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## Air Ambulance Service Providers: A Lifesaving Industry and a Financial Catastrophe

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# AIR AMBULANCE SERVICE PROVIDERS: A LIFESAVING INDUSTRY AND A FINANCIAL CATASTROPHE

## ABSTRACT

To address the exorbitant costs of air ambulance services, North Dakota passed House Bill 1255, codified as North Dakota Century Code § 23-27-04.10. Under this law, for an air ambulance service provider to be on the primary caller list, it must be a participating provider of health insurance carriers which collectively hold at least seventy-five percent of the health insurance coverage in North Dakota. In response to this bill, Valley Med Flight, Inc. moved to prevent enforcement of the law. The District Court of North Dakota granted relief based on preemption under the Airline Deregulation Act of 1978. This Note discusses relevant case and statutory law, and addresses the need for air ambulance regulation for not only North Dakota, but the entire United States. In so doing, this Note examines arguments for and against state regulation of air ambulance service providers, the regulation of insurance providers, and the regulation of health care providers.

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## I. INTRODUCTION

North Dakota state legislators have expressed an interest in curbing the exorbitant costs of air ambulance services.<sup>1</sup> Because of the realities of the health insurance system, patients may find themselves confronted with expensive bills for air ambulance services.<sup>2</sup> Occasionally, insurance companies deny coverage, leaving the entirety of the bill on the shoulders of the patient.<sup>3</sup> Other times, insurance companies make small payments,

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1. N.D. CENT. CODE § 23-27-04.10 (2016).

2. Peter Eavis, *Air Ambulances Offer a Lifeline, and Then a Sky-High Bill*, N.Y. TIMES (May 5, 2015), [http://www.nytimes.com/2015/05/06/business/rescued-by-an-air-ambulance-but-stunned-at-the-sky-high-bill.html?\\_r=0](http://www.nytimes.com/2015/05/06/business/rescued-by-an-air-ambulance-but-stunned-at-the-sky-high-bill.html?_r=0).

3. *Id.*

but leave the majority of the bill to the patient.<sup>4</sup> To cure this problem, the North Dakota Legislature sought to require all primary air ambulance service providers to become participating providers in insurance companies with a cumulative interest of seventy-five percent of the North Dakota insurance market.<sup>5</sup> North Dakota's attempt was ultimately thwarted because the Airline Deregulation Act preempts North Dakota Century Code ("N.D. Cent. Code") § 23-27-04.10.<sup>6</sup>

The Airline Deregulation Act of 1978 ("ADA") was enacted to deregulate the airline industry, allowing it to rely on market forces in hopes that the result would be greater efficiency, innovation, lower prices, and enhanced quality.<sup>7</sup>

To avoid frustration of its goal in enacting the ADA, which was to encourage, develop, and attain an air transportation system that relied on competitive market forces to determine quality, variety, and price of air services, Congress enacted the provision prohibiting states from enforcing laws, rules, or regulations relating to rates, routes, or services of any air carrier. . . .<sup>8</sup>

Specifically, in the 95th House of Representatives conference report, the Civil Aeronautics Board was directed to consider the following:

(1) the maintenance of safety as the highest priority in air commerce; (2) placing maximum reliance on competition in providing air transportation services; (3) the encouragement of air service at major urban areas through secondary or satellite airports; (4) the avoidance of unreasonable industry concentration which would tend to allow one or more air carriers to unreasonably increase prices, reduce services, or exclude competition; and (5) the encouragement of entry into air transportation markets by new air carriers, the encouragement of entry into additional markets by existing air carriers, and the continued strengthening of small air carriers.<sup>9</sup>

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4. Patrick Springer, *N.D. law test case for preventing air ambulance price 'gouging'*, BISMARCK TRIB. (June 21, 2015), [http://bismarcktribune.com/news/state-and-regional/n-d-law-test-case-for-preventing-air-ambulance-price/article\\_2ad667ea-9fcb-534a-a88d-7225551e56a2.html](http://bismarcktribune.com/news/state-and-regional/n-d-law-test-case-for-preventing-air-ambulance-price/article_2ad667ea-9fcb-534a-a88d-7225551e56a2.html).

5. N.D. CENT. CODE § 23-27-04.10 (2016).

6. *Valley Med Flight, Inc. v. Dwelle*, 171 F. Supp. 3d 930, 947 (2016) (noting that this case also preempts N.D. CENT. CODE § 65-02-08 and N.D. ADMIN. CODE § 92-01-02-45.1(22), as well as the related air ambulance fee schedule).

7. *Id.* at 938.

8. Ann K. Wooster, *Construction and Application of § 105 Airline Deregulation Act*, 49 *U.S.C. § 41713*, 149 A.L.R. FED. 299, § 3 (1998).

9. Airline Deregulation Act, S. 2493, 95TH CONGRESS (1978).

As evidenced by the House of Representatives Conference summary of ADA bill, it seems the focus of the ADA was to increase competition, encourage development in largely urban areas, and easily allow smaller companies to compete.<sup>10</sup> As a result, potential customers will have more options in determining what air service to choose, thus relying on market forces.

However, air ambulance service providers are in a unique situation; typically, time is a critical and major factor when an air ambulance is needed.<sup>11</sup> Because of this unique situation, patients are unable to completely rely on the market forces.<sup>12</sup> Specifically, given the circumstances that require an air ambulance, patients are usually unable to negotiate price or search for the best value.<sup>13</sup> In regard to costs, patients are left at the mercy of the air ambulance service provider that happened to be called for that particular emergency.<sup>14</sup> Future patients can hope that the air ambulance service provider is covered by their insurance; often times however, the insurer and provider will have a different opinion on the cost.<sup>15</sup>

Although the outrageous uncovered billing is an unfortunate side effect, the ADA does perform an essential function as illustrated in a letter to Congressman Rob Woodall from the United States Department of Transportation<sup>16</sup> Colorado required that, before entering the state, any air ambulance operator be accredited by the Commission on Accreditation of Medical Transportation Systems (“CAMTS”).<sup>17</sup> As shown in the letter, this type of regulation can cause serious problems.<sup>18</sup>

Medway Air Ambulance was contacted to transport a patient from Colorado to Michigan.<sup>19</sup> However, because of this regulation, Medway was informed it could not enter Colorado.<sup>20</sup> Although the specific facts are

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10. *Id.*

11. *Understanding Air Ambulance Insurance*, NAT’L ASS’N OF INSURANCE COMMISSIONERS, [http://www.naic.org/documents/consumer\\_alert\\_understanding\\_air\\_ambulance\\_insurance.htm](http://www.naic.org/documents/consumer_alert_understanding_air_ambulance_insurance.htm) (last visited Feb. 27, 2017).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. Letter from Ronald Jackson, Assistant General Counsel for Operations, to the Honorable Rob Woodall of the United States Congress, (Apr. 21, 2015), <https://cms.dot.gov/sites/dot.gov/files/docs/Assistant%20General%20Counsel%20Letter%20re%20Preemption%20of%20Colorado%20Law%20Affecting%20Air%20Ambulances.pdf>.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

unclear, it is certainly plausible that the patient aboard the air ambulance was in need of immediate emergency medical care.<sup>21</sup> To combat the states' different regulations, the ADA preemption applies.<sup>22</sup> Therefore, air ambulance service providers can bypass different state regulations.<sup>23</sup>

Although the ADA does help prevent situations, such as those previously illustrated, preemption causes more issues than just exorbitant prices.<sup>24</sup> Specifically, both North Carolina and Hawaii attempted to regulate the protocols and level of care associated with air ambulance service provider.<sup>25</sup> Both states' attempts were struck down under the ADA preemption.<sup>26</sup> However, the scope of this Note is limited to the exorbitant air ambulance price issue.

## II. THE AIR AMBULANCE SERVICE'S PRICE ISSUE

Under the ADA, states are unable to effectively control the increased billing costs of air ambulance services.<sup>27</sup> The ADA prohibits states from regulating the price, service, or route of air carriers.<sup>28</sup> Included in the definition of an air carrier, are air carriers that provide air ambulance services.<sup>29</sup> As a result, consumers in nearly every state have received critical lifesaving air transport by an air ambulance and then discovered the service is not covered in their insured network.<sup>30</sup>

### A. THE AIR AMBULANCE SERVICE COST INCREASE

Jonathan Hanlon, the founder of Research 360, calculated that Air Methods' average bill in 2014 was \$40,766.<sup>31</sup> Five years earlier, the average bill was \$17,262.<sup>32</sup> These figures show that in five years, the

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21. Jackson, *supra* note 16.

22. *Id.*

23. *Id.*

24. *Air Ambulance Advocacy*, NASEMSO.ORG, <https://www.nasemso.org/Projects/AirMedical/documents/AirAmbAdvocacyWhitePaper.pdf> (last visited Feb. 27, 2017).

25. *Id.*

26. *Id.*

27. *Understanding Air Ambulance Insurance*, *supra* note 11.

28. *Government Relations Issue Brief: Air Ambulance Regulation*, NAT'L ASS'N OF INSURANCE COMMISSIONERS (Apr. 2016), [http://www.naic.org/documents/government\\_relations\\_air\\_ambulance\\_regulation\\_issue\\_brief.pdf](http://www.naic.org/documents/government_relations_air_ambulance_regulation_issue_brief.pdf) [hereinafter *Government Relations Issue Brief*].

29. *Id.*

30. *Id.*

31. Eavis, *supra* note 2.

32. *Id.*

average bill issued by Air Methods increased by roughly 136 percent.<sup>33</sup> The reason provided by Michael D. Allen regarding this increase, seems reasonable.<sup>34</sup> Mr. Allen, president of domestic air medical services at Air Methods, claimed that these exorbitant charges have continued to increase to offset the decline of insurance payments.<sup>35</sup> Paul Webster of Air Methods offers another reason for the increase in air ambulance service costs.<sup>36</sup> According to Mr. Webster, Air Methods had to raise the cost for those who are privately insured because they lose money on patients with Medicaid or Medicare.<sup>37</sup> He said “[w]e have to accept what Medicaid and Medicare pay. We lose money on seven out of [ten] transports.”<sup>38</sup> The air ambulance industry has been concerned about future revenue as a bill was introduced into the U.S. House of Representatives to provide for an increase in Medicare payments to air ambulances.<sup>39</sup>

Private insurance companies have been pressured to cut health care costs, and thus, have been cutting reimbursement for air ambulance coverage.<sup>40</sup> Additionally, high revenue in the past decade has created a large growth in the number of air ambulances.<sup>41</sup> This growth created a system where there are too many helicopters and too few patients.<sup>42</sup> Dr. Ira J. Blumen from the University of Chicago, noted the following:

The number of helicopters used for medical emergencies has soared in the last two and half decades. But some analysts say there are now too many, and their utilization has declined to its lowest point in the same period.<sup>43</sup>

Greg Hildenbrand, the executive director of the nonprofit, Life Star of Kansas, says “[t]here are not enough flights to support the helicopters that

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33. *Id.* The numbers were calculated by finding the difference between the average bill in 2014 (\$40,766) and the average bill five years earlier (\$17,262). This amount equals \$23,504. The increase (\$23,504) was then divided by the original cost (\$17,262) and multiplied by 100 [(40,766 - 17,262) / 17,262] X 100 = 136.160352%].

34. Eavis, *supra* note 2.

35. *Id.*

36. Jason Knowles, *Air Ambulance Patients Complain of Sky-High Bills*, ABC7 (Mar. 16, 2016), <http://abc7chicago.com/news/air-ambulance-patients-complain-of-sky-high-bills/1249183/>.

37. *Id.*

38. *Id.*

39. Eavis, *supra* note 2.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* (depicting a graph with data compiled by Dr. Ira J. Blumen).

are in the market right now.”<sup>44</sup> Mr. Hildenbrand, goes on to say that “[w]e’ve been on a knife edge for seven years now.”<sup>45</sup>

“Over the past decade, many states are reporting issues with air ambulance providers that are not affiliated with a hospital and refuse to contract with an insurance carrier.”<sup>46</sup> These air ambulance service providers are airlifting individuals under emergency conditions and then billing them out-of-network.<sup>47</sup> The consumers are then billed tens-of-thousands of dollars.<sup>48</sup> Members of both the U.S. Senate and the U.S. House of Representatives are drafting legislation aimed at amending the ADA to allow states to specifically and narrowly regulate air ambulance prices.<sup>49</sup> To illustrate the scope and severity of the issue, this Note will discuss several accounts from patients who have fell victim to these costs. First, from patients in North Dakota, and second, from patients in the United States as a whole. This list is certainly not exhaustive; a simple google search can further show the scope of this issue.

#### B. AIR AMBULANCE SERVICE COSTS IN NORTH DAKOTA

After a medical emergency, Mrs. Mitchell was in need of an air ambulance flight.<sup>50</sup> The hospital called Valley Med Flight, Inc. (“Valley Med”) to facilitate this transfer.<sup>51</sup> She was transported via air ambulance from Grand Forks, ND to the Mayo Clinic in Rochester, MN.<sup>52</sup> The Mitchells, insured through Blue Cross Blue Shield of North Dakota (“BCBS”), were shocked when they received a \$54,000 bill for the flight.<sup>53</sup> The Mitchells’ bill was so expensive because the ambulance provider, Valley Med, was not in the provider network for BCBS of North Dakota.<sup>54</sup> Therefore, their insurance did not pay for the flight, leaving the majority of the bill on the patient’s shoulders.<sup>55</sup>

This is not an isolated incident in North Dakota.<sup>56</sup> Data from the North Dakota Department of Insurance showed twenty air ambulance bills over a

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44. *Id.*

45. Eavis, *supra* note 2.

46. *Government Relations Issue Brief*, *supra* note 28.

47. *Id.*

48. *Id.*

49. *Id.*

50. Springer, *supra* note 4.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. Springer, *supra* note 4.



period of a little less than one year that averaged a price of \$40,874.<sup>57</sup> After the insurance payments, these patients were left with an average out-of-pocket expense of \$24,514.<sup>58</sup> The deputy commissioner of the North Dakota Insurance Department, Rebecca Ternes, has been receiving numerous complaints regarding the out-of-pocket costs connected to air ambulances.<sup>59</sup> According to Ternes, “a steady stream of complaints over sky-high billings prompted her office to prioritize tracking air-ambulance companies during the past several years.”<sup>60</sup> Further, “[t]he smallest charge [she had] ever seen was \$18,000, and the highest [she had] ever seen was \$80,000.”<sup>61</sup>

Twenty out of twenty-five documented complaints from 2013-2016 were against companies that are a part of Air Medical Resource Group (“AMRG”).<sup>62</sup> In this roughly three-year period, AMRG “charged a total of \$884,244 for 20 flights.”<sup>63</sup> Due to ongoing issues between air ambulance service providers and insurance companies, the patients’ insurance providers covered only \$295,846,<sup>64</sup> leaving each patient with bills of approximately \$29,420.<sup>65</sup>

This information strongly supports that some patients from North Dakota are being charged the majority of air ambulance service costs.<sup>66</sup> Furthermore, this is not an isolated incident, the data suggests that every year numerous patients are struck with these exorbitant bills.<sup>67</sup> Out-of-pocket expenses such as the ones previously explained are not limited to

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57. *Id.*

58. *Id.*

59. Mattie Quinn, *Air Ambulances, an Unregulated Lifeline, Cost \$80,000 for some patients*, GOVERNING (June 7, 2016), <http://www.governing.com/topics/health-human-services/gov-air-ambulance-costs.html>.

60. Eric S. Peterson & Brian Maffly, *Sky’s the limit for what Utah air ambulance can charge – like the \$46K bill this man received for a 50-mile trip*, SALT LAKE TRIB. (Aug. 29, 2016, 12:04 P.M.), <http://www.sltrib.com/news/4139196-155/46k-for-50-miles-with-no>.

61. Quinn, *supra* note 59.

62. Peterson & Maffly, *supra* note 60 (noting that AMRG is headquartered in South Jordan and that Valley Med is a company under the AMRG).

63. *Id.*

64. *Id.*

65. *Id.* This number was calculated by finding the difference between the total cost (\$884,244) and the cost paid by the insurance provider (\$295,846). That number (\$588,398) was then divided by the number of complaints (20), equaling \$29,419.90 [(884,244 – 295,846) / 20 = 29,419.90].

66. Peterson & Maffly, *supra* note 60 (noting that in other states, the average bill is \$21,000).

67. Springer, *supra* note 4.

only North Dakota.<sup>68</sup> When patients are unable to rely on market forces, they are in a vulnerable situation.<sup>69</sup>

### C. AIR AMBULANCE SERVICE COSTS IN THE UNITED STATES

On two occasions, Jason Ebert of Montana needed the assistance of an air ambulance service provider.<sup>70</sup> The first time, the service was covered by his insurance.<sup>71</sup> The second time, however, Mr. Ebert received a bill for \$27,000.<sup>72</sup> Both times, the flight was 150 miles, from Bozeman, MT to Billings, MT.<sup>73</sup> The only difference was whether his insurance covered the flight.<sup>74</sup>

Similarly, Ms. Medina and her daughter went Naples, FL for vacation.<sup>75</sup> Medina's daughter suddenly began to bleed from her throat.<sup>76</sup> Doctors decided that she needed to be transferred to Fort Myers which was only thirty-seven miles away.<sup>77</sup> Medina was originally charged \$34,000 for the trip, but after insurance coverage and filling complaints with Air Methods, the air ambulance service provider, she was able to reduce the bill to \$17,548.<sup>78</sup>

Clarence Kendall, a rancher in Pearce, AZ, was moving bales of hay when he fell eight feet and struck his head.<sup>79</sup> Although his insurance covered most of his treatment, the air ambulance bill for \$47,182 was not covered.<sup>80</sup> The bill was the equivalent to an entire year's income for Kendall, who is now being sued by the air ambulance service provider.<sup>81</sup>

Shawn Miller proudly watched his daughter climb a zip line pole.<sup>82</sup> His pride turned to fear as he watched his daughter fall approximately

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68. See Eavis, *supra* note 2.

69. See Peterson & Maffly, *supra* note 60 (explaining that “[t]hese are not people shopping around for best prices; otherwise we would not be having so many complaints. . . . These are people at their most vulnerable and someone else is making a very expensive decision for them.”).

70. Amy B. Hanson, *States seek ways to regulate steep air-ambulance costs*, ASSOCIATED PRESS (Apr. 19, 2016, 10:03 A.M.), <http://bigstory.ap.org/article/2da3d27c71ae4ed3ad7ff85d04973c4c/states-seek-ways-regulate-steep-air-ambulance-costs>.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. Knowles, *supra* note 36.

76. *Id.*

77. *Id.*

78. *Id.*

79. Eavis, *supra* note 2.

80. *Id.*

81. *Id.*

82. Peterson & Maffly, *supra* note 60.

twenty-five feet after going on the zip line unharnessed.<sup>83</sup> Miller frantically rushed to his daughter, and had someone else call 911.<sup>84</sup> Dispatchers requested a medical transport helicopter.<sup>85</sup> Miller's daughter only had minor injuries to her back and a concussion.<sup>86</sup> Nonetheless, the air ambulance service provider sent Miller a bill for \$46,000.<sup>87</sup> Although he was ultimately able to convince his insurance provider to negotiate the bill down to \$21,000, a bill of this size could still be financially disastrous for some.<sup>88</sup> Additionally, although Miller was able to get his insurance provider to help him negotiate with the air ambulance service provider, many patients are unsuccessful in lowering the total cost of their bill.<sup>89</sup> Records were requested from the insurance division of each state regarding air-ambulance complaints, but most states claimed the records were private or said they kept no such documents; however, nine states did answer.<sup>90</sup> In these nine states, there were fifty-five complaints between 2013 and 2016.<sup>91</sup> These complaints added up to a combined charge of \$3.8 million, averages of about \$70,000 per complaint.<sup>92</sup> Because many of the charges were out-of-network, the combined out-of-pocket total for these trips was approximately \$2.8 million.<sup>93</sup> That is an average of almost \$51,000 per complaint that rests solely on the shoulders of the patients.<sup>94</sup>

These facts indicate that there is an issue with uncovered air ambulance costs. Many patients are left to bear the majority of these costs by themselves.<sup>95</sup> This is an issue that affects North Dakota and almost every state.<sup>96</sup> There are several ways to address this issue, each with its own benefits and problems. This Note will discuss four of the solutions. First, this Note will discuss the arguments made by the State of North Dakota in *Valley Med Flight v. Dwelle*, concerning the regulation of air ambulance

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83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. Peterson & Maffly, *supra* note 60.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. See Peterson & Maffly, *supra* note 60. This number was calculated by taking the total amount billed to the patient (\$2.8 million) and dividing that by the total number of complaints (55) [ $2,800,000/55 = 50,909.0909$ ].

95. See Eavis, *supra* note 2.

96. See *Government Relations Interest Brief*, *supra* note 28; see also Hanson, *supra* note 70.

service providers.<sup>97</sup> Second, this Note will address the solution alluded to in *Valley Med Flight v. Dwelle*.<sup>98</sup> Third, this Note will examine the solution of regulating the health care provider. Finally, this Note will address the importance of being informed as a patient.<sup>99</sup>

### III. THE DIRECT REGULATION OF THE AIR AMBULANCE SERVICE PROVIDER

Regulating air ambulance service providers is unlikely to be successful given the broad interpretation of the ADA's express preemption.<sup>100</sup> The Supreme Court has noted the importance of the law's impact rather than its form.<sup>101</sup> Given these two realities it seems unlikely that a state can practically, effectively, and directly regulate an air ambulance service provider. Additionally, the federal government has failed to amend the ADA to allow states to regulate these providers.<sup>102</sup>

#### A. STATE LAWS PREEMPTED BY THE AIRLINE DEREGULATION ACT

"This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land."<sup>103</sup> It is well established that the Supremacy Clause of the U.S. Constitution preempts "state laws 'that interfere with, or are contrary to' federal law."<sup>104</sup> Under the Supremacy Clause, federal law may supersede, or preempt state law in several ways.<sup>105</sup> According to the decision in *Valley Med Flight, Inc.*, the ADA supersedes the state law by express preemption; Congress expressly states that the federal law (the ADA) preempts state law.<sup>106</sup> Under the ADA, "a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route,

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97. *Valley Med Flight, Inc.*, 171 F. Supp. 3d at 934.

98. *Id.* at 945.

99. *Government Relations Interest Brief*, *supra* note 28.

100. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992).

101. *Northwest v. Ginsburg*, 134 S. Ct. 1422, 1430 (2014).

102. Corin Cates-Carney, *Air Ambulance Reform Effort Dies in US Senate*, MONTANA PUB. RADIO (Apr. 15, 2016), <http://mtpr.org/post/air-ambulance-reform-effort-dies-us-senate>.

103. U.S. CONST. art. VI, cl. 2.

104. *Valley Med Flight, Inc.*, 171 F. Supp. 3d at 938 (citing *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985)).

105. *Id.* (citing *Automated Med. Labs., Inc.*, 471 U.S. at 712) (noting the three types of preemption: (1) Express preemption, where Congress expressly states that federal law preempts state law; (2) Field preemption, where Congress' intent to regulate state law may be inferred from comprehensive regulation; and (3) Conflict preemption, where state law actually conflicts with federal law, making it impossible to comply with both).

106. *Id.*

or service of an air carrier that may provide air transportation under this subpart.”<sup>107</sup>

In *Valley Med Flight, Inc.*, the court discussed the Airline Deregulation Act (ADA) of 1978, a federal law.<sup>108</sup> The state laws in question were created from North Dakota House Bill 1255 and are now codified across multiple sections of the N.D. Cent. Code.<sup>109</sup> These state-level air ambulance provisions include N.D. Cent. Code §§ 23-27-04.10 and § 65-02-08.<sup>110</sup>

House Bill 1255 was North Dakota’s attempt to solve the air ambulance price issue by regulating the service provider directly.<sup>111</sup> N.D. Cent. Code §23-27-04.10 required the North Dakota Department of Health (“NDDH”) to create a primary and secondary call list for air ambulance service providers.<sup>112</sup> To be a member of the primary call list, an air ambulance service provider was required to be “a participating provider of the health insurance carriers in the state which collectively hold at least seventy-five percent of the health insurance coverage” in North Dakota.<sup>113</sup> More than fifty percent of the health insurance market in North Dakota is covered by BCBS.<sup>114</sup> “Thus, it is clear and undisputed that a provider must become a participating provider with BCBS in order to be listed on the primary call list”<sup>115</sup> Whenever a patient is in need of an air ambulance, the primary providers are called first, followed by those providers on the secondary caller list.<sup>116</sup> If no air ambulance service provider on either the primary or secondary caller list is available the hospital can explore other options.<sup>117</sup>

Because of this law and BCBS’s overwhelming presence in the insurance market, BCBS was in a unique situation to substantially lower air ambulance service providers rates.<sup>118</sup> The practical effect of this law allowed BCBS to force any air ambulance service provider interested in

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107. 49 U.S.C. § 41713(b)(1) (1994).

108. *Valley Med Flight, Inc.*, 171 F. Supp. 3d at 934.

109. *Id.*

110. *Id.* at 935, 937. But note that a portion of North Dakota House Bill 1255 was codified at N.D. CENT. CODE § 50-24.1-16 (2016) and was not discussed because Valley Med made no mention of it. See also N.D. CENT. CODE § 23-27-04.10 (2016); see also N.D. CENT. CODE § 65-02-08 (2016).

111. *Valley Med Flight, Inc.*, 171 F. Supp. 3d at 941.

112. N.D. CENT. CODE § 23-27-04.10(1) (2016).

113. N.D. CENT. CODE § 23-27-04.10(2) (2016).

114. *Valley Med Flight, Inc.*, 171 F. Supp. 3d at 936.

115. *Id.*

116. N.D. CENT. CODE § 23-27-04.10(4)(b) (2016).

117. *Id.*

118. See *Valley Med Flight, Inc.*, 171 F. Supp. 3d at 937.

being on the primary caller list to accept its rates.<sup>119</sup> Thus, it is not difficult to believe Valley Med's contentions that the rates were substantially below the market rate.<sup>120</sup> Furthermore, Valley Med claims that it would be unable to operate profitably in North Dakota if it was required to accept BCBS's rates.<sup>121</sup> Nonetheless, North Dakota argues that becoming a "participating provider" and being on the primary caller list are business decisions.<sup>122</sup> The court, however, disagreed and noted that, "it is clear to the Court that air ambulance operators who work in the North Dakota market have no choice but to become a 'participating provider' (and accept an insurer's rates) or discontinue operating in the state."<sup>123</sup>

The ADA expressly preempts air ambulance regulation laws,<sup>124</sup> such as the ones in North Dakota. The U.S. Supreme Court held that the preemption meant state laws and regulations "having a connection with or reference to airline rates, routes, or services," are invalid.<sup>125</sup> Additionally, the ADA preemption was intended to be broad.<sup>126</sup> Specifically, laws that have an indirect effect, but are still consistent with the ADA's purpose, can be preempted nonetheless.<sup>127</sup> Notably, in *Morales*, the Supreme Court did note that regulations might have too tenuous or remote an impact to be preempted.<sup>128</sup> Finally, as previously mentioned, the Court has stressed the importance of the effect of the regulation rather than its form.<sup>129</sup>

In *Valley Med Flight, Inc.*, the court concluded that N.D. Cent. Code § 23-27-04.10 was preempted by the ADA.<sup>130</sup> This provision directly impacted air ambulance services and indirectly impacted the prices of air ambulance service providers.<sup>131</sup> The law placed the vast majority of bargaining power in the hands of the insurer (specifically in this case, BCBS, due to its fifty percent interest in the North Dakota insurance market).<sup>132</sup>

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119. *See id.*

120. *See id.*

121. *Id.*

122. *Id.* at 941.

123. *Id.*

124. 49 U.S.C. § 41713(b)(1) (1994).

125. *Morales*, 504 U.S. at 384.

126. *Id.*

127. *Id.* at 386-87.

128. *Id.* at 390.

129. *Ginsburg*, 134 S. Ct. at 1430.

130. *Valley Med Flight, Inc.*, 171 F. Supp. 3d at 942.

131. *Id.* at 941.

132. *Id.*

Additionally, there is the possibility that states trying to enact legislation similar to North Dakota could face civil judgments.<sup>133</sup> In Wyoming, four air ambulance service providers filed a lawsuit claiming the State of Wyoming owes them nearly \$2 million for completed flights.<sup>134</sup> The air ambulance providers claim that Wyoming created a law that “capped what it would pay for air ambulance services just over \$3,900 per flight.”<sup>135</sup> In response, the providers submitted bills that, at times, exceeded \$40,000 per flight.<sup>136</sup> For this reason, states should proceed with caution when attempting to regulate the air ambulance service provider directly.

B. AMENDMENT TO THE AIRLINE DEREGULATION ACT BY THE U.S.  
SENATE

The broad, express preemption imposed by the ADA coupled with the Supreme Court’s analysis that focuses on the importance of the effect, or impact, rather than its form, makes it nearly impossible for the states to regulate air carriers. One possible solution to this problem is for the federal government to intervene by amending the ADA.<sup>137</sup> Notably, U.S. Senators Jon Tester of Montana and John Hoeven of North Dakota recently attempted to amend the ADA legislation to specifically and narrowly allow states to regulate air ambulance service providers.<sup>138</sup> This initial attempt was ultimately unsuccessful.<sup>139</sup> However, Tester’s Communication Director, Marnee Banks, said:

This is a relatively new issue back here. . . . This is the first time the Senate has tackled the issue of these outrageously high prices of air ambulances. So it is going to take a while for Jon and Senator Hoeven to educate their colleagues on the importance of this issue.<sup>140</sup>

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133. Ben Neary, *Air ambulance companies claim Wyoming owes them \$2 million as state fights to cap fees*, ASSOCIATED PRESS (Aug. 29, 2016), [http://trib.com/news/state-and-regional/air-ambulance-companies-claim-wyoming-owes-them-million-as-state/article\\_3bbfc58b-2a7e-5000-9915-9bdbb01aacf9.html](http://trib.com/news/state-and-regional/air-ambulance-companies-claim-wyoming-owes-them-million-as-state/article_3bbfc58b-2a7e-5000-9915-9bdbb01aacf9.html).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Tester Stands Up for Consumers, Tackles Increasing Medical Costs*, TESTER.SENATE.GOV (Apr. 7, 2016), [https://www.testersenate.gov/?p=press\\_release&id=4473](https://www.testersenate.gov/?p=press_release&id=4473).

138. *See id.*

139. Cates-Carney, *supra* note 102.

140. *Id.*

On February 21, 2017, Senator Tester announced a federal bill that would allow states to regulate air ambulances, by allowing states to control costs, services, or routes.<sup>141</sup>

One major problem, as mentioned in *Valley Med Flight, Inc.*, with allowing the states to directly regulate the air ambulance service provider is that it gives the insurer an unfair advantage when bargaining with the air ambulance service providers.<sup>142</sup> As previously explained, the law required air ambulance service providers to become a “participating provider” with insurance companies to be listed on the primary call list.<sup>143</sup> This type of law would allow insurance companies—who were uniquely situated like BCBS—to force lower rates on the air ambulance service providers.<sup>144</sup> It follows, given Valley Med’s inability to profitably survive if it accepted BCBS’s low rates, this law could cause the air ambulance service provider to leave North Dakota.<sup>145</sup>

In conclusion, after *Valley Med*, it is extremely unlikely that a state could enact legislation that effectively combats the issue of air ambulance service provider prices. A few U.S. senators, however, have actively been trying to enact air ambulance reform.<sup>146</sup> Although initially unsuccessful, legislative reform appears to be the best way to successfully regulate air ambulance service providers’ routes, services, or prices.<sup>147</sup>

#### IV. THE REGULATION OF THE INSURANCE PROVIDER

In his opinion, Judge Hovland strongly alluded to the possibility of regulating insurance providers.<sup>148</sup> In *Valley Med Flight, Inc.*, the State of North Dakota argued that under the McCarran-Ferguson Act, N.D. Cent. Code § 23-27-04.10 was reverse preempted because it was enacted for the purpose of regulating the “business of insurance.”<sup>149</sup> However, the court concluded that N.D. Cent. Code § 23-27-04.10 was preempted by the ADA and was not enacted for the purpose of regulating the “business of

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141. Judith Retana, *Tester to introduce air ambulance regulation bill*, NBC MONTANA, (Feb. 21, 2017, 8:51 P.M.), <http://www.nbcmontana.com/news/ktvm/tester-to-introduce-air-ambulance-regulation-bill/350588063> (explaining that the bill is named the Isla Rose Life Flight Act and is still in draft form).

142. *See Valley Med Flight, Inc.*, 171 F. Supp. 3d at 941.

143. *Id.*

144. *Id.*

145. *See id.*

146. Cates-Carney, *supra* note 102.

147. *Id.*

148. *Valley Med Flight, Inc.*, 171 F. Supp. 3d at 945.

149. *Id.*



insurance”.<sup>150</sup> Judge Hovland stated that “[i]f, for instance, Section 23-27-04.10 altered the terms of the policy to protect the policyholder from uncovered air ambulance bills, the outcome may be otherwise.”<sup>151</sup>

#### A. THE MCCARRAN-FERGUSON ACT REVERSE PREEMPTION

The McCarran-Ferguson Act (“MFA”) was enacted to give states the preeminent role in the regulation of the insurance industry.<sup>152</sup> The reverse preemption clause of the MFA states that “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance. . . .”<sup>153</sup> Thus, the MFA “precludes application of a federal statute in face of state law ‘enacted . . . for the purpose of regulating the business of insurance.’”<sup>154</sup>

The MFA reverse preemption clause is limited to the relationship between the parties of the insurance contract, the policyholder, and the insurance company.<sup>155</sup> There are three relevant considerations the Supreme Court has looked at to determine whether a state law was enacted for the regulation of the business of insurance.<sup>156</sup> From *Pireno*, the three relevant considerations are whether the practice: (1) has the effect of spreading or transferring a policyholder’s risk”; (2) is a fundamental part of the relationship between the insured and the insurer; and (3) is limited to insurance industry entities.<sup>157</sup> If the state law in question falls under at least one of these categories, then it is reverse preempted.<sup>158</sup>

In *Valley Med Flight, Inc.*, under the first prong (the spread of the policyholder’s risk), the regulated practice “is the provision of air ambulance services; not the performance of the insurance contract.”<sup>159</sup> Under the second prong, the relationship between the insurer and the insured, the court held that N.D. Cent. Code § 23-27-04.10 does not alter the insurance policy in any way; instead, it has an impacted on the relationship between the insurance carrier and the air ambulance service provider.<sup>160</sup> Finally, under the third prong, the limitation of the practice, N.D. Cent. Code § 23-27-04.10 directly impacts the business activities of

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150. *Id.*

151. *Id.*

152. *United States Dep’t of Treasury v. Fabe*, 508 U.S. 491, 500 (1993).

153. *Id.* (quoting 15 U.S.C. § 1012(b) (1948)).

154. *Humana Inc. v. Forsyth*, 525 U.S. 299, 307 (1999).

155. *Fabe*, 508 U.S. at 501.

156. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982).

157. *Id.*

158. *Id.*

159. *Valley Med Flight, Inc.*, 171 F. Supp. 3d at 944.

160. *Id.*

the air ambulance providers.<sup>161</sup> Critically, the air ambulance service provider is a third party to the insurance contract.<sup>162</sup> Judge Hovland discussed each of these considerations when ruling that N.D. Cent. Code § 23-27-04.10 was not aimed at regulating the “business of insurance”.<sup>163</sup>

#### B. THE MCCARRON-FERGUSON ACT ALLOWS STATE TO REGULATE THE “BUSINESS OF INSURANCE”

As previously noted, if the state enacted a law that fit under one of these three *Pireno* prongs, then it would be reverse preempted.<sup>164</sup> Therefore, even if the law was preempted by the ADA, (by regulating the services, routes, or price of an air ambulance service provider) the AMA’s reverse preemption could apply, so long as the regulation filled one of the three *Pireno* prongs.<sup>165</sup> This is likely what Judge Hovland was suggesting when he noted that “[i]f, for instance, Section 23-27-04.10 altered the terms of the policy to protect the policyholder from uncovered air ambulance bills, the outcome may be otherwise.”<sup>166</sup> Although a law that directly regulates an air ambulance service provider will be preempted by the ADA, if the law was aimed at regulating the “business of insurance” it would be reverse preempted.<sup>167</sup> This opens a small window for a state to regulate the terms of the policy in situations where a policyholder was billed by an uncovered air ambulance service provider.<sup>168</sup> Perhaps, a state could require an insurance provider to cover emergency air ambulance bills up to a set amount. Unfortunately, such a law would place the majority of the bargaining power in the hands of the air ambulance service provider.

#### V. OTHER POTENTIAL SOLUTIONS

While the main solutions to this problem are previously illustrated, perhaps the most promising is a federal amendment to the ADA. There are some other options to combat this problem. The first option is the regulation of the healthcare provider. The second option is being informed as a patient.<sup>169</sup>

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161. *Id.*

162. *Id.*

163. *Id.* at 945.

164. *Id.*

165. *Pireno*, 458 U.S. at 129.

166. *Valley Med Flight, Inc.*, 171 F. Supp. 3d at 945.

167. *Id.*

168. *Id.*

169. *Government Relations Interest Brief*, *supra* note 28.

### A. REGULATION OF THE HEALTHCARE PROVIDER

A largely unexplored option to combat the rising prices of emergency and critical air ambulance rides is to regulate the health care provider directly. A state law requiring a hospital to provide the air ambulance service through the hospitals insurance may solve this issue. However, it is unfeasible for every hospital to do so because of the associated costs. Small town hospitals would be unable to employ the personnel and/or purchase the necessary equipment.

To illustrate this point, consider that “[a] new single-engine helicopter equipped as an emergency ambulance can cost as much as \$4 million, while a twin-engine can cost more than double.”<sup>170</sup> Additionally, the executive director of a nonprofit air ambulance organization in Topeka, KS estimated that each flight costs approximately \$7,400.<sup>171</sup> But, some companies argue that the average flight is closer to \$9,000 or \$10,000.<sup>172</sup> Given these costs, it is unfeasible to require every hospital to maintain such equipment and personnel.

### B. BEING INFORMED AS A POTENTIAL PATIENT

As the air ambulance service providers and insurance companies battle over coverage issues, the National Association of Insurance Commissioners (“NAIC”) offers a solution of its own.<sup>173</sup> The NAIC is a U.S. standard-setting and regulatory support organization.<sup>174</sup> The NAIC suggests that a potential patient or family member can protect themselves, or their family, by “finding out what air ambulance coverage you have by reading your health insurance policy or contacting your agent[, i]f you need additional coverage. . . .”<sup>175</sup> Unfortunately, this issue is relatively unknown. Many patients are likely unaware that they may have to pay for the entirety of an air ambulance bill. Therefore, it is unlikely that they will check the extent of their coverage with their insurance provider. Furthermore, given the emergency situation, it is unlikely that a patient can verify his or her coverage before boarding an air ambulance. Although, the NAIC brought forth this issue in 2014,<sup>176</sup> air ambulance service bills are still

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170. Eavis, *supra* note 2.

171. *Id.*

172. *Id.*

173. *Government Relations Interest Brief*, *supra* note 28.

174. *Id.*

175. *Id.*

176. *Id.*

problematic.<sup>177</sup> Thus, it can be inferred that some patients are either failing to check with their insurance providers or are unfamiliar with the issue as a whole.

## VI. CONCLUSION

There appear to be several solutions to the issue of exorbitant air ambulance prices. Each solution has its own benefits and problems. In the meantime, patients are being surprised by the arrival of bills amounting to tens-of-thousands of dollars. Yet, states' attempts to regulate these circumstances are struck down based on the air ambulance regulation preemption of the Airline Deregulation Act.<sup>178</sup> Although these circumstances call for a solution, that is easier said than done. The ADA preemption makes it nearly impossible for states to directly regulate air ambulance service providers. Even if such a regulation was allowed, it would likely create an unequal and unfair bargaining system that would force air ambulance service providers out of the state, as mentioned in *Valley Med Flight, Inc.*<sup>179</sup> Direct regulation of insurance companies creates a similar result—only air ambulance service providers will hold the power.

Alternatively, if the U.S. Senate was able to adopt a bill that amended the ADA to give states the power to regulate, it could balance the interests of the air ambulance service provider, the insurance company, the health care provider, and, most importantly, the patient.<sup>180</sup> Lastly, the regulation of the health care facility is likely unfeasible given the costs of operating air ambulance services. A potential solution would be to regulate all three of these bodies by creating a fair middle ground. Unfortunately, until this time arrives, patients who are likely the least equipped to handle such costs could be stuck paying for the majority of the air ambulance service cost. Therefore, it is important for all to become familiar with which air ambulance service providers are covered by their insurance provider.<sup>181</sup>

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177. Quinn, *supra* note 59.

178. *Valley Med Flight, Inc.*, 171 F. Supp. 3d at 942.

179. *Id.* at 941.

180. Retana, *supra* note 141 (noting that on February 21, 2017, U.S. Senator Tester revealed a bill that would allow states to regulate air ambulance service providers).

181. *Government Relations Interest Brief*, *supra* note 28.

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