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AVIATION

ALERT

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# FAA Weighs In on Preemption in Product Liability Litigation

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Courts across the county have long struggled with the scope of federal preemption in aviation safety and with how an aircraft type certificate issued by the Federal Aviation Administration (FAA) affects aircraft product liability litigation. The FAA recently weighed in with its views on these issues in a Letter Brief submitted to the Third Circuit in *Sikkelee v. Precision Airmotive Corp.*, a case involving a fatal, single-engine plane crash, which is on appeal from the Middle District of Pennsylvania.[1] This alert summarizes the FAA Letter Brief submitted on appeal, which takes a broad approach to preemption, and then addresses its implications. However, before we begin, some context is necessary.

Sixteen years ago, the Third Circuit issued its landmark ruling on federal preemption in *Abdullah v. American Airlines*.[2] There, the Third Circuit held that the Federal Aviation Act of 1958 impliedly preempts state (and territorial) air safety standards while preserving state and territorial damages remedies. The oft-quoted holding of *Abdullah* broadly states: "we hold that federal law establishes the applicable standards of care in the field of air safety, generally, thus preempting the entire field from state and territorial regulation."[3] Although *Abdullah* holds that the "entire field" of aviation safety is preempted, that case was decided in the context of the operation of an aircraft, with the "careless and reckless" standard of 14 C.F.R. § 91.13(a) available as a catch-all when no directly applicable standard applied.

In the context of aircraft product liability claims, however, courts have struggled consistently to apply the holding in *Abdullah*, noting that some aspects of aircraft design and certification are subject to pervasive regulations by the FAA while other aspects have little or no regulation. Courts also have struggled with whether a type certificate issued by the FAA for an aircraft design bars suits against manufacturers for design defect claims. Again, *Abdullah* did not confront that scenario.

*Sikkelee* is expected to add clarity to these issues. In that pending case, the Third Circuit is again faced with the question of the scope of federal preemption, but this time in the context of the design and certification of an aircraft. Showcasing

[1] *Sikkelee v. Precision Airmotive Corp.*, No. 14-4193, (3d Cir.)
[2] *Abdullah v. American Airlines*, 181 F.3d 363 (3d Cir. 1999).
[3] *Id.* at 367.

its deliberative approach to the dispute, the Third Circuit ordered the FAA to weigh-in by answering three questions:

1. Does the scope of field preemption under the Federal Aviation Administration Act of 1958 include tort claims based on alleged defective design and manufacturing?

2. If such claims fall within the preempted field, may they proceed using a federal standard of care and where is the federal standard found?

3. What weight should be accorded to the issuance of a type certificate in determining whether the relevant standard of care has been met?[4]

In response to the first question, the FAA argues that, consistent with its position articulated in *Cleveland v. Piper Aircraft Corp.*,[5] the Federal Aviation Act of 1958 impliedly preempts the field of aviation safety with respect to substantive standards of safety. The field preempted by the Act extends broadly to all aspects of aviation safety, the FAA continues, and includes product liability claims based on allegedly defective aircraft and aircraft parts.

In response to the second question, the FAA takes the position that while the Act—by virtue of the clause saving common-law remedies—does not preempt state tort suits, it is the federal standards found in the statute and implementing regulations that govern suits based on design defects in aviation manufacturing. "[T]o the extent that a plaintiff challenges an aspect of an aircraft's design that was expressly approved by the FAA as shown on the type certificate, accompanying operating limitations, underlying type certificate data sheet, or other form of FAA approval[,]" the FAA argues, "a plaintiff's state tort suit arguing for an alternative design would be preempted under conflict preemption principles."[6]

In response to the third and final question, the FAA explains that because an aircraft type certificate embodies the FAA's determination that an aircraft, engine, or propeller design complies with federal standards, it can play an important role in determining whether a manufacturer breached a duty owed to the plaintiff. The type certificate does not create a *per se* bar to suit, but ordinary conflict preemption principles apply to the particular design-defect claim. According to the FAA, the type certificate will preempt a state tort suit only where compliance with both the certificate and the claims made in the tort suit "is a physical impossibility" or where the claims "stand as an obstacle to the accomplishment of the full purposes and objectives of Congress."[7]

Where the FAA has expressly approved the specific design aspect that a plaintiff challenges, that claim would be preempted. On the other hand, where the FAA has left a particular design choice to a manufacturer's discretion, and no other conflict exists, the type certificate does not preempt a design-defect claim. In other words, where the FAA has not made an affirmative determination with respect to the challenged design, and has left that design aspect to the manufacturer's discretion, the claim would proceed by reference to the federal standards of care found in the Act and its implementing regulations.

Next, the FAA argues that its views regarding preemption are entitled to "significant weight." After all, it is the agency with specialized expertise in the regulation of aircraft safety, making it

[4] These particular questions are paraphrased summations of the questions posed by the court.
[5] *Cleveland v. Piper Aircraft Corp*., 985 F.2d 1483 (10th Cir. 1993).
[6] FAA Letter Br. at 10.
[7] *Id.* (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 37 U.S. 132, 142–43 (1963); *Geier v. American Honda Motor Co., Inc.,* 529 U.S. 861, 883 (2000)).

qualified to assess the impact of state tort suits on aircraft manufacturers and the efficacy of federal regulations. However, that position is subject to some debate. In *Geier*, a case involving the preemptive effect of standards promulgated by the Department of Transportation (DOT) under the National Motor Vehicle Safety Act of 1966, the Supreme Court placed only "some weight"—not significant weight—on the views expressed by the DOT in a government *amicus curiae* brief.[8] Whatever quantum of weight applies to the FAA's views expressed in its Letter Brief, the views themselves may be difficult to apply.

The difficulty in applying the FAA's views on preemption to product claims lies in the fact that aircraft design specifications rarely require a specific design, but are instead couched in terms of performance or safety outcomes. For example, the certification standards for a stall warning system in a Part 23 aircraft requires "a clear and distinctive stall warning, with the flaps and landing gear in any normal position, in straight and turning flight" by a system "that will give clearly distinguishable indications under expected conditions of flight."[9] A type certificate issued for a Part 23 aircraft would presumptively mean the FAA determined that the aircraft complied with these standards at the time the design was certified. However, would the type certificate preclude all product liability claims based on a defective stall warning system? What if the certification was actually wrong and the system did not comply with the standard when the FAA already said that it did? Can this type of claim actually be litigated or is it preempted?

Additionally, what if the claimed defect was that the stall warning system did not provide a warning when operated outside certification limits such as weight, speed, or center of gravity? Are these conditions outside the "expected conditions of flight" and therefore no federal standard exists?

The FAA's Letter Brief to the Third Circuit in *Sikkelee* does not provide clear answers in the context of product liability litigation. Courts will continue to struggle with deciding these difficult issues in the future.

In sum, the FAA's Letter Brief takes a broad approach to preemption under the Federal Aviation Act of 1958, extending *Abdullah* from operation to design and certification. In the near term, expect the parties to respond to the FAA's Letter Brief by early October. Although it's possible that the Third Circuit may issue its opinion by the end of the year, in a complex case like this one, it would not be unusual to have to wait until 2016. More to follow.◆

[8] *Geier*, 529 U.S. at 883.
[9] 14 C.F.R. § 23.207 (a), (b).

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