Client Alert.

March 22, 2012

California Court of Appeals Finds Advisory Circulars Fail to Create Supremacy Clause Preemption

By Don Rushing, Alan Owens, and Jessica Moore

On March 20, 2012, the California Court of Appeal Second District held that nonmandatory safety standards issued by the FAA in Advisory Circulars do not preempt state tort law on the standard of care. *Sierra Pacific Holdings, Inc. v. County of Ventura*, 2d Civil No. B232307 (slip op.) (Cal. App. 2 Dist. Mar. 20, 2012). The court found that FAA Advisory Circulars are just that—advisory—and such nonmandatory federal standards are not federal "law" creating Supremacy Clause preemption.

The case arises from a suit by an aircraft owner against an airport for negligently creating a dangerous condition at the airport that resulted in damage to its aircraft. The district court found that the standard of care was governed by Advisory Circulars issued by the FAA. Because the allegedly dangerous condition created by a runway safe zone was in accordance with FAA-issued Advisory Circulars, the aircraft owner's negligence claim failed as a matter of law.

The California Court of Appeals reversed, analyzing the reasoning of the Second, Third, Sixth, and Tenth Circuits of the federal courts of appeal that state tort law on the standard of care is impliedly preempted by FAA standards because Congress intended to occupy the entire field of aviation safety through the Federal Aviation Act of 1958. *See Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Com'n*, 634 F.3d 206 (2nd Cir. 2011); *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318 (10th Cir. 2010); *Green v. B.F. Goodrich Avionics Systems, Inc.*, 409 F.3d 784 (6th Cir. 2005); *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3rd Cir. 1999). The court admitted that because the Advisory Circular at issue implicates the field of aviation safety, it arguably would be preempted under the reasoning of these federal circuits.

Turning to the Ninth Circuit approach to implied preemption, the court analyzed whether there was "pervasive regulation" in the specific area covered by the tort claim. *See Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc.*, 555 F.3d 806 (9th Cir. 2009). Under the *Midwest* approach, if the Advisory Circular's standards were incorporated into a *mandatory* FAA regulation with the force and effect of law, pervasive regulation would be shown and the standards arguably would preempt state tort law on the standard of care. However, Advisory Circulars are by definition not mandatory—by their very terms they are advisory. Because Advisory Circulars are guidelines, not rules, the court found that they cannot constitute paramount federal "law" subject to Supremacy Clause preemption.

The court was careful to note that such nonmandatory guidelines could still be informative of the standard of care, such as industry customs and practices. Compliance or noncompliance with such custom, though not conclusive on the issue of negligence, may assist the trier of fact to determine if the standard of care was met.

The *Sierra Pacific Holdings* opinion does not stray far from English common law roots. Under the English Law of

negligence, the appropriate standard of care is determined by considering industry practice and regulatory standards. Neither is prescriptive, however, nor do they preempt the standard to be applied. And it is well established that conformity with common practice is *prima facie* evidence that the proper standard of care has been taken. Although not conclusive, generally speaking defendants will not be found negligent if they can show that they have acted in accordance with general and approved practice. While compliance with certification requirements also is not a complete answer to a claim in negligence, such requirements are properly taken into account in an overall evaluation of what is reasonably required. The more heavily regulated the activity, the more persuasive that evidence might be. The flying of aircraft, particularly those carrying fare-paying passengers, inevitably rates as one of the more heavily regulated activities. The nature of the regulatory requirements therefore carries considerable, *but not decisive*, weight in the evaluation of what is reasonably required of those engaged in the industry. *See Lambson Aviation v. Embraer Empresa Brasiliera de Aeronautica SA & B.F. Goodrich Avionics Systems*, [2001] All ER (D) 152 (Oct).

To view the Court's decision, click here.

Contact:

Don Rushing
(858) 720-5145
drushing@mofo.com

Alan Owens
+44 20 7920 4162
aowens@mofo.com

Erin Bosman
(858) 720-5178
ebosman@mofo.com

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials in many areas. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer*'s A-List for eight straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.