Although SCOTUS passed on *Sikkelee v. Precision Airmotive* last year, here's what you can take away from that case to counter preemption defenses to aviation product defect claims.

By || **Kevin Mahoney**

The SAGA of *SIKKELEE*

Last March, *Sikkelee v. Precision Airmotive* was settled six days before trial after two U.S. Supreme Court certiorari denials.[1] The aviation products liability case did not garner national headlines, but for years it was one of the most frequently discussed cases in the aviation bar. *Sikkelee* involved a defense that could pose an existential threat to justice for aviation crash victims: federal preemption. As *Sikkelee* made its way to the doors of the Supreme Court, trial lawyers held their breath as the Court weighed granting certiorari on whether the Federal Aviation Act broadly preempts, and in practice mostly bars, state-law design defect claims involving aviation products.[2]

On July 10, 2005, David Sikkelee died in an airplane crash at just 48 years old. David was flying a Cessna 172 in North Carolina when the airplane's Lycoming engine failed after takeoff. The engine's carburetor bowl screws were found loose after the crash, which would have adversely affected the balance of fuel and air needed to run the engine. David's wife, Jill, sued Lycoming and other manufacturers, arguing that Lycoming's engine design should have specified the use of safety wire to prevent the screws from loosening.

Although a different company manufactured the carburetor, it was made according to Lycoming's proprietary design, and Lycoming held the engine's "type certificate"—which the Federal Aviation Administration

(FAA) issues to manufacturers who demonstrate their design complies with minimum standards set by the Federal Aviation Act and associated regulations.[3] Type certificate holders have the right to obtain a production certificate and sell duplicates of the approved part.[4] But with that privilege comes a responsibility to remedy defects in the underlying design that might hurt or kill people.[5]

Preemption

In *Sikkelee*, Lycoming argued that because the federal government issued a type certificate for its design, it had satisfied the applicable standards as a matter of law and that federal regulations preempted state products liability standards.[6] However, Jill Sikkelee countered that Congress never intended for the Federal Aviation Act to supplant state products liability standards in this way.[7] But even if it did, she argued, Lycoming still could be held liable for failing to modify the defective type-certificated design.[8]

The Federal Aviation Act does not expressly preempt state products liability law—it just provides the "minimum" certification standards for aircraft parts and even has a "savings clause" stating that any remedies under the statute are "in addition to any other remedies provided by law."[9] Furthermore, aviation products liability cases have been litigated for almost a century under state law, and the oft-rejected preemption defense is nothing new.[10] But *Sikkelee* and cases like it raise the question of whether the federal government's regulatory regime can suddenly no longer exist side by side with state-law products liability claims under evolving principles of "field" and "conflict" preemption.

Field preemption. If Congress intended to occupy a field exclusively, state law must give way under the doctrine of field preemption. In the aviation context, the Third Circuit was perhaps an inevitable battleground because of the extremely broad language regarding field preemption in its 1999 landmark decision *Abdullah v. American Airlines, Inc.*[11] In *Abdullah*, injured airline passengers argued that the airline violated state law in failing to warn them of imminent turbulence during a flight.[12]

The Third Circuit found "implied federal preemption of the *entire field of aviation safety*" and concluded that the pilot's alleged failure to warn the passengers of impending turbulence, beyond illuminating the fasten seat belt sign, could not be assessed using state standards.[13] It remanded the case for the trial court to determine whether the instructions provided to the jury comported with warning standards under the federal aviation regulations, permitting the plaintiffs to obtain state law damages in the event of a regulatory breach.[14]

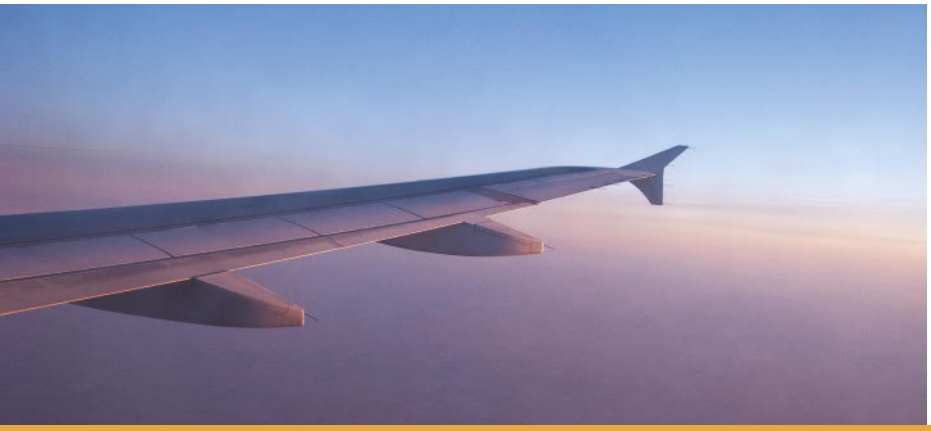
Abdullah had ripple effects on aviation safety cases throughout the country. In *Greene v. B.F. Goodrich Avionics Systems, Inc.*, for example, the Sixth Circuit relied on *Abdullah* in holding that a court could not find a helicopter's gyroscope manufacturer liable under state law for failing to warn users of defects in the part.[15] In *Montalvo v. Spirit Airlines*, the Ninth Circuit "adopt[ed] the Third Circuit's broad, historical approach to hold that federal law generally establishes the applicable standards of care in the field of aviation safety" in airline failure-to-warn cases.[16] And in *Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Commission*, the Second Circuit cited *Abdullah*, *Greene*, and *Montalvo* in broadly announcing that "Congress intended to occupy the entire field of air safety and thereby preempt state regulation of that field"—but the court still held that state land use could safely coexist with federal regulations governing airport use.[17]

The Federal Aviation Act does not expressly preempt state products liability law—it provides only 'minimum' certification standards for aircraft parts.

Despite *Abdullah*'s impact, it would be wrong to suggest that courts subsequently used the case to gut state products liability law in aviation cases. To the contrary, most courts grappling with *Abdullah* in products liability cases carefully distinguished it, noting that aviation preemption is not a one-size-fits-all defense. As the Ninth Circuit noted in *Martin ex rel. Heckman v. Midwest Express Holdings, Inc.*, "when the [FAA] issues 'pervasive regulations' in an area, like passenger warnings, the FAA preempts all state law claims *in that* area."[18]

In contrast, "in areas without pervasive regulations or other grounds for preemption, the state standard of care remains applicable."[19] Thus, in *Martin*, a claim alleging an aircraft stairway was defectively designed was not preempted because the FAA had "not comprehensively regulated stairways."[20]

PREVIOUS SPREAD: PESHKOVA/SHUTTERSTOCK



But the FAA had mandated "a litany of warnings" concerning appropriate use of seat belts during flights, indicating that "the agency intended its list of warnings to be comprehensive," and thereby justifying the Third Circuit's holding in *Abdullah*.[21]

The first time that the Third Circuit reviewed *Sikkelee* in 2016, it similarly limited *Abdullah*'s reach.[22] Like the Ninth Circuit in *Martin*, the court reasoned that although federal aviation regulations provide a "comprehensive standard of care" for operating an aircraft . . . no such regime comprehensively governed the subject of the lawsuit: aircraft design.[23] Moreover, the court said, if issuing a type certificate satisfied Lycoming's legal duty to aircraft users as a matter of law, then simply obtaining a type certificate would immunize "manufacturers of defective airplanes from the bulk of liability for both individual and large-scale air catastrophes."[24]

The court noted that congressional intent is the touchstone of any preemption analysis and that Congress never intended to immunize aviation manufacturers from state products liability suits by occupying the field of aviation certification.[25] The Third Circuit reversed the trial court's grant of summary judgment on the plaintiff's design defect claims,[26] and although Lycoming appealed, the Supreme Court denied certiorari without comment.[27]

Conflict preemption. If compliance with state and federal law is impossible, or if state law poses too great an obstacle to compliance with federal law, federal law will cancel out state law by conflict preemption. Conflict preemption was the Third Circuit's focus the second time it reviewed *Sikkelee* in 2018. Three pharmaceutical cases from the Supreme Court were central to the court's analysis.

The Supreme Court had held that state-law-based failure-to-warn and design defect claims against generic drug manufacturers were preempted because federal law prohibited the generic drug manufacturers from altering the warnings on drug labels (*PLIVA, Inc. v. Mensing*) or the design of those drugs (*Mutual Pharmaceutical Co. v. Bartlett*).[28] Thus, it would be impossible for the *PLIVA* and *Bartlett* defendants to comply with the plaintiff's state-law-based standard.[29]

In contrast, in *Wyeth v. Levine*, the Supreme Court held that a state-law failure-to-warn claim against a non-generic drug manufacturer was not preempted because the manufacturer had primary control over the contents of its warning label, and there was no evidence that the FDA would have rejected the plaintiff's proposed label change.[30]

When the Third Circuit revisited *Sikkelee* in 2018, it again reversed the grant of summary judgment in Lycoming's favor. On remand, the district court had dismissed the plaintiff's claims under *PLIVA* and *Bartlett*, reasoning that Jill Sikkelee was asking the jury to consider "hypothetical" agency action, which would effectively allow plaintiffs to act as regulators and prevent the federal government from having the last say on aviation certification.[31] The district court held that when a defendant is unable to alter its design without first obtaining agency approval, it cannot comply with state and federal law and, therefore, "state law is conflict preempted."[32] The court's second dismissal was not much different from the first: It found the issuance of a type certificate as a bar on liability against the certificate holder for a design defect.

The Third Circuit rejected this conclusion and ruled that Lycoming was more like the non-generic drug manufacturer in *Wyeth*.[33] Consequently, to prevail under an impossibility conflict preemption defense, Lycoming had to establish "clear evidence" that the government would reject the proposed design change.[34] Because Lycoming could offer no such evidence, summary judgment was improper.[35] Lycoming appealed, again seeking Supreme Court review.[36] This time the Court responded by inviting the solicitor general to weigh in on the succinct question presented by Lycoming: "Whether the Federal Aviation Act preempts state-law design defect claims."[37]

Aviation lawyers saw this as a signal that the Court was considering granting certiorari and collectively gasped. If the Court reinstated the trial court's decision in *Sikkelee* and held that state-law design defect claims were preempted simply when agency action was required to

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implement a design change, the Court could potentially forever alter aviation products liability law and make aviation in the United States less safe.

For decades, tort litigation has played an integral role in spotlighting defects in federally approved aviation designs that nonetheless killed hundreds in mass aviation disasters.[38] For example, litigation after the TWA Flight 800 crash highlighted defects in aircraft-certified fuel systems. But the hundreds of wrongful death claims arising from the TWA tragedy would be barred under the trial court's reasoning, directly undermining the Federal Aviation Act's purpose—ensuring aviation safety.[39]

The Impact of the 737 Max Crashes

In March 2019, 10 days after Lycoming's petition was filed, a type-certificated Boeing 737 Max crashed shortly after takeoff in Ethiopia, killing 157 people. It was eerily similar to another 737 Max crash in Indonesia the previous October that killed 189 people. The subsequent investigation of the two tragedies revealed troubling deficiencies in the FAA's certification of the new aircraft.[40]

Specifically, regulators at the FAA had not scrutinized a flight control law that was programmed into the airplane's computers, the Maneuvering Characteristics Augmentation System (MCAS), which would aggressively pitch the aircraft's nose down based on input from an "angle of attack sensor."[41]

One big problem with Boeing's MCAS design was its lack of redundancy—it relied on readings from only one of the airplane's two angle of attack sensors.

The 737 Max debacle reinforced for everyone what Jill Sikkelee had been saying: A type-certificated design is not always a safe one.

So if the sensor sent incorrect readings (as it did before both crashes), the MCAS's response would have no way to double-check the erroneous inputs.[42] Boeing was aware of this issue during the certification process but did not appropriately classify an MCAS failure "as being hazardous enough to require redundant features."[43]

After the crashes, Boeing insisted that its design "met all certification and regulatory requirements."[44] But by then, the 737 Max debacle reinforced for everyone what Jill Sikkelee had been saying all along: A type-certificated design is not always a safe one. Product designs that meet federal minimum standards still can hurt people, and state-law products liability lawsuits play a critical role in filling unavoidable gaps in our regulatory framework.[45]

Lessons Learned

On Jan. 13, 2020, the Supreme Court denied certiorari in *Sikkelee* for the second time.[46] The 737 Max crisis may have deprived manufacturers of credibility in describing the FAA as an omnipotent powerful agency that could ensure aviation safety. However, the preemption defense likely is not going away, and the saga of *Sikkelee* has important lessons for advocates.

If you face a field preemption argument, cite to *Sikkelee* for the principle that aviation products cases are not field preempted as a matter of law. You must show and convince the court that the overwhelming majority of aviation personal injury cases in which courts found field preemption dealt with alleged state interference with discrete decisions made during the operation of an aircraft or airport, not the broad, minimum design standards the FAA sets for aviation products.[47]

As an appeal pending in the Second Circuit shows, given expansive language in prior field preemption cases, this is easier said than done. In *Jones v. Goodrich Corp.*, the Connecticut federal district court dismissed products liability claims arising from a fatal Army helicopter crash in Georgia based on field preemption grounds, holding that federal law "occup[ies] the entire field of air safety."[48] This court made the same mistake as the district court in *Sikkelee*: It misapplied a principle from a factually distinguishable aviation operations case in an aircraft design case (and, notably, one in which FAA design standards do not even apply).

Guide courts away from the temptations of such simplistic legal analyses. Instead, forcefully assert that, regardless of the successful invocation

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of field preemption in past aviation *operations* cases, the field preemption doctrine has no application in any strict liability design defect cases.[49]

Once the battleground is shifted to conflict preemption, be prepared to demonstrate that your case is more like *Wyeth* than *PLIVA* and *Bartlett*. Here, it's critical to establish a dispute of material fact. As in *Sikkelee*, show that a reasonable finder of fact could conclude that if the defendant manufacturer presented its proposed alternative design, then the FDA would have approved it.[50] Typically, this can be done with an expert in FAA certification and aircraft design, who you should retain in the investigative phase of a case and consult frequently as the case progresses through discovery.

You must anticipate the preemption defense and draft your pleadings to allege a violation of both state and federal standards. For instance, the plaintiffs' claim in *Davis v. Tamarack Aerospace Group, Inc.*, a products case involving defective winglets, survived a preemption motion because the plaintiffs alleged a state law cause of action, and their complaint also exhaustively detailed how the winglet design violated minimum federal standards.[51] In denying a motion to dismiss, the district court noted that even if the alleged state law standards were later found to be preempted, the plaintiffs could ultimately rely "on federal authority for the standard of care."[52]

As the *Sikkelee* saga shows, until the Supreme Court weighs in definitively on preemption in design defect cases, the defense will not rest. Neither can we. T

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He thanks Justin Green, who is a partner at Kreindler & Kreindler in New York City, and Bradley Stoll, who represented Jill Sikkelee and is a partner at Katzman Lampert & Stoll in Wayne, Pa., for their contributions to this article.

Notes

1. 907 F.3d 701 (3d Cir. 2018).
2. *Avco Corp. v. Sikkelee*, 907 F.3d 701 (3d Cir. 2018), *petition for cert. filed*, 2019 WL 1058108 (U.S. Mar. 1, 2019).
3. 907 F.3d at 705.
4. *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 684 (3d Cir. 2016).
5. 14 C.F.R. §21.50(b); 14 C.F.R. §21.3.
6. 822 F.3d at 686, 695.
7. *Sikkelee v. Precision Airmotive Corp.*, 45 F. Supp. 3d 431, 446 (M.D. Pa. 2014).
8. 907 F.3d at 712–13.
9. 822 F.3d at 692 (quoting 49 U.S.C. §40120(c)).
10. *See, e.g., Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1442–45 (10th Cir. 1993) (rejecting field preemption defense in products liability case arising from 1983 crash of a Piper Super Cub); *Public Health Trust v. Lake Aircraft, Inc.*, 992 F.2d 291, 295 (11th Cir. 1993) (rejecting preemption in seat-design defect case, noting that "Congress did not intend to preempt state laws on matters unrelated to airline rates, routes or service").
11. 181 F.3d 363 (3d Cir. 1999).
12. *Id.* at 364.
13. *Id.* at 376 (emphasis added).
14. *Id.*
15. 409 F.3d 784, 794–95 (6th Cir. 2005).
16. 508 F.3d 464, 468.
17. 634 F.3d 206, 210, n.5 (2d Cir. 2011).
18. 555 F.3d 806, 811 (9th Cir. 2009).
19. *Id.*; *see also Damian v. Bell Helicopter Textron, Inc.*, 352 S.W.3d 124, 136–37 (Tex. Ct. App. 2011) (citing *Martin* to distinguish *Abdullah* in a helicopter design defect case).
20. 555 F.3d at 812.
21. *Id.* at 810.
22. 822 F.3d at 709.
23. *Id.* at 695.
24. *Id.* at 696.
25. *Id.* at 687, 696.
26. *Id.* at 709.
27. *Avco Corp. v. Sikkelee*, 137 S. Ct. 495 (2016).
28. 564 U.S. 604, 612–13 (2011); 570 U.S. 472, 480 (2013).
29. 564 U.S. at 618; 570 U.S. at 480.
30. 555 U.S. 555, 571 (2009).
31. *Sikkelee v. Avco Corp.*, 268 F. Supp. 3d 660, 694 (M.D. Pa. 2017).
32. *Id.* at 693.
33. 907 F.3d at 717.
34. *Id.* at 713–14.
35. *Id.* at 717.
36. 2019 WL 1058108.
37. *Id.*; *see* Brief for United States as Amicus Curiae, *Avco Corp. v. Sikkelee*, 2019 WL 6726852 (Dec. 9, 2019).
38. Brief of the American Association of Justice as Amicus Curiae, *Sikkelee v. Precision Airmotive Corp.*, Feb. 1, 2018, https://www.justice.org/resources/research/sikkelee-v-precision-2018.
39. *Id.* at *2.
40. *See generally* Staff of H. Comm. on Transp. & Infrastructure, 116th Cong. 15 (Comm. Print 2020), https://tinyurl.com/232wavxw.
41. *Id.* at 13.
42. *Id.* at 107–08.
43. *Id.*
44. Jack Nicas et al., *Boeing Built Deadly Assumptions Into 737 Max, Blind to a Late Design Change*, N.Y. Times, June 1, 2019, https://nytimes.com/2019/06/01/business/boeing-737-max-crash.html.
45. *See* Justin Green, *The Supreme Court Turns Down* Sikkelee, *but Federal Preemption Remains a Clear and Present Danger to the Civil Justice Rights of Aviation Disaster Victims*, Am. Ass'n Just. Aviation L. Sec., Spring 2020, https://www.kreindler.com/articles/supreme-court-turns-down-sikkelee.
46. 140 S. Ct. 860 (2020); 137 S.Ct. 495 (2016).
47. *See* 822 F.3d at 689 ("[P]roducts liability claims are not subject to the same catch-all standard of care that motivated our field preemption decision in *Abdullah* . . . and our post-*Abdullah* case law cautions us against interpreting the scope of the preempted field too broadly."); *see also, e.g., Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 76 (2d Cir. 2019) (state law regulating runway lengths are field preempted); *Montalvo*, 508 F.3d at 468 (state law requiring pilots to warn passengers of dangers of deep vein thrombosis during flight field preempted); *Abdullah*, 181 F.3d at 365 (state tort law mandating that pilots give in-flight warnings pertaining to advancing storms field preempted).
48. 422 F. Supp. 3d 518, 524 (D. Conn. 2020); 2020 WL 4558967 (D. Conn. Aug. 7, 2020) (denial of motion for reconsideration).
49. *See also* Brief of the American Association of Justice as Amicus Curiae, *Jones v. Goodrich Corp.*, Dec. 22, 2020, https://www.justice.org/resources/research/jones-v-goodrich.
50. 907 F.3d at 714.
51. 2021 WL 139981, at *2–6 (E.D. Wa. 2021).
52. *Id.* at *8.