FAA Preemption – A New Chapter Is Being Written

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The aviation defense community has long since embraced the Third Circuit's sweeping finding in *Abdulah v. American Airlines, Inc.* 181 F. 3d (3d Cir., 1999), in which it held that because "Congress's intent to regulate air safety is unambiguous," federal regulations preempt state law relative to the standard of care. *Abdullah* became the seminal field preemption case for matters involving to aviation safety. Numerous circuits and district courts have followed *Abdullah's* holding, but often with varying definitions as to what constitutes air-safety.

A recent decision offered a good opportunity to expand the field preemption defense into design defect product liability cases. In *Sikkelee v. Lycoming*, the Plaintiff's husband died in the crash of a Cessna 172 and she sued the engine manufacturer, Lycoming, based upon an alleged defect in the carburetor. However, the carburetor on the accident aircraft was not installed by Lycoming, although it was compliant with Lycoming's engine specifications. As such, it was effectively the FAA type certificate that was on trial. After expressing difficulty in crafting an appropriate jury instruction describing the manufacturer's duty of care, the district court granted summary judgment in favor of Lycoming, extending field preemption to product liability claims sounding in design defect. *Id*. The court essentially reasoned that an FAA issued type certificate necessarily satisfied the federal standard of care for product design.

The dismissal was appealed to the Third Circuit, the same court that decided *Abdullah*. In an unusual process, after all briefs had been submitted, the court solicited the FAA's response to a number of pointed questions regarding the scope of the Federal Aviation Regulations. While the court acknowledged "the FAA issues a type certificate when it has determined that a product is properly designed and manufactured, performs properly, and meets the regulations and minimum standards prescribed under [49 U.S.C. sec. 44701(a)]" and the FAA responded to the court's directed inquires stating that its standards govern litigation based on design defects in aviation manufacturing, the court nonetheless found that the field preemption identified in "*Abdullah* does not include manufacturing and design, which continues to be covered by state tort law." ***Sikkelee v. Precision Airmotive***. The opinion flatly rejects the direct statement from the Administrator to the contrary. The Third Circuit's reasoning in limiting the scope of the *Abdullah* field preemption is that the FAA Act does not provide comprehensive design and manufacturing standards, as opposed to the full system of rules regulating in-flight safe operation of aircraft. *Id*.

While this ruling clearly presents challenges, review of the underlying case continues to present the best opportunity to strengthen the product liability defense in the aviation industry. Indeed, attorneys representing appellants obtained an extension to May 17, 2016 to respond to the opinion, and are currently considering a petition for rehearing en banc. Moreover, given the growing disparity among the Circuits that has risen since *Abdullah*, this case may also offer a better opportunity for Supreme Court review.