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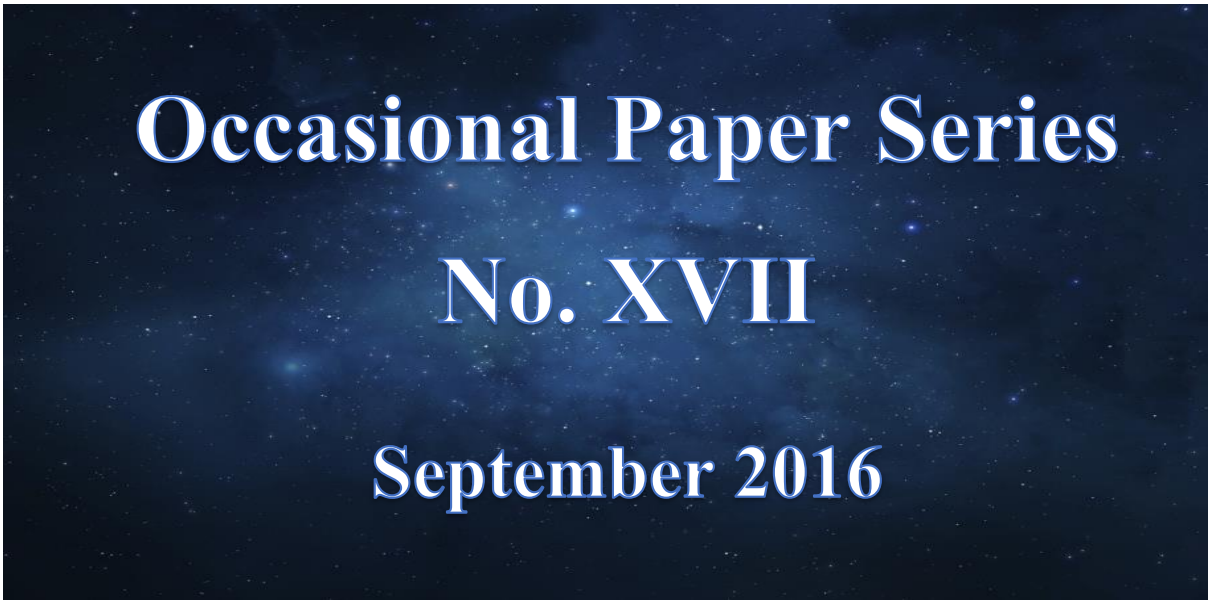

Aviation Manufacturer Held Subject to State Law Standards in US Products Liability Action

Justin T. Green

AVIATION MANUFACTURER HELD SUBJECT TO STATE LAW STANDARDS IN US PRODUCTS LIABILITY ACTION

by

Justin T. Green*

ABSTRACT

On 18 April 2016, the United States Court of Appeals for the Third Circuit handed down *Sikkelee v. Precision Airmotive Corp.*, et al., which held that US federal law does not impliedly preempt the field of aviation products safety. The decision is remarkable because in 1999 the Third Circuit broadly declared that the entire field of aviation safety was preempted in *Abdullah v. American Airlines, Inc.*

The *Sikkelee* court found that the federal regulations regarding aviation products design did not evidence congressional intent to preempt state law products liability claims. The Court saw a distinct difference between the federal regulations governing aircraft operation, which included both specific requirements and a general standard of care, and the regulations governing products safety, which did not include a general standard of care. The Court further found that the Federal Aviation Administration (FAA)'s certification of an aviation product as complying with federal standards did not prohibit a plaintiff from attempting to prove that the product was nevertheless unsafe under state products liability laws. The Court held that ordinary conflict preemption would govern whether specific requirements in federal regulations or in FAA certification documents would preempt state products liability standards.

Sikkelee signals the end to expansive federal preemption rulings in aviation cases and reduces the potential that federal preemption may result in a reduction of aviation safety standards because it ensures that any gaps in the federal standards will be filled by state law. It also means that aviation products manufacturers are exposed to products liability laws of the fifty states, five territories and one district that comprise the US, and that US juries will continue to have the final say on whether an aviation product is safe.

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The US Supreme Court has yet to rule on whether federal standards preempt state law. There are considerable differences of opinion among the federal courts on whether the US Congress intended to preempt the field of aviation safety and it is time for the Supreme Court to weigh in on the vitally important issue.

I. INTRODUCTION

On 18 April 2016, in *Sikkelee v. Precision Airmotive Corp., et al.*[1], the US Court of Appeals for the Third Circuit issued a major decision in the area of aviation preemption jurisprudence holding that the Federal Aviation Act of 1958 (the 1958 Act or the Act)[2] and Federal Aviation Regulations (FARs) promulgated by the Federal Aviation Administration (FAA) do not preempt the field of aviation safety as it relates to products liability claims.[3] This was remarkable because in 1999[4] the Third Circuit broadly declared that the entire field of aviation safety was federally preempted, and in 2010,[5] in *dicta*, appeared to indicate that aircraft certification and airworthiness requirements were within the preempted field.

In its landmark 1999 decision *Abdullah v. American Airlines, Inc.*,[6] the Third Circuit proclaimed that the entire field of aviation safety was preempted even though the claims at issue in the case related only to in-flight conduct to which the FAA had established a federal standard of care. *Abdullah* led to similarly broad rulings in other circuits.

Sikkelee clarified that only state law standards concerning in-flight safety, to which the FAA had established a general standard of care that prohibited careless or reckless operation of aircraft,[7] were preempted and that matters outside the preempted field, such as state products liability laws, would only be preempted if they conflict with a federal standard:

> Today we … hold that neither the [Act] nor the issuance of a type certificate *per se* preempts all aircraft design and manufacturing claims. Rather, subject to the traditional principles of conflict preemption, including in connection with the specifications expressly set forth in a given type certificate, aircraft products liability cases … may proceed using a state standard of care.[8]

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[1] *See Sikkelee v. Precision Airmotive Corp., et al.*,___ F.3d ___, 2016 WL 1567236, No. 14-4913, 2016 US App LEXIS 7015 (3d Cir, 19 April 2016) [*Sikkelee*], online: Plane-ly Spoken <www.planelyspokenblog.com/wp-content/uploads/2016/04/144193p.pdf#page=26&zoom=auto,-265,551>

[2] *Federal Aviation Act of 1958,* Pub L 85-726, 72 Stat 731 [*FAA Act*].

[3] *See also* Steven R Pounian and Justin T Green, *Third Circuit Limits Scope on Federal Preemption in Aviation Cases,* NYLJ (28 April 2016).

[4] *See Abdullah v. American Airlines, Inc.,* 181 F.3d 363 (3d Cir, 1999) [*Abdullah*].

[5] *See Elassaad v. Independence Air., Inc.*, 613 F.3d 119 (3d Cir, 2010).

[6] *See Abdullah, supra* note 4 at 363.

[7] *See* 14 CFR § 91.13(a).

[8] *See Sikkelee*, *supra* note 1 at *1.

Given *Abdullah's* tremendous influence and because the Third Circuit has now substantially narrowed *Abdullah's* reach, it is necessary to take a fresh look at the jurisprudence on federal preemption of aviation safety standards and to consider an appropriate new approach to determining the circumstances necessary for US federal law to preempt state tort liability standards in aviation cases.

II. HISTORICAL BACKGROUND

The notion that US federal law should preempt state law goes back to the founding of the United States. Federal preemption was a subject of two federalist papers[9] and it was addressed in the Articles of Confederation: "[e]very state shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them".[10] The basis for federal preemption over state law is now found in the US Constitution's Supremacy Clause:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land; and the judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.[11]

In 1796,[12] the US Supreme Court relied on the Supremacy Clause for the first time to strike down a State's statute. The Commonwealth of Virginia had passed a law during the Revolutionary War allowing the Commonwealth to confiscate debt payments to British creditors. The Court found that the law was inconsistent with the Treaty of Paris between the newly formed United States and Great Britain, which protected the rights of British creditors. The Court held that the Treaty superseded the Virginia statute and, accordingly, the statute was "null and void."[13]

[9] The Federalist No. 17 (Alexander Hamilton) (Describing power that should be "lodged in the national depository" includes "commerce, finance, mediation and war".); No. 44 (James Madison) (Without a supremacy clause "the authority of the whole society would be subordinate to the authority of its parts it would have seen a monster in which the head was under the direction of its members".).
[10] 5 Journals of the Continental Congress 125 (W Ford E, 1906).
[11] U S Constitution, art IV.
[12] *See Ware v. Hylton*, 3 US 199 (1796).
[13] *Ibid* at 237.

III. FEDERAL PREEMPTION OF AVIATION TORT STANDARDS

In aviation, implied federal preemption of state law tort liability standards is a modern phenomenon and courts addressing it have primarily based their decisions on the 1958 Act. Congress passed the Act in response to a series of midair collisions between civil and military aircraft that were operating under different flight rules.[14] Its principal purpose was to establish a new federal agency, the FAA, with powers necessary "to enable it to provide for the safe and efficient use of the navigable airspace by both civil and military operations".[15]

Congress did not expressly preempt state tort law when it passed the Act. In fact, Congress included a savings clause in the Act, which provided that "[a] remedy under this part is in addition to any other remedies provided by law".[16] In 1978, Congress passed the Airline Deregulation Act (ADA) via an amendment to the Act.[17] Unlike the 1958 Act, the ADA contains a limited express preemption provision that prevents states from enacting "a law, regulation, or other provision having the force and effect of law relating to price, route or service of any air carrier…".[18] Congress amended the Act again in 1994 when it passed the General Aviation Revitalization Act (GARA). GARA is a statute of repose that protects the light aircraft industry by precluding civil lawsuits against manufacturers of light aircraft or component parts that have been in service for more than eighteen years.[19] Thus, GARA is a limited express preemption of state statutes of limitations for such lawsuits.

The 1958 Act granted the FAA authority to prescribe minimum standards for aircraft safety.[20] The FAA issues FARs that contain the minimum standards. The FARs are codified in Title 14 of the Code of Federal Regulations and address a variety of issues including general aviation, charter aircraft operations, commercial airline operations, insurance and economic matters, airport operations, noise standards, airspace management and, relevant to this article, aircraft safety.[21] All aspiring pilots must seek and obtain airmen certificates from the FAA and the FAA must certify that every airplane, helicopter and aircraft component meets the federal minimum standards before they may be sold.[22]

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[14] HR Rep No. 2360, 85th Cong, 2d Session, 1958 WL 3975 (Leg Hist).
[15] *Ibid.*
[16] 49 USC § 40120(c).
[17] 49 USC § 41713.
[18] 49 USC § 41713(b).
[19] 49 USC § 40101 Note, Pub L 103-298 (1994).
[20] 49 USC § 44701.
[21] *See* CFR Title 14 – Aeronautics and Space.
[22] *See* 14 CFR § 61.3 (requirements for pilot certificates, ratings and authorizations); 14 CFR Part 21 (certifications procedures for aviation products).

The FAA does not have the resources necessary to complete all required flight inspections and certifications on its own and, as a result, designates check airmen who are not FAA employees to perform the required check flights and to certify the competence of pilots.[23] The FAA similarly designates individuals and even entire companies with the authority to certify that an aircraft or its component parts meet the federal minimum standards.[24] Accordingly, a defendant aviation manufacturer's employee may have certified on behalf of the FAA that the aviation product at issue in a products liability case met the federal minimum standards.

An FAR that is central to the federal preemption analysis is FAR 91.13(a), which prohibits the careless or reckless operation of aircraft.[25] This has been described by numerous courts as a general standard of care.[26] Its scope, however, is limited to in-flight operations. In other areas, such as aircraft design, the FAA has not established a general standard of care. So while there may be numerous regulations with specific requirements relating to the design and manufacture of aircraft and their components, no federal regulation prohibits the manufacture of a defective or unusually dangerous aviation product or requires that manufacturers use reasonable care in carrying out their responsibilities.

Both before and after the Act, aviation tort cases were decided under state law.[27] The line of cases finding broad field preemption over matters concerning aviation safety is a fairly recent phenomenon, but it all started with the Supreme Court's 1973 decision in *City of Burbank v. Lockheed Air Terminal, Inc.*[28]

A. CITY OF BURBANK V. LOCKHEED AIR TERMINAL, INC.

City of Burbank involved an action brought by the owner and operator of an airport and an interstate air carrier against the city and certain city officers for judgment declaring that a city noise ordinance was invalid. In a 5-4 decision, the Supreme Court held that Congress preempted the field of airspace management and that the imposition of airport curfews by local airport authorities "would have the twofold effect of increasing an already serious congestion problem and actually increasing, rather than relieving, the noise problem by increasing flights in the period of greatest annoyance to surrounding communities".[29] The Court found the "pervasive nature of the scheme of federal regulation of aircraft noise" as a main reason for its finding of preemption.[30] Though *Burbank* had nothing to do with tort standards, later courts used its reasoning to

[23] 49 USC § 44702(a); 14 CFR part 183.
[24] *Ibid.*
[25] 14 CFR § 91.13(a).
[26] *See Abdullah, supra* note 4 at 365.
[27] *See Cleveland v. Piper Aircraft Corp.,* 985 F.3d 1438, 1447 (10th Cir, 1993), abrogated on other grounds by *U.S. Airways v. O'Donnell*, 627 F.3d 1318 (10th Cir, 2010).
[28] *See City of Burbank v. Lockheed Air Terminal, Inc.,* 411 US 624 (1973).
[29] *Ibid* at 627.
[30] *Ibid* at *633*.

support decisions preempting state tort law.

B. THE "INTERREGNUM" – FROM *BURBANK* TO *ABDULLAH*

Kohr v. Allegheny Airlines, Inc.,[31] which the Seventh Circuit Court of Appeals handed down shortly after the Supreme Court's *City of Burbank* decision, involved claims arising from a mid-air collision. The District Court dismissed indemnity and contribution claims by applying Indiana law.[32] The Seventh Circuit held that the federal rule of contribution and indemnity must apply because of the "prevailing federal interest in uniform air law regulation".[33] In reaching its conclusion, the Court emphasized the federal control of aviation:

> Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams; it may be diverted from an intended landing, and it obeys signals and order. Its privileges, rights and protection, so far as transit is concerned, owes to the Federal Government alone and not to any state government.[34]

In other words, the federal government owns the airspace of the US and state rules that intrude into the preempted field will not have effect.

In *French v. Pan Am*,[35] a 1989 decision, the First Circuit Court of Appeals held that the Act preempted a Rhode Island statute that regulated when an employer may compel an employee to submit to a drug test. Mr. French was a Pan Am pilot who had a run in with local police. The police contacted the airline and informed it that French had likely used marijuana while he was off duty. The airline promptly ordered French to undergo a drug test, but he refused based on the protections offered by Rhode Island law, which required reasonable grounds to believe that drug use was "impairing the ability to perform his job" and required any testing to be conducted in conjunction with a rehabilitation program.[36] The airline was "unimpressed" by French's objections to submitting to a drug test and fired him.[37]

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[31] *See Kohr v. Allegheny Airlines, Inc.,* 504 F.2d 400 (7th Cir, 1974).
[32] *Ibid* at 403.
[33] *Ibid.*
[34] *Ibid* at 404.
[35] *See French v. Pan Am,* 869 F.2d 1 (1st Cir, 1989).
[36] *Ibid* at 2.
[37] *Ibid.*

French then sued Pan Am, but the District Court granted airline's motion to dismiss. In affirming the District Court, the First Circuit noted that where Congress had not expressly preempted state law, its intent to do so

> may be inferred where the pervasiveness of the federal regulation precludes supplementation by the State, where the federal interest in the field is sufficiently dominant or where 'the object sought to be obtained by the federal law and the character of obligations imposed by it … reveal the same purpose'.[38]

The Court further explained that where Congress has not expressly or even impliedly displaced state regulation in a field entirely, state regulation that conflicts with federal law would still be displaced.[39] The Court found a broad delegation of authority to the FAA in the area of pilot qualifications and fitness and that "[t]he intricate web of statutory provisions affords no room for the imposition of state law criteria vis-à-vis pilot suitability".[40] The Court thus found that the FARs regarding pilot fitness supported a finding that Congress intended to preempt state law in the field.

While *French* could have been decided on conflict grounds – in which the federal rule permitting drug testing of pilots would triumph over the conflicting state law restricting employee drug testing – the Court instead found implied field preemption in the field of pilot qualifications and fitness. In so doing, the Court concluded that in that preempted field all state regulation is displaced even if it does not conflict with federal law.[41] *French*, however, was not a tort case and did not involve tort standards of care.

Then in 1993, the Tenth Circuit Court of Appeals in *Cleveland v. Piper Aircraft Corp.*[42] held that the Act and the FARs did not preempt state products liability claims that a Piper Cub airplane had insufficient forward visibility and inadequate safety belts. The Court reasoned that the "[m]inimum standards [of the FARs] ... are not conclusive of Congress' preemptive intent" and that the FARs did not mandate how a manufacturer should comply with the safety matters at issue in the case. The Court began its analysis by refuting Piper's claims that the Act, and "the regulation it has spawned", impliedly preempted state tort actions by occupying the entire field of aviation:

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[38] *Ibid.*
[39] *Ibid* at 4.
[40] *Ibid.*
[41] *Ibid.*
[42] *See Cleveland v. Piper Aircraft Corp., supra* note 27, abrogated by *U.S. Airways v. O'Donnell,* 627 F.3d 1318 (10th Cir, 2010).

> The mere fact that Congress has enacted detailed legislation addressing a matter of dominant federal interest does not indicate intent to displace state law entirely. Congress may reserve for the federal government the exclusive right to regulate safety in a given field, yet permit the states to maintain tort remedies covering much the same territory.[43]

Importantly, the Court emphasized the large amount of discretion that the FARs leave to air carriers, and, by analogy, aircraft manufacturers.[44] The Court also recognized the significance of the Act's saving clause, stating:

> By its very words, the statute leaves in place remedies then existing at common law or by statute. Tort liability for design defects was established in the law of many states by the late 1950s and had been extended to airplane crash cases. There is nothing inconsistent with Congress' goal of maximum safety and common law claims.[45]

To bolster its conclusion, the Court discussed the effect of the ADA's express preemption provision. Relying on the tool of statutory interpretation, *expressio unius est exclusion alterius*, the Court found that the inclusion of the express preemption clause in the ADA necessarily meant that any matter not related to a price, route or service was not preempted.[46]

Cleveland also emphasized that the Act authorizes the promulgation of merely "minimum standards", and noted that such standards by themselves do not indicate Congress' preemptive intent.[47] Instead, the Court found that allowing state tort claims to exist simultaneously with minimum standards was consistent with the general purpose of the Act of promoting safety. [48]

In 1993, the Eleventh Circuit Court of Appeals came to the same conclusion as the *Cleveland* court in *Public Health Trust of Dade Co. v. Lake Airways*,[49] holding that state law claims that an aircraft seat was defectively designed were not preempted by federal law.[50] The Eleventh Circuit held that claims outside the scope of the ADA's express preemption clause could not be impliedly preempted. The Court noted the limited scope of the clause, which it found indicated congressional intent that state law would not be displaced in matters that were not expressly preempted.[51]

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[43] *Ibid* at 1441.
[44] *Ibid*.
[45] *Ibid* at 1443
[46] *Ibid.*
[47] *Ibid* at 1442-43 (internal citations omitted).
[48] *Ibid* at 1445.
[49] *See Public Health Trust of Dade Co. v. Lake Airways*, 992 F2d 291 (11th Cir, 1993).
[50] *Ibid* at 295.
[51] *Ibid* at 293; but *see U.S. Airways v. O'Donnell*, 627 F.3d 1318 at 1326 (10th Cir, 2010).

C. *ABDULLAH V. AMERICAN AIRLINES*

Six years after the Tenth and Eleventh Circuits concluded that state law based product liability claims were not preempted by the Act, the Third Circuit Court of Appeals considered a similar – but not identical – issue in *Abdullah v. American Airlines*. In *Abdullah*, the plaintiffs were passengers on a flight from New York to Puerto Rico and sustained injuries when the aircraft encountered severe turbulence. The plaintiffs alleged that the pilot and flight crew were negligent in failing to take reasonable precautions to avoid or warn passengers of the turbulent flight conditions.[52]

The District Court certified a broad issue for appeal: "Does federal law preempt the standards for air safety but preserve State and Territorial Damage remedies."[53] The Third Circuit answered yes.

Abdullah rejected the more measured approaches of other courts, which had not found preemption or had restricted the preempted field to "discrete aspects" of aviation safety, and declared "implied federal preemption of the entire field of aviation safety".[54] The Court based its decision on what it saw as "complete and thorough safety standards for interstate and international air transportation" in the Act and FARs.[55] These standards, the Court found, may not be supplemented by state law.[56]

The *Abdullah* court relied heavily on the presence of what it saw as a federal standard of care in FAR 91.13(a), prohibiting careless or reckless conduct when operating aircraft.[57] As a result of FAR 91.13(a) the Court found that not only did the FARs have specific requirements, but it had a general standard of care as well.[58] The *Abdullah* court held that state law liability standards were preempted because the Act and the regulations promulgated under the Act occupied the "entire field of aviation safety".[59] The Court reasoned that preemption does not flow from the wording of any specific regulations, but is derived from "the overall concept that aircraft may not be *operated* in a careless or reckless manner". The Court concluded:

> that because of the need for one consistent means of regulating aviation safety, the standard applied in determining if there has been careless or reckless *operation* of an aircraft should be federal; state or territorial regulation is preempted.[60]

[52] *Abdullah, supra* note 4 at 365.
[53] *Ibid* at 364.
[54] *Ibid* at 365.
[55] *Ibid* at 367.
[56] *Ibid.*
[57] *Ibid* at 371.
[58] *Ibid.*
[59] *Ibid* at 375.
[60] *Ibid* at 371-372.

Abdullah's focus on state common law claims of negligence and recklessness in the flight crew's operation of a flight demonstrates its inapplicability to cases involving products liability claims despite its broad and sweeping holding that the entire field of aviation safety was preempted. Importantly, *Abdullah* did not consider the intent of Congress, as expressed in GARA, to preserve and not preempt state law product liability claims subject to an 18 year statute of repose. Nevertheless, *Abdullah* gave birth to a modern era of broad implied field preemption decisions in aviation cases.

IV. POST-*ABDULLAH* FEDERAL PREEMPTION DECISIONS

In *Witty v. Delta Airlines,*[61] the plaintiff passenger brought various state law claims against an airline for damages suffered from deep vein thrombosis (DVT). These claims included that the airline failed to warn passengers about the risk of DVT, failed to provide adequate leg room to prevent DVT and failed to instruct passengers to walk around the cabin during a flight.[62]

Unlike *Abdullah*, the Fifth Circuit decided the case by "narrowly addressing the precise issues" before the Court.[63] *Witty* dismissed the state law claims at issue because it found that they necessarily conflicted not only with the ADA, which bars states from imposing laws related to airline prices, routes or services, but also with the FAA's specifications for the warnings that an airline must provide to passengers.[64] The plaintiffs' arguments for any enhanced warnings that would have highlighted the DVT risk and advised passengers to not remain immobile during flight conflicted with the FAA's determination that passengers are safer remaining seated during flights. In essence, *Witty* found that the Act and the FARs had occupied the narrow field of in-flight passenger warnings by issuing relevant, specific and comprehensive regulatory requirements.

In *Greene v. B.F. Goodrich Avionics System, Inc.*,[65] the Sixth Circuit followed *Abdullah* and broadly held that the plaintiff's state law products liability claims were preempted by federal law.[66] The Court offered little analysis in support of its conclusion. Interestingly, while it held that federal law preempted state law regarding a failure to warn claim, it applied a state law analysis to the claim that a navigational instrument was defective.[67]

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[61] *See Witty v. Delta Airlines,* 366 F.3d 380 (5th Cir, 2004).
[62] *Ibid* at 385.
[63] *Ibid.*
[64] *Ibid.*
[65] *See Greene v. B.F. Goodrich Avionics System, Inc.,* 409 F.3d 784 (6th Cir, 2005).
[66] *Ibid* at 794.
[67] *Ibid* at 796.

In *Montalvo v. Spirit Airlines*,[68] passengers who suffered deep vein thrombosis in flight sued airlines based on their failure to warn and for configuring the airplane with too many seats so that passengers did not have sufficient room to move around during flight. Rejecting those claims, the Ninth Circuit held that

> [t]he [Act] and FARs impliedly preempt plaintiffs' failure to warn claim because the [the Act] preempts the entire field of aviation.... The [Act] and regulations promulgated pursuant to it establish complete and thorough safety standards for air travel, which are not subject to supplementation by, or variation among, state law…. Because the [Act] preempts the entire field of aviation safety … the airlines are under no obligation to warn of the risk of developing DVT, absent a federal mandate to do so.[69]

The Court found that because the FAA did not issue a FAR requiring that the airline warn passengers about the risk of DVT, the case must be dismissed.[70] *Montalvo*, like *Abdullah* and *Witty*, noted that the FAA included a standard of care for operations in FAR 91.13(a),[71] but did not discuss whether the general standard of care would apply to the failure to warn claims at issue in the case, nor did it consider whether the Act could be found to preempt state standard of care in areas where the FARs did not include a general standard of care or where there are gaps in the federal minimum standards established by the FARs.

Two years later, the Ninth Circuit ruled against preemption in *Martin v. Midwest Express Holdings, Inc.*[72] There, the Ninth Circuit held that the Act did not preempt state laws over the plaintiff's claim that an airplane's stairs had been defectively designed because they did not include two handrails. The plaintiff was a pregnant woman who fell while deplaning, hurting herself and her foetus. The Court noted that prior to *Abdullah* courts had addressed federal preemption in aviation cases by examining the "pervasiveness of federal regulations in the specific area covered by the tort claim or state law at issue".[73] It rejected a broad approach to preemption and stated that its prior decision in *Montalvo* rested on the FAA's pervasive regulations of the warnings that must be provided to passengers and observed that it had not held that the Act preempted plaintiff's claim regarding the tight aircraft seating. (*Montalvo,* like *Witty*, had relied on the ADA's express preemption clause to find that claims alleging that tight seating conditions in economy class caused DVT in passengers were preempted because removing seats to provide more passenger room would affect ticket prices.)[74] The *Martin* court held that state standards applied in areas where the FAA had not issued pervasive

[68] *See Montalvo v. Spirit Airlines*, 508 F.3d 464 (9th Cir, 2007).
[69] *Ibid* at 468.
[70] *Ibid* at 467.
[71] *Ibid* at 472.
[72] *See Martin v. Midwest Express Holdings, Inc.,* 555 F.3d 806 (9th Cir, 2009).
[73] *Ibid* at 809.
[74] *Ibid* at 810.

regulations. Because the FAA had not pervasively regulated the design of aircraft stairs, state products liability laws governed whether the stairs were defective.[75]

Eleven years after *Abdullah,* the Third Circuit Court of Appeals revisited preemption in *Elassaad v. Independence Air, Inc.*[76] and limited *Abdullah's* reach. *Elassaad* addressed the common law negligence claims of a passenger who fell down aircraft stairs while deplaning. The airline moved for summary judgment arguing that "the controlling standard of care, dictated by federal law, obligates an airline to provide assistance only upon request" and it was undisputed that the passenger did not request assistance.[77] Applying *Abdullah*, the District Court dismissed the action, but the Third Circuit reversed, holding that the implied field preemption upon which *Abdullah* was premised was limited to an airline's "in-flight safety… operations for the purpose of air navigation," and did not impact state common law claims based on tortious conduct on the ground.[78] In *dicta*, however, the Court broadly defined the field of in-flight safety to include anything that could affect the safety of an airplane in flight. The court suggested that the field would include issues related to products liability.[79] Thus the *dicta* suggested that the preempted field extended not only to claims related to aircraft operations, where FAR 91.13(a) provided a general standard of care, but even to claims where it did not apply.

The Tenth Circuit Court of Appeals relied on *Abdullah* when revisiting aviation preemption in *US Airways v. O'Donnell,*[80] and abrogated its *Cleveland* ruling. In *O'Donnell*, US Airways sued to enjoin New Mexico from regulating the service of alcohol aboard aircraft on flights. US Airways argued that the Act and FARs occupy the entire field of aviation safety to the exclusion of all state regulation.[81]

In *O'Donnell*, a passenger who had allegedly been served alcohol on a flight caused a fatal car crash about three hours after deplaning. After the crash, the driver's blood alcohol level was tested to be over three times the legal limit. A New Mexico state agency issued a citation to US Airways for serving alcohol to an intoxicated person in violation of state law. US Airways argued for both express preemption under the ADA, which prohibits state regulation of airline services, and implied regulation under the 1958 Act. The Tenth Circuit held that the matter at issue implicated the field of aviation safety, which Congress had intended to preempt by passing the 1958 Act.[82] The *O'Donnell* court broadly identified the legislative field into which the regulation of alcoholic beverages

[75] *Ibid* at 813.
[76] *See Elassaad v. Independence Air, Inc.,* 613 F.3d 119 (3d Cir, 2010).
[77] *Ibid* at 123.
[78] The Third Circuit found it unnecessary to consider whether the Supreme Court decision in *Wyeth v. Levine,* 550 US 555 (2009) overruled *Abdullah* because "*Abdullah* [did] not apply to the facts of this case". *Ibid* at 127, note 7.
[79] *Ibid.*
[80] *See U.S. Airways v. O'Donnell, supra* note 51.
[81] *Ibid* at 1320.
[82] *Ibid* at 1324.

fell as aviation safety.[83]

O'Donnell also held that the "presumption against preemption" does not apply in the field of aviation safety because the field has been dominated by federal interests.[84] In distinguishing *Cleveland,* the Court noted that its prior decision had relied "in significant part, on the premise that 'implied preemption is generally inapplicable to a federal statute that contains an express preemption provision'".[85] The Court noted that the Supreme Court had rejected that reasoning in *Geier v. Am. Honda Motor Co., Inc.*,[86] and, therefore, found that it need not follow *Cleveland.*

The *O'Donnell* court then found that the Act's purpose to centralise aviation safety and the comprehensive regulatory scheme promulgated pursuant to the Act supported a conclusion that federal law preempts the field of aviation safety to the exclusion of state regulation. The Court noted the breadth of the federal regulation in aviation and cited the "general standard of care" for operating an aircraft found in FAR 91.13(a).[87] The Court also noted that the FAA had issued a specific regulation addressing airlines' alcoholic beverage services, but instead of considering whether New Mexico's regulation conflicted with the federal alcohol regulation, or even considering the preempted field as one related to the service of alcohol, the Court broadly defined the preempted field as the entire field of aviation safety.[88] The Court found that service of alcohol on the airplane implicated aviation safety citing the air safety considerations found in FARs and that New Mexico could not regulate an airline's service of alcohol on board airplanes.[89]

The next year, in 2011, the Second Circuit Court of Appeals joined the preemption wave in *Goodspeed v. East Haddam Inland Wetlands & Watercourses Commission*.[90] In *Goodspeed*, the Second Circuit announced that it was joining its "sister circuits" in finding that "Congress intended to occupy the field of air safety" when it enacted the Act. The Court, however, did not find preemption under the facts of the case.

Goodspeed was a declaratory judgment action brought by a private airport against the town's wetlands commission and its enforcement officer. The airport wanted to cut down trees located in protected wetlands without applying for a permit and asserted that federal aviation law preempted the relevant state environmental law. While finding that the entire field of air safety was impliedly preempted, the Court held that the state laws requiring permits before removing trees did not intrude into the field. If the state had denied the airport a permit to remove trees that under federal aviation regulations the

[83] *Ibid.*
[84] *Ibid* at 1325.
[85] *Ibid* at 1326.
[86] *See Geier v. Am. Honda Motor Co., Inc.*, 525 US 861, 873 (2000) ("[T]he express preemption provision imposes no unusual, 'special burden' against [implied] preemption").
[87] *See U.S. v. O'Donnell, supra* note 79.
[88] *Ibid* at 1327 (citing *Cleveland v. Piper Aircraft Corp., supra* note 27 at 1443).
[89] *Ibid* at 1330.
[90] *See Goodspeed v. East Haddam Inland Wetlands & Watercourses Commission*, 634 F.3d 206 (2d Cir. 2011).

airport was obligated to remove, the court noted that the agency would have lost on the basis of conflict preemption.[91]

Goodspeed led to a broad preemption decision in litigation arising from the 12 February 2009 crash of Continental Connection Flight 3407 in Clarence Center, New York.[92] In that case, the plaintiffs alleged that the airline was negligent in entrusting the safety of the passengers to the hands of a flight captain who was not ready to safely pilot the airplane despite having a license and aircraft rating. Following *Abdullah* and *Goodspeed,* the District Court held that state law was displaced even though the alleged wrongdoing at issue did not involve aircraft operation and was, accordingly, outside the scope of FAR 91.13(a).[93] The Court found that state negligence standards were preempted even though FAR 91.13 did not apply to the claims at issue and in the absence of an analogous federal general standard of care, despite the argument that this would protect an airline from liability for putting a pilot that it knew was not safe in the cockpit, as long as that unsafe pilot had a license and a type rating.[94] All the Continental Connection Flight 3407 cases settled so the Second Circuit did not have occasion to hear an appeal of the District Court's decisions.

With a majority of the federal Court of Appeals following *Abdullah,* the Third Circuit Court of Appeals revisited the question of federal preemption in aviation earlier this year.

V. *SIKKELEE V. PRECISION AIRMOTIVE CORP.*

A. THE DISTRICT COURT

On 10 July 2005, David and Craig Sikkelee took off in a 1967 Cessna 172N airplane from Transylvania County Airport in Brevard, North Carolina. The airplane lost power shortly after takeoff and crashed. A post-crash fire destroyed the airplane. David Sikkelee, the airplane's pilot, was killed, and his brother Craig was seriously injured. Jill Sikkelee, David's widow, filed a products liability action in Pennsylvania, where a critical aircraft component manufacturer was located. Plaintiff alleged the loss of power was caused by the airplane engine's allegedly defective carburetor. Three years into the litigation, the District Court granted partial summary judgment dismissing plaintiff's design defect claims, relying on *Abdullah*'s broad preemption ruling. The District Court held that the Act preempted state products liability standards and that the plaintiff must prove her claim by showing that the allegedly defective carburetor did not meet relevant federal minimum standards. The District Court further found that federal preemption in

[91] *Ibid (citing Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153-54 (1982) for the proposition that federal regulations are as preemptive as federal statutes).
[92] *See In Re Air Crash Near Clarence Center, New York* on February 12, 2009, 798 F.Supp. 481 (W.D.N.Y. 2011).
[93] *Ibid* at 485.
[94] *Ibid* at 490; *see also In Re: Air Crash Near Clarence Center, New York,* on February 12, 2009, 09-md-2085, Unpublished Decision and Order, November 6, 2013 at pp.7-9.

the field of aviation safety does not require there to be applicable federal minimum standards that would govern the conduct at issue and that there is no need for the court to fill gaps in the federal regulations with an "overall concept" of due care.[95] The court decided that it must apply only those regulations that the FAA issued, leaving unfilled any gaps in the federal minimum standards.[96]

The District Court's partial summary judgment barred the plaintiff from attempting to prove in a court that the defendant violated the FARs that applied to the carburetor because the FAA had determined that the component met those standards when it certified the engine. In the Court's view, the FAA's determination that the aviation product met the federal minimum standards was final; the only avenue left to plaintiff was if she could show that the defendant violated its duty to report known engine defects to the FAA.[97]

It is notable that the District Court's decision in *Sikkelee* was that federal law completely preempts state products liability law standards even if the FAA has not established any FARs concerning the design at issue.[98] A manufacturer could be completely immune from liability for unsafe design features that were never considered by the FAA if the design at issue falls into one of the unfilled gaps in the federal minimum standards.

B. THE THIRD CIRCUIT

Plaintiffs in *Sikkelee* appealed to the Third Circuit. On appeal, the Third Circuit asked the FAA to submit an amicus brief answering three questions:

1. What is the scope of field preemption under the Federal Aviation Act? Specifically, does the preempted field include tort claims based on alleged defective design or manufacturing? Is the FAA's position on this issue consistent with its amicus submission in *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993) (No. 91-2065), or has it changed based on factors such as the enactment of the General Aviation Revitalization Act of 1994, the increased delegation of type certificate testing, and the continued litigation of aviation products liability cases under traditional state law standards? (A type certificate is the formal document issued by the FAA to certify that the aircraft or component satisfied the FAA's minimum airworthiness standards).

[95] *See Sikkelee v. Precision Airmotive Corp.*, 45 F.Supp. 3d. 431, 449 (MD Pa, 2014), reversed, *Sikkelee v. Precision Airmotive Corp., supra* note 1.
[96] *Ibid* at 445.
[97] *Ibid* at 448.
[98] *Ibid* at 456-57.

2. If such tort claims fall within the preempted field, may they nonetheless proceed using a federal standard of care? If so, what is that standard and where is it found within the statute or regulations?

3. What weight, if any, should be accorded to the issuance of a type certificate in determining if the relevant standard of care has been met?[99]

On 21 September 2015, the FAA submitted a letter brief in which it asserted that "the [Act] implicitly preempts the field of aviation safety … [and that] while the [A]ct does not preempt state tort suits, federal standards govern state tort suits based on design defects in aviation manufacturing".[100] This is the same position that the FAA took in its amicus submission in *Cleveland*, which the Tenth Circuit rejected as lacking statutory support.[101]

The FAA, however, asserted that the type certificate does not create a *per se* bar to suit. Instead, whether a plaintiff's claim is in the FAA's words "preempted" – in effect completely barred by the type certificate - is determined by ordinary conflict principles. Thus,

> Where 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 therefore be preempted.[102]

Where the FAA leaves design choice to a manufacturer's discretion and no other conflict exists, the type certificate would not bar an aviation victim from seeking to hold a manufacturer liable for a design that allegedly did not comply with the federal minimum standards.[103]

The Third Circuit rejected both the defendants' and the FAA's positions on preemption and found no implied field preemption outside the scope of in-flight operations to which FAR 91.13(a) applies:

[99] *Sikkelee v. Precision Airmotive Corp.*, No. 14-4193, Court Order of 17 June 2015.
[100] *FAA Letter brief of September 21, 2015 to Marcia M. Waldron, Clerk of Court for the United States Court of Appeals for the Third Circuit* at 2, online: Aviation Insurance Associate <www.aiaweb.org/PDF/2016AnnualConference/Don-Andersen-Handout-2.pdf>.
[101] *Ibid* at 2, 9.
[102] *Ibid* at 3.
[103] *Ibid.*

> Importantly for our purposes, although we stated in broad terms [in *Abdullah]* that the [Act] preempted the 'field of aviation safety,' …. the regulations and decisions we discussed in *Abdullah* all related to in-air operations …and the catch-all standard of care that we held a court 'must refer to' applied only to operating, not designing or manufacturing an aircraft.[104]

The Third Circuit continued:

> *Abdullah* …. does not govern products liability claims like those at issue here…. [P]roducts liability claims are not subject to the same catch-all standard of care that motivated our field preemption decision in *Abdullah*; the design regulations governing the issuance of type certificates are not as comprehensive as the regulations governing pilot certification, pilot pre-flight duties, pilot flight responsibilities, and flight rules discussed there; and our post-*Abdullah* case law cautions us against interpreting the scope of the preempted field too broadly.[105]

The Court rejected its own *dicta* in *Elassaad* that suggested the preempted field encompassed "the certification and airworthiness requirements for aircraft parts".[106] The Court cited, with approval, the Ninth Circuit's *Martin* decision that products liability was outside the federally preempted field.[107]

Sikkelee further found that the presumption against preemption applies in aviation tort cases.[108] In so doing, the Court disagreed with the Tenth Circuit's finding in *O'Donnell* that the presumption against preemption did not apply in aviation.[109] The Third Circuit found "no evidence" in the Act's text or legislative history to suggest that Congress intended that the type certification process would preempt state products liability laws.[110] It also found that the FARs relating to aviation design were "devoid of evidence of congressional intent to preempt state law products liability claims".[111] It noted the FAA's "inability to specifically identify or articulate" a relevant federal standard of care.[112]

Accordingly, the Court disagreed with the FAA's position that the Act and the relevant FARs "so pervasively occupy the field" that state tort suits must proceed only under the federal standard of care expressed in the regulations.[113] The Court first found that the regulations governing design, production and airworthiness approvals and airworthiness certificates do not purport to govern the manufacture and design of aircraft

[104] *Sikkelee, supra* note 1 at 17.
[105] *Ibid* at 18.
[106] *Ibid.*
[107] *Ibid* at 18-19, note 6.
[108] *Ibid* at 31.
[109] *Ibid* at 54-56.
[110] *Ibid* at 26.
[111] *Ibid* .
[112] *Ibid* at 28.
[113] *Ibid* at 26.

per se or to establish a general standard of care, but rather establish procedures for manufacturers to obtain certain approvals and certificates from the FAA.[114] Second, the Court found that the standards for the issuance of type certificates were not "the type of 'comprehensive system of rules and regulations'" that the Court had found in the area of in-flight safety in *Abdullah*.[115] Third, it found that there is no analogous regulation in the products safety area as FAR 91.13(a), which prohibits the careless or reckless operation of an airplane.[116]

In a remarkable statement, the Court held that the Act should not be interpreted in a "way that would have 'the perverse effect of granting complete immunity from design defect liability to an entire industry that, in the judgment of Congress needed more stringent regulations".[117] The Court found that GARA reinforces its conclusions that federal law does not preempt state law and that Supreme Court jurisprudence did not support such a finding.[118]

The Court concluded that:

> [t]ype 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 or 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 preemption principles.[119]

What *Sikkelee* means is that in aviation products liability cases state products liability standards are not displaced unless they conflict with a federal standard or a specific provision in an FAA certificates. There is no implied field preemption under the Act in the field of aviation products safety.

VI. POST-*SIKKELEE* PREEMPTION

It is worth considering two undeniable facts to understand aviation preemption post-*Sikkelee*. The first is that Congress passed the Act to improve safety. Congress was particularly concerned with in-flight safety rules because of accidents involving aircraft operating under different flight rules. The Act is not a tort reform measure, and courts should avoid any preemption finding that reduces or eliminates safety standards because to do so would be inconsistent with Congress' intent to improve safety.[120] The second

[114] *Ibid* at 28.
[115] *Ibid* at 29.
[116] *Ibid* at 30.
[117] *Ibid* at 31.
[118] *Ibid* at 42.
[119] *Ibid* at 46-47.
[120] *Ibid* at 22-23.

important fact is that the Act authorizes the FAA to issue regulations that establish minimum standards for aviation.[121] Congress neither created a federal cause of action nor established a comprehensive federal standard of care in the Act. Moreover, Congress did not require the FAA to issue FARs that would provide a comprehensive federal standard of care. The *Abdullah/Sikkelee* implied field preemption analysis is based largely on the fact that FAR 91.13(a) reads like a general standard of care. FAR 91.13(a) is the cornerstone of *Abdullah's* implied field preemption, and without it the Third Circuit almost certainly would have applied an ordinary implied conflict preemption analysis to determine the appropriate standard of care in the case.

In all preemption cases, in particular those in fields that states have traditionally occupied, such as tort standards, the court must find that preempting state law was a clear and manifest intention of Congress.[122] The presumption against preemption protects the principle of limited federal government so important to the US founding fathers and a guiding feature of the US Constitution. It would be foolish, however, to argue that the Act has no preemptive effect over state standards of care. The Act provides broad authority to the FAA to issue minimum aviation standards; any state regulation or liability standard that conflicts with the FARs will be null and void. A defendant cannot be held liable under state law for complying with a federal requirement.[123] If, however, the defendant can comply with the federal standard and meet its responsibilities under state products liability law there is likely no conflict and the state standard would not be displaced. Ordinary conflict preemption is consistent with the Act's goal of improving safety because it maximizes safety standards with state law filling any gaps in the federal minimum standards.

The ultimate question is whether Congress intended to preempt the entire field of aviation safety when it centralized control of aviation and authorized the FAA to issue minimum safety standards. Recent Supreme Court jurisprudence suggests that that implied field preemption in aviation will not survive a trip to the Supreme Court.

The Supreme Court has not directly addressed the issue of preemption under the Act since its 1974 *City of Burbank* decision and has never ruled on the Act's preemption of state tort standards. Since *Abdullah* ignited the flood of lower court preemption decisions the Supreme Court has been reluctant to find preemption of state law in other areas. This reluctance is notable in the Supreme Court's 2009 decision *Wyeth v. Levine.*[124]

In *Wyeth*, the plaintiff alleged that the label on the drug Phenergan failed to warn against the danger of intravenously administering the drug with an IV-push, which resulted in a patient developing gangrene and losing her arm. Having abandoned its

[121] *Ibid* at 24.
[122] *Ibid* at 19, 23.
[123] *See Sprietsma v. Mercury Marine*, 537 US 51, 65 (2002) (where it is impossible to comply with a federal regulation without incurring liability under state law the state law is preempted).
[124] *See Wyeth v. Levine*, *supra* note 78.

implied field preemption argument, which was unsuccessful in the lower courts, *Wyeth* relied on implied conflict preemption. It argued that because the Food, Drug and Cosmetic Act (FDCA) requires the FDA to determine that a drug is safe and effective under the conditions set forth in the drug labeling, the FDA "must be presumed to have performed a precise balancing of risks and benefits and to have established a specific labeling standard that leaves no room for different state law judgments".[125] Wyeth claimed that it would have been impossible for it to comply with the state law duty to modify the labeling without violating federal law and that the recognition of state law standards would be an obstacle to the accomplishment of the objectives of Congress.[126] The Court rejected Wyeth's arguments finding that the failure of Congress to expressly preempt state law weighed heavily against a finding of implied conflict preemption:

> If Congress thought state lawsuits posed an obstacle to its objectives, it surely would have enacted an express preemption provision at some point during the FDCA's 70-year history. But despite its 1978 enactment of an express preemption provision for medical devices … Congress has not enacted such a provision for prescription drugs. … Its silence on the issue, coupled with the certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness.[127]

The 1958 Act is now fifty-eight years old. Congress has never expressly preempted state tort standards despite twice amending the Act and enacting limited express preemption provisions in the ADA and GARA. Congress surely knew that aviation cases were being addressed under state law standards. It passed GARA to specifically protect light aircraft manufacturers against state products liability lawsuits.

The current attitudes of US Supreme Court Justices toward implied field preemption have been revealed in recent decisions. In *Kurns v. Railroad Friction Products Corp.*,[128] the Supreme Court held that the Locomotive Inspection Act (LIA)[129] preempted the state law design defect and failure to warn claims at issue in the case. The Court, however, based its decision on *stare decisis* because of the Court's 1926 ruling in *Napier v. Atlantic Coast Line R. Co.*[130] *Napier* held that the LIA occupied the entire field of regulating locomotive equipment.[131] In *Kurns,* the petitioners did not ask the Court to overrule *Napier* and thus did not attempt "to overcome the presumption of *stare decisis* that attaches to this 85-year old precedent".[132]

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[125] *Ibid* at 559-60.
[126] *Ibid* at 575.
[127] *Ibid.*
[128] *Ibid.*
[129] *See Kurns v. Railroad Friction Products Corp.*, ____ US ____, 132 S Ct 1261 (2012).
[130] Locomotive Inspection Act, 49 USC § 20701, *et seq.*
[131] *See Napier v. Atlantic Coast Line R. Co.,* 272 US 605 (1926).
[132] *See Kurns v. Railroad Friction Products Corp., supra* note 129 at 1271 (Sotomayor J concurring and quoting *Camps Newfound/Owatona, Inc. v. Town of Harrison,* 520 US 564, 617 (1997) (Thomas, J, dissenting)).

While *Kurns* may be considered as support for an argument for implied field preemption of aviation safety standards, especially since the case involved the interplay between federal and state law on product safety, the concurrences to the majority's decision reveal a different story. In concurring in part and dissenting in part to the decision, Justice Sotomayor, joined by Justices Ginsburg and Breyer, observed that the LIA lacks an express preemption clause and '"our recent cases have frequently rejected field preemption in the absence of statutory language expressly requiring It'".[133] In her concurrence to *Kurns*, Justice Kagan wrote:

> I doubt the court would decide *Napier* … in the same way today. The *Napier* court concluded that Congress had "manifest[ed] the intention to occupy the entire field of regulating locomotive equipment" based on nothing more than a statute granting regulating authority over that subject matter to a federal agency. Under our more recent cases, Congress must do much more to oust all of state law from a field.[134]

Justice Thomas, who delivered the Court's opinion in *Kurns,* revealed his skeptical attitude toward implied field preemption in his dissent to the Court's decision in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*[135] where he observed that "field preemption is itself suspect, at least as applied in the absence of a congressional command that a particular field be preempted".[136]

Admittedly aviation is unique. As *Kohr* so eloquently described, airplanes enter a nation-wide system that is exclusively controlled by the federal government as soon as they taxi.[137] Federal law clearly preempts any attempts of the states to control aircraft in flight. The Third Circuit, however, overreached in *Abdullah* by holding that the Act and the FARs impliedly preempt the entire field of aviation safety. It was central to *Abdullah* that there were relevant and comprehensive federal regulations covering the claims at issue, including a federal general standard of care.[138] The general standard of care does not govern the entire field of aviation safety and the *Abdullah/Sikkelee* preempted field is now limited to legal standards regarding the in-flight operation of aircraft.

The courts that have issued broad preemption rulings, like the Third Circuit in *Abdullah*, did not fully consider the implications of their decisions because the matters before the courts did not involve the entire field of aviation safety but rather only discrete issues within the field. In *Sikkelee*, the Third Circuit corrected the problem that it created in *Abdullah* and narrowed the preempted field to one that it found federal law had fully

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[133] *Ibid* at 1267, Kagan, J concurring.
[134] *Ibid* at 1271.
[135] *Ibid* at 1270 (internal citation omitted in citing *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405 (1973).
[136] *Camps Newfound/Owatonna, Inc. v. Town of Harrison, supra* note 132 at 616-17 (Thomas, J. dissenting joined by Justice Scalia and Chief Justice Roberts).
[137] *Ibid* at 616-17.
[138] *Kohr v. Allegheny Airlines, Inc., supra* note 31 at 404.

occupied.

Sikkelee essentially concludes that Congress intended to provide the FAA with the authority to preempt aviation law, including preempting "fields," but that the FAA must fully occupy a relevant "field" before that field is preempted. The Court found that the FAA fully occupied the field of aviation operational safety by enacting comprehensive regulations including a general standard of care, but did not occupy the field of aviation product safety because it had not established an analogous general standard of care.

The majority of courts faced with the same question decided that the scope of federal preemption in aviation law did not encompass the design and manufacture of aviation products.[139] Courts have been loath to preempt long established state law duties where the FAA has not issued comprehensive federal duties of care and has left gaps in the standards that do exist.

Outside the field of aviation operations, *Sikkelee* requires a case-by-case examination of aviation tort claims at issue in a case to determine whether the relevant state standard of care is preempted by federal regulations. Courts must examine the specific claims and determine whether the FAA has established a complete standard of care governing the claims. If so, the court may find that there is field preemption over the claims. If not, the court must address the matter consider whether the state standard of care necessarily conflicts with any relevant federal standards.

VII. CONCLUSION

Congress did not pass the Act to limit the rights of tort victims. To the contrary, it included a savings clause to preserve existing remedies. There is no justification to use federal preemption to reduce or eliminate safety standards. *Sikkelee* signals the end of the era of expansive preemption rulings and reduces the potential that federal preemption can be used to reduce or eliminate safety standards. *Sikkelee*, however, did not overturn *Abdullah*, and time will tell whether the entire idea of "implied field preemption" in aviation will survive further examination.

[139] *See Wyeth v.* Levine, *supra* note 78 at 565.

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