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EXPERT ANALYSIS

Uncertain Fate of 9th Circuit's Decision That FAAAA Doesn't Preempt Break Law

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For several years, motor carriers have defended themselves, mostly successfully, against California's meal and rest break laws by using the Federal Aviation Administration Authorization Act of 1994, which preempts state laws "related to a price, route, or service of any motor carrier."

Neither the FAAAA, nor its air carrier equivalent, the Airline Deregulation Act,[1] however, defines "related to," and how far this phrase extends to preempt state laws has often been disputed. Federal preemption is clearest if the state statute specifically references a carrier's prices, routes or services.[2]

In "borderline" cases, however, where a state law does not refer to a carrier's prices, routes or services, as with California's break laws, or other laws of "general application," the 9th U.S. Circuit Court of Appeals has long held the test for preemption is whether the state law "binds the carrier to a particular price, route or service."[3]

Last April the U.S. Supreme Court, in *Northwest Inc. v. Ginsberg,* overturned the 9th Circuit's reliance on its "borderline" test, holding that the key to preemption of any state law is its "effect" on prices, routes or services — not whether the law is one of general application.[4]

Nevertheless, in its recent decision in *Dilts v. Penske Logistics*,[5] the 9th Circuit again applied the test and methodology it applied in *Northwest* when it concluded the FAAAA does not preempt California's meal and rest break laws. The *Dilts* decision could have far-reaching effects on all trucking companies operating in California. Given the apparent conflict between *Northwest* and *Dilts*, and that *Dilts* appears to be at odds with the reasoning of about a dozen district court cases, the future of the decision is uncertain.

BACKGROUND OF THE FAAAA

Congress passed the Federal Aviation Administration Authorization Act to preempt state laws that could affect the trucking industry following its deregulation. The FAAAA preempts state laws or regulations or any other provision having the force and effect of law "*related to* a price, route, or service of any motor carrier."[6] The purpose of the preemption clause in the FAAAA, similar to the ADA, is to prevent states from enacting, either directly or indirectly, "a patchwork of state service-determining laws, rules, and regulations," so as to "leave such decisions, where federally unregulated, to the competitive marketplace."[7]

Expressly excluded from FAAAA preemption is state enactment of motor vehicle safety regulations, such as highway route controls or limitations based on the size and weight of the motor vehicle or the hazardous nature of the cargo. Likewise excluded from FAAAA preemption is a state's ability to set minimum amounts of financial responsibility relating to insurance requirements.[8]

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These express exclusions from FAAAA preemption still leave the scope of the phrase "related to" extremely broad and, as Justice Antonin Scalia noted in a concurrence concerning the same term used in the Employee Retirement Income Security Act, "everything is *related to* everything else."[9]

In FAAAA and ADA jurisprudence, the U.S. Supreme Court has held the term "related to" means "having a connection with, or reference to" prices, routes and services, regardless of whether that connection is direct or indirect, and that preemption "occurs at least where state laws have a 'significant impact' related to Congress' deregulatory and pre-emption related objectives."[10]

Conversely, the FAAAA does not preempt state laws that affect prices, routes and services only in a "tenuous, remote, or peripheral ... manner, such as state laws forbidding gambling."[11] But the Supreme Court has never said where, or how, "it would be appropriate to draw the line" in borderline situations.[12]

When a law does not refer directly to rates, routes or services, the 9th Circuit has held "the proper inquiry is whether the provision, directly or indirectly, binds the carrier to a particular price, route or service and thereby interferes with the competitive market forces within the industry."[13]

BACKGROUND OF *DILTS*

The *Dilts* plaintiffs represent a certified class of almost 350 delivery drivers and installers of appliances in a class action filed against Penske Logistics in the U.S. District Court for the Southern District of California. The plaintiffs work exclusively in California and said Penske routinely violates the state's meal and rest break laws. The motor carrier's delivery drivers and installers typically worked in pairs with one driver and one installer in each truck.

Because California's meal and rest break laws were not aimed at the motor carrier industry, the District Court used the 9th Circuit's "borderline" formulation whereby these laws would be preempted only if they would "bind" the motor carrier's prices, routes or services and "interfere with competitive market forces within the ... industry."[14]

Penske argued the California laws would force its drivers to alter their routes daily while searching out an appropriate place to exit the highway and locating stopping places that safely and lawfully accommodate their vehicles. The District Court found that, "while the laws do not strictly bind [the motor carrier's] drivers *to* one particular route," they would not be able to take routes that did not offer adequate places to stop, and therefore "the laws bind motor carriers to a smaller set of possible routes."[15]

Likewise, the District Court held that "by virtue of simple mathematics," forcing the drivers to take a number of breaks within a specified period of time would "reduce the amount and level of service Penske can offer its customers without increasing its workforce and investment in equipment," which would also have a significant impact on prices.[16]

Finally, the District Court found that "to allow California to insist exactly when and for exactly how long carriers provide breaks for their employees" would allow other states to do the same, thus creating the forbidden "patchwork of state service-determining laws."[17]

The plaintiffs appealed. Nevertheless, following the District Court's published decision, numerous district courts followed the *Dilts* analysis and likewise held that California's meal and rest breaks were preempted either by the FAAAA for motor carriers or the ADA for air carriers.[18] Building on that analysis, two district courts held California's minimum wage laws, as applied to piece-rate compensation, were preempted,[19] and a Virginia federal court used the same analysis to hold that the Massachusetts Independent Contract Law, which does not allow motor carriers to use independent contractors as drivers, was preempted.[20]

NORTHWEST INC. V. GINSBERG

Oral argument on the *Dilts* appeal took place March 3. In April, three months before the 9th Circuit issued its decision in *Dilts*, the U.S. Supreme Court decided *Northwest Inc. v. Ginsberg*,[21] reversing a 9th Circuit decision that the ADA did *not* preempt the plaintiff's common-law claim for

breach of the implied covenant of good faith and fair dealing because the air carrier terminated plaintiff from its frequent flier program.

First, the Supreme Court noted that the 9th Circuit had held the plaintiff's common-law claim to be "too tenuously connected to airline regulation to trigger preemption under the ADA" as it "does not interfere with the [ADA's] deregulatory mandate" and does not "force the airlines to *adopt or change* their prices, routes or services — the prerequisite for ... preemption."[22] The Supreme Court dismissed this holding as being based on "pre-*Wolens* circuit precedent," that is, the 9th Circuit had not taken into account the high court's decision in *American Airlines Inc. v. Wolens* (finding the ADA preempts claims brought under the Illinois Consumer Fraud Act with respect to a frequent flier program).[23]

Instead, the Supreme Court held that what is important is "the effect of a state law, regulation, or provision [on prices, routes or services], *not its form*," as "the ADA's deregulatory aim can be undermined just as surely by a state common-law rule as it can be by a state statute or regulation."[24] Indeed, the Supreme Court said it "'defies logic to think that Congress would disregard real-world consequences and give dispositive effect to the form of a clear intrusion into a federally regulated industry.'"[25]

THE 9TH CIRCUIT'S DECISION IN *DILTS*

On July 9, the 9th Circuit reversed the District Court in *Dilts*.

In discussing how a court should "draw a line" between laws that are significantly related to prices, routes and services, and those that are only tenuously related, the 9th Circuit concluded that the type of law that can be preempted is one in which "the existence of a price, route or service [was] essential to the law's operation."

Otherwise, in "borderline cases" concerning laws of general application, the proper inquiry is "whether the provision, directly or indirectly, *binds* the carrier to a particular price, route or service and thereby interferes with the competitive market forces within the industry."[26] As such, "generally applicable background regulations that are several steps removed from prices, routes, or services, such as prevailing wage laws or safety regulations, are not preempted, even if employers must factor those provisions into their decisions about the prices that they set, the routes that they use, or the services that they provide."

In this respect, the 9th Circuit noted that many of the laws the FAAAA expressly excludes from preemption, such as transportation safety and insurance regulations, likewise "increase a motor carrier's operating costs." Indeed, while "[n]early every form of state regulation carries some cost," this alone does not make a state law related to prices, routes or services.[27]

The holding in *Northwest* notwithstanding, the 9th Circuit concluded that if the law is of general application, it can only be preempted if it "binds" the carrier regarding prices, routes and services.

In its briefing to the 9th Circuit, Penske attempted to provide the court with an alternative test for deciding difficult cases based on the 7th Circuit's decision in *S.C. Johnson & Son Inc. v. Transport Corporation of America*.[28]

In that case, the 7th Circuit distinguished between "inputs" that companies must use to provide their services, and "outputs," which are the services themselves. Inputs, such as labor, are often the subject of regulations, such as anti-discrimination laws, and often are not subject to preemption because they operate in the background one or more steps away "from the moment at which the [carrier] offers its customers a service for a particular price."[29]

The impact of background laws affecting the inputs will, thus, frequently be too attenuated to be preempted. In contrast, California's meal and rest break laws, because they directly affect the delivery of services and the routes used in doing so, would be subject to preemption.

While the *Dilts* court acknowledged the analysis in *S.C. Johnson*, it nonetheless classified California's meal and rest break laws as "generally applicable background regulations," without analyzing the actual "effect" of the law on a motor carrier's prices, routes or services.[30]

Before the 9th Circuit's decision, numerous district courts followed the Dilts *trial court's analysis and likewise held that California's meal and rest breaks were preempted by the FAAAA or the ADA.*

Having already decided laws of general applicability cannot be preempted simply because they "shift[] incentives and make[] it more costly for motor carriers to choose some routes or services *relative* to others," the 9th Circuit easily concluded that California's meal and rest break laws are not preempted. "They do not set prices, mandate or prohibit certain routes, or tell motor carriers what services they may or may not provide, either directly or indirectly."[31]

Such laws do not create an impermissible "patchwork" of state-specific laws that would defeat Congress' deregulatory objectives because, again, citing to its own circuit precedent, such laws are more analogous to state wage laws, "which may differ from the wage law adopted in neighboring states but nevertheless [may still be] permissible."[32]

The court then applied these general principles to Penske's specific arguments, often noting those laws expressly excluded from preemption by the FAAAA would cost the motor carrier more than compliance with California's break laws. Moreover, the break laws do not require a cessation of service, or a change in service, or the frequency of a service; instead, the laws require individual employees to be given breaks and, if this impacts services, more employees can be hired. "They simply must take drivers' break times into account — just as they must take into account speed limits or weight restrictions, ... which are not preempted by the FAAAA."

Likewise, the court held that forcing drivers to pull over to take breaks was not the sort of route control that Congress sought to preempt, and Penske presented no evidence that such minor deviations limited its drivers to a small set of possible routes. "Indeed, Congress has made clear that even more onerous route restrictions, such as weight limits on particular roads, are not 'related to' routes and therefore are not preempted."

The court also found that such laws do not interfere with the FAAAA's deregulatory objectives where "all motor carriers in California are subject to the same laws" and, thus, "equally subject to the relevant market forces.[33]

FUTURE OF *DILTS* UNCERTAIN

There is much in the 9th Circuit's *Dilts* decision that arguably conflicts with the U.S. Supreme Court's ruling in *Northwest*. Not only did the Supreme Court find the 9th Circuit was wrong in the "borderline" test for preemption, but in holding that a common-law claim was preempted, it stated it is the law's effect on prices, rates and services — not the type of law — that determines preemption. Yet, by continuing to insist that laws of general applicability can only be preempted if they "bind" the carrier to a particular price, route or service, the court appears to believe that no further analysis of the effects of California's meal and rest break laws on motor carriers need be done.

And while the 9th Circuit opined in *Dilts* that the preemption issue was not even "close," about a dozen FAAAA and ADA cases have held differently. Whether Penske will obtain a different decision by petitioning the Supreme Court remains to be seen. Until that time, the future of the *Dilts* decision appears uncertain.

NOTES

1 49 U.S.C. § 41713(b)(1).

2 *Am. Trucking Ass'ns v. City of L.A.*, 660 F.3d 384, 396 (9th Cir. 2011).

3 *Id*. at 397.

4 134 S. Ct. 1422 (2014).

5 2014 WL 3291749 (9th Cir. July 9, 2014), superseding opinion, 2014 WL 4401243 (9th Cir. Sept. 8, 2014)

6 49 U.S.C. § 14501(c)(1) (emphasis added).

7 *Rowe v. N.H. Motor Transport Ass'n*, 552 U.S. 364, 373 (2008).

8 49 U.S.C. § 14501(c)(2).

9 *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr.*, 519 U.S. 316, 335 (1997) (emphasis added).

10 *Rowe*, 552 U.S. 370.

[11] *Id*.

[12] *Id*.

[13] *Am. Trucking*, 660 F.3d at 397.

[14] *Dilts v. Penske Logistics*, 819 F. Supp. 2d 1109, 1118 (S.D. Cal. 2011).

[15] *Id*. at 1118-19.

[16] *Id*. at 1120.

[17] *Id*. at 1120.

[18] *See, e.g., Rodriguez v. Old Dominion Freight Line Inc.*, 2013 WL 6184432 (C.D. Cal. Nov. 27, 2013) (FAAAA); *Miller v. Southwest Airlines Co.*, 923 F. Supp. 2d 1206 (N.D. Cal. 2013) (ADA).

[19] *Burnham v. Ruan Transp.*, 2013 WL 4564496 (C.D. Cal. Aug. 16, 2013); *Ortega v. J.B. Hunt Transp.*, 2014 WL 2884560 (C.D. Cal. June 3, 2014).

[20] *Sanchez v. Lasership Inc*. 937 F. Supp. 2d 730 (E.D. Va. 2013).

[21] 134 S. Ct. 1422 (2014).

[22] *Id*. at 1428 (quoting *Ginsberg v. Northwest Inc.*, 695 F. 3d 873, 881 (9th Cir. 2012) (emphasis added)).

[23] *See American Airlines v. Wolens*, 513 U.S. 219, 226-227 (1995) (reversing an Illinois Supreme Court decision that found frequent flier program claims under the Illinois Consumer Fraud Act were not preempted by the ADA because such programs were not "essential" but merely "peripheral to the operation of an airline," and holding that ADA preemption "does not countenance the Illinois Supreme Court's separation of matters 'essential' from matters unessential to airline operations").

[24] *Northwest Inc.*, 134 S. Ct. at 1430 (emphasis added).

[25] *Id*. (quoting *Brown v. United Airlines Inc.*, 720 F. 3d 60, 66-67 (1st Cir. 2013)).

[26] *Dilts*, 2014 WL 4401243, at *6.

[27] *Id*. at *7.

[28] 697 F.3d 544 (7th Cir. 2012).

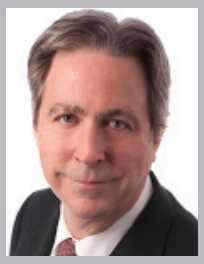
[29] *Id.* at 558.

[30] *Dilts*, 2014 WL 4401243, at *7.

[31] *Id*.

[32] *Id*. at *8.

[33] *Id*. at *9.



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