JONES DAY

MAY 2016

COMMENTARY

Deciphering *Sikkelee*: Implications for Aviation Claims and Product Manufacturers

On April 19, 2016, the Third Circuit issued its long-awaited decision in *Sikkelee v. Precision Airmotive Corp. et al.*[1] Aviation product manufacturers had hoped the opinion, which considered whether the Federal Aviation Act ("Act") and Federal Aviation Administration ("FAA") regulations preempt aviation product liability claims, would result in an affirmative finding of pre-emption. The Third Circuit instead found against field preemption but recognized that traditional principles of conflict preemption could preempt certain aviation product liability claims. This *Commentary* discusses the *Sikkelee* decision, how it compares to decisions in other Circuits, and its implications for the future.

The Third Circuit's Opinion in *Sikkelee v. Precision Airmotive Corp. et al.*

In July 2005, pilot David Sikkelee perished when his Cessna 172N aircraft crashed in North Carolina. In 2004, the Cessna's engine had been overhauled and a new carburetor was installed pursuant to the manufacturer's FAA issued type-certified design. In 2007, Mr. Sikkelee's spouse filed suit against 17 defendants in the Middle District of Pennsylvania claiming that the crash resulted from alleged manufacturing and design defects in the Cessna's engine—specifically, a "malfunction or defect in the engine's carburetor."[2]

The complaint alleged various claims incorporating state law standards of care, including strict liability, breach of warranty, negligence, misrepresentation, and concert of action. In 2010, the district court dismissed the complaint, finding the state law claims fell within the preempted field of "air safety" pursuant to *Abdullah v. American Airlines, Inc.*[3] Plaintiff filed an amended complaint asserting state law claims but incorporating federal standards of care reflected in FAA regulations. The remaining state law claims included design defect and failure to warn.[4]

The district court granted partial summary judgment with respect to the amended defective design claim. The court found the type certificate issued to the manufacturer by the FAA established the federal standard of care, and the "issuance of a type certificate for the … engine meant that the federal standard of care had been satisfied as a matter of law."[5] The court denied summary judgment on the failure to warn claim.[6] The Third Circuit agreed to interlocutory review, noting the

decision "raised novel and complex questions concerning the reach of *Abdullah* and the scope of preemption in the airlines industry."[7]

The Holding

The Third Circuit reversed, limiting the scope of *Abdullah*'s holding. Importantly, the court drew a distinction between claims based on in-air operations and those based on design defects, stating that *Abdullah*'s preemption does not extend to product liability claims. In a 60-page opinion, the court concluded that Congress did not express a clear and manifest intent "to preempt aircraft products liability claims in a categorical way."[8] Thus, "neither the [Act] nor the issuance of a type certificate *per se* preempts all aircraft design and manufacturing claims."[9] Rather, the court held that state law applied to product claims, subject to "traditional principles of conflict preemption" to resolve any conflicts between the pertinent type certificate specifications and state law standards of care.[10]

The Court's Reasoning

Interpreting *Abdullah* and the Field of "Air Safety." In *Abdullah*, the Third Circuit addressed the allegation that, while the defendant airline followed federal in-flight seatbelt regulations, it failed to adequately warn passengers of the need to fasten their seatbelts in the face of upcoming turbulence. *Abdullah* held that federal aviation regulations occupied the field of "air safety" and thus preempted any state-created duties of care because the FAA, through the broad authority granted to it by the Act, "has implemented a comprehensive system of rules and regulations, which promotes flight safety by regulating pilot certification, pilot pre-flight duties, pilot flight responsibilities, and flight rules," and these regulations must remain uniform in the field.[11] The *Abdullah* court found that federal preemption in the field of air safety was supported by decisions in other circuits, and in the United States Supreme Court, that "had found federal preemption with regard to discrete matters of in-flight operations, including aircraft noise … pilot regulation … and control of flights through navigable airspace."[12]

The *Sikkelee* court read *Abdullah* narrowly. It noted that, although *Abdullah* described the preempted field as "air safety," it really included only "in-air operations."[13] The court stated that *Abdullah* discussed a catch-all standard of care in FAA regulations for in-air operations (something not applicable to design and manufacturing), and that *Abdullah* relied on regulations and other opinions relating only to in-air operations. The court further noted the Third Circuit also limited *Abdullah* in *Elassaad v. Indep. Air, Inc.*,[14] where the court declined to apply *Abdullah* to the disembarkation of passengers after an airplane came to a complete stop at its destination. *Elassaad*, the court said, "made clear that the field of aviation safety described in *Abdullah* was limited to in-air operations."[15]

Field Preemption. As an initial matter, the *Sikkelee* court observed that, because state law has consistently been applied to product liability claims, the presumption against preemption applies to aviation product liability cases.[16] The court then analyzed whether Congress expressed "a clear and manifest intent to preempt aviation products liability claims."[17] The court looked at three significant indicia of congressional intent: the Act, FAA regulations, and the General Aviation Revitalization Act of 1994 ("GARA").

First, the court noted that the Act is, at best, ambiguous with regard to preemption.[18] FAA regulations likewise provide no "evidence of congressional intent to preempt state law products liability claims."[19] The court considered a letter brief filed by the FAA[20] but disregarded the FAA's conclusion that the Act and FAA regulations were "'intended to create federal standards of care' for manufacturing and design defect claims."[21] The court also considered the FAA's type certification process but concluded the "process cannot as a categorical matter displace the need for compliance in this context with state standards of care."[22] Finally, the court stated that "GARA's legislative history states explicitly what is implied by the statutory text: Aviation products liability claims are governed by state law."[23] In conclusion, the court found insufficient support for "preemption of the entire field of aviation design and manufacture."[24]

The court was influenced considerably by its reluctance to "interpret[] the Federal Aviation Act in a way that would," in its view, grant immunity from design defect liability in aviation.[25] The court stated it would be a "perverse" result if issuance

of a type certificate would wholly exempt manufacturers and designers from what it termed "the bulk of liability for both individual and large-scale air catastrophes."[26]

Conflict Preemption. The *Sikkelee* court held that "type certification does not itself establish or satisfy the relevant standard of care for tort actions, nor does it evince congressional intent to preempt the field of products liability; rather, because the type certification process results in the FAA's preapproval of particular specifications from which a manufacturer may not normally deviate without violating federal law, the type certificate bears on ordinary conflict principles."[27] Conflict analysis raises the issue of whether the alternative design suggested by a plaintiff would necessitate a defendant returning to the FAA for approval of the new design. If so, the claim is preempted, because "even if an alternative design aspect would improve safety, the mere 'possibility' that the FAA would approve a hypothetical application for an alteration does not make it possible to comply with both federal and state requirements."[28]

The court did not determine whether plaintiff's allegations in *Sikkelee* were conflict preempted, rather opting to leave this question for the district court on remand. Accordingly, the question remains how this rule will be applied in the future.

The FAA's Position

Sikkelee is unique because the court sought the FAA's guidance, then largely disregarded it. The court requested the FAA file a brief commenting on "the scope of field preemption, the existence and source of any federal standard of care for design defect claims, and the role of the type certificate in determining whether the relevant standard of care has been met."[29] In response, the FAA stated, "[t]he field preempted by the Federal Aviation Act [] extends broadly to all aspects of aviation safety and includes products liability claims based on allegedly defective aircraft and aircraft parts by preempting state standards of care."[30] The FAA explained: "The Act requires the Department of Transportation, through the FAA Administrator, to impose uniform national standards for every facet of aviation safety, including the design of aircraft and aircraft parts,"[31] thus impliedly preempting any state-created standard of care in the field of aircraft design and manufacturing. The *Sikkelee* court considered these unequivocal statements by the FAA, saying that it recognized the FAA is "well equipped to understand the technical and complex nature of the subject matter over which they regulate," but then dismissed them, stating the FAA's arguments were "entitled to respect only to the extent [they] ha[ve] the power to persuade."[32]

The court, however, did give some credence to the FAA's opinion with regard to type certificates. The FAA stated, "[b]ecause the type certificate embodies the FAA's determination that an aircraft, aircraft engine, or propeller design complies with federal standards," any conflicts between state standards of care and a type certificate should be resolved through "ordinary conflict preemption principles."[33] As the Agency noted, if "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 be preempted."[34] In such cases, the type certificate establishes the applicable standard of care because the FAA has already applied the relevant federal standard during the type certification process, and "the manufacturer is bound to manufacture its aircraft or aircraft part in compliance with the type certificate."[35] However, when the FAA leaves the design choice up to the manufacturer, application of the federal standard of care to a particular design defect claim may be left to the court to adjudicate on the merits. The *Sikkelee* court's conflict preemption analysis somewhat mirrors the FAA's position.

Preemption Holdings in Other Circuits

No other circuit has engaged in such a detailed review of federal preemption in product liability as did the Third Circuit in *Sikkelee*. While no circuit has yet concluded that field preemption is applicable to the entire field of aviation product liability, some circuits have left the door open to preemption in certain circumstances.

Circuits that Have Addressed Preemption in Aviation Product Liability. Of the circuits that have decided cases involving preemption in aviation product liability—the Sixth, Ninth, Tenth, and Eleventh Circuits—only the Tenth and Eleventh Circuits have directly found that FAA regulations do not preempt the field. The Tenth Circuit, in *Cleveland By & Through Cleveland v. Piper Aircraft Corp.*, held that a manufacturer's obtainment of FAA certification does not preempt state product liability

claims because "certification is, by its very nature, a minimum check on safety."[36] Similarly, in *Pub. Health Trust of Dade Cty., Fla. v. Lake Aircraft, Inc.*,[37] the Eleventh Circuit held that, because product liability claims fall outside the scope of the Airline Deregulation Act's express preemption clause, such claims are not preempted under federal law.[38]

In *Greene v. B.F. Goodrich Avionics Sys.*,[39] the Sixth Circuit held the Act preempts failure to warn claims because "federal law establishes the standards of care in the field of aviation safety and thus preempts the field from state regulation."[40] However, the Sixth Circuit also discussed, extensively, plaintiff's manufacturing defect claim from a state law perspective.[41] Some have surmised from this discussion that the Sixth Circuit has concluded the Act does not preempt product liability claims.

The Ninth Circuit has left the door open to preemption in certain circumstances through the use of a "pervasive regulations" standard.[42] This standard reviews each individual claim to determine whether the specific area at issue is "pervasively" regulated by the FAA.[43] If the area is pervasively regulated, FAA regulations preempt the state law claim.[44] The Ninth Circuit has stated this standard should not be read expansively to conclude "that the FAA preempts all state law personal injury claims."[45]

Circuits Where the Question of Preemption is Unsettled. In the First, Second, Fourth, and Seventh Circuits, no decisions have discussed aviation product liability preemption specifically. However, these courts have concluded that some preemption exists in the not-fully-defined field of aviation safety.[46] District courts in these circuits have analyzed the breadth of preemption in aviation-related contract and tort claims, but no circuit decisions have provided definitive guidance. Accordingly, the district court opinions are unsettled.[47]

The Fifth Circuit has taken an individualized approach to preemption in aviation-related torts based on the specific allegations before the court, much like the approach taken by the Ninth Circuit. In *Witty v. Delta Airlines*, the court rejected the broad decision of the Third Circuit in *Abdullah* and noted it was "decid[ing] this case narrowly by addressing the precise issues before [it]."[48] The court held a "state claim for failure to warn passengers of air travel risks … must be based on a violation of federally mandated warnings."[49] While the Eighth Circuit has not yet ruled, at least one district court in the Eighth Circuit adopted this individualized approach and applied the "pervasively regulated" standard recognized by the Ninth Circuit.[50]

Finally, the D.C. Circuit has not yet provided any guidance on aviation preemption.

Next Steps for Aviation Product Manufacturers after *Sikkelee*

What are some takeaways from the *Sikkelee* decision that aviation product manufacturers should consider in the months ahead, assuming the decision is not revisited further?

Approaching Aviation Product Liability Litigation. Importantly, the Third Circuit panel made clear its holding was confined to field preemption. While the court held the field of aviation safety continues to be governed by state tort law, it also emphasized the area continues to be "subject to traditional conflict preemption principles." Accordingly, the doctrine of conflict preemption remains alive and well in aviation tort law. The *Sikkelee* court noted specifically that when manufacturers are unable to comply simultaneously with both federal and state requirements, arguments that state law design defect claims are conflict-preempted remain sound.

Following *Sikkelee*, when facing aviation product liability litigation, manufacturers should quickly gather and carefully analyze their type certificates, parts manufacturer approvals, and related FAA preapprovals, along with supporting files and documents. Companies should evaluate whether plaintiffs' state law theories would essentially require them to make major changes in design or manufacture without FAA preapproval. Company engineers and expert witnesses should assist with this effort. Companies should also consider whether plaintiffs' theories would make it impossible to comply with both a type certificate's specifications and a separate—and perhaps more stringent—alleged state tort duty. If so, manufacturers should consider filing a dispositive motion early in litigation raising conflict preemption arguments.

In this dispositive motion, a product manufacturer would demonstrate how compliance with both an FAA-approved

design and an alleged state law standard of care would be a physical impossibility, or how compliance with both federal and state duties would pose an obstacle to Congress's purposes and objectives in the area of aviation safety. The *Sikkelee* court recognized specifically that "in such cases, the state law claim would be conflict preempted."[51]

Testing the Bounds of *Abdullah*. The application of field preemption beyond product liability claims is still unclear. The *Sikkelee* court's conclusion that *Abdullah* applies only to "in-air safety" matters is not self-defining, nor did the court define it. For example, the court indicated that pilot training and certification, as well as pilot pre-flight duties, are preempted under *Abdullah*, when neither of these are strictly "in-flight" activities. *Abdullah* preemption may still be viable offensively (for failures in flight management, piloting, and aircraft maintenance) and defensively (where non-design defect claims—such as negligent hiring or training—are asserted).

Considerations for the Type Certification Process. The *Sikkelee* conflict preemption analysis will likely bring the specificity and breadth of an FAA type certificate into question more frequently in future cases. Accordingly, manufacturers should keep *Sikkelee* in mind when pursuing new or modified type certificates. Manufacturers should recognize that product designs certified under type certificates that leave design choices to the manufacturer's discretion are more vulnerable to attacks from plaintiffs under state law standards of care. While these considerations are not new, as type certification has always been a factor in litigation, they are perhaps even more significant after *Sikkelee*.

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Endnotes

1 No. 14-4193, 2016 U.S. App. LEXIS 7015 (3d Cir. Apr. 19, 2016).

2 *Id.* at *7.

3 181 F.3d 363 (3d Cir. 1999).

4 *Sikkelee*, No. 14-4193 at *8-*9.

5 *Id.* at *11.

6 *Id.*

7 *Id.* at *12.

8 *Id.* at *2.

9 *Id.* at *2-*3.

10 *Id.* at *3.

11 *Abdullah*, 181 F.3d at 369 (footnotes omitted).

12 *Sikkelee*, No. 14-4193 at *16-*17 (citing *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624 (1973); *French v. Pan Am Express, Inc.*, 869 F.2d 1, 6 (1st Cir. 1989); and *British Airways Bd. v. Port Auth. Of N.Y.*, 558 F.2d 75, 84 (2d Cir. 1977)).

13 *Id.* at *17.

14 613 F.3d 119, 121 (3d Cir. 2010).

15 *Sikkelee*, No. 14-4193, *18 (citing *Elassaad*, 613 F.3d at 127-31).

16 *Id.* at *23-*24.

17 *Id.* at *24.

18 *Id.* at *27.

19 *Id.* at *28.

20 The FAA Brief is discussed in greater detail *infra*.

21 *Id.* at *34.

22 *Id.* at *36.

23 *Id.* at *40 (citing H.R. Rep. No. 103-525, pt. 2, at 3-7 (1994)).

24 *Id.* at *44.

25 *Id.* at *35.

26 *Id.* (internal quotation marks and citations omitted).

27 *Id.* at *54.

28 *Id.* at *57 (internal citation omitted).

29 *Id.* at *29 n. 9.

30 *See* FAA Letter brief of Sept. 21, 2015 to Marcia M. Waldron, Clerk of Court for the United States Court of Appeals for the Third Circuit, at *7.

31 *Id.* at *2.

32 *Sikkelee*, No. 14-4193 at *29-*30.

33 FAA Letter Brief at *2.

34 *Id.* at *3.

35 *Id.* at *10-*11.

36 985 F.2d 1438, 1446-47 (10th Cir. 1993). The *Cleveland* court also found no implied preemption of state product liability claims, because "there is no irreconcilable conflict" between the FAA regulations and state common law standards. *Id.* at 1445. This holding suggests the Tenth Circuit may entertain conflict preemption similar to that endorsed in *Sikkelee*, if a product manufacturer/designer can show that, with regard to the specific standards at issue, there is an "irreconcilable conflict." *See also US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1329 (10th Cir. 2010) (determining that a state's alcoholic beverage regulatory scheme was preempted "based on the pervasive federal regulations concerning flight attendant and crew member training and the aviation safety concerns involved when regulating an airline's alcoholic beverage service").

37 992 F.2d 291 (11th Cir. 1993).

38 *See* 49 U.S.C. § 41713. The Eleventh Circuit's opinion is based largely on *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), where the Supreme Court held that, in the face of an express preemption clause, there can be no implied preemption. *See* 49 U.S.C. § 41713(b), formerly 49 U.S.C. § 1305(a) ("ADA") (preempting state laws "relating to rates, routes, or services" of an air carrier). However, the Supreme Court has since clarified that *Cipollone* does not establish an iron-clad rule against finding implied preemption under a statute containing an express preemption clause. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 872-73 (2000). Nonetheless, courts in the Eleventh Circuit continue to apply *Public Health*'s broad holding. *See, e.g.*, *Lucia v. Teledyne Continental Motors*, 173 F. Supp. 2d 1253, 1269-70 (S.D. Ala. 2001) (finding no federal preemption of state law product liability claims against airline engine manufacturer).

39 409 F.3d 784, 788-94 (6th Cir. 2005).

40 *Id.* at 794-95.

41 *Id.* at 788-94 (analyzing the legal standard for a defect claim and whether the evidence at trial was sufficient to support the defect claim).

42 *See Martin ex rel. Heckman v. Midwest Express Holdings, Inc.*, 555 F.3d 806, 811 (9th Cir. 2009); *Montalvo v. Spirit Airlines*, 508 F.3d 464 (9th Cir. 2007); *see also Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995 (9th Cir. 2013).

43 *Id.*

44 *Gilstrap*, 709 F.3d at 1004–06 (holding that if a claim is preempted, the second step is to determine whether there are any applicable state standards of care that are also preempted).

45 *Martin*, 555 F.3d at 810.

46 *See French v. Pan Am Express, Inc.*, 869 F.2d 1, 4 (1st Cir. 1989) ("finding that Congress intended to occupy the field of pilot regulation related to air safety"); *Goodspeed Airport L.L.C. v. E. Haddam Inland Wetlands & Watercourses Comm'n*, 634 F.3d 206, 210-11 (2d Cir. 2011) ("Congress intended to occupy the field of air safety."); *Smith v. Comair*, 134 F.3d 254, 256-59 (4th Cir. 1998) (claims based on an air carrier's boarding procedures were preempted by federal law, but state claims of false imprisonment and intentional infliction of emotional distress were not preempted because those claims were "based on conduct distinct from [the carrier's] determination not to grant permission to board"); *Bennett v. Southwest Airlines Co.*, 484 F.3d 907 (7th Cir. 2007) (generally, some standards of care in state law aviation negligence claims are furnished by federal regulations).

47 *See, e.g., Echevarria v. Caribbean Aviation Maint. Corp.*, 845 F. Supp. 2d 467, 469 (D.P.R. 2012) (citing *Cleveland v. Piper*, 985 F.2d 1438, 1447 (10th Cir. 1993) (avoiding question of preemption in product cases by finding it was "sufficient for Plaintiffs to show noncompliance with applicable FARs" to satisfy design defect claim)); *In re Air Crash Near Clarence Ctr.*, 09-md-2085, 2013 BL 311486, at *2 (W.D.N.Y. Nov. 08, 2013) (citing *Goodspeed*, at 212) (negligence claims relating to pilot hiring, training, selection, and supervision "governed by federal standard of care"); *Indemnity Ins. Co. of North America v. American Eurocopter LLC.*, 1:03CV949, 2005 BL 65830, at *8 (M.D.N.C. July 08, 2005) (applying North Carolina's negligence standards to product liability claim involving a helicopter).

48 366 F.3d 380, 385 (5th Cir. 2004).

49 *Id.* at 385-86 (finding plaintiff's "leg room claim" that she should have been warned of the risks of DVT or methods for preventing DVT was preempted).

50 *Johnson v. Avco Corp.*, 702 F. Supp. 2d 1093 (E.D. Mo. 2010).

51 *Sikkelee*, No. 14-4193 at *57.