

# Supreme Court declines to clarify whether federal laws pre-empt aviation product liability claims

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### Introduction

On November 28 2016 the Supreme Court denied a petition for writ of certiorari, (1) leaving open the question of whether the Federal Aviation Act pre-empts state law standards governing design defects by aircraft and engine manufacturers. When the issue was presented on interlocutory appeal to the Court of Appeal for the Third Circuit in *Sikkelee v Precision Airmotive Corporation*, (2) the court held that design defects were not the subject of field pre-emption. This finding narrowed the Third Circuit's prior holding in *Abdullah v American Airlines Inc*, (3) in which the court had held that federal law pre-empts the field of aviation safety generally, to cover only the field of in-air operations. The court specifically held that aircraft product liability cases may proceed using a state standard of care, subject to a traditional pre-emption analysis, which provides that federal law pre-empts state law only if it is impossible for a party to comply with both the applicable state and federal standards.

Circuit courts around the country are divided on the issue and the Supreme Court's unwillingness to rule on it means that aircraft and engine manufacturers will continue to be caught between detailed pre-certification requirements imposed by federal regulators and conflicting, inconsistent or differing state tort standards in the wake of aircraft accidents.

### Facts

In July 2005 David Sikkelee was piloting a Cessna aircraft that crashed shortly after take-off. Jill Sikkelee, the pilot's wife, filed a wrongful death action against the engine manufacturer, Lycoming, among others, alleging that the engine carburetor was defective. The court denied the manufacturer defendant's summary judgment motion with respect to a design defect product liability claim, finding that the design defect was the cause of the aircraft accident and that alternative designs were feasible but not used by the manufacturer. However, after a new judge was assigned to the case, the judge requested and granted a renewed summary judgment motion on the issue because it was unclear what federal standards of care should apply other than issuance of the Federal Aviation Administration (FAA) type certificate for the relevant engine, which had been obtained from the FAA. The judge stated that conflicting arguments were compelling because there appears to be gaps in the regulatory scheme governing makers of aircraft engines. Since the judgment raised novel and complex questions concerning the scope of pre-emption, the judge certified the order for immediate appeal to the Third Circuit.(4)

### Reasoning

#### ***Reliance on Third Circuit precedent***

In finding that aviation design defects are not pre-empted by the Federal Aviation Act, the court

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found several arguments persuasive and rejected many others. The court considered the issue of field pre-emption in light of its prior decision in *Abdullah*. In that case, the court stated in broad terms that the act pre-empted the field of aviation safety, finding that federal in-flight seatbelt regulations pre-empted state law claims because the act and federal regulations "establish[ed] complete and thorough safety standards for...air transportation and that these standards are not subject to... variation among jurisdictions". However, the Third Circuit in *Sikkelee* observed that in *Abdullah* and other precedential cases, the field of aviation safety was limited to in-air operations and therefore would not govern products liability claims. The regulations relating to type certificates were not as pervasive as aircraft operating flight rules considered in *Abdullah*.<sup>(5)</sup>

### ***Analysis of federal regulations covering design defects***

Since the court determined that *Abdullah* was not controlling, the court analysed whether Congress intended the act to pre-empt product liability claims. The court first noted that it has consistently applied state tort law to tort claims arising from aircraft crashes and that there is a presumption against pre-emption. The court then looked to the language, structure and purpose of the relevant statutory and regulatory scheme to determine whether there was any room for state regulation and whether Congress had a clear and manifest intent to supersede state law in the entire field. When Congress enacted the act in 1958, it wanted to consolidate regulatory authority in a single entity: the FAA. However, there is no express pre-emption provision in the act, and there is even a savings clause, which permits other remedies available at law to be sought. If Congress had intended the type certification process to pre-empt state law, it would have given some indication of that intention in the statutory language.

Moreover, the regulations concerning aircraft design prescribe minimum standards<sup>(6)</sup> for manufacturers to obtain a type certificate for a new design of an aircraft or aircraft part. In addition, the regulations prescribing the standards that must be met for issuance of type certificates are not a "comprehensive system of rules and regulations" and are more in the nature of "discrete, technical specifications" that require a product to work properly. For these reasons, the Third Circuit concluded that the mere issuance of a type certificate does not foreclose all design defect claims from proceeding in state tort suits.

The court also recognised that had Congress intended to pre-empt design defect claims, it would not have created a statute of repose barring certain product liability suits against manufacturers after 18 years, as it did when it codified the General Aviation Revitalisation Act 1994.<sup>(7)</sup>

### ***Split circuit decisions***

The Third Circuit was not swayed by the argument that its sister circuits had taken different views of the pre-emption of aircraft design defects.<sup>(8)</sup> The court pointed out that even when other courts found field pre-emption to exist, it had so narrowly defined the 'field' that it amounted to a traditional pre-emption analysis. Ultimately, the court's determination in those cases rested on an analysis of how pervasive the regulations were in the particular area at issue. It noted that generally state tort claims were permitted for product liability claims arising out of aircraft accidents, and that the defendant manufacturer had failed to produce a single federal appellate case where aviation product liability had been the subject of field pre-emption.

### ***Policy concerns***

The court was also not convinced by the policy argument that this ruling would create tremendous potential liability for manufacturers because it merely preserves the *status quo*. Since the beginning of aviation, plaintiffs have brought tort claims against manufacturers of aircraft products for design defects arising out of aircraft accidents. The court even commented that from a public policy perspective, if it had ruled in favour of field pre-emption for design defect claims, it would have the effect of granting immunity to manufacturers from design defect liability.

### ***Applicable standard***

Under a traditional pre-emption analysis, the court should consider whether the specific design defect being challenged was required to obtain the type certificate. In other words, was it impossible for a manufacturer to avoid the design defect and comply with the standards required to obtain the type certificate or did the manufacturer have discretion over the design aspect? The court remanded the case to the district court to determine whether the manufacturer had the power to alter the

alleged design defect at issue under the federal certification rules.

## Comment

A review by the Supreme Court regarding the issue of whether manufacturing defects in aviation products should be subject to field pre-emption would have been helpful to provide certainty on the issue and avoid the potential for plaintiffs to forum shop. In the meantime, perhaps other courts will adopt the approach taken by the Third Circuit, subjecting claims of a design defect to a traditional pre-emption analysis, rather than holding that field pre-emption exists. Analysing on a case-by-case basis whether a particular design defect could have been avoided while still complying with federal compliance requirements seems to be a reasonable solution. For example, in *Sikkelee*, evidence was presented by the plaintiff to demonstrate that the defect in the carburetor could have been avoided by using a different material (and in the past, it had used a different material before switching to the new screws that were present on the carburetor at the time of the accident), and such a change would have been permissible under the type certificate that the manufacturer had received. If such evidence is found to be persuasive by the district court on remand under a traditional pre-emption analysis, that court may find that the particular design defect at issue in the case is not pre-empted by the federal regulations approving the type certificate.

In January 2017, in a case with similar facts to *Sikkelee*, the Washington State Supreme Court, citing the Third Circuit's holding in *Sikkelee*, held that the act does not pre-empt state product liability of an aviation systems manufacturer.<sup>(9)</sup> The court specifically held that the act creates minimum standards surrounding aviation safety.

Further monitoring of this issue is necessary to determine whether other courts will find the Third Circuit's approach persuasive, since the Supreme Court has declined to shed any light on it for now.

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## Endnotes

(1) *Avco Corp v Sikkelee*, 137 S.Ct 495 (November 28 2016).

(2) 822 F3d 680.

(3) 181 F3d 363 (3d Cir 1999) (holding that federal pre-emption exists in the field of air safety, pre-empting the entire field from state regulation).

(4) The judge opined that he was bound to follow *Abdullah* and apply a federal standard of care and that there was no federal standard of care to apply other than issuance of the type certificate.

(5) The court's decision is based on a nuanced (and arguably indistinguishable) difference between injuries resulting from a flight arising out of turbulence occurring on the aircraft versus injuries which occurred during a flight that crashed and arose from a defective engine carburetor. It is difficult to see how a case arising out of seatbelt rules and turbulent conditions relate to in-air operations but a defective engine carburetor does not.

(6) See 49 USC §44701.

(7) See 49 USC §40101 note.

(8) See generally *Martin v Midwest Express Holdings Inc*, 555 F3d 806 (9th Cir 2009) (holding that a regulation must not only be pervasive, but also comprehensively regulate an area of law to have a pre-emptive effect).

(9) *Estate of Becker v AVCO Corp*, 387 P3d 1066 (Wash 2017).

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