



# The Truth About Torts

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## Regulatory Preemption at the Federal Aviation Administration

By CPR Member Scholars  
Thomas McGarity, Nina Mendelson,  
Sidney Shapiro, and  
CPR Senior Policy Analyst  
James Goodwin and CPR Policy  
Analyst Mollie Rosenzweig

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Thomas McGarity is a professor at University of Texas School of Law and a Board Member of the Center for Progressive Reform.

Nina Mendelson is a professor at the University of Michigan Law School and a Member Scholar of the Center for Progressive Reform.

Sidney Shapiro is a professor at Wake Forest University School of Law and a Board Member of the Center for Progressive Reform.

James Goodwin is a Senior Policy Analyst at the Center for Progressive Reform.

Mollie Rosenzweig is a Policy Analyst at the Center for Progressive Reform.

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Direct media inquiries by email to [Brian Gumm](mailto:brian.gumm@cpr.org) or [Matthew Freeman](mailto:matthew.freeman@cpr.org), or by phone at 202.747.0698.

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## Regulatory Preemption at the Federal Aviation Administration

### Executive Summary

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When companies manufacture and sell defective products that seriously injure or even kill people, many Americans assume that they can use tools such as private lawsuits to hold those corporations accountable for their actions. But companies frequently do not see it that way, and they do whatever they can to make sure the courthouse doors are not open to victims of corporate wrongdoing. Sometimes the companies succeed, but a recent federal appeals court ruling may help ensure that victims and their families can actively seek justice.

In early 2016, the U.S. Court of Appeals for the Third Circuit issued an important ruling that could prove to be an important victory for the public interest. The case, *Sikkelee v. Precision Airmotive Corporation*,<sup>1</sup> required the court to determine whether state-based product liability cases are “preempted” by the Federal Aviation Administration’s (FAA) regulations for the design and manufacture of aircraft and their component parts. The court held that the FAA’s rules do not block such cases, giving the plaintiff in the case and others like her the opportunity to sue the manufacturers of defective aircraft or component parts.

Preemption is a complex legal concept that flows from the system of government established under the U.S. Constitution, in which powers are divided and shared between federal authorities and the states. According to this design, the federal government’s power is limited, but when Congress exercises its constitutional power, it may explicitly or implicitly “preempt” state law on the same subject, thereby rendering it null and void.

“Express preemption” exists when Congress includes language in a statute specifically providing for preemption of related state law. Absent such language, the Supreme Court has also held that a federal statute or regulation can result in “implied preemption” of state law when the two bodies of law are in conflict or when Congress intended for the federal law to occupy the entire field of governmental action to the exclusion of state law. The first type of implied preemption is known as “implied conflict preemption,” while the second is known as “implied field preemption.”

The specific issue in *Sikkelee* was whether the FAA’s regulations preempted a branch of state tort law known as products liability law. While the issue of federal regulatory preemption of state tort law might sound technical and

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even esoteric, it has potentially far-reaching effects on both the level of product safety that Americans enjoy and the ability of victims to access the courts to vindicate their rights and hold corporations accountable for unacceptably dangerous actions and dangerous products. This is especially crucial given that the other legal institutions aimed at addressing harmful corporate behavior or products – namely, federal and state regulatory agencies – offer protections that are often not stringent enough or that are poorly enforced, enabling scofflaw companies to endanger the public.

Meanwhile, state tort law offers ordinary citizens a critical avenue to seek compensation for their injuries. The application of state tort law standards can lead to the demand for greater care by individuals and corporations in the actions they take and the products they produce while promoting greater responsiveness to the public.

Preserving the benefits of state tort law is especially important in the context of aviation safety. According to statistics gathered by the National Transportation Safety Board (NTSB), an average of nearly four small plane crashes occur every day in America, resulting in about 400 deaths per year.<sup>2</sup> When such crashes involve faulty parts or poor manufacturing practices, victims and their families should be allowed to seek justice in the most effective ways possible.

Many aircraft manufacturers are eager to avoid the accountability mechanisms that the civil justice system affords. Accordingly, they have attempted to use pending cases such as *Sikkelee* to argue that relevant federal regulations serve to preempt state tort law, thereby blocking individuals who have been injured by defective aircraft or their component parts from pursuing their products liability claims in court. For these manufacturers, this result is desirable because the applicable federal regulations tend to impose comparatively smaller compliance costs due to their relatively weak requirements and because resource-strapped federal agencies engage in haphazard enforcement.

As the Government Accountability Office (GAO) has found, weak regulatory implementation and enforcement is particularly acute with the FAA's aircraft safety programs. Among other things, it found that resource constraints have compelled the FAA to outsource nearly 90 percent of its safety certification activities to private persons or organizations, including the aircraft manufacturers themselves. In this way, federal preemption often leaves the public less protected against dangerous activities or products and with no effective means for obtaining compensation for their injuries when they are harmed.

In their campaign to use the *Sikkelee* case to secure federal regulatory preemption of state aviation tort claims, the aircraft manufacturing industry faced a significant obstacle: Congress did not explicitly provide for federal

preemption of state tort law when it enacted the Federal Aviation Act, the primary authorizing statute for regulations at issue in that case. Consequently, industry lawyers resorted to making the case that the FAA's regulations themselves result in implied preemption of the state tort law claims.

The Third Circuit rejected the industry's preemption argument in the *Sikkelee* case, but only in part. The court correctly held the FAA's regulations did not result in implied field preemption of state aviation products liability law, but it left open the possibility that FAA regulations might still override state tort law under the alternative theory of implied conflict preemption.

Policymakers or members of the public have three primary options for responding to this shortcoming in the Third Circuit's opinion:

- Congress could amend the Federal Aviation Act to clarify that regulations issued under the statute do not result in implied conflict preemption.
- An injured victim whose claim is deemed foreclosed by conflict preemption could petition the Third Circuit to revisit the applicability of implied conflict preemption to aviation products liability claims.
- The FAA could use its power to issue "airworthiness directives" to avoid situations that might give rise to implied conflict preemption.

Unfortunately, none of the available policy options for addressing the problematic aspects of the *Sikkelee* case seem likely to succeed in the near future. Nevertheless, it is important for policymakers to find ways to preserve the role of state tort law in promoting aviation safety. When permitted to function effectively, the civil justice system complements and reinforces the FAA's work in promoting aviation safety in several important ways:

- It deters manufacturers from introducing unsafe products into the marketplace.
- It generates new information on how existing aircraft and aircraft parts can be made safer.
- It counters the problem of "regulatory capture." Regulatory capture occurs when regulated entities exert considerable influence over the agencies that are supposed to oversee them, and the agency instead works to advance the narrow interests of the regulated entities instead of the broader public interest. In contrast, because its supervisory authority is spread over numerous state courts, the state civil justice system is less susceptible to such interference.

*When permitted to function effectively, the civil justice system complements and reinforces the Federal Aviation Administration's work in promoting aviation safety.*

All of these useful aspects of state tort law contribute to the FAA's goal of averting harm before it occurs. Moreover, when people *are* hurt, the civil justice system stands ready to provide compensation for injured parties. It is therefore unsurprising that Congress did not intend for state law to be preempted in the FAA's statutory mandate and in other related laws.

## Introduction

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In 2000, Diana Levine, a professional guitarist, experienced an unthinkable tragedy. Following a botched IV injection of an anti-nausea medication called Phenergan to treat her migraine headaches, her right arm became so gangrenous that doctors were forced to amputate the entire arm below the elbow. It turns out that the manufacturer of the drug, Wyeth Pharmaceuticals, had been aware of this specific risk, but nonetheless failed to label the drug adequately to warn medical professionals and patients. Fortunately, Ms. Levine was able to sue Wyeth in court and hold the pharmaceutical company accountable for harming her with its unacceptably dangerous business practices.<sup>3</sup> Wyeth had sought to block the suit, arguing that Levine's claim, which was based on state tort law, had been "preempted" by the Food and Drug Administration's (FDA) regulations governing warning labels for pharmaceuticals. In an important victory for the public interest, however, the Supreme Court rejected this argument.

But the courthouse doors are not always open to individuals who have been harmed by defective products, as Jill Sikkelee nearly discovered. In July 2005, her husband David was killed when the single-engine plane he was operating abruptly lost power and crashed soon after takeoff due to a defect in the carburetor. Although he survived the initial ground impact, he "died when flames consumed the cockpit after a desperate struggle to free him from his seat harness," according to one newspaper account.<sup>4</sup> Mr. Sikkelee's brother Craig, who was a passenger in the plane at the time and suffered extensive injuries himself, survived only to see his brother consumed in the ensuing flames.

Jill Sikkelee later brought a lawsuit against the carburetor manufacturer, but the company persuaded the federal district court that Federal Aviation Administration (FAA) regulations preempted her claim. The Third Circuit Court of Appeals disagreed and reversed the lower court's dismissal of her lawsuit. While the court concluded that the FAA's regulations did not occupy the field of aviation safety, the basis of implied field preemption, the court did suggest that there might be implied conflict preemption because of a potential inconsistency between the relevant state tort law standard of care and the application of a specific FAA regulation. The Third Circuit court then sent the case back to the lower court to make this determination.<sup>5</sup>

### *What is "Preemption"?*

*The U.S. Constitution establishes a system of government in which powers are divided and shared among the federal government and the states. The U.S. Constitution also provides that federal laws and regulations are "the Supreme Law of the Land." This means that federal laws and regulations will take precedence over—or preempt—any state laws to the extent that they are mutually inconsistent.*

Whether it is a prescription drug or a defective aircraft component, when an unacceptably dangerous product causes harm, the victims should have the same meaningful opportunity to seek redress for their injuries and hold the responsible parties accountable for their wrongdoing. Why should the law treat Ms. Levine’s right to be heard any differently than that of Mrs. Sikkelee’s? Both have been harmed by a company’s dangerous product, and both should have their day in court.

The aviation manufacturing industry had hoped to use the *Sikkelee* case to install a new regime of federal preemption under the FAA’s regulations governing the design and manufacture of aircraft and their component parts. In turn, this would have allowed the mere existence of these often insufficient regulations to effectively insulate manufacturers from tort liability.

At the time that the *Sikkelee* suit was filed, considerable uncertainty prevailed over whether and to what extent this FAA regulatory program had preemptive effect. In 1999, the United States Court of Appeals for the Third Circuit issued a controversial decision in *Abdullah v. American Airlines Inc.*, in which it broadly held that the Federal Aviation Act impliedly preempted “the entire field of aviation safety.”<sup>6</sup> At issue in the case was whether the FAA’s regulatory program governing “in-air operations” preempted a state tort law claim that the defendant airline had negligently failed to provide passengers with an adequate seatbelt warning prior to encountering turbulence. Following this decision, it remained unclear whether the court’s underlying reasoning extended to the FAA’s other regulatory programs as well.<sup>7</sup> Aviation industry trade groups argued vigorously – albeit unsuccessfully – that the earlier decision should be read broadly to cover all of the FAA’s regulatory programs.

***Express Preemption vs. Implied Preemption***

*Express preemption exists when Congress includes language in a statute that clearly indicates its intent to preempt state tort law. Absent such explicit language, courts have sometimes used different theories of implied preemption to infer Congress’s intent to preempt state tort law.*

A victory for aircraft manufacturers in the *Sikkelee* case would have far-reaching ramifications. According to statistics gathered by the National Transportation Safety Board (NTSB), an average of nearly four small plane crashes occur every day in America, resulting in about 400 deaths per year.<sup>8</sup> When such crashes involve faulty parts or poor manufacturing practices, victims and their families should be allowed to seek justice in the most effective ways possible.

This report examines the aviation industry’s arguments that federal law preempts state aviation tort claims and concludes that they are without merit. Since Congress did not “**expressly preempt**” state tort law when it



enacted the laws that authorize the FAA's aviation safety regulations, the aviation industry has attempted to argue that state tort law is "**impliedly preempted**." As explored in detail below, however, the FAA's regulations for the design and manufacture of aircraft and their component parts do not meet the very high legal bar for establishing implied preemption.

After rejecting the arguments in favor of federal preemption, the report's authors then make an affirmative policy case for maintaining the robust and active role of state tort law in the area of aviation products liability, and they describe how the civil justice system is uniquely able to reinforce and complement the FAA's regulatory programs aimed at promoting aviation safety.

Ensuring that citizens have meaningful access to the courts is particularly important in the context of aviation safety. The FAA's regulations governing the design and manufacture of aircraft and their component parts are often too weak to ensure that the public's safety is adequately protected. Aircraft or their component parts can be in technical compliance with those regulations but still pose an unacceptable risk of harm to the general public. In light of these weaknesses in federal aviation safety laws, states should be allowed to retain their longstanding sovereign authority to safeguard their citizens against aviation-related disasters by permitting their courts to recognize a more protective standard of care.

## Federal Preemption and the Aviation Manufacturers' Campaign Against State Tort Law

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Over the last several decades, the aviation manufacturing industry has argued vigorously in court that the FAA's regulatory programs governing the design and manufacture of aircraft and aircraft parts should bar individuals from bringing state products liability claims. This campaign has largely followed a similar playbook used by manufacturers of other consumer products. Trade groups representing these manufacturers, along with their individual members, have sought establish regimes of federal regulatory preemption of state tort law at a wide variety of agencies, including the Consumer Product Safety Commission, the Food and Drug Administration, the Federal Railroad Administration, and the National Highway Traffic Safety Administration.<sup>9</sup>

In the *Sikkelee* case, Boeing and Airbus, along with industry trade groups such as the General Aviation Manufacturers Association (GAMA) and the Aerospace Industries Association (AIA), filed amicus briefs with the Third Circuit Court of Appeals arguing that the FAA's regulations preempted the plaintiff's claim.<sup>10</sup> This was not the first time that groups, including GAMA, had submitted amicus briefs pushing similar preemption arguments in products liability cases.<sup>11</sup>

Unfortunately, the FAA actively supported the aircraft manufacturing industry's efforts in *Sikkelee* to establish federal regulatory preemption of state products liability claims. Acting on behalf of the agency, the Department of Justice submitted an amicus brief in that case that argued that the FAA's regulatory programs impliedly preempted the plaintiff's state tort law claims.<sup>12</sup> As noted in the brief, the FAA has long held the view that its regulatory programs preempt state tort law and has worked to advance this view in past amicus briefs as well. The FAA is not alone in this regard; federal agencies have frequently asserted that their regulations had preemptive effect on state tort law claims.<sup>13</sup>

## The FAA's Aircraft Safety Regulations Do Not Preempt State Tort Law Claims Involving Aviation Products Liability

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### Background

The case against preemption of state tort law claims by the FAA's statutory scheme must begin with a close look at the statutes and regulations that supposedly result in preemption. The federal government has sought to oversee the safety and design of aircraft since the early days of the aviation industry. The statutory scheme implemented by today's FAA closely resembles the one first devised in the late 1930s.

In 1938, Congress passed the Civil Aeronautics Act and created the Civil Aeronautics Authority (CAA) to regulate aviation. Under the act, Congress gave the CAA the authority to establish minimum standards of safety for the "design, materials, workmanship, construction, and performance of aircraft."<sup>14</sup> To ensure that aircraft and their component parts complied with these minimum safety standards, the CAA issued three different aircraft certifications: type certificates; production certificates; and airworthiness certificates. The CAA used these certifications to regulate any new aircraft or engine coming into use.

The first step for manufacturers of new aircraft or engines was to acquire a type certificate. The CAA issued type certificates for aircraft that were shown to comply with the CAA's minimum safety standards. Once a certain design had received a type certificate, the manufacturer could then obtain a production certificate, granting permission for the manufacturer to produce duplicate aircraft based upon that approved design. Aircraft owners could then seek an airworthiness certificate from the CAA showing that their aircraft conformed to the type certificate and, therefore, was in a safe condition for flight.

Over time, dozens of different federal agencies became involved in aviation regulation.<sup>15</sup> With their respective responsibilities becoming increasingly intertwined and inefficient, Congress intervened in 1958 and passed the Federal Aviation Act. This law streamlined the federal regulation of aviation by consolidating authority into a single agency, the Federal Aviation Administration. Significantly, Congress copied the language from the Civil Aeronautics Act to establish minimum safety standards and the issuance of certificates in the Federal Aviation Act.<sup>16</sup> As a result, aircraft manufacturers and owners must still obtain type certificates,<sup>17</sup> production certificates,<sup>18</sup> and airworthiness certificates<sup>19</sup> from the FAA. In addition to obtaining a type certificate for new designs, a manufacturer must also get approval from the FAA before it can make a significant change to existing designs.<sup>20</sup> Manufacturers must submit data to confirm the safety of the amended

design. If the amended design conforms to the FAA's safety standards, the agency can issue an amended or supplemental type certificate.<sup>21</sup>

### **The FAA's Authorizing Legislation Does Not Expressly Preempt State Tort Law**

When courts are tasked with determining whether federal law preempts state law, as the Third Circuit did in *Sikkelee*, they are guided by a strong presumption against preemption unless Congress has clearly indicated a preemptive intent. This presumption reflects a respect for the principles of federalism, and it is particularly apt to aviation-related torts.

Products liability, in general, arose as a cause of action out of the common law of individual states. Aviation-related torts fall firmly within that realm of state law, a fact recognized as early as 1914 by a federal court in the State of Washington.<sup>22</sup> Even after federal laws regulating aviation were enacted, federal courts continued to recognize the concurrent applicability of state tort law.<sup>23</sup> When a field is traditionally governed by state law, courts should be reticent to find preemptive effect in federal statutes governing that field.

The Supreme Court made clear in the 2009 case, *Wyeth v. Levine*,<sup>24</sup> that when Congress legislates in a field traditionally controlled by the states, courts must apply a presumption against preemption. Consistent with this holding, courts should avoid withdrawing the long-held powers of the states to hear cases in a field such as aviation tort except in the rare cases where Congress has plainly intended it.<sup>25</sup> Because state courts have traditionally handled aviation tort cases, courts must grapple with this well-established presumption against preemption when it comes to the Federal Aviation Act.

The Federal Aviation Act's text, structure, and statutory history make it clear that Congress never intended to preempt state tort law in the area of aircraft and component part manufacturing and design safety. Beginning with the Civil Aeronautics Act and continuing throughout the history of federal oversight of aircraft safety, Congress has refused to explicitly codify federal preemption in those statutes governing manufacturing and design safety, despite having several opportunities to do so. Congress's decision not to expressly preempt state tort law in this field accords with the traditional primacy of state courts in products liability disputes.

Critically, at the time that Congress replaced the Civil Aeronautics Act with the Federal Aviation Act, it was well aware that the federal courts had consistently interpreted the earlier law as not preempting state tort law.<sup>26</sup> It was also aware of the strong judicial presumption against preemption. Nevertheless, Congress generally incorporated into the Federal Aviation Act those provisions in the Civil Aeronautics Act that govern the federal statute's relationship with other laws, including state tort law.

As with earlier iterations, the current law contains no express preemption provision applicable to products liability cases. Moreover, under the act, the

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FAA is permitted to establish “minimum standards” for aviation safety.<sup>27</sup> Federal courts have long recognized that this language – “minimum standards” – runs strongly *against* finding a clear and manifest intent on the part of Congress to preempt state law.<sup>28</sup> Indeed, the language strongly suggests that Congress sought to establish a system in which federal regulatory standards set a “floor” for aviation safety and that states would be free to promulgate more protective standards. Significantly, another consequence that follows from this legislative approach is that mere compliance with the minimum federal standards would by definition not automatically satisfy relevant standards of state products liability law.

Another critical component of the act indicating that Congress did not intend to preempt state tort law is its savings clause.<sup>29</sup> Congress includes these clauses to indicate some exception to a law’s broad application. In this case, the savings clause, located in the section of the act titled “Relationship to Other Laws,” indicates that the act does not foreclose existing legal remedies, but rather merely provides an additional remedy to those already available. The clause reads: “A remedy under this part is in addition to any other remedies provided by law.”<sup>30</sup> Consistent with this reading, the Supreme Court previously determined that the Federal Aviation Act’s savings clause preserved states’ power to implement and enforce their own regulatory programs governing such aspects of the aviation industry as intrastate airfare and deceptive marking practices.<sup>31</sup>

In the years since the Federal Aviation Act was first enacted, Congress has continued to make additional refinements to the basic statutory scheme governing aircraft safety. This subsequent legislation has provided Congress with several opportunities to expressly preempt state tort law, and yet it has conspicuously refused to do so.

First, in passing the Aviation Deregulation Act of 1978, Congress amended the Federal Aviation Act to include a limited express preemption provision that blocked states from regulating the “rates, routes, or service of any carrier.”<sup>32</sup> This clause reflects the long-shared understanding that the original act did not broadly preempt state law; otherwise, Congress’s goal in adopting the limited express preemption provision would have already been accomplished, rendering it unnecessary. The limited scope of the provision further suggests that any matters relevant to the original act, including the safety of aircraft and aircraft component manufacturing and design, remained unaffected and thus would not be preempted.

Later, when Congress enacted the General Aviation Revitalization Act of 1994 (GARA), it carved out another limited express preemption provision. Specifically, this provision placed new limitations on civil suits against aircraft manufacturers in the form of a statute of repose, which, subject to certain exceptions, bars lawsuits involving claims that arise more than 18 years after the aircraft was delivered or a defective part was installed.<sup>33</sup> With

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this provision, Congress not only demonstrated its willingness to place statutory limits on state aviation tort law suits, but also acknowledged that the Federal Aviation Act does not generally preempt such suits. Again, it would have been unnecessary to limit suits arising from claims more than 18 years old if those suits were already preempted by federal law. The inclusion of this express preemption provision in GARA further demonstrates Congress's intent to leave most state law claims intact, prohibiting only those that involve certain older aircraft or aircraft parts.

### Neither the FAA's Authorizing Legislation nor Its Regulations Impliedly Preempt State Tort Law

Absent clear language indicating that Congress intended for a statute to preempt state law, courts can still find that a federal statute preempts state law through implied preemption. Courts have identified two types of implied preemption: "field preemption" and "conflict preemption."<sup>34</sup> Just as federalism concerns drive the presumption against preemption, separation of powers concerns should disfavor implied preemption in federal regulatory law. And where, as here, Congress has indicated its intent to avoid preemption, judges should exercise particular caution in their implied preemption analyses. As noted above, the drafters of the Federal Aviation Act included the well-recognized device of the savings clause to preserve a continued role for state tort law. Moreover, subsequent Congresses have failed to enact express preemption provisions, despite numerous opportunities.

#### ***Implied Field Preemption vs. Implied Conflict Preemption***

*Courts identify field preemption when a federal statute is so comprehensive that it occupies an entire field. Conflict preemption exists when a court finds that enforcement of a state law would frustrate the purpose of a federal program or that simultaneous compliance with both federal and state laws would be impossible.*

In *Sikkelee*, the Third Circuit correctly concluded that the FAA's regulations for the design and manufacture of aircraft and their component parts do not impliedly preempt the field of state products liability claims.<sup>35</sup> In doing so, it joined the other federal courts of appeal that have reached this same conclusion, including the Sixth,<sup>36</sup> Ninth,<sup>37</sup> Tenth,<sup>38</sup> and Eleventh circuits.<sup>39</sup>

To reach this conclusion, the *Sikkelee* court first had to grapple with its controversial decision in *Abdullah v. American Airlines Inc.*<sup>40</sup> At issue in that case was whether federal in-air seatbelt regulations preempted a state law negligence claim for a flight crew's failure to warn passengers that their flight would encounter severe turbulence. The court appeared to broadly hold that the Federal Aviation Act impliedly preempted "the entire field of aviation safety."<sup>41</sup> This broad holding on field preemption not only prompted confusion and uncertainty within the lower courts of the Third Circuit; it also created a split with the many other federal circuit courts of appeal that had already concluded that the Federal Aviation Act and other

relevant laws did not preempt many aspects of aviation safety, including products liability claims arising from aircraft design and manufacture.<sup>42</sup> The Supreme Court of the United States has not yet resolved this split.

The court in *Sikkelee* distinguished *Abdullah* by explaining that it meant for its holding to be limited to the FAA's regulations for "in-air operations" such as seat belt warnings. As such, *Abdullah's* holding on implied field preemption did not govern a case like *Sikkelee*, which involved a products liability claim.<sup>43</sup>

The *Sikkelee* court then turned to the question of whether the FAA's regulations governing the design and manufacture of aircraft and their component parts were sufficiently analogous to those at issue in *Abdullah* as to result in implied field preemption of state products liability law. In *Abdullah*, the court concluded that implied preemption existed because the FAA's regulations for "in-air operations" so fully occupied the field as to create a federal standard of care that operated to exclude any parallel state standards of care in the resolution of relevant negligence claims. In other words, plaintiffs who seek to bring negligence claims arising from FAA-regulated in-air operations in state courts could still seek state tort law remedies, if applicable, but the question of negligence would be resolved by reference to the federal standard of care, as defined by the FAA's regulations.

The *Sikkelee* court concluded that, unlike the regulatory scheme at issue in *Abdullah*, the FAA's regulations for aircraft design and manufacture safety did not so fully occupy the field as to create a comprehensive federal standard of care for aviation-related products liability that left no room for any coexisting state standards of care. It therefore held that these regulations did not result in field preemption of aviation-related state products liability law.

In reaching this contrary result, the *Sikkelee* court identified three "fundamental differences" that distinguished the FAA's regulations for the design and manufacture of aircraft and their component parts from those at issue in *Abdullah*. First, the court observed that these regulations do not govern the actual design and manufacturing processes that aircraft and component manufacturers employed. Instead, they are primarily focused on establishing the process by which manufacturers obtain approval for their designs and manufacturing processes. In contrast, the regulations in *Abdullah* defined specific requirements that were directed at the conduct of in-air operations.

Second, the court observed that while the FAA's regulations establish certain standards that manufacturers must meet in order to obtain approval for their design and manufacturers, the substance of these standards are primarily confined to the delineation of "discrete, technical specifications."

As such, this regulatory scheme falls well short of the kind of “comprehensive system of rules and regulations” that was at issue in *Abdullah*.

Third, the *Sikkelee* court determined that the FAA’s aircraft design and manufacture regulations do not articulate a “comprehensive standard of care.” In other words, these regulations do not provide courts with a manageable method for evaluating safety-related issues for an aircraft or component part that are not already specifically addressed by the provisions of existing regulations. In contrast, the FAA’s regulations for “in-air operations” supplied such a comprehensive standard of care.<sup>44</sup> As the *Sikkelee* court noted, those regulations established this standard of care by prohibiting the operation of an aircraft “in a careless or reckless manner.”<sup>45</sup>

To be sure, the fact that the *Sikkelee* court was able to distinguish the FAA’s regulations for the design and manufacture of aircraft and their component parts from those at issue in *Abdullah* does not necessarily imply that *Abdullah* was correctly decided in the first place. Even the *Sikkelee* court’s narrower reading – namely, that its holding only extends to FAA’s regulations governing “in-air operations” – remains fairly open to debate.<sup>46</sup> For the purposes of this report’s analysis, the important thing is that the *Sikkelee* court distinguished *Abdullah* in concluding that the FAA’s regulations for the design and manufacture of aircraft and their component parts do not impliedly preempt state aviation-related products liability law.

#### **The Sikkelee Court’s Position on Implied Conflict Preemption Raises Concerns**

While the *Sikkelee* court rejected the theory of implied *field preemption* in the area of aircraft manufacturing and design safety, its opinion still held open the possibility that FAA regulations could result in implied *conflict preemption* under certain circumstances.<sup>47</sup> Specifically, the court hypothesized that FAA regulations governing approval for changes to previously-approved type certificates could give rise to conflict preemption.<sup>48</sup> If, for example, an aircraft or its component part was found to be defective, thereby requiring a change in design or manufacture significant enough to constitute what FAA regulations define as a “major” change, then the manufacturer would generally be barred from making those changes without first obtaining FAA approval and a revised type certificate. Thus, to the extent that the relevant state standard of care imposes a duty on the manufacturer to make particular design or manufacturing changes that differ from the duty imposed by the applicable type certificate, the manufacturer would not be able to simultaneously comply with both applicable state tort law and FAA regulations, resulting in the state tort law being conflict preempted.

Significantly, however, the conflict preemption that exists in most of these scenarios would only be temporary in duration and *de jure* in nature. For example, suppose that a state standard of care required a manufacturer to

*Most of the conflict preemption scenarios identified by the Sikkelee court would only be temporary in duration and de jure in nature. In most cases, it is likely that the Federal Aviation Administration would approve the necessary changes to a component’s type certificate once the approval process had run its course.*



improve the safety of an aircraft component by making a particular change to its design. In most cases, it is likely that the FAA would approve these kinds of changes to the component's type certificate once the approval process had run its course.

In *dicta*, the *Sikkelee* court nevertheless opined that conflict preemption would still exist in these kinds of situations. In fact, it even went so far as to suggest that conflict preemption would be rendered "all but meaningless" if it did not apply in situations where a hypothetical change to an existing type certificate was likely to be approved.<sup>49</sup> In support of this position, it cited *PLIVA v. Mensing*<sup>50</sup> in which the Supreme Court held that state tort failure-to-warn claims were conflict preempted by FDA regulations governing the process by which generic drug manufacturers were required to change their warning labels.

The *Sikkelee* court's reliance on *Mensing* is inapt, however. There, the Court envisioned several hypothetical scenarios for eliminating the conflict between the FDA's drug labeling regulations and state tort law, all of which would have been time-consuming to accomplish, unlikely to occur at all, or both. In contrast, the FAA's process for approving changes to type certificates is relatively short in duration and offers a framework in which the likelihood of success can be readily ascertained.

In short, the conflict at issue in most situations involving the FAA's aviation safety regulations does make simultaneous compliance technically impossible. But, the manufacturer can comply with the state tort law duty by petitioning FAA to amend its type certificate. Because the elimination of this conflict is so readily achievable in most cases, it would be offensive to the principles of basic fairness to use it as a basis for denying citizens' their fundamental right to access the courts to obtain compensation for their injuries.

More broadly, though, if interpreted expansively, the *Sikkelee* court's line of reasoning risks creating the problem of transforming conflict preemption into a kind of "safe harbor" in which aircraft manufacturers are effectively insulated against tort liability for any defects that are discovered after their products have received type certificates. This safe harbor would effectively eliminate the critical incentives that the civil justice system creates for manufacturers to continuously reevaluate the safety of their manufacturing processes and designs.

In turn, the insulation against tort liability an expansive interpretation of implied conflict preemption supplies threatens to undermine the effectiveness of the FAA's regulatory programs, as well. These programs are increasingly and dangerously dependent on the industry's own self-policing because of inadequate governmental resources. These constraints undermine the FAA's own efforts to monitor the safety of aircraft and aircraft

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parts to identify newly discovered defects in a timely and effective manner. Without the looming threat of tort liability, manufacturers who are unscrupulous would have a strong incentive to postpone identifying and reporting on any failures or defects in their products to avoid incurring the costs associated with updating their design or manufacturing processes to comply with FAA regulations.

### **Judges or Policymakers Can Act to Avert the Problematic Application of Conflict Preemption in the Context of Aircraft Manufacturing Safety**

The options for responding to an improperly broad application of conflict preemption are limited but are nonetheless worth pursuing. One solution is for Congress to amend the Federal Aviation Act to clarify what existing legislation already makes clear – namely, that the FAA’s minimum safety standard regulatory programs for the design and manufacture of aircraft and their component parts do not preempt state tort law. Legislation seems unlikely in the near term, however, given that deep political divisions between the two main political parties have all but ground regular lawmaking to a halt.

Another response would be for the U.S. Supreme Court or the Third Circuit Court of Appeals to revisit their problematic jurisprudence on conflict preemption. But it is unclear whether those courts will have an opportunity to reconsider their positions on conflict preemption in the near future.

The best option for addressing the *Sikkelee* court’s potentially problematic conflict preemption decision is for the FAA itself to take affirmative steps to avoid situations that would give rise to such conflicts. The most promising tool that the FAA has at its disposal for this task derives from its power to issue enforceable orders known as “airworthiness directives,” which require aircraft owners to take certain actions “to resolve an unsafe condition.”<sup>51</sup>

It is reasonable and consistent with the FAA’s statutory safety protection mandate for the agency to use airworthiness directives to limit the operations of aircraft or the use of particular component parts that have been found to be defective under a state product liability regime. Aviation safety hazards that are identified through a final determination in a civil lawsuit are no less dangerous than those that the FAA identifies on its own through the implementation of its regulatory programs. State and federal law offer different but complementary approaches to identify such hazards, and, as such, allowing both institutions to work in harmony to protect the flying public offers the best way forward for advancing aviation safety.

Of course, this approach would not eliminate all potential cases of conflict preemption. In particular, the FAA might ultimately disagree with a finding that an aircraft or component part is defective under a differing state standard of care. In those situations, the agency would be unlikely to approve changes to the type certificate that might be required. Accordingly,

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implied conflict preemption would still exist since the manufacturer would not be able to simultaneously comply with both the FAA's regulations and the state standard of care, and since the circumstances that give rise to this conflict would be unlikely to change in the near term. That said, in most instances, the dangers evaluated in aviation tort cases have not been specifically evaluated by the FAA, and instances in which the FAA ruled out viable solutions for safety problems identified in these cases are rare.

In support of its power to issue airworthiness directives, the FAA should promulgate regulations providing a rapid process for approving amendments to type certificates to address defective parts and equipment that have been newly discovered through state tort litigation or its own investigations to ensure that it is not impossible for manufacturers to comply with their tort law duties and their duty to comply with their certificates. These regulations should establish a strong presumption that the FAA will issue an airworthiness directive in response to a state tort finding that an aircraft or component part is defective. A manufacturer's failure to seek an amendment to a type certificate for a defective part or equipment would violate both the manufacturer's duty to report unsafe conditions to the FAA and its tort law duty to avoid exposing aircraft occupants to the risks posed by defective products and equipment.

While the deployment of airworthiness directives can go a long way toward avoiding harm, their ultimate success depends on the FAA's awareness of the defective part or equipment in the first place. As noted above, however, overly broad application of conflict preemption can discourage manufacturers from making the FAA aware of such defects. It also eliminates the ability of injured persons and their attorneys to use the tort law discovery process to uncover defects in previously approved designs and produce evidence of the manufacturer's awareness of such defects.

Taking administrative steps to minimize the likelihood of conflict preemption is not unprecedented. Indeed, the FDA initially responded to the Supreme Court's decision in *Mensing* by launching a rulemaking effort to change the process by which generic drug manufacturers may seek changes to their warning labels.<sup>52</sup> (Unfortunately, this rulemaking appears to be languishing.) The FAA should similarly make aggressive use of its existing regulatory authority to mitigate the risks associated with conflict preemption and to ensure that the civil justice system will continue to play a robust and active role in ensuring aviation safety.

Of course, given that the FAA has for the last several years aggressively pressed the case that its regulations preempt state tort law, it might be unrealistic to expect the agency to suddenly reverse course and begin taking affirmative steps aimed at avoiding the occurrence of federal regulatory preemption. To be accomplished, this change in course would

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require at a minimum a change in leadership, either within the White House or within the agency itself.

Significantly, the upcoming presidential election provides an opportunity for bringing a new approach to the FAA's policies on federal regulatory preemption. A new FAA Administrator could work with relevant agency officials to adopt new policies that seek to avoid or minimize any potential preemptive effect that the agency's regulations might have. The agency can further buttress these efforts by working with the Department of Justice to develop amicus briefs that rebut industry attempts to use litigation to press for implied preemption, if and when cases similar to *Sikkelee* arise in the future.

Better still, the next president could direct the FAA and other agencies through executive order to employ administrative strategies that are aimed at avoiding federal regulatory preemption.<sup>53</sup> In 1999, President Bill Clinton took a step in this direction when he issued Executive Order 13132, which instructs administrative agencies to consider the federalism implications of their actions.<sup>54</sup> This order, however, does not go far enough. The next president should replace it with one that specifically addresses the issue of federal regulatory preemption of state tort law and directs federal agencies to avoid preemption whenever it is not inconsistent with their authorizing statutes.

*The next president should issue an Executive Order that specifically addresses the issue of federal regulatory preemption of state tort law and directs federal agencies to avoid preemption whenever it is not inconsistent with their authorizing statutes.*

## A Strong State Civil Justice System Reinforces and Complements the FAA's Mission

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One of the FAA's primary responsibilities is to "promote safe flight of civil aircraft in air commerce." As noted above, Congress has directed the FAA to pursue this mission by implementing several regulatory programs, including the establishment of "minimum standards required in the interest of safety for appliances and for the design, material, construction, quality of work, and performance of aircraft, aircraft engines, and propellers."<sup>55</sup> A robust civil justice system in which citizens have meaningful access to the courts serves to strengthen this regulatory program, further enhancing the FAA's ability to achieve its mission of promoting aviation safety.

As with other federal regulatory programs, the FAA's regulations governing the design and manufacture of aircraft and their component parts are preventative in nature, seeking to avoid harm to the public – including death, injury, and property damage – *before* it can occur. For example, when functioning properly, the FAA's type certificate program establishes a rigorous process for reviewing the design and manufacture of aircraft and their component parts to ensure that they meet the agency's minimum safety standards. The type certificate program represents a practical effort to minimize the kinds of mechanical failures that are responsible for many aircraft crashes. These programs seek to ensure that aircraft and their component parts are designed and manufactured in ways that can avoid likely or foreseeable sources of malfunction or other kinds of performance failures.

The civil justice system reinforces the FAA's regulations by deterring manufacturers of aircraft and their component parts from attempting to market products that give insufficient attention to safety considerations. The threat of tort liability deters manufacturers from producing or selling unacceptably dangerous aircraft or aircraft parts while encouraging them to continuously investigate and develop safer designs and manufacturing processes.<sup>56</sup> In this way, the civil justice system can better align manufacturers' incentives with the FAA's mission to promote public safety.

The additional deterrent effect afforded by the civil justice system is particularly important for the FAA, given the challenges that it faces in implementing its programs to promote safety in the design and manufacture of aircraft and their component parts in a timely and effective manner. Like all agencies, the FAA must negotiate a thick web of procedural and analytical requirements before issuing new rules. The federal rulemaking process has become so "ossified" that some FAA rulemakings can experience several years of delay before the agency promulgates final rules.<sup>57</sup> For example, the agency's recently completed rule governing the safe operation of small unmanned aircraft vehicles, more commonly known

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as “drones,” had been under development for nearly six years; the final rule came nearly two years after the statutory deadline that Congress had imposed on the FAA for completing the rulemaking.<sup>58</sup>

In other cases, the FAA’s regulatory efforts might be weakened through improper political interference, as illustrated by the agency’s 2011 rulemaking aimed at preventing unsafe fatigue in commercial pilots. In that case, economists and political operatives in the White House’s Office of Information and Regulatory Affairs (OIRA), acting at the behest of the cargo air carrier industry, forced the agency to rewrite its final rule so that it would exempt commercial pilots flying planes that only contained cargo, as opposed to passenger carriers.<sup>59</sup> This is just one example of cases that raise troubling questions about whether the FAA’s regulations alone are sufficient to safeguard the public.

Like other agencies, the FAA faces severe resource constraints, as its budget has failed to keep pace with the growing breadth and complexity of its statutory mission in recent years. These resource shortfalls inhibit the agency’s ability to effectively implement its regulatory programs and render it more susceptible to a phenomenon known as “regulatory capture.” Massive resource disparities between an agency and the industries that it oversees can contribute to regulatory capture by undermining an agency’s ability to resist pressure from members of those regulated industries. In the worst cases, regulatory capture can force the agency to improperly rely on regulated entities themselves to carry out the agency’s programs.

In a 2004 audit, the Government Accountability Office (GAO) – a government watchdog that Congress established to help oversee regulatory agencies’ programs and activities – found that severe resource constraints had compelled the FAA to outsource nearly 90 percent of certification activities to private persons or organizations known as “designees.” In some cases, the designees are the manufacturers themselves, raising at least the appearance, if not the reality, of a conflict of interest.<sup>60</sup> Such apparent self-regulation by the aviation industry casts serious doubt on the efficacy of the FAA’s regulatory programs and whether they are adequately serving the agency’s mission of promoting greater flight safety.

To make matters worse, the GAO found that the FAA’s oversight of outsourced programs was often weak or nonexistent. For example, the GAO found instances in which FAA field offices failed to follow existing policies when selecting designees for certification programs, which could result in unqualified or under-qualified individuals and organizations performing

***What is “Regulatory Capture”?***

*Regulatory capture occurs when regulated entities exert considerable influence over the agencies that are supposed to oversee them. Due to this influence, the agency ends up working to advance the regulated entities’ narrow interests instead of the broader public interest.*

these critical duties.<sup>61</sup> In other cases, the GAO found that FAA field offices were unwilling or unable to terminate poorly performing designees, apparently “due to reluctance on the part of managers, engineers, and inspectors to take disciplinary action.”<sup>62</sup>

To maintain the ongoing effectiveness of its programs, the FAA must be able to continually identify and incorporate new risk-related information concerning the design and manufacture of aircraft and their component parts. This information includes newly discovered defects in existing designs and manufacturing processes, as well as ways to improve safety for future designs and manufacturing processes.

For example, as noted above, FAA regulations spell out various mechanisms for updating previously approved type certificates for these products to address newly discovered defects or to otherwise enhance safety. The efficacy of these programs depends on the extent to which the FAA or manufacturers are able to identify these defects or opportunities for safer alternatives before harm occurs.

Here again, the state civil justice system is able to buttress FAA regulations by providing a constellation of institutional mechanisms and actors that are uniquely well-suited for generating crucial new information concerning aircraft safety.<sup>63</sup> As indicated above, the threat of liability provides manufacturers with a strong incentive to continually monitor and evaluate the safety of their designs and manufacturing processes and make necessary changes before harm occurs.<sup>64</sup> Consequently, such industry-initiated monitoring and evaluation is less likely to take place in the absence of the incentives provided by the state civil justice system.<sup>65</sup>

Similarly, in the aftermath of aviation disasters, the state civil justice system provides a critical venue for uncovering any mechanical failures or malfunctions that may have contributed. In particular, the process of civil discovery can lead to the revelation of new information that a manufacturer might not have been aware of regarding the safety of its products or, even worse, that it might have deliberately tried to hide from the FAA and general public. In turn, information revealed during civil litigation can help the FAA revise and strengthen its regulatory programs to avert future disasters. In *Sikkelee*, for instance, the plaintiffs appear to have identified a defect in the design of the MA-4SPA carburetor.<sup>66</sup>

But for the litigation, the FAA would not now be in a position to revise its standards governing relevant carburetor design to eliminate this defect. In the absence of this litigation, though, it is possible that this defect would never have come to light, leaving numerous airplanes still equipped with these dangerous carburetors to remain in operation.

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*Even when functioning well, though, the regulatory system cannot prevent all harm. For those cases, the state civil justice system is available to offer compensation after harm has occurred.*

Finally, the state civil justice system is able to enhance the FAA's regulatory programs by providing an effective antidote to the risk of regulatory capture.<sup>67</sup> The resource disparities between the FAA and the industry it regulates create a high susceptibility for the problem of regulatory capture. The state civil justice system is able to help counter these pressures by providing a broad and diverse set of institutions – namely, the various state courts – over which supervisory authority is ultimately spread. As such, the value to the aircraft manufacturing industry of capturing the FAA to secure lax standards or enforcement is diminished because the state courts are still available to hold the industry accountable for its harmful products and activities. It would be nearly impossible for even the relatively well-resourced aircraft manufacturing industry to capture a substantial portion of the state courts, given their sheer number. The courts, therefore, stand ready to provide the victims of corporate wrongdoing with a powerful accountability mechanism.

The state civil justice system does more than just enhance the FAA's regulatory programs, however; it also supplies a corrective justice function that complements FAA regulations.<sup>68</sup> The primary objective of the regulatory system is to prevent harm *before* it occurs. Even when functioning well, though, the regulatory system cannot prevent all harm. For those cases, the state civil justice system is available to offer compensation *after* harm has occurred. State tort law offers the victims of corporate wrongdoing a powerful avenue for seeking compensation from those whose irresponsible products and activities have caused their injuries. It thereby provides them with the opportunity to hold businesses accountable for their harmful products or activities and improve aviation safety for everyone.

Indeed, the Federal Aviation Act, the federal statute that authorizes the FAA's regulatory programs for promoting safety in the design and manufacture of aircraft and their component parts, explicitly recognizes the civil justice system's important compensatory role by providing that "[a] remedy under this part is in addition to any other remedies provided by law."<sup>69</sup>



## Conclusion

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The *Sikkelee* case raised the important issue of whether the FAA's regulations governing aircraft manufacturing and design safety preempted state tort law claims involving aviation products liability. The outcome of the case affects the extent to which victims of defective aircraft or their component parts have meaningful access to the courts to seek redress for their injuries and to hold those responsible to account.

More broadly, a finding that FAA regulations preempt state tort law could risk undermining the effectiveness of the agency's programs aimed at promoting aircraft safety. The threat of tort liability provides aircraft manufacturers with strong incentives to produce safer products, thereby reinforcing the FAA's goal of preventing aviation disasters before they can occur. A strong civil justice system further reinforces the FAA's regulatory programs by providing institutional mechanisms for generating new information that can improve aircraft design and manufacturing safety and by countering the threat of regulatory capture.

Fortunately, the Third Circuit correctly ruled that the mere existence of the FAA's regulatory program for this field did not serve to preempt state tort law. The court found nothing in the FAA's authorizing legislation, including the Federal Aviation Act and subsequent related laws, demonstrating Congress' express intent for FAA regulations to have preemptive effect. Further, the court rejected arguments from both the defendant engine manufacturer and the FAA that implied field preemption blocked state products liability claims. In doing so, the court noted that the regulatory scheme at issue was not nearly comprehensive enough to create a clear federal standard of care that could supplant applicable state tort law.

While the *Sikkelee* case represents a significant victory for citizen access to courts, plaintiffs with aviation products liability claims may still find the doors to the courthouse shut. The court left room for the possibility that future cases involving otherwise legitimate claims might still be barred under conflict preemption principles. An expansive application of conflict preemption in this area would be troubling because it threatens to undermine the effectiveness of the FAA's regulatory programs and deny deserving plaintiffs an opportunity to redress their injuries. Congress is unlikely to enact new legislation that re-confirms its original intent for the Federal Aviation Act not to result in conflict preemption. Likewise, the federal courts, including the U.S. Supreme Court and the Third Circuit, are unlikely to revisit this issue in the near future to address the potential negative consequences that conflict preemption could have on regulatory programs that involve pre-market approval for products such as aircraft and pharmaceuticals. The FAA should, therefore, explore using its regulatory authority to avoid situations in which conflict preemption could arise.

Some manufacturers of consumer products will no doubt see the *Sikkelee* case as a setback in their decades-old campaign against citizen access to the courts in products liability cases, but it is unlikely to discourage their future efforts to secure federal regulatory preemption in aviation safety and other fields. As this case demonstrates, federal agencies have repeatedly argued for federal preemption in those areas that overlap with their regulatory programs. This must stop. Instead, federal agencies should do everything in their power to preserve an active and robust role for the civil justice system in promoting public safety, including writing their regulations to avoid having preemptive effect and ending the practice of submitting amicus briefs in pending litigation that argue in favor of regulatory preemption.

## Endnotes

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<sup>1</sup> 822 F.3d 680 (3d Cir. 2016).

<sup>2</sup> Nat'l Transp. Safety Bd., U.S. Civil Aviation Accident Statistics, <http://www.nts.gov/investigations/data/Pages/AviationDataStats.aspx> (last visited Sept. 30, 2016).

<sup>3</sup> Robert Barnes, *Court Rules Against Drug Companies in Amputation Case*, THE WASHINGTON POST, Mar. 5, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/04/AR2009030401407.html>; *Woman Loses Arm from Botched Injection*, Oct. 31, 2008, available at <http://www.foxnews.com/story/2008/10/31/woman-loses-arm-from-botched-injection.html>.

<sup>4</sup> *Greenville Man Killed, Brother Rescued in North Carolina Plane Crash*, WISTV (July 11, 2005, 7:38 AM), <http://www.wistv.com/story/3577599/greenville-man-killed-brother-rescued-in-north-carolina-plane-crash?clienttype=printable>.

<sup>5</sup> *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680 (3d Cir. 2016).

<sup>6</sup> *Abdullah v. American Airlines Inc.*, 181 F.3d 363 (3d Cir. 1999).

<sup>7</sup> See David E. Rapoport & Michael L. Teich, *The Pre-Abdullah Consensus That Federal Law Does Not Preempt the Field of Aviation Safety in Tort Cases Should Remain the Law*, 8 ISSUES AVIATION L. & POL'Y 241 (2009) (discussing the controversy that followed the *Abdullah* decision).

<sup>8</sup> Nat'l Transp. Safety Bd., U.S. Civil Aviation Accident Statistics, <http://www.nts.gov/investigations/data/Pages/AviationDataStats.aspx> (last visited Sept. 30, 2016).

<sup>9</sup> See generally THOMAS O. MCGARITY, *THE PREEMPTION WAR: WHEN FEDERAL BUREAUCRACIES TRUMP LOCAL JURIES* (2008); William Buzbee et al., *"Fifty FDAs": An Argument for Federal Preemption of State Tort Law That is Less Than Meets the Eye* (Ctr. for Progressive Reform, White Paper 911, 2009), available at <http://www.progressivereform.org/articles/50FDAs911.pdf>; William Buzbee et al., *The Truth about Torts: Rethinking Regulatory Preemption and its Impact on Public Health* (Ctr. for Progressive Reform, White Paper 901, 2009), available at <http://www.progressivereform.org/articles/RethinkingPreemption902.pdf>; William Funk et al., *The Truth about Torts: Regulatory Preemption at the Consumer Product Safety Commission* (Ctr. for Progressive Reform, White Paper 807, 2008), available at [http://www.progressivereform.org/articles/Truth\\_About\\_Torts\\_CPSC\\_807.pdf](http://www.progressivereform.org/articles/Truth_About_Torts_CPSC_807.pdf); William Funk et al., *The Truth about Torts: Regulatory Preemption at the National Highway Traffic Safety Administration* (Ctr. for Progressive Reform, White Paper 804, 2008), available at [http://www.progressivereform.org/articles/NHTSA\\_Preemption\\_804.pdf](http://www.progressivereform.org/articles/NHTSA_Preemption_804.pdf).

<sup>10</sup> Bryan Koenig, *Boeing, Airbus Tell 3<sup>rd</sup> Circ. Only FAA Can Regulate Planes*, LAW 360 (May 25, 2016, 11:18 PM), <http://www.law360.com/articles/800553/boeing-airbus-tell-3rd-circ-only-faa-can-regulate-planes>.

<sup>11</sup> See *Public Health Trust of Dade County, Fla. v. Lake Aircraft, Inc.*, 992 F.2d 291 (11th Cir. 1993); *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993).

<sup>12</sup> Letter Brief for United States Department of Justice, United States Department of Transportation, and the Federal Aviation Administration, *Sikkelee v. Precision Airmotive Corporation*, 822 F.3d 680 (3d Cir. 2016) (No. 14-4193).

<sup>13</sup> See, e.g., H. COMM. ON OVERSIGHT AND GOVERNMENT REFORM, MAJORITY STAFF REPORT, *FDA CAREER STAFF OBJECTED TO AGENCY PREEMPTION POLICIES* (2008) (discussing how, during the George W. Bush Administration, the White House not only "played a significant role" in including preemption provisions into the preamble of FDA regulations, but also "pressured the agency to reject the concerns of career experts" regarding these preemption provisions).

<sup>14</sup> Civil Aeronautics Act of 1938, 52 Stat. 973 §601(1).

<sup>15</sup> At one point, 75 agencies took part in regulating the field. *Sikkelee*, 822 F.3d at 684.

## Endnotes (cont'd)

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- <sup>16</sup> *Id.* at 684.
- <sup>17</sup> 14 C.F.R. §21.31.
- <sup>18</sup> Production certificates are defined at 49 U.S.C. §44704(c) and 14 C.F.R. § 21.137.
- <sup>19</sup> Airworthiness certificates defined at 49 U.S.C. §§44704(d); 44711(a)(1).
- <sup>20</sup> 49 U.S.C. §44704(a).
- <sup>21</sup> 14 C.F.R. §21.97.
- <sup>22</sup> See *The Crawford Bros. No. 2*, 215 F. 269 (W.D. Wash. 1914).
- <sup>23</sup> See *Curtiss-Wright Flying Service v. Glose*, 66 F.2d 710 (3d Cir. 1933).
- <sup>24</sup> 555 U.S. 555, 565 (2009).
- <sup>25</sup> *Id.* at 565.
- <sup>26</sup> See e.g., *Prashker v. Beech Aircraft Corp.*, 258 F.2d 602, 603-04 (3d Cir. 1958); *Northwest Airlines, Inc. v. Glenn L. Martin Co.*, 224 F.2d 120, 124 (6<sup>th</sup> Cir. 1955).
- <sup>27</sup> 49 U.S.C. § 44701 (listing the various safety standards for which the FAA has the authority to establish minimums).
- <sup>28</sup> See e.g., *Piper Aircraft Co.*, 985 F.2d at 1445 (“[A]s noted previously, the Federal Aviation Act authorizes promulgation of “minimum standards.” . . . By themselves, minimum standards such as these are not conclusive of Congress’s preemptive intent.”); see also *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 145 (1963); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 168 n.19 (1978); *Abdullah*, 181 F.3d at 373-74.
- <sup>29</sup> 49 U.S.C. § 40120(c).
- <sup>30</sup> *Id.*
- <sup>31</sup> *Morales v Trans World Airlines, Inc.*, 504 U.S. 374, 378-79 (1992).
- <sup>32</sup> 49 U.S.C. app. §1305(a)(1).
- <sup>33</sup> 49 U.S.C. §40101.
- <sup>34</sup> See *Levine*, 555 U.S. at 588-89 (“First, the Court has found pre-emption . . . ‘where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce.’ *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–143 (1963). Second, the Court has determined that federal law pre-empts state law when, ‘under the circumstances of [a] particular case, [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).”).
- <sup>35</sup> *Sikkelee*, 822 F.3d at 699-701.
- <sup>36</sup> *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 788-89 (6<sup>th</sup> Cir. 2005).
- <sup>37</sup> *Martin ex rel. Heckman v. Midwest Express Holdings, Inc.*, 555 F.3d 806 (9<sup>th</sup> Cir. 2009).
- <sup>38</sup> *Piper Aircraft Corp.*, 985 F.2d at 1447.
- <sup>39</sup> *Public Health Trust of Dade Cnty., Fla. v. Lake Aircraft, Inc.*, 992 F.2d 291, 295 (11<sup>th</sup> Cir. 1993).
- <sup>40</sup> 181 F.3d 363 (3<sup>d</sup> Cir. 1999).
- <sup>41</sup> *Id.* at 371.
- <sup>42</sup> See generally *Rapoport & Teich*, *supra* note 7.
- <sup>43</sup> *Sikkelee*, 822 F.3d at 689.
- <sup>44</sup> *Id.* at 694-95.
- <sup>45</sup> See 14 C.F.R. §91.13.
- <sup>46</sup> For a persuasive critique of the court’s reasoning, see *Rapoport & Teich*, *supra* note 7.
- <sup>47</sup> *Sikkelee*, 822 F. 3d at 702-03.
- <sup>48</sup> *Id.* at 703-04.
- <sup>49</sup> *Id.* at 704.
- <sup>50</sup> 131 S.Ct. 2567 (2011).
- <sup>51</sup> 14 C.F.R. § 21.3.

## Endnotes (cont'd)

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<sup>52</sup> See Supplemental Applications Proposing Labeling Changes for Approved Drugs and Biological Products, 78 Fed. Reg. 67985 (Nov. 13, 2013).

<sup>53</sup> William Funk et al. *Limiting Federal Agency Preemption: Recommendations for a New Federalism Executive Order* (Ctr. for Progressive Reform, White Paper 809, 2008), available at [http://www.progressivereform.org/articles/ExecOrder\\_Preemption\\_809.pdf](http://www.progressivereform.org/articles/ExecOrder_Preemption_809.pdf).

<sup>54</sup> Exec. Order No. 13132, 64 Fed. Reg. 43255 (Aug. 10, 1999).

<sup>55</sup> 49 U.S.C. §44701(a)(1).

<sup>56</sup> William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1588-89 (2007).

<sup>57</sup> Thomas O. McGarity, *Some Thoughts on "Deossifying" The Rulemaking Process*, 41 DUKE L.J. 1385, 1401 (1992).

<sup>58</sup> Operation and Certification of Small Unmanned Aircraft Systems (sUAS) (proposed Mar. 1, 2010), available at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201004&RIN=2120-AJ60>; Operation and Certification of Small Unmanned Aircraft Systems, 14 C.F.R. § 91 (2016), available at

<http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201604&RIN=2120-AJ60>.

<sup>59</sup> James Goodwin, *Spurred on by Industry, OIRA Weakens Rule to Prevent Fatigue-Related Aviation Catastrophes*, CPR BLOG (May 30, 2012), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=9CA2427E-B023-E297-6E9CA1731AF03E99>.

<sup>60</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-40, AVIATION SAFETY: FAA NEEDS TO STRENGTHEN THE MANAGEMENT OF ITS DESIGNER PROGRAMS (2004), available at <http://www.gao.gov/assets/250/244458.pdf>.

<sup>61</sup> *Id.* at 22.

<sup>62</sup> *Id.* at 24.

<sup>63</sup> Buzbee, *supra* note 56, at 1589.

<sup>64</sup> MCGARITY, *supra* note 9, at 238.

<sup>65</sup> McGarity, *supra* note 57, at 1401.

<sup>66</sup> *Sikkelee*, 822 F.3d at 685.

<sup>67</sup> Buzbee, *supra* note 56, at 1609-10.

<sup>68</sup> Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2350-51 (1990).

<sup>69</sup> 49 U.S.C. § 40120(c).

## About the Center for Progressive Reform

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Founded in 2002, the Center for Progressive Reform is a 501(c)(3) nonprofit research and educational organization comprising a network of scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. CPR believes sensible safeguards in these areas serve important shared values, including doing the best we can to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR rejects the view that the economic efficiency of private markets should be the only value used to guide government action. Rather, CPR supports thoughtful government action and reform to advance the well-being of human life and the environment. Additionally, CPR believes people play a crucial role in ensuring both private and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation, and improved public access to information.