Conflict in the Field:
Federal Preemption After Sikkelee

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2016 was noteworthy for any number of reasons. In aviation litigation, 2016 was noteworthy because the United States Court of Appeals for the Third Circuit, long the leader in aviation field preemption jurisprudence, changed course in *Sikkelee v. Precision Airmotive, Inc.*, 822 F.3d 680 (3d Cir.), cert. denied sub nom. *AVCO Corp. v. Sikkelee*, No. 16-323, 2016 U.S. LEXIS 6932 (U.S. Nov. 28, 2016). The Third Circuit held in *Sikkelee* that aircraft products liability claims are not preempted under the doctrine of implied field preemption but that implied conflict preemption principles might nevertheless preempt state law tort suits, a matter of first impression in aviation products liability litigation.


*Sikkelee* was given leave to amend to plead federal standards of care. The Lycoming Engines division of AVCO Corporation, the last remaining defendant, filed a motion for summary judgment arguing that none of the federal standards pled was applicable to the claims remaining in the case, that there was no evidence of breach of any federal standard, and that there was no causal connection between any alleged breach of any allegedly applicable federal standard and the happening of the accident. Lycoming Engines argued in the alternative that, insofar as *Sikkelee* identified engine design and certification regulations as providing the applicable federal standards, the issuance of a type certificate by the FAA conclusively established that design-related standards set forth in the applicable regulations were met. The district court granted partial summary judgment based on the alternative argument, holding that the issuance of the type certificate by the FAA was dispositive. *Sikkelee v. Precision Airmotive Corp.*, 45 F. Supp. 3d 431, 456 (M.D. Pa. 2014).

The district court certified its summary judgment order for interlocutory appeal. The Third Circuit accepted *Sikkelee’s* interlocutory appeal and reversed and remanded on April 19, 2016.

Purporting to “clarify the scope of *Abdullah*,” the court of appeals held that the Federal Aviation Act (the Act) does not in fact preempt the entire field of aviation safety. *Id.* at 683. The court instead held that the Act preempts only the limited field of “in-air operations.” *Id.* at 689. Having concluded that aircraft design falls outside the preempted field, the court of appeals held that “aircraft products liability cases . . . may proceed using a state standard of care.” *Id.* at 683.

Applying the presumption against preemption, the court asserted that Congress had not expressed a clear and manifest intent to preempt products liability claims in the aviation context, primarily relying on two provisions of the Act. The court first contended that the Act “says only that the FAA may establish ‘minimum standards’ for aviation safety.” *Id.* at 692 (quoting 49 U.S.C. §44701). According to the court, that language was “insufficient on its own to support a finding of clear and manifest congressional intent of preemption.” *Id.* The court next highlighted the Act’s savings clause, which preserves “other remedies provided by law.” *Id.* (quoting 49 U.S.C. §40120(c)). The court reasoned that the existence of the savings clause “belie[d]” an argument that the Act preempted state standards of care. *Id.* at 692-93.
The court acknowledged the FAA’s view in an amicus brief (which the Third Circuit requested be filed) that the Act preempted the application of state law standards in the field of aviation safety, but rejected the agency’s view as unpersuasive, relying on “three fundamental differences between the regulations at issue in *Abdullah* and those concerning aircraft design.” *Id.* at 694. First, the court contended that the FAA’s design regulations merely “establish procedures for manufacturers to obtain certain approvals and certificates from the FAA” and do not “purport to govern the manufacture and design of aircraft.” *Id.* Second, the court asserted that the FAA’s airworthiness standards are not as “comprehensive” as the standards at issue in *Abdullah.* *Id.* at 694-95. Third, the court observed that there is no catch-all provision “sound[ing] in common law tort” that “could be used to evaluate conduct not specifically prescribed by the regulations.” *Id.* at 695.

The court reasoned that its holding that the Act preempts the application of state law standards only in the field of in-air operations was “solidified” by the General Aviation Revitalization Act of 1994 (GARA), Pub. L. No. 103-298, 108 Stat. 1552. *Id.* at 696. In GARA, Congress enacted a statute of repose that generally bars suits against general aviation manufacturers arising from general aviation accidents eighteen years after the aircraft was delivered or a new part installed. See 49 U.S.C. §40101 note, §3(3). According to the court of appeals, “[b]y barring products liability suits against manufacturers of these older aircraft parts, GARA necessarily implies that such suits were and are otherwise permitted.” *Id.* at 696.

Having held that state law standards of care govern claims that an aircraft or engine was defectively designed, the court of appeals left open the possibility that some state law tort suits still would be preempted “as a result of a conflict between state law and a given type certificate” *Id.* at 702. The court did not elaborate as to how such conflict preemption would operate, leaving that issue for the district court on remand. *Id.*

The court of appeals denied rehearing en banc on June 7, 2016. The United States Supreme Court denied certiorari on November 28, 2016. Proceedings in the district court, previously held in abeyance, have resumed. Motions based on conflict preemption principles are required to be filed by January 31, 2017.

The potential reach and impact of *Sikkelee* is uncertain. While commentators on the “other side of the v.” have suggested that *Sikkelee* “signals the end to expansive federal preemption rulings in aviation cases,” see Justin T. Green, *Aviation Manufacturer Held Subject to State Law Standards in US Products Liability Action*, McGill Center for Research in Air and Space Law, Occasional Paper Series, No. XVII (Sept. 2016), that remains to be seen.

In the Third Circuit, to be sure, field preemption principles do not operate to preempt state law standards in aviation products liability cases. Field preemption remains viable in non-products cases in the Third Circuit to the extent that the Third Circuit defined the preempted field as being “in-air operations.” The Third Circuit likewise left open the applicability of conflict preemption principles to preempt state law standards in aviation products cases, which have the potential to be an effective defense tool given the pervasive regulation of aircraft design and certification by the FAA and the inability of design approval holders to design aircraft and aircraft components or to make changes to existing designs without FAA approval.

*Sikkelee* is not binding in other federal circuits, many of which have addressed the preemptive effect of the Act. The Second and Tenth Circuits have held that the Act preempts state regulation in the entire field of aviation safety. *Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Commission*, 634 F.3d 206, 210 & n.5 (2d Cir. 2011); *US Airways, Inc. v. O’Donnell*, 627 F.3d 1318, 1326 (10th Cir. 2010). The First and Fifth Circuits have suggested the same conclusion. *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380, 384, 385 (5th Cir. 2004); *French v. Pan Am Express, Inc.*, 869 F.2d 1, 5 (1st Cir. 1989). The Sixth Circuit has applied *Abdullah* to foreclose state law failure to warn claims. *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 794-95 (6th Cir. 2005). The Ninth Circuit has taken a “pervasive regulation” approach to field preemption, holding that whether the Act preempts state law regulation of aviation safety depends on the pervasiveness
of the specific regulations promulgated by the FAA. *Martin ex rel. Heckman v. Midwest Express Holdings, Inc.*, 555 F.3d 806, 811 (9th Cir. 2009). The Eleventh Circuit has held that state law standards are not preempted in a design defect case. *Public Health Trust of Dade County v. Lake Aircraft, Inc.*, 992 F.2d 291, 295 (11th Cir. 1993).

In the short term, the go-forward impact of *Sikkelee* in products liability cases will vary by forum. Products liability litigation in the Third Circuit will proceed under conflict preemption principles. The Ninth Circuit has its own middle ground rule and is unlikely to be persuaded by the Third Circuit's rejection of its field preemption approach in products liability or other aviation tort cases. Products liability litigation in jurisdictions where *Abdullah* has been adopted likely will be a battleground for arguments to limit broader, pre-*Sikkelee* holdings. Products liability litigation in jurisdictions such as the Fourth, Eighth, and District of Columbia Circuits, with no established aviation field preemption law, will focus on which implied preemption doctrine applies, if any, and which rule is consistent with existing preemption jurisprudence in that circuit. Products liability litigation in the state courts likely, though not necessarily, will mirror the approach taken by the corresponding federal judicial circuits in their respective geographic regions.