

## Federal preemption of state and local drone regulation

Some forty states and municipalities have enacted or are considering restrictions on drones. Measures restricting private drone use (compared to those restricting state and local law enforcement agencies) are unconstitutional, because they are preempted by federal law.

The Supremacy Clause of the United States Constitution, Art. VI, nullifies state law that conflicts with federal law. Such conflict may arise when the United States Congress expressly forecloses state law in a statute (express preemption), when a state law or regulation directly conflicts with federal law (conflict preemption), or when the pervasiveness of federal regulation leaves no room for state regulation (field preemption).

Field preemption operates with respect to aviation safety regulation.

In *Abdullah v. American Airlines, Inc.*,<sup>1</sup> the United States Court of Appeals for the Third Circuit held that state regulation of aviation safety is federally preempted.<sup>2</sup>

"[W]e find implied federal preemption of the entire field of aviation safety."<sup>3</sup>

The case involved a state law claim for damages occasioned by operation of an airline transport in turbulence.

In *French v. Pan Am Express, Inc.*,<sup>4</sup> the First Circuit held that state regulation of drug tests for pilots was preempted, for the same reasons.<sup>5</sup>

More recently, In *In re Air Crash Near Clarence Center, New York*,<sup>6</sup> the district court assigned multiple cases involving the Colgan Airways crash held that occupation of the field of aviation safety by the Federal Aviation Act leaves no room for state safety

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<sup>1</sup> 181 F.3d 363 (3d Cir. 1999).

<sup>2</sup> 181 F.3d at 365.

<sup>3</sup> 181 F.3d at 365.

<sup>4</sup> 869 F.3d 1 (1st Cir. 1989).

<sup>5</sup> 869 F.2d at 4.

<sup>6</sup> 798 F. Supp.2d 481 (W.D. N.Y. 2011).

standards. "Applying state law standards of care would interfere with these regulations and potentially subject airlines and related entities to 50 different standards."<sup>7</sup>

The cases finding state law not preempted mostly involve products liability actions. *Public Health Trust of Dada County, Fla. v. Lake Aircraft, Inc.*<sup>8</sup> is an example. The plaintiff was injured in a seaplane accident and claimed that his seat was negligently designed. The court of appeals reversed summary judgment for the defendant, finding that, despite FAA standards for seat design, allowing a damages action to proceed did not interfere with federal regulation.<sup>9</sup> Damages for personal injuries can co-exist with federal aviation safety regulations. State regulation prescribing flight rules or aircraft design cannot. In *Lewis v. Lycoming*,<sup>10</sup> the district court interpreted *Abdullah and Elassaad* to hold that state products liability claims are not preempted by federal aviation regulation.<sup>11</sup>

Even commentators who advocate state regulation of drone activities that threaten privacy concede that safety regulation must be left to the FAA.<sup>12</sup>

In early 2014, the FAA said:

"For example, a state law or regulation that prohibits or limits the operation of an aircraft, sets standards for airworthiness, or establishes pilot requirements generally would be preempted. But state and local governments do retain authority to limit the aeronautical activities of their own departments and institutions. Under most circumstances, it would be within state or local government power to restrict the use of certain aircraft, including a UAS, by the state or local police or by a state department or university."<sup>13</sup>

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<sup>7</sup> 798 F. Supp.2d at 486.

<sup>8</sup> 992 F.2d 291 (11th Cir. 1993).

<sup>9</sup> 992 F.2d at 294.

<sup>10</sup> 957 F. Supp.2d 552 (E.D. Pa. 2013),

<sup>11</sup> *Id.* at 558-559.

<sup>12</sup> See Margo E. Kaminski, *Drone Federalism: Civilian Drones and the Things They Carry*, 4 Cal. L. Rev. Circuit 57, 67 (2013) ("this essay does not intend to wrest safety or other basic aviation licensing matters from the Federal Aviation Administration").

<sup>13</sup> FAA, Fact Sheet – Unmanned Aircraft Systems (UAS),

[http://www.faa.gov/news/fact\\_sheets/news\\_story.cfm?newsId=14153](http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=14153) (Jan. 6, 2014).