Aviation Expert Study 2016

Preemption and Aviation Products Claims

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Introduction

Federal preemption of aviation safety standards is a firmly established legal defense that has been widely accepted by numerous courts throughout the United States. When this defense applies, it fundamentally alters the manner in which a claim is litigated and resolved.

To understand its import, one must consider there are two basic types of aviation safety related claims instituted by plaintiffs. One is a negligence type of claim which is brought in accordance with a common law "reasonable care" standard. The other is a claim alleging some form of "strict product liability."

For common law negligence claims, juries must decide whether the defendant acted "reasonably." When a trial judge instructs them how they should go about making this decision, they are told that the defendant’s compliance with federal standards is just "some evidence" that the defendant’s conduct was reasonable. The jury is told that they decide what is considered reasonable and whether the defendant’s conduct meets that standard.

Basic Aviation Safety Claims
- Negligence in accordance with reasonable care standard
- Strict product liability

In a strict product liability claim, the jury is told that a manufacturer, distributor and/or retailer must be found liable if they find that the product (or component part) in question has a "defect" which contributed to the accident. When a trial judge instructs the jury how they should go about deciding whether the product is defective, they are generally told that the Federal Aviation Administration's (FAA) determination that the product is safe is also just "some evidence" that the product is not defective and that, irrespective of what the FAA concluded, it is the jury which has the ultimate authority to determine whether they believe the product to have some type of defect.

Preemption defense in aviation safety

Recognition of the preemption defense in aviation safety based common law negligence claims has fundamentally changed the way those claims are decided. If courts also apply the defense in strict product liability claims, it will have an equally profound impact. At this point, however, the law regarding the use of this defense in strict product liability cases must be developed further.

To better understand how this could be accomplished, it is important to consider that the fundamental premise of the FAA preemption defense is that Congress long ago recognized that aviation had to be uniformly regulated at the federal level. Congress also recognized that the only way to do so and preserve the "delicate balance between safety and efficiency" was to create the FAA and vest it with "exclusive" authority to regulate "all aspects" of the "field" of aviation safety. [See City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624, 93 S. Ct. 1854 (1973)].
The aviation preemption case law has developed to the point that US courts now recognize that cases alleging some type of common law negligence claim must be judged by federal standards established by the FAA. Hence, the traditional common law "reasonable care" standard is eliminated from the case, as are the experts who would otherwise testify about what they consider to be reasonable conduct. Instead of the jury making a determination about what they consider to be reasonable, the jury is told what federal standards require and then simply told to determine whether the defendant’s conduct meets that standard.

Air carriers’ and the preemption defense in common law negligence claims

Not surprisingly, air carriers have been at the forefront of using the preemption doctrine to dismiss a wide variety of common law negligence claims asserted against them, including routine denied boarding claims, a worldwide spate of wrongful death claims attributed to so-called “economy class syndrome,” and even negligent security claims alleging that American Airlines, United Airlines and other carriers should be held responsible for 9/11. For some reason, however, product manufacturers have not widely utilized the FAA preemption defense in the strict product liability context.

Product manufacturers do not widely use the FAA preemptive defense for strict product liability cases

It is somewhat surprising that product manufacturers have not more proactively sought to utilize the FAA preemption defense in the various strict product liability claims which are asserted against them. The case law recognizing the defense in the common law negligence context bases this holding on Congressional intent to “exclusively” regulate “all aspects of air safety” at the federal level. [See City of Burbank v. Lockheed Terminal, 411 U.S. 624, 93 S. Ct. 1854 (1973); Abdullah v. American Airlines, Inc., 181 F.3d 363 (3d Cir. 1999)]. That broad expression of Congressional intent clearly includes claims related to the safety of aviation products and equipment. There is, however, an additional factor to consider as to how the preemption defense would apply in a strict product liability context.

Non-product aviation safety based negligence claims

In non-product aviation safety based negligence claims, the issue which determines liability is the reasonableness of the defendant’s conduct at the time of the accident. Because of preemption, federal standards established by the FAA must be used to resolve this issue. Since most such claims arise in a context where there is no FAA approval of the conduct at issue, e.g., a claim based on careless or reckless piloting under Federal Aviation Regulation (FAR) 91.13, a question of fact can exist as to whether FAA standards were violated. When that happens, a jury will hear evidence and then determine whether the weight of the evidence establishes an actual breach of the federal standard. The legal analysis is quite different for product based aviation safety claims.
Liability

In strict product claims, the issue which determines liability is whether a defect existed at the time of manufacture and sale. Because of preemption, federal standards established by the FAA must also be used to resolve this issue. However, unlike the common law negligence claim, such as one involving an allegation of negligent piloting, the FAA is required by law to use federal standards to review the product at issue before it is manufactured and sold. The manufacturer is not allowed to manufacture and sell the product unless the FAA has determined that the product is safe for use and not defective.

Since the FAA’s determination that an aviation product can be manufactured and sold is based on it finding compliance with federal standards, there really is no question of fact for a jury to decide. If a court allows a jury to second guess the propriety of the FAA’s determination, it would essentially be holding that lay juries are the ultimate arbiters of aviation product safety even though Congress vested the FAA with the exclusive authority to do so. The preemption defense should be used to proactively prevent this type of result.

Courts should be educated to recognize that not only are the standards promulgated by the FAA controlling but so too is the FAA’s determination that an aviation product (or component part) meets those standards. Judicial recognition that a jury is not allowed to disregard an FAA determination as to what a safety standard should be is not substantively or analytically different from judicial recognition that a jury is also not allowed to disregard an FAA determination that a product complies with that standard.

Congress has always recognized the need for aviation to be regulated uniformly. It created the FAA to establish a uniform system of regulation and to carefully monitor the technological advancements that would make flying safer. Congress vested the FAA with exclusive regulatory authority because it believed that was the best way to preserve the delicate balance between safety and efficiency. When these fundamental principles are understood, it becomes rather obvious that if juries are allowed to overrule FAA safety determinations, the FAA would be divested of its exclusive regulatory authority. Moreover, if juries in fifty different states are all similarly empowered, the result would be a system which is inherently non-uniform and extremely inefficient. That is not what Congress intended and contrary to what the applicable law actually requires.

The purpose of this white paper is to review the law and analysis relevant to the FAA preemption defense and to explain why this defense also applies in strict product liability litigation. Hopefully the information set forth herein will set forth a straightforward approach as to how best to utilize this defense in all future aviation product litigation.
I. Overview of the FAA Preemption Defense in General Aviation Product Litigation

To understand how preemption works in aviation product cases, it is helpful to first consider how strict product liability claims are typically litigated. In most cases, the plaintiff serves a complaint which generally alleges that an aviation product or some component is "defective." Plaintiff's attorney, in conjunction with a so-called expert, then conducts what is usually broad ranging discovery intended to discover some "defect" which can then be alleged to be a cause of the accident. The fact that the FAA certified the product as airworthy and meeting federal safety standards is deemed just "some evidence" that the product is not defective. The ultimate determination as to whether the product should be deemed safe or defective is made by jurors with little or no technical expertise and no real substantive knowledge of aviation safety. Their decision is almost always influenced by which expert the jury likes and how sympathetic the jury feels towards the plaintiff.

An offshoot of the typical strict product liability case is one wherein the jury is purportedly instructed to use federal standards to determine whether the product is safe. In this type of hybrid case, a product which is certified by the FAA as meeting applicable FAA safety standards is nonetheless submitted to a jury to determine whether the FAA's certification decision was correct. Under this recently advanced theory, the jury would be instructed as to the certification standards used by the FAA and then instructed to determine whether they find that the product satisfies these standards. During trial, the jury would be permitted to hear expert testimony related to the foregoing and in essence, be allowed to overturn the certification decision reached by the FAA's technical experts.

Needless to say, six people walking in off the street one day to sit as jurors in a strict product liability claim do not have the technical expertise of the FAA nor could they possibly be expected to learn and apply the myriad technical standards which the FAA is required to factor into every certification decision. Thus, under either a pure strict product liability standard or a hybrid federal standard, a lay jury, not the FAA, will be the ultimate authority for determining whether a highly complex aviation product meets applicable safety standards.

Litigation of an aviation product claim within either the strict product liability or hybrid framework is very costly and provides little long term benefit to the defendant or its insurer. **Win or lose, the defendant and its insurer must pay for a costly defense and then deal with a multitude of risks and additional post-trial costs which arise irrespective of the result in a particular case.**

Consider a claim asserted against an aviation product that has gone through years of rigorous development and testing. Numerous meetings with the FAA are held throughout the process and as a result of these discussions and extensive analysis, and usually some modification, the design of the product is certified as meeting the FAA's safety standards. Additional time and resources are then invested with respect to the submission and issuance of a production certificate so that the product can be manufactured. After each product is manufactured in accordance with what the FAA has required, it is marketed and ultimately used on aircraft which are allowed to be operated only when the FAA issues a certificate of airworthiness certifying the overall safety of that aircraft. The FAA is involved in every step of this process and even requires post-
market monitoring and feedback from the manufacturer regarding any problems which develop during the time when the product is in actual use.

When an aircraft is involved in an accident, litigation is frequently instituted claiming that one or more products used on the aircraft were "defective" and contributed to the cause of the accident. Extensive discovery is usually conducted and experts are retained to support the theory that the plaintiff's attorney will use to prove the alleged defect. The cost of discovery is usually very substantial, as is the cost of retaining defense experts and developing demonstrative exhibits that will be used to help communicate their opinions at trial. If the defense wants to test how a jury would view the likely expert themes or defenses, even more costs are added.

If the case goes to trial, more substantial costs are incurred with no guarantee of success. If, despite defense counsel's best efforts, a jury finds that the product is defective, the defendant may decide to accept that result and simply pay the verdict amount. When it does so, it must then deal with the strong possibility that there will be similar claims made against that product or its component parts in the future. The manufacturer and its insurer must also consider whether they will be collaterally estopped from denying liability if a future claim is asserted.

If, on the other hand, the defendant decides to appeal, it will then have to bear the substantial costs of pursuing that appeal without knowing the ultimate outcome and without knowing whether it should continue to market and sell the product at issue. The risks which arise from continued sale and marketing necessarily include not only the distinct possibility of future litigation costs, but even the specter of punitive damages.
When a manufacturer wins a suit alleging product defect, that is obviously good news in the context of that case. However, that result has little value insofar as defending a future case is concerned. Any other plaintiff can claim that the same product is defective and a cause of the accident at issue in its case. Indeed a subsequent plaintiff’s attorney would be likely to tailor his or her theory of the case and retain experts who would take into account how the product was successfully defended in the prior case. Needless to say, when the costs of even a successful defense are added up, even a win can be fleeting since that result has little or no favorable impact on similar claims that may be advanced in the future.

By way of contrast, when the federal preemption defense is recognized, the result differs dramatically. When preemption applies, federal standards control and state law standards are no longer relevant. Under the federal preemption construct, FAA product certification is not just "some evidence" that the product is not defective but conclusive proof that the product complies with applicable safety standards and is airworthy. Thus, if the defendant establishes that the FAA approved the product’s design and issued a type certificate, summary judgment must be granted to the defendant.

Using the preemption defense to obtain summary judgment can completely eliminate the need for trial and the costs associated with doing so. Prior to a motion for summary judgment being filed, the preemption defense can also dramatically reduce claims handling expenses and greatly simplify the entire defense. Any discovery and expert costs related to the typical claim that a manufacturer should have done more than what the FAA required and/or any discovery related to a claim that the FAA erred when it certified the product should all be precluded.

In addition to providing these important benefits in the case being litigated, when summary judgment on preemption grounds is granted, that victory is not limited to just that case. Favorable precedent is instead established and that precedent can be broadly used to defend many other types of product claims, even those involving different types of products. This is because, irrespective of the particular product at issue, any decision recognizing the preemption defense can be used to support a similar defense whenever a plaintiff claims that any FAA certified product is defective.

Despite these obvious and very substantial benefits, few manufacturers or other general aviation defendants have successfully utilized the FAA preemption defense. This may be due in part to this exact defense being rejected by the Tenth Circuit over twenty years ago when it was raised by a manufacturer as a defense to a defective design claim1. The Tenth Circuit rejected the defense even though the FAA agreed with the defendant and fully supported the legal basis for not allowing a jury to second guess its safety determinations2. After the Tenth Circuit did so, its decision was then cited by Congress the following year as one of the motivating factors prompting the passage of the General Aviation Revitalization Act (GARA)3. As a result of this history, it seems that manufacturers have focused most of their legal attention on defenses provided by GARA and in the course of so doing, not focused their attention on the far more potent use of a FAA preemption defense that has far broader application and far greater benefits.

1 Cleveland vs. Piper Aircraft Corp., 985 F.2d 1438 (10th Cir. 1993) (abrogation recognized by U.S. Airways, Inc. vs. O’Donnell, 627 F.3d 1318 (10th Cir. 2010)).
In considering the foregoing issues, it is also important to note that when the Third Circuit first recognized the FAA preemption defense in 1999 and held that federal law preempted all aspects of air safety⁴, it specifically rejected the aforesaid anti-preemption holding of the Tenth Circuit and explained in some detail why its rationale was wrong. It took, however, almost twenty years for the Tenth Circuit to finally state that it agreed with the Third Circuit and acknowledge that its 1993 decision rejecting the preemption defense in the product liability context was flawed⁵.

Irrespective of the reasons why this fertile defense ground has lay fallow for so many years in the product context, it is far more important to note that the FAA preemption defense was recently utilized in a strict product liability case and its use upheld in a decision issued by a United States District Court in the Third Circuit. The rationale for that holding was largely based on the Third Circuit’s 1999 seminal preemption holding in *Abdullah v. American Airlines*⁶. As was also the case when *Abdullah* was decided, the district court’s decision upholding preemption has been appealed and is now pending before the Third Circuit.

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⁵ *US Airways, Inc. vs. O’Donnell*, 627 F.3d 1318 (10th Cir. 2010).
Clyde & Co represents the defendant in that case, and one of the authors of this paper (Jeff Ellis) wrote the appellate amicus brief for the General Aviation Manufacturer’s Association (GAMA). Although oral argument has been held, the Third Circuit has asked the FAA to submit its views as to whether its issuance of a type certificate should preclude a design defect claim. Those of us involved in the appeal are cautiously optimistic of an affirmance because the prior case law in the Third Circuit strongly supports our position and, as pointed out in the GAMA amicus brief, the FAA has twice previously advised federal courts that it agrees with the position being espoused by the defense.

While we will obviously have to wait several months or more before the Third Circuit issues a decision, it must be remembered that the decision now on appeal already recognizes the FAA preemption defense and grants summary judgment dismissing design defect claims based on same. Accordingly, there is not only specific precedent which supports the immediate use of this defense, but also a wealth of case law in numerous jurisdictions which provide the legal foundation to support this holding.

As was the case with the original 1999 preemption holding of the Third Circuit in Abdullah, it is a virtual certainty that the plaintiff’s aviation bar will strenuously fight against the use of the FAA preemption defense in product cases. A complete understanding of the legal basis for this defense and consistency as to how the defense is analyzed, briefed and argued in future cases will be of critical import.

Any failure to properly raise and effectively argue the FAA preemption defense can easily cause a court to reject the preemption defense and instead issue a decision which simply follows a plethora of decisions which never properly considered whether preemption should even be applied. Such a decision will then be cited over and over again by the plaintiffs as part of their coordinated attempt to prevent the widespread application of the preemption defense in the product context.

Coordination on the defense side is equally, if not more, important. This is precisely how air carriers were ultimately able to achieve widespread, national recognition of the FAA preemption defense in common law negligence claims and why that defense has now been accepted in cases that range from routine passenger claims to the claims arising out of the cataclysmic events of 9/11. This same template can be applied in the product liability context and hopefully achieve the same widespread success. The first step on this path should be a full understanding of why the law favors recognition of the preemption defense in the product context.

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7 For a copy of the GAMA amicus brief contact Jeff Ellis at Clyde & Co. at jeff.ellis@clydeco.us.
8 The Department of Transportation and Federal Aviation Administration submitted a letter brief to the Third Circuit on September 21, 2015. In this brief, the government adhered to the same position that it took in Cleveland, explaining that the Federal Aviation Act of 1958 (“1958 Act”) preempts the field of aviation safety with respect to substantive standards of safety. As the 1958 Act requires the FAA to impose uniform national standards, the FAA determines whether every new aircraft, aircraft engine or propeller meets these standards by issuing a type certificate. However, the type certificate does not preclude all design defect claims. Whether a claim is preempted by a type certificate is governed by ordinary conflict preemption principles. If the FAA expressly approved the challenged design aspect, any claim that the design should have been different conflicts with the federal standard and is preempted. Brief for the Department of Transportation and Federal Aviation Administration, Sikkelee vs. Precision Airmotive Corp., No. 14-4193 (3d Cir. Sept. 21, 2015).
9 See pgs. 15-18 of GAMA amicus brief.
II. The U.S. Constitution Provides the Source for Congress' Power to Preempt State Law and Creates the Framework for Preemption Jurisprudence

The power of Congress to preempt State law derives from the Supremacy Clause of Article VI of the Constitution, which provides that the laws of the United States “shall be the Supreme Law of the Land … any Thing in the Constitution of Laws of any state to the Contrary notwithstanding.” Our earliest Supreme Court holdings note, “It is basic to this constitutional command that all conflicting state provisions be without effect.”

In one of its first decisions to address whether State law should be preempted by federal law, the United States Supreme Court held that federal law should exclusively govern matters that are the subject of the federal government's commerce power and "are in their nature national, or admit only of one uniform system, or plan of regulation."
As the Supreme Court's preemption jurisprudence has developed, it has been held that a court should infer an implicit intent by Congress to preempt whenever an "Act of Congress may touch a field in which the **federal interest is so dominant** that the federal system will be assumed to preclude enforcement of state laws on the same subject"\(^{13}\). The Supreme Court has also held that a court should imply an intent by Congress to preempt a particular state law when that "state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress"\(^{14}\), and/or when there is **pervasive federal regulation** in the field at issue\(^{15}\).

In light of the importance and weight the Supreme Court gives to the **nature** of the commerce at hand, the necessity of one **uniform** system or plan of regulation, the existence of a **dominant federal interest**, the **purposes and objectives of Congress**, and the existence of **pervasive federal regulation**, it is hardly surprising that the Supreme Court's preemption jurisprudence has long included the aviation field.

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\(^{15}\) *Rice*, supra, at 230.
III. The Supreme Court hasRepeatedly Recognizedthat Congress Intended toRegulate Aviation Exclusively at the Federal Level.

In City of Burbank v. Lockheed Air Terminal, Inc16, the specific issue before the Court was whether the 1958 Act, as amended by the Noise Control Act of 1972, implicitly preempted a local ordinance that sought to control aircraft noise by regulating the time periods in which jet aircraft could take-off from the Hollywood-Burbank Airport17. The Supreme Court concluded that the local ordinance was preempted by federal law18. Justice Douglas, writing for the majority, reasoned that although the control of noise is within the police power of the states, the "pervasive control" of aviation safety and flight operations at the federal level left "no room for local curfews or other local controls19." In other words, the holding in Burbank is that state or local law that purports to regulate aircraft noise is preempted because it falls within the scope of an area of law that is exclusively regulated at the federal level, i.e., aviation safety and flight operations.

The Supreme Court premised its holding in Burbank on its finding that the 1958 Act "requires a delicate balance between safety and efficiency" and that the "interdependence of these factors requires a uniform and exclusive system of federal regulation if the [C]ongressional objectives underlying the [1958 Act] are to be fulfilled."20. This conclusion that Congress intended to preempt state regulation is set forth not only in the five justice majority opinion authored by Justice Douglas but also in the four justice dissenting opinion authored by former Chief Justice Rehnquist.

Justice Rehnquist stated that although he believed that this local noise ordinance fell outside the scope of federal preemption, he nonetheless agreed with the majority that the scope of the 1958 Act's implied preemption of state law extended to "all aspects of air safety."21 Justice Rehnquist specifically stated:

The 1958 Act was intended to consolidate in one agency in the Executive Branch the control over aviation that had previously been diffused within that branch. The paramount substantive concerns of Congress were to regulate federally all aspects of air safety ... and, once aircraft were in 'flight,' airspace management22.

The holding in Burbank is not the first time that the Supreme Court recognized the uniquely federal nature of aviation. Even prior to the passage of the 1958 Act, the Supreme Court recognized that the nature of air transportation required uniform and exclusive federal standards23. In Northwest Airlines, Inc. v. Minnesota, Justice Jackson authored a concurring opinion more than sixty years ago wherein he noted that the nature of aviation admits to only one uniform system of standards:

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17 Id., at 625.
18 Id., at 626.
19 Id., at 638.
20 Id., at 638-639 (emphasis added).
21 Id., at 644 (emphasis added).
22 Id. (emphasis added).
Congress has recognized the national responsibility for regulating air commerce. 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 taxies onto a runway it is caught up in an elaborate and detailed system of controls.

In 1948 the Supreme Court majority echoed Justice Jackson’s statements in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp*:

- Congress has set up a comprehensive scheme for regulation of common carriers by air ... We find no indication that the Congress either entertained or fostered the narrow concept that air-borne commerce is a mere outgrowth or overgrowth of surface-bound transport ... air commerce, whether at home or abroad, soared into a different realm than any that had gone before. Ancient doctrines of private ownership of the air as appurtenant to land titles had to be revised to make aviation practically serviceable to our society. A way of travel which quickly escapes the bounds of local regulative competence called for a more penetrating, uniform and exclusive regulation by the nation than had been thought appropriate for the more easily controlled commerce of the past.

These decades old Supreme Court decisions do not reflect what is now sometimes described as "judicial lawmaking." Rather, the Supreme Court’s recognition that aviation must be regulated at the federal level, and without any involvement of the States, can be traced to what Congress intended from the time that it enacted the earliest federal aviation legislation.

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24 322 U.S. at 303 (emphasis added).
26 333 U.S. at 105-107 (emphasis added).

Published by Allianz Global Corporate & Specialty Publications, Greg Dobie, Editor
IV. The Legislative History for Federal Aviation Legislation has Always Indicated a Desire for Uniform Federal Regulation with no Safety Oversight Role Reserved for the Individual States

The conclusion that Congress intended for aviation safety to be exclusively and uniformly regulated at the federal level can be traced all the way back to the Congressional hearings that led to the passage of the 1926 Air Commerce Act. One of the witnesses who testified, William MacCracken, Chairman of the American Bar Association Committee on the Law of Aeronautics, noted that his committee assisted Congress in drafting the bill and “solving the legal problems that have been presented.”

In explaining the legal framework of the proposed legislation to a Congressional Committee that was studying its enactment, Mr. MacCracken stated: “There were two things that were of controlling importance. One is that there should be exclusive regulatory power in the Commissioner to the end that there might be uniformity throughout the States.” Mr. MacCracken then emphasized the absolute necessity of exclusive federal regulation when he was questioned by members of the Congressional committee reviewing the issue:

- Mr. Burtness: Mr. MacCracken, the men responsible for the drafting of this bill, they, do feel that there would be objections to concurrent jurisdiction on the part of the State Government?
- Mr. MacCracken: Absolutely. There is no question about that.

The legislative history of the 1958 Act likewise reveals Congress’ intent to exclusively regulate matters of aviation safety at the federal level. According to its legislative history, the purpose of the 1958 Act was to create one uniform system of air space management so as to “eliminate divided [federal] responsibility and conflicts of interest” and “avoid duplication of effort and a division of [federal] authority that could result in further confusion.” In a report accompanying the 1958 Act, Stuart Tipton, President of the Air Transport Association explained,

“Aviation is unique among transportation industries in relation to the Federal Government – it is the only one whose operations are conducted almost wholly within the federal jurisdiction, and are subject to little or no regulation by the States or local authorities.”

That report further sets forth that transferring all safety and rulemaking to a single federal agency (i.e., the Federal Aviation Administration) was necessary because “aviation safety is essentially indivisible,” and “That experience indicates that the preparation, issuance, and revision of regulations governing matters of safety can best be carried on by the agency charged with the day to day control of traffic, the inspection of aircraft and service facilities, and certification of pilots and related duties.”

27 H.R. 10522, 68th Cong., 2nd Sess., pp. 54-55; also referred to at page 30 of the “History of the Legislation” section of the Legislative History for the Air Commerce Act of 1926.
28 H.R. 10522, at p. 55 (emphasis added).
29 H.R. 10522, pp. 63-64 (emphasis added).
32 Id., at p. 11 (emphasis added).
33 Id., at p. 27.
Congress concluded that the only means to effectuate such a uniform and exclusive system of regulation was to vest “full safety rule making authority” in one federal agency headed by an administrator with “plenary” (complete) authority to make and enforce safety regulations governing, among other things, the design and operation of civil aircraft.34

The foregoing legislative history is wholly consistent with the Supreme Court case law that recognizes that Congress intended the field of aviation safety to be exclusively and uniformly regulated at the federal level. As many courts have now recognized, the only way to accomplish this goal is for the courts to respect and uphold FAA safety determinations, irrespective of whether that determination pertains to the creation of a federal standard or a determination that a product complies with that standard.

V. Abdullah Correctly Holds that Congress Intended the FAA to Exclusively Regulate all Aspects of Air Safety and did not Intend to Allow Lay Juries to Second Guess the FAA’s Safety Determinations

The Third Circuit’s seminal preemption decision in *Abdullah* is based on and cites to the prior preemption holdings of the Supreme Court to guide its analysis. In accordance with same, *Abdullah* notes at the outset that when determining whether preemption exists, *"the purpose of Congress is the ultimate touchstone."* 181 F.3d at 366 (emphasis added). *Abdullah* therefore cited to the Supreme Court’s extensive review of the legislative history of the 1958 Act in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). In that regard, Burbank specifically held that “the Federal Aviation Act of 1958 requires a delicate balance between safety and efficiency” and that the “interdependence of these factors requires a uniform and exclusive system of federal regulation if the Congressional objectives underlying the Federal Aviation Act are to be fulfilled.” 411 U.S. at 638, 639 (emphasis added).

*Burbank’s* two requirements for how Congressional intent can be fulfilled cannot be achieved when a potentially infinite number of juries are allowed to second guess FAA safety and type certification decisions. This type of legal construct would not only upset the “delicate balance between safety and efficiency” that Congress wanted to preserve when it passed the 1958 Act but it would also clearly disrupt the “uniform and exclusive” system of federal regulation that Congress created the FAA to achieve.

Even the hybrid approach wherein a jury purports to apply the same federal standards as the FAA is impossible to implement. This is because the FAA’s type certification process is highly complex and jurors lack the FAA’s technical expertise and experience to even understand those standards, let alone apply them. Indeed, when the district court in the Third Circuit case now on appeal tried to draft jury instructions that would allow a jury to attempt to duplicate the FAA’s certification procedure, the Court found that task undoable. The trial judge even stated that plaintiff’s experienced counsel was “completely unable to assist the Court.”

As any aviation manufacturer knows very well, the certification process is long, very complex and detailed. It is not something that lawyers, judges or juries are capable of or intended to implement. That is what Congress and the Supreme Court recognized long ago and that is why the FAA was created and vested with the exclusive authority needed to preserve the “delicate balance between safety and efficiency.”
VI. The FAA's Certification of Aviation Products and their Component Parts Fall within the Preempted Field of Air Safety

Abdullah held that "all aspects of air safety" are preempted because that was clearly what Congress intended and exactly what the Supreme Court had previously held. The FAA's certification of aviation products is clearly one very important "aspect" of aviation safety and therefore must be included in the "field" held to be preempted by the 1958 Act. This conclusion is further evidenced by review of the legislative history addressing the reasons why Congress passed the 1958 Act.

The House Report which accompanied the passage of the 1958 Act clearly indicates that the field being preempted includes product certification. Abdullah quotes a portion of that report to support its holding that one of the purposes of the 1958 Act was to give "... the Administrator of the new Federal Aviation Agency ... full responsibility and authority for the advancement and promulgation of civil aeronautics." 181 F.3d at 368, 369 citing to H.Rep. No. 2360, reprinted in 1958 U.S.C.C.A.N. 3741. The full report, however, makes it clear that the FAA's "full responsibility" for "safety" extended also to "the design and operation of civil aircraft". Id.

The foregoing clearly establishes that the 1958 Act was intended to give the FAA full responsibility and exclusive authority over all aspects of aviation safety, including aircraft design and operation. When it is further considered that the Supreme Court held in Burbank that uniformity and the delicate balance between safety and efficiency require exclusive federal control, it becomes self-evident that juries cannot be allowed to second guess FAA determinations that a product meets applicable safety standards. That conclusion is entirely consistent with the holding of Abdullah, Congressional intent and longstanding Supreme Court precedent. It is in no way contradicted by the statutory purpose of GARA or any other federal aviation legislation.
VII. GARA Cannot be Read as Intending to Undo the Regulatory Scheme Created by the 1958 Act

It has been argued that GARA implicitly undoes the 1958 Act’s preemptive scheme and should be interpreted as evidencing Congressional intent to empower juries with the ultimate authority to determine, on a claim by claim basis, whether a general aviation product meets applicable safety standards. This argument ignores the Supreme Court’s maxim that “the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.” Cipollone v. Liggett Group, 505 U.S. 504, 520 (U.S. 1992) citing to United States v. Price, 361 U.S. 304, 313, 4 L.Ed.2d 334, 80 S. Ct. 326 (1960). This argument also ignores the fact that there is nothing in GARA’s statutory provisions to indicate a Congressional intent to undo key provisions of the 1958 Act.

GARA’s stated purpose was simply to establish an “18 year statute of repose for a civil action against aircraft manufacturers.” See, H. Rep. No. 103-525(II), 103rd Cong., 2d Sess., 1. Nothing in GARA’s statutory provisions or legislative history indicates that it was in any way intended to undo “the delicate balance between safety and efficiency” intended by the 1958 Act or, alter the FAA’s exclusive regulatory authority over all aspects of aviation safety, including the certification and design of aviation products.

The argument that GARA should be interpreted to limit the broad preemptive scope of the 1958 Act completely disregards the principles of statutory construction which the Third Circuit addressed at length in Abdullah. In Abdullah, the court was faced with an argument that a statute passed subsequent to the 1958 Act should be interpreted to re-define the 1958 Act’s preemptive scope. It was argued that the Airline Deregulation Act of 1978 (1978 ADA), P.L. No. 95-504, 92 Stat. 1705, should be interpreted to re-define the preemptive scope of the 1958 Act. 181 F.3d at 372, 373. Abdullah, however, rejected that argument along with the primary case cited to support this claim, the Tenth Circuit’s 1993 decision in Cleveland v. Piper Air Craft Corp., 985 F.2d 1438 (10th Cir. 1993). Id. Abdullah explained that the 1978 ADA’s preemption of “any law, rule, regulation, standard ... relating to rates, routes, or services of any air carrier” was not intended to implicitly undo the 1958 Act’s preemption of “all aspects of air safety.” Id. Abdullah cited to well-accepted rules of statutory construction and stated that “the meaning of a statute is found in the evil [problem] which it is designed to remedy”. 181 F.3d at 373. It then stated that the aforesaid preemption provision of the 1978 ADA was “enacted to ensure that states would not undo Federal deregulation with regulation of their own,” and not to undo the 1958 Act’s preemption of all aspects of aviation safety. Id. (internal alterations omitted).

As the Supreme Court explained in Morales v. TWA, 504 U.S. 374 (1992):

- “Prior to 1978, the Federal Aviation Act of 1958 ... gave the Civil Aeronautics Board (CAB) authority to regulate interstate airfares and to take administrative action against certain deceptive trade practices” 504 U.S. at 378 (internal citation omitted).
Morales explained that because Congress found that the federal controls put in place by the 1958 Act were hindering "efficiency, innovation, and low prices," it passed the 1978 ADA to deregulate this area from federal controls. Id. In light of the limited purpose for which the 1978 ADA was enacted, Abdullah correctly recognized that the ADA's preemption provision should be interpreted only to preclude States from attempting to impose economic regulations of their own. 181 F.3d at 373. In other words, there was no basis to interpret a provision in a statute that has absolutely nothing to do with aviation safety as revising the previously enacted federal scheme for regulating that area.

Any anti-preemption citation to GARA is much like the citation to the 1978 ADA in Abdullah. Both statutes were enacted long after Congress passed the 1958 Act and neither statute was intended to impact the exclusively federal regulation of all aspects of air safety that was specifically addressed in the 1958 Act. The problem that GARA was enacted to address was simply the extraordinarily long time period for bringing claims against aviation manufacturers. As with the 1978 ADA, Congress never addressed aviation safety in GARA.
If Congress had intended to undo any aspect of the regulatory scheme for aviation safety when it passed GARA, it clearly understood how to do so since the 1978 ADA had specifically deregulated federal control over economic aspects of air carrier operations. The fact that GARA did not enact a similar deregulation provision with respect to the safety of general aviation aircraft and products certainly indicates that Congress did not intend to do so and that GARA should not be interpreted to infer such an intent.

In considering the foregoing, it also should be considered that the case most cited as supporting the conclusion that juries are permitted to overrule FAA certification decisions is the Tenth Circuit’s 1993 decision in Cleveland v. Piper Aircraft Corp., 985 F.2d 1438 (10th Cir. 1993). Like many product cases, Cleveland involved a negligent design claim against a general aviation manufacturer which the manufacturer claimed to be preempted by the FAA’s certification of the aircraft and the exclusively federal regulatory scheme established by the 1958 Act. 985 F.2d at 1440, 1443. Cleveland rejected these arguments and held that the 1978 ADA should be interpreted to define the entire scope of aviation preemption and Burbank interpreted only to require preemption of aircraft noise claims. 985 F.2d at 1443. Abdullah, however, explained in great length why these holdings in Cleveland were clearly erroneous.

When the Tenth Circuit re-visited its decision in Cleveland, it cited to Abdullah and held that its prior finding of no preemption in Cleveland was incorrect. In so holding, the Tenth Circuit cited also to the Supreme Court’s decision in Burbank and stated:

- "Based on the FAA’s purpose to centralize aviation safety regulation and the comprehensive regulatory scheme promulgated pursuant to the FAA, we conclude that federal regulation occupies the field of aviation safety to the exclusion of state regulations. The FAA was enacted to create a ‘uniform and exclusive system of federal regulation’ in the field of air safety …"

Because the design and certification issues addressed in Cleveland are virtually identical to the issues raised in the case at bar, Cleveland’s post-GARA refutation by the Tenth Circuit in U.S. Airways and by the Third Circuit in Abdullah is obviously significant. What is equally significant to note is that the FAA stated in Cleveland that it agreed with the position taken by the manufacturer and fully believed that Congress had created it so that it could be vested with exclusive authority over all aspects of aviation safety, including aircraft design and certification.

The FAA explained in the amicus brief which it filed in Cleveland that “the federal government is the sole and exclusive arbiter of safe aircraft design...” 1991 U.S. 10th Cir. Briefs 2065; 1992 U.S. 10th Cir. Briefs LEXIS.

1. That brief not only cites to much of the same legislative history and case law cited in Abdullah but also articulates the reasons why the FAA’s issuance of a type certificate should not be second guessed by a jury.

The FAA’s detailed explanation in Cleveland as to why lay juries should not be permitted to intrude into the certification process is as relevant today as it was when it was set forth more than twenty years ago:

- “The (1958 Act’s) statutory scheme establishes an all-encompassing federal regulatory framework, one that indicates an affirmative congressional intent to occupy the field of air safety. First, the statute delegates to a federal agency the power to set standards governing the adequacy of every facet of aircraft design, materials, workmanship, construction, and performance. 49 U.S.C. App. 1421(a). It does not refer to supplemental regulation by the states, nor is there any gap in the federal regulatory framework that would indicate Congress contemplated interstitial state regulation.

- Second, the certification of a civil aircraft is based on a complete assessment of each and every factor relevant to safety. The FAA is empowered to fully investigate any aspect of a proposed aircraft design. 49 U.S.C. App. 1423(a). It may hold hearings to gather additional information or order any tests reasonably necessary to evaluate the plane’s safety. Ibid. It is further authorized to draw upon the expertise of the National Aeronautics and Space Administration or any other research or technical agency of the United States in assessing the merits of the proposed design. 49 U.S.C. App. 1505. The federal design certification process thus entails an exhaustive inquiry into design safety. Consequently, a federal design type certification may not issue until the FAA or its designee n.1 determines, after a highly technical, specialized, and expert review, that the aircraft is safe to fly. 49 U.S.C. App. 1423(a).

- N.1 The FAA may delegate to manufacturers the authority to determine whether a design meets pertinent airworthiness standards if the manufacturer: (1) already holds design type and production certificates for the same category of aircraft, and (2) it has a staff qualified to conduct necessary tests and inspections. See 14 C.F.R. 21.231 et seq.


The FAA reiterated these same views 13 years after GARA was enacted. In Air Evac EMS, Inc. v. Robinson, 486 F. Supp. 2d 713 (M.D. Tenn. 2007), the State of Tennessee sought to regulate the type of equipment used in air ambulance helicopters. The plaintiff helicopter operator instituted an action in federal court seeking to enjoin the State from doing so. It claimed that Tennessee was prohibited from intruding in a field that was wholly preempted and subject only to regulation by the FAA.
In making its argument, Air Evac specifically noted that the safety of the helicopter was not subject to challenge because the FAA had issued a type certificate for same. After extensive briefing and hearings, the district court granted the injunction. The court cited to *Abdullah* to support that conclusion but also cited to a statement that was submitted to the Court by the FAA's Director of Flight Standards. The Court noted and upheld his statement that “only the FAA” has “responsibility for matters concerning aviation safety, including the certification and operation of aircraft.” 486 F. Supp. 2d at 715 (emphasis added).

In light of the foregoing, there is no credible basis to argue that a statute passed more than 35 years after the enactment of the 1958 Act should be interpreted to undo an important aspect of the regulatory scheme which the earlier statute promulgated. As with the 1978 ADA, nothing in GARA’s statutory provisions seeks to undo any aspect of the FAA’s regulation of “all aspects of air safety.” To suggest otherwise requires one to ignore the absence of any deregulatory language in GARA. The absence of same cannot be deemed inadvertent. When Congress intended to deregulate the 1958 Act’s federal economic control over air carrier rates, routes and services, it specifically set forth that deregulatory purpose in the 1978 ADA’s statutory provisions. When it is further considered that a case virtually identical to the one at bar was refuted by the Tenth Circuit, *Abdullah* and the FAA after GARA was enacted, it should be held that GARA cannot be used to accomplish something that its statutory provisions never even address.

Lastly, any inference that GARA should be implicitly interpreted to constitute a Congressional rejection of what it intended to accomplish with the passage of the 1958 Act is clearly refuted by the following findings which Congress made as part of its enactment of the Federal Aviation Reauthorization Act of 1996, two years after GARA was enacted:

- The [Federal Aviation] Administration is **recognized throughout the world as a leader in aviation safety**
- The [Federal Aviation] Administration **certifies aircraft, engines, propellers, and other manufactured parts**
- The Administration’s **certification means that the product meets world-wide recognized standards of safety and reliability**
- The Administration’s **certification means aviation-related equipment and services meet world-wide recognized standards**

The foregoing findings clearly echo precisely what Congress intended when it passed the 1958 Act and dispel any notion that GARA was intended to undo the uniform scheme of federal regulation. Indeed, when the foregoing expressions of Congressional intent are considered together with the fact that there is nothing in GARA, the Reauthorization Act of 1996 or the 1958 Act vesting any authority whatsoever in the individual States or lay jurors, it is difficult to comprehend how any court could conclude that Congress intended to vest juries with the authority to establish the ultimate standards for aviation safety.

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35 49 U.S.C.A. § 40101, PL 104-264, 1196 HR 3539 (section 271, ¶¶ 1, 2, 9, and 10) (emphasis added).

Published by Allianz Global Corporate & Specialty Publications, Greg Dobie, Editor
VIII. Recognizing the FAA Preemption Defense will Help Preserve the "Delicate Balance between Safety and Efficiency" which the FAA was Created to Preserve and will Promote Technological Advances that Improve Safety Consistent with Congressional Intent

Technological advancement and aviation safety have come a long way since Daedalus gave Icarus wings made of wax and feathers and told him not to fly too close to the sun. The technological and safety advancements achieved in aviation in the relatively short period of time since Wilbur and Orville Wright made their first flight in what we would now describe as a general aviation aircraft are truly remarkable.

The modern technology which provides the foundation for these advances is developed and financed by the aviation industry. An exclusively federal system of regulation which preserves the balance between safety and efficiency also promotes both technological and safety advances. The inefficient and non-uniform system proposed by anti-preemption advocates impedes both of those mutually dependent goals.

Aviation safety is not improved by allowing lay juries to second guess FAA safety determinations. As Congress noted when it was considering the passage of GARA, one manufacturer’s survey of 203 manufacturing and/or design defect claims that had been filed against it found that the NTSB had not supported even one of those claims but nonetheless, the cost of defense had averaged over $530,000 per case!36

Needless to say, the cost to defend and resolve an action more than twenty years later has increased dramatically. The sums expended are staggering and obviously unavailable to fund research and technological development. Moreover, since litigation and appeals can take many years to finally resolve under the common law or hybrid legal construct, what is a manufacturer supposed to do during the pendency of this process? If the manufacturer believes that other products can build off a technical advancement that the FAA previously certified but that product is now the subject of a pending tort claim, the manufacturer may very well wait until that claim is resolved before trying to incorporate the existing technology into even more advanced designs.

As technological advancement and improved safety remain on hold while the litigation continues, a manufacturer would also have to consider that irrespective of the decision of the jury in that case, another jury might reach a completely contrary decision in another case. Thus, a manufacturer could never truly know whether its technological advances and approved designs should be built upon when developing new products or instead, completely abandoned because they are far too expensive to explain and defend in cases where lay juries are the ultimate decision-makers.

Manufacturers in an industry which the Supreme Court has recognized to be more extensively regulated at
the federal level than any other should not have to bear the extraordinary litigation costs that other less
federally regulated industries do not incur. These expenditures do not increase safety, but instead thwart
investment into research and the development of new technologies that will enhance safety. In a field
which the Supreme Court has long recognized to be uniquely federal in nature, manufacturers of aviation
products should not be afforded less certainty and legal protection than manufacturers of less federally
regulated products.

It is relevant to note that the Supreme Court has upheld similar preemption defenses to dismiss product
defect claims involving (1) locomotives (Kurns v. A.W. Chesterton Inc., 620 F.3d 392, 398 (3d Cir. 2010), aff’d,
132 S. Ct. 1261 (2012); see also Delaware & Hudson Railway Co. v. Knoedler Manufacturers, Inc., No. 13-3678,
781 F.3d 656, available at 2015 WL 127374, at *6 (3d Cir. Jan. 9, 2015) (explaining that, but for preemption,
railroads might have “to change equipment when a train crosses state lines”); (2) inadequate safety
restraints for automobiles in a claim directly analogous to the claim asserted in Cleveland (Geier v. American
Honda Motor Co., 529 U.S. 861, 869 (2000)); (3) a defective design of a maritime tanker (Ray, Governor of
Washington v. Atlantic Richfield, 435 U.S. 151 (1978)); and (4) claims involving myriad medical devices (see,
Riegel v. Medtronic, Inc., 552 U.S. 312 (2008), et. al.). If, as Congress and the Supreme Court have said,
aviation is more inherently federalized than any of the foregoing, then aviation manufacturers should be
afforded the same protection as manufacturers in these other industries.

As the FAA stated in the briefs which it filed in Cleveland and Air Evac, aviation manufacturers should not be
required to expend the extraordinary amounts of money and time needed to try to convince a lay jury that
the issuance of a type certificate by the FAA’s technical experts means exactly what Congress intended it to
mean, i.e., the product meets all applicable safety standards. Not only are lay juries ill equipped to
duplicate the expertise and policy considerations that factor into every FAA certification determination but
allowing juries to even attempt to do so necessarily results in an inherently non-uniform and unpredictable
system.

Congress has long recognized that aviation safety requires predictability and uniformity and that the only
way to accomplish these goals is to vest exclusive authority in the FAA. Contrary to what many courts have
wrongly concluded, Congress never intended for juries and State law to superecede FAA determinations
and standards. When attorneys for aviation manufacturing defendants effectively present the overwhelming
evidence which compels this result, the cost of aviation product litigation will decrease dramatically and
aviation manufacturers will be far better able to focus their resources on promoting innovation and even
more improved safety measures. That is what Congress intended and that is what the law should recognize
and embrace.
Going forward

The inefficiency and uncertainty of allowing lay juries to be the final arbiter of the FAA’s aviation safety determinations is self-evident and not limited just to claims involving general aviation products. If a jury is empowered to overturn the FAA’s determination that a product meets applicable standards then a precedent will be established that can open the door to a lay jury being able to overturn the FAA’s certification of pilots, mechanics, airports and even air carriers.

Preemption case law and overwhelming expressions of Congressional intent clearly support a legal construct which recognizes that FAA standards and its certification decisions are conclusive and not subject to the vagaries of State common law or second guessing by lay juries who are woefully ill-equipped to be the final arbiters of aviation safety determinations. Because however, there is a plethora of case law which never fully considered this defense, it is extremely important to make sure that the defense is properly raised and argued.

Plaintiffs are already coordinating their opposition and pooling their resources to prevent the FAA preemption defense from being widely accepted in the product context. The defense must be similarly coordinated and all prospective defendants made aware that any further adverse decisions will surely be cited as evidencing the court’s rejection of a defense that has now gotten a toehold in the Third Circuit. Such coordination can be effective and results similar to what air carriers achieved can be obtained. If this strategy is implemented correctly, the chances of success are good and the benefits that can be achieved quite remarkable.