisions is consistent with the intent of Congress. They argue that because

³⁰ Brief for Appellee at 9, *Hodges v. Delta Airlines, Inc.*, (5th Cir. 1991) (No. 91-6037) (citing WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 1076 (1988)).

³¹ See *Howard*, 793 F. Supp. at 132.

³² See 123 CONG. REC. 30,595 (1977) (comments of Rep. Anderson).

³³ See 49 U.S.C. app. § 1506 (1988).

Congress enacted § 1305 without modifying § 1506, Congress intended the airlines to remain free from state economic regulation, while still being governed by common law negligence standards.

II. DOES § 1305 OF THE AIRLINE DEREGULATION ACT OF 1978 PREEMPT ALL STATE TORT CAUSES OF ACTION?

When Congress legislates in an area traditionally relegated to the states, such as common law actions for negligence, there is a strong presumption against preemption of state law.³⁴ This presumption can be overcome only by demonstrating a clear and manifest congressional purpose.³⁵ As with every examination of a statutory provision's preemptive effect, we must first look to the intent of Congress.³⁶ What did Congress intend to achieve through its enactment of the Airline Deregulation Act of 1978?

Congress may preempt state authority in any one of three ways: first, by so stating in express terms;³⁷ second, by so occupying a field that it would upset the system to allow conflicting state law as an available alternative to litigants;³⁸ and finally, by enacting a narrowly construed federal statute that so conflicts with existing state law as to render compliance with both impossible.³⁹ Section 1305 is unquestionably an express preemption provision.⁴⁰

³⁴ *Puerto Rico Dep't of Consumer Affairs v. ISLA Petroleum Corp.*, 485 U.S. 495, 500 (1988); *Chrysler Corp. v. Texas Motor Vehicle Comm'n*, 755 F.2d 1192, 1205 (5th Cir. 1985).

³⁵ *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989).

³⁶ *Wardair Can., Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 6 (1985); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 738 (1984).

³⁷ *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

³⁸ *English v. General Elect. Co.*, 496 U.S. 72, 79 (1990); *Michigan Canners & Freezers Ass'n, Inc. v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984).

³⁹ *English*, 469 U.S. at 79.

⁴⁰ See 49 U.S.C. § 1305. In *Salley v. Trans World Airlines, Inc.*, 723 F. Supp. 1164, 1166 (E.D. La. 1989), the court analyzed § 1305 as an example of preempt-

Hence, the question becomes not whether Congress intended to preempt state laws relating to an air carrier's services, but rather to what extent that preemption was intended.

A. ANALYSIS OF SECTION 1305 LANGUAGE

1. "Relates to" as determining breadth of § 1305

Basic rules of statutory construction dictate that absent contrary congressional intent, statutory language should be given its ordinary meaning.⁴¹ In a similar preemption provision, Congress used a phrase very similar to the "relating to" language used in § 1305. Section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA)⁴² states that ERISA "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan."⁴³ Courts have interpreted the phrase "relates to" as used in ERISA, broadly.⁴⁴ In *Shaw v. Delta Airlines, Inc.*,⁴⁵ the Supreme Court stated that a law

tion due to interference or conflict with federal law. One scholar discusses the *Salley* decision:

In *Salley v. Trans World Airlines, Inc.*, the court also determined that § 1305 preempts only those state law claims that conflict with federal laws. Specifically, the court found that the state law claims were not in conflict with any Federal Aviation Act provisions and, therefore, no preemption resulted. Apparently ignoring the requisites of express preemption, the court found that § 1305 was "not preemption based on pervasive federal regulation, but preemption due to interference or conflict with federal law."

Given the fact that § 1305 constitutes an express preemption of any law, rule, or regulation that relates to rates, routes, or services, an analysis of the inconsistencies between state and federal rules is unnecessary. Thus, if any state law, rule, or regulation relates to rates, routes, or services, § 1305 should preempt it whether or not it is consistent with any similar federal laws.

Daniel Petroski, *Airlines' Response to the DTPA Section 1305 Preemption*, 56 J. AIR L. & COM. 125, 144 (1990) (footnotes omitted).

⁴¹ *Park 'N Fly, Inc. v. Dollar Park and Fly*, 469 U.S. 189, 194 (1985); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 97 (1983).

⁴² 29 U.S.C. § 1144(a) (1988).

⁴³ *Id.*

⁴⁴ *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987).

⁴⁵ 463 U.S. 85 (1983).

"relates to" a subject "if it has a connection with or reference to" that subject.⁴⁶ The airlines have urged that § 1305 should be given the same broad interpretation that § 514 has been given.

a. Fifth Circuit Approach

Following on the heels of *O'Carroll*⁴⁷ was *Trans World Airlines v. Mattox*.⁴⁸ *Mattox* involved a public state cause of action brought by the Texas attorney general under the Texas Deceptive Trade Practices Act (DTPA). The Attorney General alleged that TWA, Continental and British Air had engaged in deceptive fare advertising in violation of that Act. The airlines subsequently sought to enjoin enforcement of the DTPA by arguing that § 1305 foreclosed the availability of such a state law claim. The district court granted the preliminary injunction.⁴⁹ In reviewing that decision the court of appeals explained:

Although the state laws against deceptive advertising are not aimed specifically at airlines, and clearly do not attempt to set rates, the conclusion is inescapable that such laws do "relate to" rates when applied to airline fare advertising. As the Supreme Court noted in *Shaw*, a law relates to a particular subject "if it has a connection with or reference to" that subject It cannot be gainsaid that enforcement of a state law regulating fare advertising by airlines has a connection with or reference to rates within the meaning of § 1305(a)(1). Therefore, such state action is expressly preempted by section 1305(a)(1).⁵⁰

The *Mattox* case indicates that judicial enforcement of statutory enactments not specifically targeting airlines is nonetheless preempted if such enforcement will have an effect on airline rates, routes, or services.

⁴⁶ *Id.* at 96-97.

⁴⁷ *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11 (5th Cir.), *cert. denied*, 490 U.S. 1106 (1989).

⁴⁸ 897 F.2d 773 (5th Cir.), *cert. denied*, 498 U.S. 925 (1990) (affirming preliminary injunction).

⁴⁹ *Id.* at 788.

⁵⁰ *Id.* at 783.

b. Ninth Circuit Approach

The Ninth Circuit has taken a more narrow approach to the meaning of "relates to." In *West v. Northwest Airlines, Inc.*,⁵¹ William West was denied a seat on an overbooked flight for which he had purchased a ticket. He subsequently filed suit against the airline for breach of covenant of good faith and fair dealing. In its opinion, the Ninth Circuit Court of Appeals discussed its interpretation of the "relates to" language in § 1305:

[W]hile we agree with Northwest that "services" include boarding policies, we disagree with Northwest and the district court that 'law[s] . . . relating to airline services' encompass all state laws that affect airline services, however tangentially. This interpretation of § 1305(a)(1) would unduly expand preemption and ignore our presumption against federal preemption in this traditional state law area. Instead, we find that § 1305(a)(1) preempts claims only when the underlying statute or regulation itself relates to airline services, regardless of whether the claim arises from a factual setting involving airline services. Thus, state laws that merely have an *effect* on airline services are not preempted.⁵²

The *West* court went on to hold that federal law did not preempt Mr. West's claim.⁵³ This holding suggests that only state laws which specifically target the airlines are subject to § 1305 preemption. The opinion in *West* has recently been vacated by the Supreme Court,⁵⁴ in light of the holding in *Morales v. Trans World Airlines*,⁵⁵ discussed below.

c. United States Supreme Court

In *Morales v. Trans World Airlines*,⁵⁶ the Supreme Court

⁵¹ 923 F.2d 657 (9th Cir. 1990), *vacated and remanded*, 112 S.Ct. 2932 (1992).

⁵² *Id.* at 660 (alteration in original).

⁵³ *Id.* at 661. The court did, however, hold Mr. West's claim for punitive damages preempted. *Id.*

⁵⁴ See *Northwest Airlines, Inc. v. West*, 112 S. Ct. 2932 (1992).

⁵⁵ 112 S. Ct. 2031 (1992).

⁵⁶ *Id.*

adopted a broad interpretation of the "relates to" language in § 1305. In that case a state sought to enforce its fare advertising guidelines by virtue of a lawsuit pursuant to the state's general consumer protection laws. The guidelines had been promulgated by the National Association of Attorneys General. The issue was whether the Airline Deregulation Act preempted enforcement of the consumer protection law in this context.⁵⁷ In holding that such action was indeed preempted, the Court apparently adopted the Fifth Circuit's approach:

True to our word, we have held that a state law "relates to" an employee benefit plan, and is preempted by ERISA, "if it has connection with or reference to such a plan." Since the relevant language of the ADA is identical, we think it appropriate to adopt the same standard here: State enforcement actions having a connection with or reference to airline "rates, routes, or services" are preempted under 49 U.S.C. App. § 1305(a)(1).⁵⁸

Morales also makes it clear that § 1305 is to be construed as limiting the savings clause in § 1506. Applying the canon of statutory construction, which dictates that the specific govern the general, the Court stated that "[a] general 'remedies' savings clause cannot be allowed to supersede the specific, substantive preemption provision."⁵⁹

Because it involved judicial enforcement of promulgated guidelines and not common law claims, *Morales* leaves some unanswered questions about the scope of the "relates to" language. Conceivably, its holding could be limited to judicial enforcement of state statutes and regulations which have an effect on airline rates, routes and services. There is no indication in *Morales* that its holding applies to common law tort actions which merely arise out of factual settings involving air carriers.

⁵⁷ *Id.*

⁵⁸ *Id.* at 2037.

⁵⁹ *Id.*

2. "Services" as determining scope of § 1305

A personal injury action against an airline will normally have a nominal regulatory effect on airline rates and routes. Therefore, in personal injury cases, airlines typically invoke § 1305, claiming that the passenger's cause of action will have a regulatory effect on airline "services." Regardless of the scope of the "relates to" language, if a passenger's cause of action can be pleaded so as not to fall within the meaning of the term "services," it is not subject to § 1305 preemption. The breadth of the word "services" then becomes a key inquiry. Congress may have intended to limit its use of the term "services" to economic considerations. Alternatively, Congress may have intended for the word to encompass anything that an airline does. Congress may even have intended the scope of the word to fall somewhere between these two extremes. All three possibilities will be examined.

a. All-Encompassing Approach

Proponents of complete preemption have adopted a very straightforward, common-sense approach in determining whether all state law claims relating to the services of an air carrier are preempted under § 1305. They cite the primary rules of statutory construction, one of which is to "give effect to the plain meaning of the language used."⁶⁰ In *West v. Northwest Airlines*, the Ninth Circuit applied the "plain meaning" analysis and concluded:

[W]e believe that the plain meaning of "services" clearly includes services provided to customers such as the boarding services at issue here. If Congress had intended to limit the word "services" to something other than its common usage, it could easily have used the words "types of services" rather than "services."⁶¹

Proponents of complete preemption argue that the word

⁶⁰ *West*, 923 F.2d at 659 (citing *Hughes Air Corp. v. Public Util. Comm'n*, 644 F.2d 1334, 1337 (9th Cir. 1981) and *Watt v. Alaska*, 451 U.S. 259, 265 (1981)).

⁶¹ *Id.* at 659-60.

"service" is defined by Webster's Dictionary as "useful labor that does not produce a tangible commodity."⁶² As such, virtually everything that an airline does, from handing out head phones to piloting the aircraft, is by definition "service." Since litigation can have a regulatory effect upon an air carrier's conduct, any claim arising out of, or "relating to" the "service" provided by the air carrier is necessarily preempted by § 1305.

Proponents of this all-encompassing approach maintain that the legislative history of § 1305 indicates that the scope of its preemptive effect goes far beyond economic regulations. The broad "routes, rates, or services" language of the House version was adopted over a more narrow Senate version: "routes, schedules, or rates, fares, or charges in tariffs of, or otherwise promulgating economic regulations for."⁶³

Because of its simplicity, this approach has an initial appeal. However, if carried to its logical extreme, it creates results which are difficult to fathom. Courts adopting this approach have yet to confront these "common sense" arguments in a mass disaster setting. Under the all encompassing approach, there is no material distinction between the facts of *In re Air Crash Disaster at Dallas/Fort Worth Airport*,⁶⁴ a case involving the tragic deaths of many persons, and the wrongful exclusion case of *O'Carroll*.⁶⁵ The facts in both cases fall under the broad definition of "services."

b. Incidental Services Approach

At least one court has taken a view that draws a distinction between maintenance or operation of the aircraft and services provided incidental to the flight. In *Stewart v. American Airlines, Inc.*,⁶⁶ a passenger was injured when the

⁶² Brief for Appellee at 9, *Hodges v. Delta Airlines, Inc.*, (5th Cir. 1991) (No. 91-6037) (citing WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1076 (1988)).

⁶³ H.R. REP. No. 1779, 95th Cong., 2d Sess. 94-95 (1978).

⁶⁴ 919 F.2d 1079 (5th Cir. 1991).

⁶⁵ 863 F.2d 11 (5th Cir.), *cert. denied*, 490 U.S. 1106 (1989).

⁶⁶ 776 F. Supp. 1194 (S.D. Tex. 1991).

nose wheel of the aircraft deflated during flight. The passenger brought suit in state court, alleging state law claims. The case was then removed to federal court by the airline. The district court determined that the passenger's claim fell outside the scope of § 1305 "services" and remanded the case to state court.⁶⁷ The court explained:

[I]t is far from clear that, in the instant case, Plaintiff's claims relate to "services" within the meaning of § 1305. First, those cases which have held that a Plaintiff's claims were claims relating to "services" and therefore preempted by § 1305 all involved services provided by individual airline employees directly to passengers, such as ticketing, boarding, in-flight service, and the like. . . . By contrast, Plaintiff's claims do not arise out of the allegedly negligent performance of such "services." Moreover, assuming, *arguendo*, that Defendants' argument is correct, it would appear to follow that most, if not all, State law claims arising out of an air crash would be preempted, since most such cases involve claims similar to those at issue in the instant case, namely that a Plaintiff or a Plaintiff's decedent was a passenger on a flight and was injured in the course of the flight due to [a] crash caused by the airline's negligence. Several Courts have held that such claims are not preempted. *Air Crash Disaster at John F. Kennedy Int'l Airport*, 635 F.2d 67, 74 (2nd Cir. 1980) (compensatory damages not preempted); *In re Air Crash Disaster at Sioux City, Iowa*, 734 F. Supp. 1425, 1428 (N.D. Ill. 1990) (punitive damages not preempted); *In re Air Crash Disaster at Stapleton Int'l Airport*, 721 F. Supp. 1185, 1187 (D. Colo. 1988) (punitive damages not preempted).

In the instant case, Plaintiff's claims are more like those arising out of an air crash than those considered in *O'Carroll*. . . . Plaintiff does not allege that Defendant negligently provided such services as boarding, ticketing, and the like. Rather, he simply alleges that he was injured when the airplane malfunctioned during the course of his flight, and that Defendants' negligent maintenance and operation was the legal and proximate cause of his injuries.

⁶⁷ *Id.* at 1199.

....

Since Federal preemption was the only ground of jurisdiction alleged in Defendants' removal petition, and since the Defendants have failed to allege facts sufficient to demonstrate removal jurisdiction based on diversity of citizenship, the Court further holds that it lacks subject matter jurisdiction, and that this action must therefore be remanded to the State Court from whence it came.⁶⁸

The problem with the *Stewart* decision is that it gives no rationale for the distinction that it makes between incidental services and operation or maintenance of the aircraft. *Stewart* blindly follows the results of air crash cases that did not involve arguments of § 1305 express preemption. The courts cited by *Stewart* were faced with the question of implied preemption by specific FAA provisions.⁶⁹ Thus, their results provide no real precedent for a limited view of § 1305.

On the other hand, if Congress did intend to limit the scope of § 1305, no rationale is needed by a court to carry out the intent of Congress, however irrational it may be. In *Seidman v. American Airlines, Inc.*,⁷⁰ a passenger was injured while evacuating the airplane using the emergency slide after a bomb threat had forced the plane to land prematurely. The passenger commenced a diversity action and obtained a favorable jury verdict.⁷¹ While the Fifth Circuit affirmed in part, reversed in part, and remanded the case to the district court, it did not vacate on the ground that the district court lacked subject matter jurisdiction as it did in *O'Carroll*.⁷² Whether this indicates that the Fifth Circuit draws the same distinction as *Stewart* is yet unknown.

⁶⁸ *Id.* at 1197-1200 (footnotes omitted).

⁶⁹ Air Crash Disaster at John F. Kennedy Int'l Airport, 635 F.2d 67, 74 (2d Cir. 1980); In re Air Crash Disaster at Sioux City, Iowa, 734 F. Supp. 1425, 1428 (N.D. Ill. 1990); In re Air Crash Disaster at Stapleton Int'l Airport, 721 F. Supp. 1185, 1187 (D. Colo. 1988).

⁷⁰ 923 F.2d 1134 (5th Cir. 1991).

⁷¹ *Id.* at 1136.

⁷² *Id.* at 1137-42.

It is clear that the Fifth Circuit considers negligent acts by flight attendants to be "services" within the meaning of § 1305. In *Baugh v. Trans World Airlines*,⁷³ a passenger alleged that a member of the flight crew stepped on her foot, breaking her ankle. Her claim was based upon a state common law negligence theory. In affirming the dismissal of the passenger's action, the Fifth Circuit Court of Appeals held that the negligence claim related to the services provided by the air carrier and was preempted by § 1305.⁷⁴

Courts are not the only entities to take the incidental services approach. In promulgating regulations to implement § 1305, the Civil Aeronautics Board issued the following policy statement:

Tentatively included within the types of regulation that are preempted are those governing scheduling, in-flight amenities, minimum capitalization and other regulations designed to affect the quality of air service.

. . . .

For example, liquidated damages for bumping (denial of boarding), segregation of smoking passengers, minimum liability for loss, damages and delayed baggage, ancillary charges for headsets, alcoholic beverages, entertainment, and excess baggage would clearly be "service" regulation within the meaning of [§ 105].

. . . .

Accordingly, we conclude that preemption extends to all of the economic factors that go into the *quid pro quo* for passenger's fare, including flight frequency and timing, liability limits, reservation and boarding practices, insurance, smoking rules, meal service, entertainment, bonding and corporate financing; and we hereby occupy these fields completely.⁷⁵

Noticeably absent is any reference to piloting, operat-

⁷³ No. 90-2074 (5th Cir. 1990) (per curiam, unpublished).

⁷⁴ *Id.* The *Baugh* opinion is unpublished and is arguably of no precedential value.

⁷⁵ Implementation of Preemption Provisions of the Airline Deregulation Act of 1978, 44 Fed. Reg. 9948, 9948-51 (1979) (statements of General Policy).

ing, or maintaining the aircraft. This omission may imply that § 1305 preempts state laws affecting something less than everything an airline does, but more than the mere act of providing the traveling public with a particular air transportation option and price.

c. Utility-Type Regulation Approach

The Airline Deregulation Act never changed the regulations governing incidental services or maintenance and operation of aircraft.⁷⁶ Before the Act, these were minimum-requirement, utility-type regulations which could be supplemented by consistent state tort laws.⁷⁷ There is no reason to believe that the Act was meant to alter this aspect of the regulatory scheme.

The legislative history of the Act indicates that "service" was used by Congress almost always as providing air transportation to the flying public from point to point, not the operation and maintenance of the aircraft.⁷⁸

⁷⁶ See Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, reprinted in HOUSE COMM. ON PUB. WORKS AND TRANS., 96TH CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE AIRLINE DEREGULATION ACT OF 1978, at 1-53 (Comm. Print 1979) [hereafter LEGISLATIVE HISTORY].

⁷⁷ 49 U.S.C. § 1421(a) (1988).

⁷⁸ The introduction to the LEGISLATIVE HISTORY sheds light on the scope of the intended regulation of fares, routes and services:

INTRODUCTION

This committee print is a legislative history of the Airline Deregulation Act of 1978, an act which frees the airlines from the restrictive system of economic regulation which has governed their operations since 1938.

...
The regulatory system established in 1938 subjected airlines to extensive economic regulation by the Civil Aeronautics Board. If an airline wished to change the cities it served or the prices it charged, it was required to seek permission from the Civil Aeronautics Board. The Board could refuse to allow the airline to take actions which would benefit consumers and which the airline believed to be in its best interest. Even if the Board ultimately granted an airline's request, there could be years of delay before the airline could implement its proposal.

...
To remedy these deficiencies in the 1938 act, the Airline Deregulation Act frees the airlines from economic regulation on a phased

To counter the argument that § 1305's breadth is indicated by the different language employed by the House and Senate versions, one can point to the similarities in the House and Senate approaches. In discussing its "dif-

and orderly basis. Following the basic approach of the House bill, the act includes a sunset provision which ends most economic regulation of domestic air service in 1985. As intermediate steps, the act ends the Civil Aeronautics Board's authority over domestic routes on December 31, 1981, and the Board's authority over domestic fares on January 1, 1983. [Note the similarity of the language with "rates, routes and services."]

In the years before sunset, the act requires CAB to increase competition. This is accomplished by a new policy statement requiring the Board to emphasize competition in its decisions; by liberalizing the test for authorization of new air service; and by placing procedural deadlines on the Board and giving the agency authority to adopt simplified procedures which will enable it to meet these deadlines.

Other provisions of the act establish specific programs to encourage new entry and added competition. The automatic entry program allows carriers to enter one new market a year and to protect one market a year against entry. The dormant authority program provides for prompt authorization of carriers in markets in which other carriers have authority to provide nonstop service, but are not using this authority. The fare flexibility provisions of the act permit carriers to raise fares by up to 5 percent a year or reduce them by up to 50 percent, without Board approval.

The act includes provisions which will insure that the transition to a more competitive system will not be damaging to small communities or to airline employees.

The act provides that all communities now listed on air carrier certificates are guaranteed continued air service for 10 years. Before the Board may allow a certificated carrier to suspend or reduce its service to a small community, the Board must find a replacement carrier. If necessary, the replacement carrier must be subsidized through a new community-based subsidy program, requiring use of aircraft appropriate for the community's needs.

....

In sum, the Deregulation Act represents a comprehensive and carefully thought-out plan for freeing the airline industry from excessive economic regulation. It should result in a more efficiently operated industry, able to respond promptly to the needs of consumers. The Public Works and Transportation Committee is proud of the major role it played in developing this historic legislation, led by Congressman Anderson, and Congressman Snyder, and ranking minority member of the full committee, Congressman Bill Harsha, and all other members who devoted their time and talents to this legislation.

Harold T. (Bizz) Johnson

Chairman, Committee on Public Works and Transportation

LEGISLATIVE HISTORY, *supra* note 76, at v and vi.

ferent" version, the Senate report refers to the same utility-type regulation of interstate and intrastate "services."⁷⁹ Also, the Senate actually considered a version of the provision remarkably similar to the adopted version.⁸⁰ In a section-by-section discussion of this version, it was stated: "This section is not intended to change the state-federal relationship over matters not regulated by the Board."⁸¹ Thus, it may be argued that, because torts have never been regulated by the Board, the preemption section could not have been intended to be so broad as to apply to torts. Even when discussing the House version which was actually adopted, the Senate used "services" in a limited context.⁸² Thus, it can be ar-

⁷⁹ See *id.*, at 264, 266.

⁸⁰ The proposed provision read as follows:

Federal Preemption

SEC. 105. No State including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States, political subdivision of a state, or political agency of two or more states, shall enact any law, regulation, or standard relating to rates, routes, services, or other matters regulated by the Board in interstate, overseas or foreign air transportation or the transportation of mail by aircraft. Nothing in this section shall be construed to limit the authority of any state or political subdivision over intrastate air transportation of intrastate air carriers.

123 CONG. REC. 4214 (1977).

⁸¹ *Id.* at 4219.

⁸² After the Conference Committee adopted the House version (the final version), the Senate consideration of the conference report on § 1305 reads as follows:

MR. BENTSEN. The bill establishes a new section of the Federal Aviation Act under which Federal law would preempt State regulation as soon as an intrastate airline received any interstate authority, no matter how limited those interstate activities may be.

....

My question is whether, under the bill now before us, the CAB will be able to continue to use its exemption authority to exempt intrastate carriers which are conducting some interstate *services* from Federal regulation where the CAB deems it is appropriate.

....

MR. CANNON. That is correct. Under this bill, the CAB may exempt intrastate carriers from Federal regulation where they are conducting some services, such as the use of alternate airports that take the carrier out of State and services provided within a State where

gued effectively that the subtle differences in the original Senate version are irrelevant.

The House consideration was similar. Representative Anderson, the chief sponsor of the House Bill and its version of § 1305, presented a section-by-section analysis: "The existing declaration of policy, conceived and promulgated in 1938, is a reflection of the times in which it was born. Its orientation is toward the development and protection of an infant industry through public utility-type regulation over entry, exit, pricing."⁸³

the passengers are interstate or whenever else the Board finds an exemption to be in the public interest.

MR. BENTSEN. My understanding is correct though, is it not, that this bill does not alter the regulatory authority that States now possess over the intrastate routes?

MR. CANNON. That is correct. This bill does nothing to change the States' jurisdiction over the operations of those intrastate carriers which continue to provide solely intrastate services.

MR. KENNEDY. Section 105 of the conference bill states in part: No state or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier granted the authority under this title to provide interstate air transportation.

I am concerned that long recognized powers of the airport operators to deal with noise and other environmental problems at the local level may be inadvertently curtailed by this section. Am I correct in stating that actions of the airport operators, presently accepted as valid exercises of proprietary powers, are not intended to be interpreted as "relating to . . . routes or services" of air carriers and are not intended to be preempted by the powers created by this section?

124 CONG. REC. 37,419 (1978) (emphasis added).

⁸³ 123 CONG. REC. 30,595 (1977). In specifically discussing the new preemption provision, the analysis provided in total:

SECTION 3. FEDERAL PREEMPTION

I. Existing law

The existing law contains no explicit recognition of Federal preemption of interstate air transportation which prevents the States from regulating interstate air service and fares. However, preemption is implicit in the present Act, and has been recognized by the courts.

Under existing law as interpreted by the courts, it is reasonably clear that the states have no authority to regulate interstate service and fares. However, some states have asserted jurisdiction to regulate intrastate fares charged by interstate carriers. This has led to difficulties. The interstate carriers frequently provide service between two points in a state (e.g., Philadelphia-Pittsburgh, San Fran-

Both the House and the Senate's consideration of the final and adopted version arguably indicates that "services" was limited to its term of art meaning and that pre-

cisco-Los Angeles) as part of longer interstate routes. This means that an interstate carrier may be carrying two types of passengers between points in a single state; intrastate passengers whose entire journey is between these points, and interstate passengers who are traveling between two points in the same state and then stopping over or connecting and continuing their journey. In some cases the CAB and the state have reached different results in regulating the fares charged between a pair of points, and as a result, passengers on the same flight traveling between the same points have been charged different fares. The CAB has asserted jurisdiction to remedy this discriminatory practice, but the Board's decision has been appealed to the courts and the outcome is uncertain.

II. *Changes made by Air Service Improvement Act*

With the passage of legislation such as the Air Service Improvement Act, loosening Federal regulation of airline service and fares, it is possible that some states will enact their own regulatory legislation, imposing restrictive utility-type regulation on interstate airline service and fares. The Air Service Improvement Act includes a specific statutory provision precluding state interference with interstate service and fares. This is not intended to preempt the exercise of normal proprietary functions by airport operators, such as the establishing of curfews and landing fees which are consistent with other requirements in Federal law and do not unduly burden interstate commerce.

It is also desirable to remove the discrimination which arises from conflicting Federal and state regulations governing interstate and intrastate passengers on the same flight. The Air Service Improvement Act accomplishes this by providing that the states may not regulate the intrastate service or fares of interstate carriers. There is one situation in which state authority over intrastate service and fares is preserved. There are now several large intrastate air carriers in Texas, California, and Florida which have pioneered in providing low fare service. Under the Air Service Improvement Act these carriers will be eligible to enter at least one interstate market per year. For a period of time after the carriers begin entering interstate markets they may remain primarily intrastate carriers and it seems appropriate to preserve the states' authority to regulate their intrastate service and fares. The Act provides that so long as carriers which were exclusively intrastate in August 1977 continue to derive more than 50% of their revenues from intrastate operations, the states will continue to regulate their intrastate service and fares.

Id. at 30,595-96 (emphasis added).

Additionally, Congress was operating under the assumption that under "existing law," courts had already determined that the states could not regulate service and fares. Yet Congress was aware of the co-existence of air carrier tort liability. Thus, arguably, Congress' interpretation of services could not have included tort liability.

emption was limited to utility-type economic regulation. Those who advocate the common ordinary meaning of "services" may be ignoring fundamental canons of statutory construction which require the examination of the object and policy of a statute.⁸⁴ The best way to determine congressional intent is to look at the meaning Congress gave the words when it enacted that legislation.⁸⁵

Any argument that places reliance on the fact that § 1305 uses the term "services" in the plural instead of the singular is potentially misplaced. Congress used both "service" and "services" almost interchangeably in the legislative history.⁸⁶ Just as the word "service" has a spe-

⁸⁴ The Supreme Court has required the review of overall legislative purpose in addition to the simple analysis of statutory language:

Of course, the "starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (Powell, J., concurring). But the text is only the starting point. As Justice O'Connor explained last term: "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."

Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 222 (1986); *Kelly v. Robinson*, 479 U.S. 36, 43 (1986); see also *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2403 (1991) (recognizing "the maxim of statutory construction *noscitur sociis* that a word is known by the company it keeps.").

⁸⁵ *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 546 (1978) (statutory language is to be read in light of customary understanding of words at time of enactment).

⁸⁶ See LEGISLATIVE HISTORY, *supra* note 76, at 2 (providing transport from one point to another); *id.* at 14 ("nonstop service between any pair of points"); *id.* at 15 ("impact of the new services on the national air route structure"); *id.* at 16 (between points); *id.* at 21 (local service); *id.* at 27 (reduced levels of service due to strike); *id.* at 28 (passenger service, cargo service); *id.* at 31 (serving eligible points); *id.* at 104 (pooling of service); *id.* at 110 (frequency, type of equipment to assure service); *id.* at 120 ("air routes and services"); *id.* at 140 (through service and joint rates); *id.* at 153 (air services); *id.* at 171 ("prices, route structures, and the nature and variety of air services to be set by the independent forces of the free market"); *id.* at 219 (route service); *id.* at 223 (transcontinental service); *id.* at 225 (serve a route); *id.* at 233 (variety of air service patterns non-stop, multi-stop, etc.); *id.* at 254 ("the Board made a comprehensive survey of all commuter replacement services and found that on the average, traffic increased 71 percent after the commuter initiated service, and flight frequencies increased by over 100 percent with the commuter service"); *id.* at 258 ("minimum service requirement" of "not less than two round trips a day 5 days a week"); *id.* at 260 ("serving the U.S. mainland . . . experimental service patterns . . . termination of service"); *id.* at 261 (charter services); *id.* at 262 ("services" of "scheduled" and "charter" operators); *id.* at 264 ("services" between points, specifically discussing Senate pre-

cific meaning in religion and in the game of tennis, it has a particular meaning in the aviation industry. It is this meaning which Congress used throughout the legislative history. Indeed, the House version was entitled the "Air Service Improvement Act," and it did not require more careful flight attendants. Its goal was to increase the flight options available to the public.⁸⁷

In *Diefenthal v. CAB*⁸⁸ the Fifth Circuit recognized a common law cause of action for what actually amounts to tortious rendition of services under both the all-encompassing approach and the incidental services approach.⁸⁹ While dismissing the claim for lacking the requisite amount in controversy, the court recognized the existence of a claim for a flight attendant's alleged malicious behavior in refusing to seat the plaintiffs in a smoking section.⁹⁰ This holding seemingly supports the narrow view of the word "services." While § 1305 was not at issue in *Diefenthal*, the court discussed the power of the CAB to regulate air carrier "services" and to "specify a minimum quality of

emption provision); *id.* at 265 ("interstate services" discussing preemption of state regulation via state Public Utilities Commission); *id.* at 274 (classes of service, such as deluxe, coach, night coach); *id.* at 294 (scheduled air transport equals regular route service); *id.* at 319 (ratemaking elements include class of service); *id.* at 380 (remarks of Mr. Schmitt about the "lessening of such services as airlines remove aircraft to more lucrative routes"); *id.* at 391 (Mr. Goldwater's remarks regarding airlines abandoning services to smaller communities in order to compete in more lucrative, dense, long-haul markets); *id.* at 404 (increased frequency of flights equals better service); *id.* at 412 (large aircraft services, small aircraft services, "services which the Board cannot specify as to timing and aircraft type"); *id.* at 417 (Mr. McGovern's remarks regarding "loss of total service between cities A and B"); *id.* at 418 (Mr. McGovern's remarks regarding "downgrading of service with smaller aircraft"); *id.* at 434 (expanded services); *id.* at 447 ("interconnecting network of air services"); *id.* at 510 ("cities it serves or price it charges," "route moratorium" affecting amount of "service" airlines could provide); *id.* at 516 (certificate restrictions requiring a carrier to make a stop at one city when operating between two other cities which limit the "service" the carrier can provide); *id.* at 769, ("route service"); *id.* at 774 (better service equated with increased carriers on routes and increase in number of flights); *id.* at 975 ("fare and service competition," "opened up routes to additional service").

⁸⁷ See LEGISLATIVE HISTORY, *supra* note 76, at 509-12.

⁸⁸ 681 F.2d 1039 (5th Cir. 1982), *cert. denied*, 459 U.S. 1107 (1983).

⁸⁹ *Id.* at 1052-53.

⁹⁰ *Id.*

service and a minimum frequency of schedule.”⁹¹ Also, the legislative history excerpts used by the court in the *Diefenthal* case are similar to those cited above. While the court rejected the Diefenthals’ argument that “adequate services” only referred to frequency of flights, the “quality” the court spoke of is put in terms of the CAB’s power to regulate the “type” of air service as well as the frequency.⁹² Thus, because the court in *Diefenthal* recognized the plaintiffs’ state common law tort claim, the court’s definition of services did not encompass tort laws.

An examination of several federal regulations demonstrates that “service” is often used to describe the type and frequency of operations offered to passengers. For instance, anyone seeking a license to operate an airline must submit an application containing a “statement as to the type of aircraft [the] applicant proposes to use in the new *service* and whether such aircraft is presently owned by the applicant.”⁹³ Another federal rule defines an airline’s “route authority” as authority “to provide *service* between and among various points except the *service* which has been designated as essential air service.”⁹⁴ Yet another regulation defines a “substantial change in operations” as including “changes in operations from charter to scheduled *service* or a large increase in the number of markets served.”⁹⁵ Another regulation exempts small air taxi operators from certain federal economic regulations.⁹⁶ This regulation specifies that applicants or registrants as air taxi operators must describe the “type of *service* the carrier will offer (scheduled passenger, sched-

⁹¹ *Id.* at 1046 (emphasis added). The court specifically mentions a case upholding the CAB’s authority to specify the “type of vehicle” to be used. *Id.* at 1045 (citing *Crescent Express Lines v. United States*, 320 U.S. 401, 408 (1943)). The example of “quality” regulation at hand was the CAB regulation of smoking areas, even after the Deregulation Act. *Id.* at 1047. This type of regulation does not encompass *every* act of the airline; nor does it encompass tort law.

⁹² *Id.* at 1044 (“both quantity and the kind”).

⁹³ 14 C.F.R. § 201.4(5)(c) (emphasis added).

⁹⁴ *Id.* § 204.2(l) (emphasis added).

⁹⁵ *Id.* § 204.2(m) (emphasis added).

⁹⁶ *Id.* § 298.21(c)(i)(2).

uled cargo, mail under a U.S. Postal Service contract, on-demand passenger, on-demand cargo, or other service such as air ambulance operations, fire fighting or seasons operations).”⁹⁷ Taken together, these regulations demonstrate that the term “service” or “services” often describes only the type and frequency of operations offered to passengers and not the manner in which they are provided.

B. GENERAL INDICATORS OF CONGRESSIONAL INTENT

There is nothing in the legislative history to suggest, even by inference, that Congress considered modifying or federalizing air carrier tort liability.⁹⁸ Certainly such an undertaking would merit discussion. Rather, the entire history, including the bills, the reports, and the floor debates, focuses on utility-type regulation of fares, routes, schedules and aircraft type.⁹⁹ In addition, strong evidence indicates that Congress intended to preserve the tort liability of air carriers. As part of the Airline Deregulation Act, Congress added the following provision to the original Federal Aviation Act:

(Q) INSURANCE AND LIABILITY

(1) No certificate shall be issued or remain in effect unless the applicant for such certificate or the air carrier, as the case may be, complies with regulations or orders issued by the Board governing the filing and approval of policies of insurance or plans for self insurance in the amount prescribed by the Board which are conditioned to pay, within the amount of such insurance, amounts for which such applicant or such air carrier may become liable for bodily injuries to or the death of any person, or for loss of or damage to property of others, resulting from the operation or maintenance of aircraft under such certificate.¹⁰⁰

It is evident that in 1978 Congress knew that the system

⁹⁷ *Id.* (emphasis added).

⁹⁸ See LEGISLATIVE HISTORY, *supra* note 76, at 1-53.

⁹⁹ *Id.*

¹⁰⁰ 49 U.S.C. app. § 1371(q) (1988).

that would be in place after deregulation could subject airlines to such extensive tort liability that Congress required approval of insurance plans.

C. SECTION 1305 PREEMPTION EXCEPTIONS

Proponents of a broad application of § 1305 preemption are quick to point to the language of § 1305(b)(2) that specifically exempts the proprietary powers of airport operators and the regulation of flights over the State of Hawaii from preemption.¹⁰¹ They argue that no other exceptions to preemption are indicated by Congress, thereby giving § 1305 a broad effect. By so arguing the total preemption proponents create another problem: under the broad interpretation of the word "services," a passenger injured anywhere in the continental United States due to an air carrier's negligence would have his state law based tort claim preempted; but, if fortunate enough to have crashed into the lush foliage and beautiful mountains of Maui, his state law claim would remain intact. This would be a ludicrous result and surely could not have been intended by Congress.

D. PROCEDURAL IMPACT OF § 1305

1. *General*

Assuming complete preemption of state tort law claims, the practitioner must be prepared to deal with the radical and significant changes that would follow in approaching an airline tort claim. First, all such claims brought under state law are vulnerable to summary judgment and dismissal. Second, dismissal may be avoided only by pleading a federal claim. This assumes a specific federal claim may be implied in the federal aviation statutes and regulations,¹⁰² or a federal common law claim can be recog-

¹⁰¹ See 49 U.S.C. app. § 1305(b)(2) (1988).

¹⁰² The federal aviation program as set forth in the United States Code provides only a hodgepodge of remedies for very specific types of wrongful conduct. For example, it has been held that passengers who are the victims of airline discrimination have a cause of action pursuant to the anti-discrimination sections of the

nized.¹⁰³ Third, the pleading of a federal claim may allow for removal of state court actions to federal court. Finally, the rendition of a judgment on either a state law or federal claim may result in an appeal on the very issues presented in this article.

2. Removal Considerations

Ordinarily, a defendant wishing to remove a state claim to federal court is confronted with the well-pleaded complaint rule. This rule requires that the plaintiff's pleading must state a federal question on its face.¹⁰⁴ Since preemption is normally considered a defense, the federal question does not appear on the face of the pleading and is not subject to removal.¹⁰⁵ However, a corollary to this "well-pleaded complaint rule" is the "complete preemption" doctrine, which states that "[t]he preemptive force of certain Federal statutes is so great that they convert otherwise ordinary State law claims into Federal claims for the purposes of the 'well-pleaded complaint rule.'"¹⁰⁶ While courts appear to be divided on the issue, some have held that enactment of § 1305 represents an express manifestation of intent to preempt state law entirely with regard to the regulation of rates, routes, and services of an air

Federal Aviation Act, 49 U.S.C. app. § 1374(b) (1988). See, e.g., *Smith v. Piedmont Aviation, Inc.*, 567 F.2d 290 (5th Cir. 1978); *Mahaney v. Air France*, 474 F. Supp. 532 (S.D.N.Y. 1979); *Roman v. Delta Airlines, Inc.*, 441 F. Supp. 1160 (N.D. Ill. 1977); *Valentine v. Eastern Airlines, Inc.*, 365 A.2d 475 (N.J. Super. 1976). Conversely, courts have almost uniformly denied the existence of a cause of action for breach of an airline's duty to provide "safe and adequate service," a duty imposed by 49 U.S.C. app. § 1374(a) (1988). See, e.g., *Anderson v. USAir*, 818 F.2d 49, 54 (D.C. Cir. 1987); *Deifenthal v. CAB*, 681 F.2d 1039, 1048-50 (5th Cir. 1982), cert. denied, 459 U.S. 1107 (1983). It should be noted that the results in *Anderson* and *Deifenthal* may have been different had the courts in those cases assumed a broad reading of § 1305 preemption. See discussion *infra* parts III and IV.

¹⁰³ See *infra* part III.

¹⁰⁴ *Gully v. First Nat'l Bank*, 299 U.S. 109, 112-13 (1936).

¹⁰⁵ *Stewart v. American Airlines, Inc.*, 776 F. Supp. 1193, 1196 (S.D. Tex. 1991).

¹⁰⁶ *Id.* at 1196 (citing *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987)).

carrier.¹⁰⁷ In *Trans World Airlines, Inc. v. Mattox*,¹⁰⁸ the court clearly stated that: "[a]n examination of the preemption language in § 1305(a)(1) and its legislative history leads to the conclusion that Congress did intend to preempt so completely the particular area of state laws 'relating to rates, routes, or services' as to preclude state court actions."¹⁰⁹ As such, airlines faced with state law claims should argue that Congress intended such complete preemption in this area as to render any pleaded state law claim federal in nature and removable to federal court.

III. IS THERE A FEDERAL REMEDY FOR PERSONAL INJURY OR DEATH CAUSE BY WRONGFUL AIRLINE CONDUCT?

If Congress intended to preempt all state law causes of action relating to air carrier services, then one must ponder if any causes of action exist at federal law.

A. IS THERE AN IMPLIED PRIVATE CAUSE OF ACTION FOR VIOLATIONS OF THE FEDERAL AVIATION ACT?

Several provisions of the Federal Aviation Act, and virtually every regulation promulgated thereunder, impose duties on air carriers that, if violated, may result in the injury of a passenger.¹¹⁰ One of the most notable of these provisions imposes a duty on every air carrier to provide "safe and adequate service, equipment and facilities" to

¹⁰⁷ Petroski, *supra* note 40, at 145 (citing *State v. Pan American World Airways, Inc.*, No. 3-89-0713-H (N.D. Tex. Apr. 19, 1989)); *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 787 (5th Cir.), *cert. denied*, 498 U.S. 926 (1990)).

¹⁰⁸ 897 F.2d 773 (5th Cir.), *cert. denied*, 498 U.S. 926 (1990).

¹⁰⁹ *Id.* at 787.

¹¹⁰ For example, Subchapter VI of the Federal Aviation Act deals with Safety Regulation of Civil Aeronautics. *See, e.g.*, 49 U.S.C. § 1421(f) (1988) (collision avoidance systems); *id.* § 1425 (maintenance of equipment in air transportation). In addition, there are 20 provisions in the Code of Federal Regulations that regulate deicing requirements. *See, e.g.*, 14 C.F.R. § 135.149 (1992) (general equipment requirements). There are also many provisions that regulate aircraft engine safety inspections. *See, e.g., id.* § 21.21 (inspection and tests); *id.* § 125.247 (inspection programs and maintenance). It is easy to see how failure to comply with such regulations could foreseeably result in injury to airline passengers.

its passengers.¹¹¹

In *Cort v. Ash*,¹¹² the Supreme Court set forth four factors to be used in determining whether an implied cause of action for violation of a federal statute exists:

First, is the plaintiff one of the class for whose special benefit the statute was enacted, . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of any legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such remedy for the plaintiff? And finally, is the cause of action traditionally relegated to state law, in an area basically the concern of the States so that it would be inappropriate to infer a cause of action based solely upon federal law?¹¹³

These factors form the template around which litigants must argue.

1. *Airlines' Argument*

The airlines point to a host of cases holding that no federal implied private cause of action exists under various provisions of the FAA.¹¹⁴ They maintain that proponents of an implied federal right of action have ignored the Fifth

¹¹¹ 49 U.S.C. § 1374(a) (1988).

¹¹² 422 U.S. 66 (1975).

¹¹³ *Id.* at 78 (citations omitted). It should be noted that the four factors set forth in *Cort v. Ash* do not constitute a test, but are merely factors relevant to the more significant inquiry of general congressional intent. *Id.*

¹¹⁴ See *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1414 (9th Cir. 1984) (implied private right of action under § 1374(b) for discrimination, but no federal implied right of action under § 1374(a) for inadequate service); *Kodish v. United Airlines*, 628 F.2d 1301 (10th Cir. 1980) (no federal implied right of action under §§ 1374(b) or 1302(a)(3) for age discrimination among pilots); *Caceres Agency v. Trans World Airways*, 594 F.2d 932, (2nd Cir. 1979) (no federal implied private cause of action under § 1374(b) for airline's discrimination among travel agents); *Rauch v. United Instruments*, 548 F.2d 452 (3rd Cir. 1976) (no federal implied private right of action under § 1421 for defective equipment); *Wolf v. Trans World Airlines, Inc.*, 544 F.2d 134 (3rd Cir. 1976), *cert. denied*, 430 U.S. 915 (1977) (no federal implied private cause of action under § 1374(b) or § 1381 for deceptive trade practices); *Danna v. Air France*, 463 F.2d 407 (2d Cir. 1972) (no federal implied private cause of action under § 1374(b) for fare discriminations).

Circuit's exemplary decision in *Diefenthal v. CAB*,¹¹⁵ which specifically analyzes the *Cort* factors and holds that no implied cause of action exists under the "adequate service" language of § 1374(a).¹¹⁶ The *Diefenthal* court first noted that § 1374(a) did not provide on its face that it protected any particular class of persons.¹¹⁷ Second, the federal scheme already provided for the CAB to seek the injunctive relief which the *Diefenthal*'s sought.¹¹⁸ Therefore, there was no indication that Congress intended to create the cause of action propounded.¹¹⁹ Third, the injunctive powers of the CAB were more than adequate to promote the concerns of the *Diefenthals*.¹²⁰ Thus, private enforcement would not advance the goals of the statute.¹²¹ Finally, while the duty of adequate services is derived solely from federal law, this factor was not enough to imply the federal claims sought.¹²² While *Diefenthal* did not specifically address § 1305, it was decided after the provision's enactment and, thus, the court could be presumed to have considered its preemptive effects when applying the *Cort* factors.

2. *Passengers' Argument*

Supporters of an implied right of action contend that the airlines have missed the mark with this argument. They point out that *Diefenthal* and the other cases refusing to recognize a federal implied claim were all decided prior to *O'Carroll v. American Airlines, Inc.*¹²³ Thus, none were operating under the assumption that state common law was preempted by a "clear manifestation of Congressional intent" to federalize airline rates, routes and serv-

¹¹⁵ 681 F.2d 1039 (5th Cir. 1982).

¹¹⁶ *Id.* at 1048-50.

¹¹⁷ *Id.* at 1049.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1050.

¹²¹ *Id.*

¹²² *Id.*

¹²³ 863 F.2d 11 (5th Cir.), *cert. denied*, 490 U.S. 1106 (1989).

ices. Those cases assumed the existence of state law remedies.

Those courts were not operating under the assumption that all state tort claims relating to air carrier operations were preempted. Surely, if they had been, their analysis under *Cort v. Ash* would have been different. In *Diefenthal*, the plaintiffs sought injunctive relief to allow them to smoke under the "adequate services" provisions of § 1374. Arguably, a personal injury case arising under the "safe services" language will allow for a totally different analysis under *Cort*. The "safe service" language of § 1374 imposes a duty on air carriers to deliver their passengers to their destination safely and unharmed.¹²⁴

If § 1305 indeed preempts passenger claims, then § 1374 provides a cause of action under the *Cort v. Ash* analysis. First, in the absence of state laws protecting them, passengers can look to no authority other than the Federal Aviation Act for protection. It provides the only other source of due care placed upon the carrier to transport passengers safely to their destinations. Indeed, § 1374's duty to provide safe service is aimed at protecting a distinct class of persons: passengers. As members of the class for whose benefit § 1374 was enacted, passengers have a right to expect safe service. In light of Congress' obvious intention that air carriers be subject to liability for bodily injury and death, as evidenced by the insurance provisions of the Act, the "safe services" provisions of § 1374 seem to be Congress' only remaining tool to protect injured or killed passengers (the obvious recipients of unsafe service). The argument here focuses on protection of passengers. *Diefenthal* is distinguishable because the court there recognized that the federal scheme was not designed to protect smokers, but to control them.¹²⁵

Second, § 1305 provides explicit intent to create a fed-

¹²⁴ This is much like the duty imposed by Louisiana law discussed in *Seidman v. American Airlines, Inc.*, 923 F.2d 1134, 1138 (5th Cir. 1991).

¹²⁵ *Diefenthal*, 681 F.2d at 1049.

eral remedy. Most case authority previously discussing whether the Federal Aviation Act implies a cause of action held no cause of action implied because of the available state law remedies and the lack of congressional intent to preempt state law. One such case is *Rogers v. Ray Gardner Flying Service, Inc.*¹²⁶ In *Rogers*, the plaintiffs brought a wrongful death action against a fixed-base operator (FBO) for the death of certain occupants in a plane crash. The plane was leased by a third party to the FBO, who in turn orally rented it to the pilot, a relative of the plaintiffs. The plaintiffs sought to hold the FBO vicariously liable for the negligence of the pilot. Because the Oklahoma law of bailments precluded the plaintiffs' claims against the FBO, plaintiffs sought to hold the FBO vicariously liable under Federal Aviation Act provisions and regulations that, if they implied a cause of action, would indeed create the desired vicarious liability. Section 1301(26) of article 49 of the United States Code provided that lessors were deemed to be operating the aircraft they lease, and 14 C.F.R. § 91.9 stated that no person may operate an aircraft unsafely.¹²⁷

The court held that Ms. Rogers had no federal claim primarily for one reason: lack of Congressional intent to preempt the state laws involved.¹²⁸ In a well-reasoned and detailed opinion, the court carefully considered the plaintiffs' argument. The plaintiffs argued that "Congress clearly intended to preempt state law and to protect the public from the negligence and financial irresponsibility of pilots by imposing vicarious liability upon one who allows his aircraft to be flown by another."¹²⁹ The court stated:

We do not question that under its Commerce Clause powers Congress could preempt state law with regard to the liability for injuries resulting from air crashes. But we are

¹²⁶ 435 F.2d 1389 (5th Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

¹²⁷ *Id.* at 1391-92.

¹²⁸ *Id.* at 1393-95.

¹²⁹ *Id.* at 1392.

not convinced that in this instance Congress has clearly indicated any such intent to supersede state laws of bailments as related to the operation of aircraft.¹³⁰

The court rejected the plaintiffs' analogy to maritime law on the ground that maritime law was made the subject of exclusive jurisdiction under the Constitution.¹³¹ In aviation, the Commerce Clause powers of Congress had not been exercised to create exclusive federal jurisdiction.¹³² The court's opinion reads in part as follows:

Appellants' counter-argument quickly reaches the flaw in appellees' analogy to maritime law. The Constitution of the United States extends the judicial power of the federal courts to admiralty and maritime cases, and the federal courts have therefore been obliged to fashion a general maritime law in the absence of federal statute. State legislation which conflicts with general maritime law or federal statute is invalid.

Conversely, the Commerce Clause as interpreted by the courts has left state sovereignty unimpaired except where Congress has clearly indicated an intent to supersede state law. . . . The difference is clearly expressed by appellants' reply to the supplemental brief:

Under this constitutional grant, the federal courts, except insofar as precluded by Congressional enactment or inhibited by stare decisis, are free to recognize and apply a judge-made cause of action for wrongful death in an admiralty case, as was done in *Moragne*. The Constitution, however, has not granted the federal courts any comparable power to fashion their own common law remedies in tort cases arising in the airways.

It becomes clear that the development of the power of the federal government under these two constitutional provisions has been strikingly dissimilar. A clear mandate has been recognized in the maritime area for the establishment of uniform federal law, whereas the delicate problem of federal-state relations has resulted in a more stringent rule that federal preemption under the Commerce Clause

¹³⁰ *Id.* at 1393.

¹³¹ *Id.* at 1395.

¹³² *Id.*

will not be presumed in the absence of a clear indication of the intent of Congress.¹³³

The *Rogers* court stated that had congressional intent been clearly manifested, its "task would be correspondingly simpler."¹³⁴

If § 1305 has a broad preemptive effect, encompassing passengers' claims for injuries, then Congress has presumably exercised its Commerce Clause powers to create exclusive federal jurisdiction and allow the application of federal remedies. In *O'Carroll v. American Airlines, Inc.*¹³⁵ in spite of plaintiff's claims that state law remedies were still preserved by § 1506, the court held that "section 1305 is a clear indication of Congressional intent to preempt and is controlling."¹³⁶ Section 1305 is obviously a clear manifestation of congressional intent to preempt. Whether or not § 1305 indicates a congressional intent to federalize air carrier tort liability is another question. But if state tort claims are preempted, then the second factor of *Cort v. Ash* may have to be satisfied.¹³⁷ Otherwise, the liability

¹³³ *Id.* (citations omitted).

¹³⁴ *Id.* at 1394.

¹³⁵ 863 F.2d 11 (5th Cir.), *cert. denied*, 490 U.S. 1106 (1989).

¹³⁶ *Id.* at 13.

¹³⁷ The *Cort* discussion of the second factor indicates that it is based on a general analysis of congressional intent, which includes consideration of the relationship between state and federal law in providing additional remedies. Indeed, the Supreme Court analyzed the statute there in question (which prohibited corporate expenditures in campaigns for federal office) and stated:

True, in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to create a private cause of action, although an explicit purpose to deny such cause of action would be controlling. But where, as here, it is at least dubious whether Congress intended to vest in the plaintiff class rights broader than those provided by state regulation of corporations, the fact that there is no suggestion at all that § 610 may give rise to a suit for damages or, indeed, to any civil cause of action, reinforces the conclusion that the expectation, if any, was that the relationship between corporations and their stockholders would continue to be entrusted entirely to state law.

Cort v. Ash, 422 U.S. 66, 82-84 (1975).

Assuming preemption, there can be no expectation that the relationship between the airlines and the passengers would be entrusted entirely to state law. The opposite is true, and in light of the insurance provisions in § 1371(q), it is

insurance provisions of the Act would be rendered meaningless.

The third prong of the *Cort v. Ash* test requires less analysis. An implied remedy would definitely provide airlines with an added incentive to make flights safer, which is the primary purpose of the "safe services" duty of § 1374. The paltry penalties provided by the governmental scheme pale in comparison to the potential multi-million dollar liability that may arise from an air crash disaster.¹³⁸

Finally, assuming state tort laws are preempted, air carrier tort liability would no longer be a matter traditionally relegated to state law under the fourth prong of the *Cort v. Ash* test.¹³⁹ Thus it would be appropriate to imply a federal remedy in absence of a state law remedy.

B. IS THERE A FEDERAL COMMON LAW CAUSE OF ACTION AVAILABLE TO PASSENGERS INJURED BY AIRLINES?

Assuming complete preemption and no implied federal statutory remedy, one must determine whether a passenger injured through an airline's negligence may assert a federal common law cause of action.

1. *Passengers' Argument*

Proponents of such a federal common law remedy take

clear that federal law has granted passengers the right to damages for personal injury or death.

¹³⁸ See 49 U.S.C. app. § 1471 (1988) (a punitive section merely designed to fine airlines from \$1,000 to \$10,000 per violation); 49 U.S.C. app. § 1472 (1988) (establishing criminal penalties); 49 U.S.C. app. § 1487 (1988) (providing the district court with the power to enforce the above-cited provisions); 14 C.F.R. § 13.5 (1992) (allowing the DOT to process private complaints, tracking the statutory remedies of a \$1,000 penalty per violation).

¹³⁹ In analyzing the fourth *Cort* factor, the Supreme Court placed emphasis on the current state law scheme governing corporations: "Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation." *Cort*, 422 U.S. at 84. If one accepts a federal scheme where no state can interfere with the regulation of commercial air travel, then under *Cort* the scheme requires the existence of a federal cause of action.

a straightforward approach: there should be a remedy for personal injury or death caused by wrongful air carrier conduct, whether such conduct falls within the federal domain (within the term "services") or within the state domain (outside of the term "services"). If the airlines are correct in their assertion that state law remedies have been preempted, and that no federal statutory remedy exists, then Congress must have delegated to the federal courts the responsibility for fashioning the rules of aviation law. In *Moragne v. States Marine Lines, Inc.*,¹⁴⁰ the United States Supreme Court fashioned a common law action for wrongful death under the authority granted to it under Article III, Section 2 of the Constitution.¹⁴¹ The Court noted certain anomalies that would result if the current law did not recognize a federal common law claim. Among them were: (1) in territorial waters, identical conduct violating federal law produced liability if the victim was injured, but exculpated the defendant if the victim was killed; (2) identical breaches of duty resulting in death produced liability outside the three-mile limit, but not within the territorial waters of a state; and (3) a true seaman was provided with no remedy for death caused by unseaworthiness within territorial waters, while a long-shoreman would have such a remedy when allowed by a state statute.¹⁴²

Under the broad view of § 1305 (preempting all state law claims), similar anomalies result. A person wrongfully excluded from a flight would have a federal implied remedy under § 1374 of the Federal Aviation Act.¹⁴³ Likewise, a handicapped person victimized by discriminatory conduct of an airline could assert a claim under the Air

¹⁴⁰ 398 U.S. 375 (1970).

¹⁴¹ *Id.* at 395-96.

¹⁴² *Id.*

¹⁴³ This cause of action has typically been asserted as an "abuse of discretion" case, asserting that the pilot in command abused the discretion given to him by 49 U.S.C. app. § 1511 in removing passengers in the interests of safety. Section 1374(b) prohibits giving unreasonable preference to one passenger over another and has been interpreted to limit the pilot's § 1511 discretion. *See, e.g., O'Carroll*, 863 F.2d at 12-13.

Carrier Access Act.¹⁴⁴ However, other persons who are physically injured by equally negligent and careless conduct on the part of the airlines lack a remedy. Moreover, those fortunate few who happen to have state law claims falling outside the scope of § 1305's preemption will be able to seek redress for their injuries, while those whose claims fall within the scope of § 1305 are subject to the piecemeal application of federal remedies.¹⁴⁵

Federal courts today face the same practical considerations that spurred the *Moragne* decision with regard to the airline regulation scheme that has developed.¹⁴⁶ In addition, scholars have been quick to point out the factual

¹⁴⁴ 49 U.S.C. app. § 1347 (1988).

¹⁴⁵ The district court in *Stewart v. American*, 776 F. Supp. 1194, 1197-98 (S.D. Tex. 1991), attempting to reconcile recent Fifth Circuit holdings, drew an equally arbitrary distinction. The *Stewart* court held that § 1305 does not preempt claims of passengers injured in incidents related to an airline crash disaster, but does preempt claims of persons merely injured by negligent rendition of flight crew service. *Id.* at 1198.

¹⁴⁶ The Court in *Moragne* noted that general public policy favoring the creation of federal common law claims can be derived from the overall purpose of federal statutory schemes. *Moragne*, 398 U.S. at 390-93. The Court stated: "This appreciation of the broader role played by legislation in the development of the law reflects the practices of common-law courts from the most ancient times. . . . '[M]uch of what is ordinarily regarded as 'common law' finds its source in legislative enactment.' " *Id.* at 392 (citations omitted). The Court in *Moragne* went on to use the general purposes of the many existing federal maritime statutes as its source of the general principals of its newly-fashioned remedy.

Arguably Congress has provided Article III courts with the authority to do so by extending its Commerce Clause powers through the preemptive intent evidenced by § 1305. *See* 49 U.S.C. app. § 1305 (1988). The general purpose of the federal aviation statutory scheme is to provide safe, efficient service to its passengers. *Id.* § 1302. Many remedies have already been created by Congress, albeit in a piecemeal fashion. A federal common law cause of action for negligence in operating an air carrier, or providing air carrier services, is consistent with the goals of the federal statutory scheme. Lower courts could be guided by federal court precedents in the areas of maritime law and previously implied aviation causes of action. As the court in *Moragne* recognized, the lower courts were well-equipped to deal with the details of the newly-created cause of action:

We do not determine this issue now, for we think its final resolution should await further sifting through the lower courts in future litigation. . . . The experience thus built up counsels that a suit for wrongful death raises no problems unlike those that have long been grist for the judicial mill.

Moragne, 398 U.S. at 408.

likeness between the maritime and aeronautical arenas.¹⁴⁷ The very nature of the "ocean of air" would suggest that matters in aviation be governed in a fashion similar to those in admiralty. In his treatise, one scholar discussed the problems created by the fact that aviation came into being after the drafting of the Constitution:

Much of the plaintiff's problem in aviation accident law, or in peculiar jury reactions to aviation cases, lies in a simple fact that many of us frequently forget that aviation is new. The first aviation case tried in England was heard in 1933. Chicago claims to have the busiest airport in the entire world. Yet the first Illinois case involving an airplane accident was also tried in 1933. To this day the appellate decisions of many states fail to list any aviation cases. Many basic questions concerning aviation are still to be decided. A federal district court, in 1954, stated that "The question of whether the air space over the seas is within the jurisdiction of admiralty has received little attention and is an open one." The question was not resolved until 1958 when the Second Circuit held that admiralty governed. As recently as 1935, law review articles appeared expressing the view that the entire ocean of air surrounding the earth was within the admiralty jurisdiction.¹⁴⁸

The perceptive discussion of the similarities and differences that exist between maritime law and the law of aviation found in the *Rogers* case can be employed to assert the existence of a federal common law cause of action just as easily as it is employed to create an implied remedy. If the analysis in *Rogers* holds true, then a broad reading of § 1305 to include preemption of state law claims for wrongful air carrier conduct necessarily eliminates the critical distinctions between maritime and aviation law.

¹⁴⁷ See, e.g., David K. Linnan, *Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-Defense, and State Responsibility*, 16 YALE J. INT'L L. 245 (1991).

¹⁴⁸ LEE S. KRIENDLER, 1 AVIATION ACCIDENT L. § 1.01, at 1-4 (1991) (citing Arnold W. Knauth, *Aviation & Admiralty*, 6 AIR L. REV. 226, 227 n.7 (1935); Van Vechter Veeder, *The Legal Relation Between Aviation and Admiralty*, 2 AIR L. REV. 29 (1931); *Report of the Special Committee On the Law of Aviation of the American Bar Association*, 46 ABA REP. 77-97, 498-530 (1921); George G. Bogert, *Problems in Aviation Law*, 6 CORNELL L. Q. 271, 303-05 (1921)).

The court noted in *Rogers* that if Congress clearly indicated its legislative intent to preempt, then federal courts would be granted the "comparable power to fashion their own common law remedies in tort cases arising in the airways."¹⁴⁹ If § 1305 is a clear indication of congressional intent to preempt state tort law, the *Rogers* analysis permits the fashioning of a federal remedy.

2. *Airlines' Argument*

The argument against a common law action is more difficult to make. There is no particular test that one must meet, as there is with implied remedies under *Cort v. Ash*.¹⁵⁰ The best argument is to attack the analogy to maritime law and argue that § 1305 is not a significant exercise of Congress' Commerce Clause powers to indicate "exclusive" federal jurisdiction. At the time of the enactment of the Constitution, maritime law was based on a significant preexisting body of common law.¹⁵¹ Moreover, Article III of the Constitution is not a mere grant of jurisdiction, but specifically provides judicial "power" to the courts in cases of admiralty and maritime jurisdic-

¹⁴⁹ *Rogers*, 435 F.2d at 1395.

¹⁵⁰ 422 U.S. 66 (1975).

¹⁵¹ While our American system of maritime law draws heavily from our English ancestors, we can trace some general concepts of admiralty law back even further. In writings from Babylonian times until the collapse of the Roman empire, there remains evidence of maritime doctrines that persist to this day:

[t]he power of a shipmaster to throw cargo overboard to save a ship and other cargo (jettison), and the duty of the ship and saved cargo to reimburse the jettisoned cargo's owners so that all share in proportion to the property values (general average); and the concept of a loan secured by a ship (bottomry) in which the borrower's personal liability is cancelled if the ship is lost. The body of ancient law is referred to loosely as the 'Rhodian sea law.' No primary sources persist, so far as is known, but secondary references are fairly common in Greek and Latin writers, and Rhodes was a sufficiently important port in its heyday (around 500 B.C.) to have given rise to a large body of litigation and maritime disputes and to compilation and codification of the commonest doctrines.

NICHOLAS J. HEALY & DAVID J. SHARPE, CASES AND MATERIALS ON ADMIRALTY 3 (1974).

tion.¹⁵² No such comparable grant of power is evidenced by § 1305. To make this argument, one must attack the *Rogers* case head on, and show that the language of *O'Carroll* does not provide the type of evidence needed to invoke the *Moragne* analogy.

IV. ADMINISTRATIVE REMEDIES

Some argue that no cause of action exists at all for personal injuries relating to an air carrier's rates, routes, or services. To counter any perceived injustice, they argue that passengers remain free to pursue an administrative remedy. In *Anderson v. USAir*,¹⁵³ the court stated:

Nevertheless, the absence of a private remedy does not leave airlines free to deny "safe and adequate service." A party alleging that an airline failed to provide the requisite service can pursue an appropriate administrative remedy. Under the Aviation Act, Department of Transportation (DOT) or the FAA is empowered to bring suit directly against an airline or seek other statutorily defined relief.¹⁵⁴

Other federal district courts, in apparent reliance upon the *Anderson* decision, have made similar reference to the existence of an administrative remedy for passengers injured through wrongful air carrier conduct.¹⁵⁵ However,

¹⁵² The relevant portion of Art. III, § 2 of the United States Constitution reads as follows:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State; between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, *amended by* U.S. CONST. amend. XI.

¹⁵³ 818 F.2d 49 (D.C. Cir. 1987).

¹⁵⁴ *Id.* at 49, 55.

¹⁵⁵ *Howard v. Northwest Airlines*, 793 F. Supp. 129 (S.D. Tex. 1992); *Hodges v. Delta Airlines*, No. H-90-2276 (S.D. Tex. Sept. 3, 1991).

the several statutes and regulations cited in *Anderson* do nothing to remedy passenger injuries and are merely penal in nature.¹⁵⁶ In fact, a careful review of the entire federal aviation scheme fails to disclose a single statute that provides for monetary damages to compensate for bodily injury or death of a passenger.¹⁵⁷

V. CONCLUSION

In *Marbury v. Madison*,¹⁵⁸ the United States Supreme Court recognized one of the most fundamental tenets of our system of jurisprudence:

¹⁵⁶ First, 49 U.S.C. § 1421(a)(6) (1988) merely empowers the Secretary of Transportation to establish reasonable rules, regulations and "minimum" standards governing practices and procedures for safety in air commerce. Not only does this do nothing to compensate injured passengers, but it also shows that Congress really contemplated that the Aviation Act only provide "minimum" standards for safety, allowing states to provide consistent but stricter tort liability. Next, § 1511 merely gives an air carrier authority to refuse transportation to a passenger if allowing the passenger to travel would be detrimental to the safety of the flight. This does not provide most passengers any remedy whatsoever. Section 1471 is a punitive section designed to fine airlines from \$1,000 to \$10,000 per violation. This does nothing to compensate injured passengers as contemplated by Congress. Section 1472 establishes criminal penalties and does nothing to further the civil liability contemplated by Congress. Under this criminal penalty section the list of violations is painfully narrow and is aimed at punishing wayward pilots and passengers. Section 1482 only establishes a complaint procedure and does not constitute any remedy for injured passengers. Section 1482(d)(3) cited by the *Anderson* court merely deals with correcting discriminatory rates and practices and will do nothing for compensating personal injury claims. Finally, the *Anderson* court cites § 1487, which merely provides the district court with the power to enforce the above-cited provisions. If the district court enforced an order that an airline pay the FAA \$1,000, or even \$10,000, that would do very little to assist an injured passenger in getting the compensation that Congress clearly contemplated in § 1371(q). Such a result may be tolerable in a discrimination case like *Anderson* where the plaintiff was a handicapped passenger with a political, rather than personal agenda, but not in most other cases. Query: What type of remedy would a \$10,000 penalty be for 200 passengers killed in an air crash disaster?

The lower court in *Anderson* cites 14 C.F.R. § 13.5, as well as 14 C.F.R. §§ 302.201-.206. These procedures merely allow the DOT to process private complaints and track the statutory remedies of a \$1,000 penalty per violation.

¹⁵⁷ See 14 C.F.R. §§ 1.1-49.55, 61.1-139.343, 141.11-199.31, 201.1-415.31, 1201.100-1271.600 (1992); 49 U.S.C. §§ 1301-08, 1324-25, 1341-59, 1371-89, 1401-06, 1421-32, 1441-43, 1461-63, 1471-75, 1481-90, 1501-19, 1521-23, 1531-42, 1551-57 (1988).

¹⁵⁸ 5 U.S. (1 Cranch) 137 (1803).

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain, the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court. In the 3d vol. of his Commentaries, p. 23, Blackstone states two cases in which a remedy is afforded by mere operation of law.

"In all other cases," he says, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded."

And afterwards, p. 109. of the same vol., he says, "I am next to consider such injuries as are cognizable by the courts of the common law. And herein I shall for the present only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are for that very reason, within the cognizance of the common law courts of justice; for it is a settled and invariable principal in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress." The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.¹⁵⁹

Other scholarly works have noted similar ideals. "Fundamental in our jurisprudence is the principal that for every wrong there is a remedy and that an injured party should be compensated for all damage proximately caused by the wrongdoer."¹⁶⁰

The unjust results that would stem from complete preemption of an injured passenger's state law claims tend to indicate that Congress never meant to preempt such claims. However, it is not completely clear what Congress

¹⁵⁹ *Id.* at 163.

¹⁶⁰ ROBERT S. THOMPSON & JOHN A. SEBERT, JR., *REMEDIES: DAMAGES, EQUITY AND RESTITUTION*, § 1.02, at 1-15 (1983) (citations omitted).

intended to preempt when it employed the term “services” in § 1305. It is clear that Congress intended to leave a system in which airlines would be liable for personal injury and death arising out of their operations. Therefore, assuming that § 1305 does preempt all such claims, the absence of an administrative remedy compels recognition of a federal remedy.

