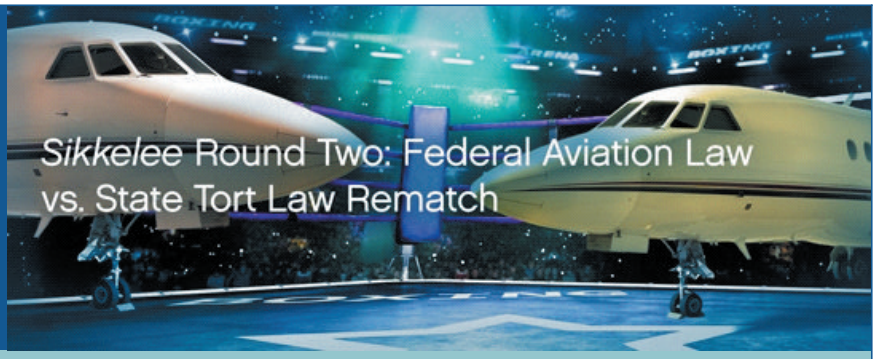
JONES DAY

COMMENTARY

NOVEMBER 2018



IN SHORT

The Situation: The Third Circuit decided *Sikkelee II*, a closely watched case involving preemption in the aviation context.

The Outcome: A divided Third Circuit held, 2–1, that federal aviation law did not "conflict preempt" state tort claims asserting aircraft design defects. To the majority, the facts suggested the manufacturer was aware of the purported issue and discussed it with the Federal Aviation Administration ("FAA") but did not seek FAA approval to address it. The dissent reasoned (correctly in our view) that since manufacturers cannot alter engine designs without FAA approval, impossibility preemption rightly applied.

Looking Ahead: Despite *Sikkelee II*, aircraft manufacturers should still assert conflict-preemption defenses in future litigation because: (i) *Sikkelee II* is narrow and fact-based and does not create a categorical rule; (ii) other circuits have not definitively addressed conflict preemption in aviation cases; and (iii) the decision did not address "obstacle" conflict preemption.

In April 2016, the Third Circuit shifted the landscape of aviation law by holding, in *Sikkelee v. Precision Airmotive Corp.*, 14-4193 (*Sikkelee I),* that federal aviation law does not occupy the field of aircraft design, leaving room for state tort liability. *Sikkelee I*, however, left important questions unanswered: What happens when state tort law conflicts with federal aviation law, thereby creating a "conflict preemption" situation? Must conflicting state law yield to federal law under conflict-preemption principles?

On October 25, 2018, the Third Circuit addressed these questions in the highly anticipated *Sikkelee II*, 17-3006. In a split 2–1 decision, the court held that federal aviation law, under unique facts presented on summary judgment, did not conflict preempt state tort claims alleging aircraft design defects. While not the result for which manufacturers advocated, *Sikkelee II* is a narrow, fact-based decision leaving ample room for future preemption defenses.

> While *Sikkelee II*'s dissent correctly adheres to Supreme Court precedent, the majority's opinion does not hinder the aviation industry.

Background

David Sikkelee perished in 2005 when his Cessna 172N airplane crashed. His spouse sued numerous defendants, bringing Pennsylvania tort claims alleging design defects in the Cessna's carburetor. While defendants initially obtained summary judgment on their field-preemption defense, *Sikkelee I* reversed, allowing the plaintiff's claims to proceed using state standards of care, subject to traditional principles of conflict preemption.

The defendants took this cue on remand, moving for summary judgment on "impossibility" conflict-preemption grounds. They argued that since they needed FAA approval to alter the engine's type certificate and design, compliance with both federal and state law was impossible. They won summary judgment again, and the plaintiff appealed.

The Decision

The Third Circuit reversed in *Sikkelee II*, ruling 2–1 that defendants were not entitled to summary judgment on impossibility-preemption grounds. Significantly, the majority acknowledged the manufacturer could not alter the engine's type certificate and carburetor design without FAA approval. The majority, however, then concluded the manufacturer was "not stuck with the design initially adopted and approved" by the FAA. Maj. Op. 23.

To the majority, the summary judgment record—viewed in the plaintiff's favor—suggested the manufacturer: (i) received approval for prior type-certificate amendments, and (ii) repeatedly communicated with the FAA about purported carburetor issues in the field, but (iii) did not seek FAA approval to amend the type certificate to address those purported issues. Given its view of these distinct facts, the majority concluded that compliance with both federal and state law

was not "impossible."

The dissent would have applied impossibility preemption, correctly in our view. It explained that the Supreme Court—in its decisions in *Wyeth*, *PLIVA*, and *Bartlett*—created a bright-line rule that, "when federal regulations prohibit a manufacturer from altering its product without prior agency approval, state-law claims imposing a duty to make a different, safer product are preempted." Dissent 6. In the aviation context, the dissent explained, manufacturers undisputedly cannot make design changes without FAA approval, meaning conflict preemption rightly applied. This analysis is sound.

Implications

While *Sikkelee II*'s dissent correctly adheres to Supreme Court precedent, the majority's opinion does not hinder the aviation industry. First, it was a narrow, fact-based decision dependent on the unique circumstances presented in the summary judgment context. The majority did not create a categorical rule that federal aviation law *never* conflict preempts state tort law under "impossibility" principles.

Rather, the majority held only that, where the facts purportedly suggested manufacturer inaction despite communication with the FAA about an alleged design defect, impossibility preemption did not apply. This means that where an alleged defect is unknown, or where the FAA rejected or declined to act on a requested design alteration, *Sikkelee II* does not govern, and impossibility preemption could apply.

Second, while the Third Circuit declined to apply impossibility preemption on the unique facts presented, impossibility preemption still remains viable in a broader range of cases outside the Third Circuit. *Sikkelee II*'s persuasive dissent should guide the analysis in other courts. Particularly given the strong interest in a uniform, national approach to aviation safety, a decision splitting with *Sikkelee II* could attract the Supreme Court's attention, resulting in a final resolution of this issue, even though the Court previously declined to review *Sikkelee I*'s rejection of field preemption. *AVCO Corp. v. Sikkelee*, 16-323.

Finally, *Sikkelee II* addressed only impossibility preemption, not "obstacle" preemption, where "compliance with [federal and state law] is possible, but state law poses an obstacle to the full achievement of federal purposes." Maj. Op. 15 & n.7. Manufacturers should therefore continue to press obstacle-preemption defenses in future litigation, particularly since that defense has been recognized in the aviation-safety context. *Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973).

THREE KEY TAKEAWAYS

1. In *Sikkelee II*, a divided Third Circuit held, 2-1 and in light of unique facts presented on summary judgment, that federal aviation law did not conflict preempt state tort claims alleging aircraft design defects.
2. The majority reasoned that since the summary judgment record, viewed in the plaintiff's favor, allegedly suggested the manufacturer was aware of and discussed a purported defect with the FAA, but did not seek FAA approval to amend the type certificate to address the alleged issue, "impossibility" preemption did not apply.
3. Conflict preemption, however, should still be asserted in future aviation litigation. *Sikkelee II* is a narrow, fact-based decision leaving room for impossibility- and obstacle-preemption defenses in subsequent cases, both within and outside the Third Circuit. *Sikkelee II*'s well-reasoned dissent supports this view.


John D. Goetz
Pittsburgh

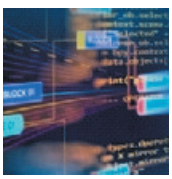

Matthew E. Papez
Washington


Dean E. Griffith
Washington


Benjamin G. Minegar
Pittsburgh

YOU MIGHT BE INTERESTED IN: Go To All Recommendations >>

FAA Increasing Access to



Be Wary of Warranties for

New York's Martin Act Just Got a

Automated Airspace Approval for Drone Operators

Software Design

Little Less Powerful

SUBSCRIBE SUBSCRIBE TO RSS

Jones Day is a global law firm with more than 2,500 lawyers on five continents. We are One Firm Worldwide℠.