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**FEDERAL PREEMPTION—THE HAZY LINE OF COMMON
LAW CLAIM PREEMPTION UNDER THE AIRLINE
DEREGULATION ACT**

JESSICA MANNON*

IN *TOBIN V. FEDERAL EXPRESS CORP.*,¹ the First Circuit held that Tobin’s tort claims against Federal Express Corporation (FedEx) for the mislabeling and misdelivery of a package that contained marijuana were preempted by the Airline Deregulation Act (ADA).² In so doing, the court reluctantly extended the ADA’s preemption of common law claims to a point so peripheral to the Act’s purpose that similarly-situated plaintiffs may lack a remedy. The First Circuit’s decision blurs the already hazy line of preemption so that it might gradually envelop every common law cause of action as “related to a price, route, or service of an air carrier.”³ While still applying the statute “in the way that the U.S. Supreme Court has interpreted it,” the court should have recognized the claims as “tenuous, remote, or peripheral,” so as to fall outside the ADA’s protective carapace and preserve Tobin’s remedy.⁴

Tobin brought an action against FedEx for invasion of privacy, infliction of emotional distress, and negligence after she and her two young daughters received a mislabeled and misdelivered package that contained marijuana.⁵ The sender of the package in question requested priority overnight delivery and affixed a handwritten label.⁶ A FedEx employee inputted the

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¹ 775 F.3d 448, 449 (1st Cir. 2014).

² 49 U.S.C. § 41713 (2012).

³ *Tobin*, 775 F.3d at 452.

⁴ *Id.* at 454, 457.

⁵ *Id.* at 449.

⁶ *Id.*

handwritten information to generate a printed label, which showed the wrong address—Tobin’s home address—and a courier brought it to the address printed (the location of Tobin’s home where her young children also resided).⁷ Thinking it was a birthday present for her eleven-year-old daughter, the two opened the package together, only to discover the marijuana inside.⁸ The police responded quickly, and an officer told Tobin that he was concerned for her family’s safety because the intended recipient might come looking for the package.⁹ FedEx noted the officer’s request to flag the shipment and refrain from disclosing any information about the actual delivery address.¹⁰

The same day, a woman called FedEx twice attempting to get information about the package. She supplied the tracking number to FedEx and maintained that the package was misdelivered.¹¹ On the first call, a FedEx employee initiated a “trace” after the woman requested the delivery location, but on the second call, the woman voiced her (accurate) belief about where the package was delivered and said she would get the package herself.¹² A little over an hour after the officer left her home, Tobin “heard a male voice coming through her unlocked screen door asking if she had received a package that day.”¹³ Startled, she rushed to bolt the door shut, told the man she did not have his package, and noticed two other men sitting in a car parked in her driveway.¹⁴

Tobin alleged that FedEx was responsible not only for mislabeling and misdelivering the package, but also for wrongfully disclosing her address.¹⁵ She sued for damages in Massachusetts state court under a statute and several common law theories.¹⁶ FedEx removed the case to federal district court.¹⁷ The district court granted FedEx’s motion for summary judgment on the

⁷ *Id.*

⁸ *Mass. Mom Sues FedEx for Giving Suspected Drug Dealers Her Address*, CBS NEWS (Mar. 1, 2013, 11:24 AM), <http://www.cbsnews.com/news/mass-mom-sues-fedex-for-giving-suspected-drug-dealers-her-address/> [https://perma.cc/8EFK-N9G9].

⁹ *Tobin*, 775 F.3d at 450.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Kevin Koeninger, *World-Class Screw-up at FedEx, Mom Says*, COURTHOUSE NEWS SERV. (Feb. 28, 2013, 7:08 AM), <http://www.courthousenews.com/2013/02/28/55278.htm> [https://perma.cc/PV4S-8FPT].

¹⁴ *Tobin*, 775 F.3d at 450.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

statutory claim and several of her common law claims.¹⁸ In reviewing the district court's grant of summary judgment de novo, the appellate court reduced Tobin's claims to three factual premises: "(1) that FedEx mislabeled the package; (2) that FedEx misdelivered the package; and (3) that FedEx disclosed her address to third parties."¹⁹ While FedEx did not dispute the first two assertions, it "vigorously" denied disclosing the address.²⁰

The issues before the court were (1) whether FedEx disclosed the address; and (2) if the ADA preempts Tobin's remaining claims.²¹ To overcome summary judgment on the address disclosure issue, Tobin had to prove that an actual disclosure took place.²² However, the court summarily dismissed her argument in three paragraphs as a "laundry list" of possibilities and hypotheticals.²³ The First Circuit affirmed the district court's entry of summary judgment on Tobin's statutory invasion of privacy claims and her three common law claims "to the extent" the claims hinged on the disclosure of information by FedEx.²⁴ The court then analyzed Tobin's three tort claims "to the extent that those claims hinge on FedEx's admitted mislabeling and misdelivery of the package."²⁵ The court held that the ADA preempted the claims, because they (1) "inexorably" implicated FedEx's services; (2) were sufficiently "related" to those services to trigger preemption; and (3) might produce a "forbidden effect" by freezing services in place that the future market may not dictate.²⁶

The court began its analysis with the Supremacy Clause because state law that contravenes federal law is null and void.²⁷ This is an express preemption case because the ADA contains a preemption clause and FedEx is a regulated air carrier.²⁸ Congress desired market forces to maximally determine airline fares and services, so it enacted the ADA to ensure that the states

¹⁸ *Id.*

¹⁹ *Id.* at 451.

²⁰ *Id.*

²¹ *See id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 452.

²⁵ *See id.*

²⁶ *See id.* at 453–57.

²⁷ *Gibbons v. Ogden*, 22 U.S. 1, 210–11 (1824); *Brown v. United Airlines, Inc.*, 720 F.3d 60, 63 (1st Cir. 2013).

²⁸ *Tobin*, 775 F.3d at 452.

would not replace federal deregulation with state regulation.²⁹ The court's ADA inquiry was condensed to a two-part question: (1) a "mechanism" question that asked if plaintiff's claims were "predicated on a . . . provision having the force and effect of law" (answered affirmatively by the Supreme Court in *Northwest v. Ginsberg*); and (2) a "linkage" question—whether the plaintiff's common law claims were sufficiently related to a "service" of FedEx.³⁰ Because the Supreme Court recently clarified that common law claims can fall within preemption's scope, the First Circuit only considered whether Tobin's claims were sufficiently "related to" a service of FedEx.³¹

The court relied on the definition of a "service" under the ADA from *Hodges v. Delta Airlines, Inc.*, where a service represents "bargained-for or anticipated provision of labor from one party to another," and matters appurtenant to the contract of carriage.³² Noting the "wide sweep" the Supreme Court has given the term service in *American Airlines, Inc. v. Wolens* and *Rowe v. N.H. Motor Transp. Ass'n* by labeling any state law that enlarges the duties of carriers as an appurtenance to airline "services," the court said that package handling, address verification, and package delivery implicate FedEx's services.³³ Tobin argued that she could not bargain for the delivery of an unwanted package and that as a stranger to the transaction, misdelivery could not be a preempted service; however, the court cited two examples where ADA preemption does not require the plaintiff to be a customer.³⁴ Next, the court quoted *Morales v. Trans World Airlines, Inc.*, determining that state laws having a "connection" with an airline's services are preempted, but acknowledged that the connection cannot be *de minimis*.³⁵ If the connection to prices,

²⁹ *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 367–68 (2008) (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)).

³⁰ *Tobin*, 775 F.3d at 453 (citing *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1430 (2014)).

³¹ *Id.*

³² *Id.* (citing *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc)).

³³ *Tobin*, 775 F.3d at 453; see *Rowe*, 522 U.S. at 368–69; *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995); see also *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769 (2013) (Federal Aviation Administration Authorization Act's preemption provision is in pertinent part identical to the preemption provision of ADA).

³⁴ *Tobin*, 775 F.3d at 454 (citing *Bower v. EgyptAir Airlines Co.*, 731 F.3d 85, 88–89, 95 (1st Cir. 2013) (claims by a non-customer parent); *DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 83, 87–88 (1st Cir. 2011) (claims by baggage handlers)).

³⁵ *Id.* (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383–84 (1992)).

routes, and services is “tenuous, remote, or peripheral,” ADA preemption will not attach.³⁶ If the plaintiff proved her case, the court opined, it would impose a “fundamentally new set of obligations on the airlines” or at least supplant market forces with common law definitions of reasonableness and create a patchwork of regulations.³⁷ Although the plaintiff analogized her “garden variety” tort claims to personal injury claims, which sometimes escape preemption, the court side-stepped the point by saying that the *Morales* framework calls for an individual assessment of the facts rather than categorization by claim type.³⁸ “Although claims arising out of careless driving or infelicitously placed packages may not impose any greater duty on an airline . . . the common-law claims here are of a different genre.”³⁹

The court’s “dividing line” was the character and scope of the duty of care imposed; where an alleged breach of the duty of care could “effect fundamental changes in the carrier’s current or future service offerings,” ADA preemption attaches.⁴⁰ Although Tobin pointed out that her claims would not impose duties different than those the market already demands (to label and deliver packages in an accurate manner), the court said the purpose of the ADA is that “protean demands of the market” dictate airline services, and market demands “could change at any time.”⁴¹ If Tobin’s claims escaped preemption, the court cautions, accuracy in labeling in shipping as a carrier service may be frozen in place, regardless of what the market may dictate in the future.⁴²

If Tobin had been able to prove that FedEx disclosed her address, the court could have instead categorized the claim as “tenuous, remote, and peripheral,” so as to avoid preemption.⁴³ The court emphasized that this was a “hard case” with an “atypical fact pattern;” and the facts are parallel to claims the Supreme

³⁶ *Morales*, 504 U.S. at 390 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983)).

³⁷ *Tobin*, 775 F.3d at 455 (discussing *Rowe*, 552 U.S. at 373; *Bower*, 731 F.3d at 96).

³⁸ *Id.* at 455–56; see generally *Owens v. Anthony*, No. 2-11-033, 2011 WL 6056409, at *3 (M.D. Tenn. Dec. 6, 2011) (unpublished) (tort claims arising from delivery truck driver’s negligence in causing wreck not preempted); *Kuene v. United Parcel Serv., Inc.*, 868 N.E.2d 870, 872, 876 (Ind. Ct. App. 2007).

³⁹ *Tobin*, 775 F.3d at 456.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See *id.* at 453–56.

⁴³ See *id.* at 454.

Court recently held were not preempted.⁴⁴ For example, the address disclosure would have taken place after FedEx's "service" to the package sender ended, a dispositive point in *Dan's City Used Cars, Inc. v. Pelkey*, where claims survived preemption because they could not be "related to" services that ended before the conduct on which the claims were based occurred.⁴⁵ The Court also noted that the *Dan's City Used Cars* claims were unlikely to "freeze into place services that carriers might prefer to discontinue in the future."⁴⁶ Similarly, the services that would potentially freeze in place if Tobin's claims succeeded—accurate labeling, delivery, and protection of consumer privacy—are so central to FedEx's business that, were the "protean market" to dictate something else, FedEx may go out of business.⁴⁷ Moreover, the standard of care that may be imputed to FedEx is the ubiquitous ordinary care "against which all individuals order their affairs."⁴⁸ But this alternate analysis avoiding preemption would have been unlikely in light of recent First Circuit precedent.⁴⁹

The court's decision to preempt the claims based only on the mislabeling and misdelivery technically adheres to the application of ADA preemption as the Supreme Court has interpreted it. Nevertheless, this holding, as well as the First Circuit's likely preemption of Tobin's claims even if she had proven disclosure, creates a result beyond the scope of what Congress intended under the ADA and may leave similarly-situated plaintiffs without a remedy.

The Supreme Court has long recognized a presumption against preemption of state laws that fall within the traditional police power of the states, unless it is the clear intent of Congress.⁵⁰ Preemption analysis "must be guided by respect for the separate spheres of governmental authority To determine whether Congress had such an intent, [Stevens] believe[d] that a consideration of the history and structure of the ADA is more

⁴⁴ *See id.* at 457, 449.

⁴⁵ *See Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1779 (2013).

⁴⁶ *Id.*

⁴⁷ *See id.*; *Tobin*, 775 F.3d at 448, 456.

⁴⁸ *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 236–37 (1995) (Stevens, J., concurring in part and dissenting in part).

⁴⁹ *See, e.g., Brown v. United Airlines, Inc.*, 720 F.3d 60 (1st Cir. 2013); *Bower v. EgyptAir Airlines Co.*, 731 F.3d 85 (1st Cir. 2013).

⁵⁰ *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 518 (1992).

illuminating than a narrow focus on the words ‘relating to.’”⁵¹ Congress enacted the Civil Aeronautics Act in 1938 and gave the Civil Aeronautics Board (CAB) the power to prohibit unfair competition in air transportation.⁵² The CAB’s power was not exclusive, as a savings clause preserved existing common law remedies.⁵³ Congress withdrew from the economic regulation of airlines and passed the ADA to encourage market control and to keep states from substituting the federal deregulation, but it retained the savings clause and the CAB’s authority to regulate unfair trade practices.⁵⁴ Since it retained the unfair trade practices authority when it deregulated air carriers (despite its penchant for market-driven control), there is no indication that Congress intended to foreclose common law remedies either.⁵⁵ “Surely Congress could not have intended to pre-empt every state and local law and regulation that similarly increases the airlines’ costs of doing business and, consequently[,] has a similar ‘significant impact’ upon their rates.”⁵⁶ *Hodges*, the case from which *Tobin* adopted its definition of “service,” presents similar reasoning: the CAB’s statements strongly support the view that the ADA was concerned solely with economic regulation and not displacing state tort law.⁵⁷ The *Hodges* court also noted that carriers are still required to maintain insurance to cover personal injury liability.⁵⁸ Complete preemption in this area, which the First Circuit’s reasoning in *Tobin* would virtually create, would render insurance coverage useless.⁵⁹ Finally, the Supreme Court provides the example that zoning laws are not preempted because they are peculiarly within the province of state authority.⁶⁰ So, too, are tort remedies.⁶¹ A broad application of “related to” that envelops even claims several steps removed from airline services, such as a claim because a vehicle has been wrongfully sold by a carrier, or a claim by a stranger to any airline services whose privacy was invaded by carrier negligence (such as

⁵¹ *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 420–21 (1992) (Stevens, J., dissenting).

⁵² *Id.* at 422–23.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 423–24.

⁵⁶ *Id.* at 427.

⁵⁷ *See Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 338 (5th Cir. 1995).

⁵⁸ *Id.*

⁵⁹ *See id.*

⁶⁰ *Dan’s City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1780–81 (2013).

⁶¹ *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

Tobin), “leaves no law to govern resolution of a non-contract-based dispute.”⁶² Federal law does not speak to these issues and “[n]o such design can be attributed to a rational Congress.”⁶³

“It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those impaired by illegal conduct,”⁶⁴ but this is what the First Circuit foreshadows with a harsh application of preemption of claims “related to” carrier services. Most courts agree that the ADA does not provide for a private right of action.⁶⁵ The Supreme Court allowed breach of contract claims to succeed under *Wolens*, but the ADA still preempts any state-imposed obligations or legal theories beyond the airline’s self-imposed contractual undertakings.⁶⁶ Likewise, there is some authority indicating that the ADA may not preempt safety-related personal injury claims arising from airline operations.⁶⁷ But for non-contracting parties who are simply visited upon by tortious conduct unrelated to airline operations, there is no remedy if claims are preempted. To echo *Dan’s City Used Cars*, “if such state laws are preempted, no law would govern resolution of a non-contract-based dispute arising from a towing company’s disposal of a vehicle previously towed or afford a remedy for wrongful disposal No such design can be attributed to a rational Congress.”⁶⁸

In this case, an innocent bystander suffered great angst because of conduct she did not contract for or invite, and her daughters were traumatized by the experience. Fortunately, the result was not tragic, as Tobin and her daughters did not suffer actual bodily harm. But even had they been physically injured, the court’s analysis was pretty clear that it would preempt her claims regardless of actual harm suffered. *Northwest v. Ginsberg* confirmed that the ADA may preempt common law claims that are “related to” a route, price or service, the question of what that includes is still unclear.⁶⁹ While technically in line with Supreme Court precedent, the First Circuit’s broad application of preemption makes it unclear what claims may be “tenuous, re-

⁶² See *Dan’s City Used Cars, Inc.*, 133 S. Ct. at 1780–81.

⁶³ *Id.* at 1781.

⁶⁴ *Id.*

⁶⁵ Gill v. JetBlue Airways Corp., 836 F. Supp. 2d 33, 47–48 (D. Mass. 2011).

⁶⁶ Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 228–29 (1995).

⁶⁷ See *id.* at 231 n.7.

⁶⁸ *Dan’s City Used Cars, Inc.*, 133 S. Ct. at 1781.

⁶⁹ *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1430–31 (2014).

mote, or peripheral,” if Tobin’s were not.⁷⁰ Additionally, while economic deregulation is an important touchstone for preemption analysis, it should not eclipse congressional intent. Particularly if Tobin had proved that FedEx disclosed her address, the court should not have preempted her claims. In light of the changing landscape in shipping and delivery, our infatuation with promises of drone delivery,⁷¹ and our increasing reliance on internet shopping, it is plausible to envision future similarly-situated plaintiffs who have no contract with a carrier yet suffer injury because of the carrier’s actions. We should be able to assure non-contracting parties who are randomly injured by a carrier’s tortious conduct that they will be able to pursue a remedy but, unfortunately, the line of preemption is still hazy.

⁷⁰ See *Tobin v. Fed. Express Corp.*, 775 F.3d 448, 454–55 (1st Cir. 2014).

⁷¹ 60 Minutes Overtime, *Amazon Unveils Futuristic Plan: Delivery by Drone*, CBS NEWS (Dec. 1, 2013), <http://www.cbsnews.com/news/amazon-unveils-futuristic-plan-delivery-by-drone/> [<https://perma.cc/RTW4-QG67>].