

# Will Federal Preemption Grant Immunity to Aviation Manufacturers?

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The U.S. Court of Appeals for the Third Circuit will soon hand down a major decision that may extinguish the right of aviation disaster victims to recover from manufacturers that produce and sell dangerous airplanes, helicopters, or aircraft components. In *Sikkelee v. Precision Airmotive Corp.*,<sup>1</sup> the court will decide whether the Federal Aviation Administration's mere certification of aircraft or aircraft components provides immunity to aviation manufacturers against most products liability claims.

While the FAA certifies all aircraft, the agency has limited resources and is not responsible for design; its review is not comprehensive and, indeed, much of the certification is performed by the manufacturer itself. FAA certification does not mean that the airplane is safe or that it necessarily meets the federal minimum standards. At best, certification is a spot check based on information provided by the manufacturer to the FAA as of a given date.<sup>2</sup> There is a long history of accidents caused by design or manufacturing defects in certified aircraft, and the FAA frequently issues airworthiness directives to mandate changes after learning about defects not discovered during the certification process.



Since the FAA was formed almost 60 years ago, courts have routinely applied state tort laws that hold manufacturers responsible for injuries and deaths caused by unsafe products regardless of FAA certification. We have seen vast improvements in aviation accident rates during that time period.<sup>3</sup> A rule granting immunity based on FAA certification would reduce the safe ty

standards applied to aviation products and overturn decades of aviation products liability cases that imposed liability on manufacturers, including major litigation such as those arising from the TWA 800 and SwissAir 111 disasters.

## Sikkelee Case

On July 10, 2005, David and Craig Sikkelee took off in a 1967 Cessna 172N airplane from Transylvania County Airport in Brevard, N.C. The airplane lost power shortly after it departed the runway and crashed. A post-crash fire destroyed the airplane. David Sikkelee, the airplane's pilot, was killed, and his brother Craig was seriously injured.<sup>4</sup>

Jill Sikkelee, David's widow, filed a products liability action that alleged the loss of power was caused by the airplane engine's defective carburetor, specifically the throttle body to bowl assembly inside the carburetor.<sup>5</sup>

Three years into the litigation, the district court dismissed all of plaintiff Sikkelee's state law claims, relying on the Third Circuit's ruling in *Abdullah v. American Airlines*,<sup>6</sup> that the "entire field of aviation safety" was impliedly preempted by the Federal Aviation Act of 1958 (FAAct). The district court held that the FAAct preempted state law products liability standards and that the plaintiff must prove her claim by showing that the allegedly defective carburetor did not meet relevant federal standards.

The plaintiff then amended her complaint to assert that the unsafe condition of the carburetor did not meet federal standards. Shortly before the scheduled trial, however, the district court granted the manufacturer partial summary judgment, concluding that the FAA's certification of the carburetor barred the plaintiff from attempting to prove that the carburetor did not meet the applicable federal minimum standards.

The district court found that federal preemption in the field of aviation safety does not require there to be applicable federal minimum standards that would govern the conduct at issue and that there is no need for the court to fill gaps in the federal regulations with an "overall concept" of due care. The court decided that it must apply only those regulations that the FAA issued, leaving unfilled any gaps in the federal minimum standards.

The district court found that the regulatory scheme barred the plaintiff from attempting to prove in court that the defendant violated the applicable federal minimum standards that applied to the carburetor because the FAA had determined that the component met those standards when it certified the engine. In the court's view, the FAA's determination was final; the only avenue left to plaintiff was if she could show that the defendant violated its duty to report known engine defects to the FAA.

The district court's decision in *Sikkelee* holds that federal law completely preempts state products liability law standards even where the FAA has not established any minimum standards concerning the design at issue. A manufacturer can be completely immune from liability for unsafe design features that were never considered by the FAA if the design at issue falls into one of the gaps in the federal minimum standards. The district court's decision in *Sikkelee* eliminates critical safety standards

governing the design and manufacture of aircraft and their components and would leave many victims without any potential remedy.

## The Third Circuit

*Sikkelee* is now before the Third Circuit. On June 17, 2015, shortly prior to the oral argument, the Third Circuit issued an order that asked the FAA to submit a brief that answers three questions:

1) What is the scope of field preemption under the Federal Aviation Act? Specifically, does the preempted field include tort claims based on alleged defective design or manufacturing? Is the FAA's position on this issue consistent with its amicus submission in *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993) (No. 91-2065), or has it changed based on factors such as the enactment of the General Aviation Revitalization Act of 1994, the increased delegation of type certificate testing, and the continued litigation of aviation products liability cases under traditional state law standards? (A type certificate is the formal document issued by the FAA to certify that the aircraft or component satisfies the FAA's minimum airworthiness standards.)

2) If such tort claims fall within the preempted field, may they nonetheless proceed using a federal standard of care? If so, what is that standard and where is it found within the statute or regulations?

3) What weight, if any, should be accorded to the issuance of a type certificate in determining if the relevant standard of care has been met?<sup>7</sup>

On Sept. 21, 2015, the FAA submitted a letter brief in which it asserted that "the Federal Aviation Act of 1958 implicitly preempts the field of aviation safety with respect to the substantive standards of safety [and that] while the act does not preempt state tort suits, it is federal standards that govern state tort suits based on design defects in aviation manufacturing." This is the position that the FAA took in its amicus submission in *Cleveland v. Piper Aircraft Corp.*,<sup>8</sup> but the U.S. Court of Appeals for the Tenth Circuit discounted the FAA's submission as lacking statutory support.<sup>9</sup>

As to the effect of the type certificate, the FAA asserted that because it embodies the FAA's determination that an aircraft's or component's design meets the federal minimum standards it can "play an important role in determining whether the manufacturer in fact breached a duty owed to the plaintiff."<sup>10</sup> According to the FAA, however, the type certificate does not "create a per se bar to suit."<sup>11</sup> Instead, whether a plaintiff's claim is in the FAA's words "preempted" in real effect completely barred by the type certificate is determined by "ordinary conflict principles."<sup>12</sup> "Where the FAA has expressly approved the specific design aspect that a plaintiff challenges any claim that the design should have been different would conflict with the FAA's application of the federal standard and therefore be preempted."<sup>13</sup> Only where "the FAA has left a particular design choice to a manufacturer's discretion and no other conflict exists" would a type certificate not bar an aviation victim from seeking to hold a manufacturer liable for a design that allegedly did not comply with the federal minimum standards.<sup>14</sup>

The government, accordingly, suggests a two-tiered preemption analysis:

Tier 1. The 1958 FAA Act preempts, by implication, the entire field of aviation safety. As a result, the federal minimum standards that the FAA may (or may not) issue preempt all state standards of care.

Tier 2. All claims that a product did not comply with the federal minimum standards are barred if the FAA has expressly approved the specific design. "[W]here compliance with both the type certificate and the claims made in the state tort suit 'is a physical impossibility,' or where the claim 'stands as an obstacle to the accomplishment and execution of the full purposes of Congress,' that the type certificate will serve to preempt a state tort suit."<sup>15</sup>

The FAA's preemption stance urges the court to establish a new immunity defense for aviation manufacturers. This defense would be broader than the government contractor defense announced by the Supreme Court in *Boyle v. United Technologies*, which preempted state product liability laws in claims against government contractors that manufactured products pursuant to a contract with the government and complied with the government's specifications.<sup>16</sup> Under the defense urged by the FAA, whenever any design aspect 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 incorporated by reference into those materials," then "a plaintiff's state tort suit arguing for an alternative design would be preempted."<sup>17</sup>

In its submission, the FAA admits that it has limited resources and that it delegates many of its functions to manufacturers, including those "related to engineering, manufacturing, operations, airworthiness or maintenance."<sup>18</sup> Manufacturers play the central role in the FAA certification process. In fact, the FAA permits manufacturers to draft the very certification documents that the FAA argues should confer immunity to the manufacturers.<sup>19</sup>

The civil justice rights of aviation victims are accordingly subjected to an Orwellian liability standard state products liability standards are preempted and victims may only seek justice if they can show that the product does not comply with federal minimum aviation standards, but they are forbidden from even attempting to make such a showing in court if the FAA "certified" the product in a process that is largely conducted by its manufacturer.

## Conclusion

Neither the FAA Act, its legislative history nor the actions of Congress subsequent to passing the FAA Act support "certification immunity" for aviation manufacturers. It is contrary to the fundamental purpose of the FAA Act and the interests of aviation safety to permit a manufacturer to escape responsibility for an unsafe product merely because the FAA certified the product following a limited review process performed in large part by the manufacturer.

When enacted in 1958, the FAA Act did not include a preemption clause; rather, Congress included a savings clause that expressly preserves state law remedies.<sup>20</sup> The 1978 Airline Deregulation Act amended the FAA Act and expressly preempted only those state laws and regulations having an effect on airline rates, routes or service.<sup>21</sup> Congress again expressly preempted state law in a limited fashion when it passed the 1994 General Aviation Revitalization Act which imposed an 18-year statute of repose on state products liability actions.<sup>22</sup>

Until *Sikkelee*, the battlefield on federal preemption in aviation law focused on whether state common law products liability standards govern in aviation cases or whether manufacturers need only comply with the minimum standards set forth in federal aviation regulations. The majority of courts faced with the question decided that the scope of federal preemption in aviation law did not encompass the design and manufacture of aviation products.<sup>23</sup> No prior court had held that FAA certification bars products liability actions.

The preemption advanced by the district court in *Sikkelee* thwarts the fundamental goal of Congress in the FAA Act: to promote aviation safety and thereby save lives. *Sikkelee* threatens not only to deny victims of defective aviation products a remedy but would gut the basic tort safety standard of due care that governs aircraft design and manufacture under state laws.

### Endnotes:

1. No. 14-4193 (3d Cir. argued June 24, 2015).
2. *U.S. v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airline)*, 467 U.S. 797, 817 (1984).
3. [http://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/national\\_transportation\\_statistics/html/table\\_02\\_14.html](http://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/national_transportation_statistics/html/table_02_14.html) (last accessed Oct. 13, 2015).
4. NTSB Investigation Report, ATL05FA128.
5. *Sikkelee v. Precision Airmotive Corp.*, 876 F.Supp.2d 479, 484 (M.D. Pa. 2012).
6. 181 F.3d 363 (3d Cir. 1999).
7. Letter Brief for Department of Transportation and Federal Aviation Administration at p. 1-2, *Sikkelee v. Precision Airmotive Corp.*, No. 14-4193 (3d Cir. argued June 24, 2015)
8. 985 F.2d 1438 (10th Cir. 1993)
9. *Id.* at 1444.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at p.3.
14. *Id.*
15. *Id.* at p.10.
16. 487 U.S. 500 (1988).
17. See *supra* note xii at p. 10.
18. *Id.* at p. 14 (quoting 14 C.F.R. 183.41(a)).
19. See, e.g., 14 C.F.R. 21-253 (manufacturers draft the type certificate data sheet).
20. 49 U.S.C. 1506.
21. 49 U.S.C. 41713.
22. 49 U.S.C. 40101, note.

23. See generally *Trust v. Lake Aircraft*, 992 F.2d 291 (11th Cir. 1993); *Lucia v. Teledyne Continental Motors*, 173 F.Supp.2d 1253, 1266 (S.D. Ala. 2001); *Sunbird Air Services v. Beech Aircraft Corp.*, 789 F. Supp. 360, 363 (D. Kan. 1992); *Elsworth v. Beech Aircraft Corp.*, 691 P.2d 630 (Cal. 1984); *Holiday v. Bell Helicopter Textron*, 747 F.Supp. 1396, 1399-1400 (D. Hawaii 1992); *Maitra v. Mitsubishi Heavy Industries*, No. CIV.A.SA01CA0209FBNN, 2002 WL 1491855, \*6 (W.D. Tex. 2002); *Damian v. Bell Helicopter Textron*, 352 S.W.3d 124, 137 (Tex. App.-Fort Worth 2011); *Lewis v. Lycoming*, 957 F.Supp.2d 552, 558 (E.D. Pa. 2013); *Er v. Boeing Co.*, Case No. 2009 L 013791, slip op. at 17 (Cir. Ct. Cook Cnty., Aug. 18, 2010); see also *Martin ex rel. Heckman v. Midwest Exp. Holdings*, 555 F.3d 806, 811 (9th Cir. 2009) (case law "neither precludes all claims except those based on violations of specific federal regulations, nor requires federal courts to independently develop a standard of care when there are no relevant federal regulations. Instead, it means that when the agency issues 'pervasive regulations' in an area, like passenger warnings, the FAA preempts all state law claims in that area. In areas without pervasive regulations or other grounds for preemption, the state standard of care remains applicable."); *In re September 11th Litig.*, 280 F.Supp.2d 279, 289 (S.D.N.Y. 2003) (applying state law to tort claims concerning aviation safety no showing of any inconsistency between the law of duty provided by New York law and federal statutes or regulations).

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