

Wiley Rein & Fielding Successfully Defends Owner of Communications Tower Near Airport

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Washington, DC-Wiley Rein & Fielding successfully defended a company that constructed, owned and operated a communications tower on a parcel of land near a private use airport and was sued for several million dollars in damages by the airport's owners. *Topton Air Estates, Inc. and Bill Ross v. SBA Properties, Inc. et al.*, Civil Action No. 4:04-CV-32-LN, United States District Court for the Southern District of Mississippi. The lawsuit, originally filed in Mississippi state court, alleged that the tower creates an unreasonably dangerous condition for aircraft flying into and out of the private airport, and therefore constituted a private or public nuisance that reduced the plaintiffs' property values and their quality of life. The plaintiffs sought \$2.2 million in actual damages and \$5 million in punitive damages.

WRF removed the case to federal court and then moved to dismiss the suit on the grounds that (i) it was preempted by the comprehensive federal statutory and regulatory scheme committing questions of air safety, specifically those related to towers, to the Federal Aviation Administration and (ii) the airport owners' claims of public or private nuisance must fail in any event because the tower operator made proper use of its land and did not physically invade the airport owners' property. Noting that the tower operator had obtained approvals from the FAA, the Federal Communications Commission and local zoning authorities before erecting the tower, the court agreed with WRF that the airport owners could not state a claim against the tower operator even if the tower did in fact interfere with the use of their land for an airport. The court therefore dismissed the case with prejudice and entered final judgment in favor of the tower operator. The court did not rule on the preemption issue, although it stated that it was inclined to find the claims preempted to

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some extent, and this theory would certainly be viable in cases in which state law is less favorable to the tower operator.

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