Second Circuit Deepens Split with Third Circuit Over Aviation Safety Field Preemption, Awaiting Possible Supreme Court Resolution

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There is no greater issue currently facing the aviation bar than whether the Federal Aviation Act ("FAAct") preempts state law by occupying the entire field of air safety. In other words, do federal standards of care exclusively govern liability in the aviation industry, or are states allowed to govern aspects of aviation safety through a patchwork of unique tort or regulatory liability regimes? This question is the subject of a petition for writ of certiorari pending before the U.S. Supreme Court, seeking review of the Third Circuit’s decision in Sikkelee v. Precision Airmotive (2016). In Sikkelee, the Third Circuit concluded that Abdullah v. American Airlines – in which it previously held in the context of in-air operations that “federal law establishes the applicable standards of care in the field of air safety, generally, thus preempting the entire field from state and territorial regulation” – did not apply to state product liability claims concerning the design of aircraft engines. The Supreme Court has asked the U.S. Solicitor General to weigh in on this important question.

Most recently, while the Sikkelee cert petition is pending, the Second Circuit decided Tweed-New Haven Airport Authority v. Tong (2019). In Tweed, the Court of Appeals doubled down on its prior holding in Goodspeed Airport v. East Haddam Inland Wetlands & Watercourses Commission (2011) that the FAAct occupies the “entire field of aviation safety” to the “exclusion of state law” and consequently preempts state laws that sufficiently interfere with federal regulation of air safety. Though the Third Circuit in Sikkelee tried to distinguish and reconcile such other broad field preemption decisions, the analytical split between them – made even more visible in Tweed – is unmistakable. The resultant uncertainty is antithetical to the very purposes of the FAAct – to create a uniform system of federal regulation for aviation industry participants. Tweed thus underscores the need for the Supreme Court to grant certiorari and resolve the split.

The Second Circuit’s Approach to Field Preemption

In Goodspeed, a small privately owned airport sought a declaratory judgment that local environmental and wetlands laws were preempted by the FAAct. The Second Circuit affirmed a “thorough and well-reasoned” district court decision using a two-step analysis for field preemption.
The first step asks whether Congress intended the entire field to be occupied by federal law to the exclusion of state law. If so, the second step considers whether the state law in question sufficiently intrudes upon that field.

Applying the two steps, the Second Circuit had little difficulty concluding first that “the overall statutory and regulatory scheme” under the FAA Act is “evidence of a clear congressional intent to occupy the entire field of aviation safety to the exclusion of state law,” because it “has established a comprehensive regulatory scheme ‘addressing virtually all areas of air safety,’ including the certification of aircraft, most airports, pilots and mechanics, air traffic control systems, air navigation and communication, and airspace classifications.” In so holding, the Court noted that it was joining the First, Third, Sixth, Ninth, and Tenth Circuits.

Turning to the second question, the Goodspeed Court considered whether the state environmental and wetland law at issue, which simply required a permit before cutting down trees in protected wetlands, “sufficiently interferes with federal regulation that it should be deemed preempted.” Examining the purpose and effect of the state law, the Court found that the law did not sufficiently enter into the scope of the preempted field: “Goodspeed Airport is not licensed by the FAA; it is not federally funded, and no federal agency has approved or mandated the removal of the trees from its property. Indeed, in its response to a formal inquiry from the district court, in this case, the federal government disclaimed any authority to order the trees’ removal.” In other words, as the district court had explained below, “Courts have long distinguished between state laws that directly affect aeronautical safety, on the one hand, and facially neutral laws of general application that have merely an incidental impact on aviation safety.”

In Tweed, the Second Circuit applied the same, two-step analysis in considering whether a state law preventing the expansion of an airport runway was impliedly field preempted. Tweed is a small commercial Airport. Its largest runway is currently 5,600 feet long making it one of the shortest commercial airport runways in the country, substantially limiting commercial flights. In 2002, Tweed had prepared a Master Plan with Federal Aviation Administration (“FAA”) involvement for upgrading its airport, including extending the runway. In 2009, however, the Connecticut legislature enacted a statute expressly blocking the expansion of the runway. In response, Tweed filed a declaratory judgment action seeking a determination that the statute was preempted by the FAA Act. The district court rejected Tweed’s arguments, finding that Tweed lacked standing to sue, and that, even if it had standing, the FAA Act did not preempt the statute. The Second Circuit reversed, finding both standing and preemption.

With regard to preemption, the Court of Appeals first reiterated the Goodspeed holding that the FAA Act “was enacted to create a uniform and exclusive system of federal regulation in the field of air safety. . . . It was passed by Congress for the purpose of centralizing in a single authority . . . the power to frame rules for the safe and efficient use of the nation’s airspace.” Consequently, it reasoned, state laws that conflict with the FAA Act “or sufficiently interfere with federal regulation of air safety are preempted.”

Thus turning to the second step in the analysis, the Court considered whether the statute fell within the scope of the preempted field. It found that the statute directly impacted air safety by limiting the length of the runway, which in turn limited the number of passengers, amount of baggage, and even the type of planes that could use the airport. The Court also considered the extent of FAA involvement with Tweed overall and with the length of the runway specifically, concluding that the “FAA’s involvement with Tweed and its runway project has been direct and significant.” As the Court explained, Tweed is federally regulated as part of the Tweed-New Haven Airport Layout Plan, which
requires approval by the FAA. Additionally, as a primary commercial service airport, Tweed needs to hold an operating certificate pursuant to federal regulations. It is required to submit its Master Plan to the FAA, which, as early as 2002, included a plan for extending the length of the runway. The FAA directly approved the Master Plan, including the extension of the runway. For all these reasons, the Court held that the state law was preempted.

The Third Circuit’s Conflicting Approach

In Abdullah v. American Airlines (1999), the Third Circuit similarly considered whether the FAAAct preempted the field of air safety thus barring a tort claim premised on an alleged failure by aircraft crew to warn passengers of expected turbulence. The Plaintiffs alleged negligence by the pilot and flight crew for failing to either avoid the turbulent conditions or warn the passengers so they could protect themselves. The Court of Appeals found implied field preemption based on its conclusion that the FAAAct and relevant federal regulations “establish complete and thorough safety standards for interstate and international air transportation that are not subject to supplementation by or variation among, jurisdictions.” Indeed, the Third Circuit expressly distinguished its holding from those in which courts had only found preemption of “discrete aspects of air safety,” explaining that “federal law establishes the applicable standards of care in the field of air safety, generally, thus preempting the entire field from state and territorial regulation.”

Despite the breadth of this express holding in Abdullah, the Third Circuit subsequently held in Sikkelee that the FAAAct does not preempt state law aviation product liability claims. The plaintiff had alleged that a design defect in the carburetor of an airplane engine resulted in the aircraft crashing shortly after takeoff. Examining whether that claim was subject to implied field preemption, the Third Circuit did not use the Second Circuit’s two-step analysis, but instead essentially conflated the inquiries, focusing entirely on whether there was pervasive enough federal regulation addressing the particular aviation safety aspect at issue to rebut the general presumption against preemption.

In that regard, the defendants pointed to the extensive certification process required by the FAA in order to receive a type certificate for the engine: “This certification process can be intensive and painstaking, for example, a commercial aircraft manufacturer seeking a new type certificate for wide-body aircraft might submit 300,000 drawings, 2,000 engineering reports, and 200 other reports in addition to completing approximately 80 ground tests and 1,600 hours of flight tests.” As the defendants explained, the type certificate “certifies that a new design for an aircraft or aircraft part performs properly and meets the safety standards defined in the aviation regulations,” and any changes to the design thereafter must be approved by the FAA. A “major” change to the type certificate requires the issuance of an amended or supplemental type certificate. The defendants argued that, because a type certificate applicant goes through such a rigorous regulatory process culminating in the certification of a part as meeting safety standards defined in the aviation regulations, the question of whether a part design was reasonably safe under state law was preempted by the FAAAct.

The Third Circuit disagreed. Focused on the general presumption against preemption, the Court of Appeals considered the fact that “aviation torts have been consistently governed by state law” as far back as 1914. It also read the text of the FAAAct as “not signal[ing] an intent to preempt state law products liability claims.” The Third Circuit dismissed the extensive regulations addressing the engine design and certification process as merely establishing “a baseline requirement” for “minimum standards.”

In thus holding that the FAAAct did not impliedly preempt the field of aviation safety pertaining to
engine certification, the Third Circuit tried to distinguish and reconcile its approach to field preemption with that of other Courts of Appeals, including the Second Circuit: “Appellees observe that various Courts of Appeals have described the entire field of aviation safety as preempted, but, on inspection, even those courts have carefully circumscribed the scope of those rulings. The Second, Ninth, and Tenth Circuits all assess the scope of the field of aviation safety by examining the pervasiveness of the regulations in a particular area rather than simply determining whether the area implicated by the lawsuit concerns an aspect of air safety.”

Not so. Again, for example, the Second Circuit has not started its analysis by “examining the pervasiveness of the regulations in a particular area” of aviation. In direct conflict with Sikkelee, the Second Circuit through Tweed has now twice readily found at the outset of its analyses that the FAAAct impliedly preempted the “entire” field of aviation safety. Only thereafter has the Second Circuit examined the state law at issue to determine if it sufficiently intruded into the preempted field (Tweea), or, rather, was merely incidental to it (Goodspeed).

This fundamental difference in analyzing field preemption belies the Third Circuit’s attempt to distinguish product liability cases (Sikkelee) from in-air operations (Abdullah). Indeed, the Second Circuit acknowledged no such distinction in Tweed, and in its predecessor, Goodspeed, the Court affirmed the district court’s “thorough and well-reasoned” explanation that, in response to the FAAAct’s “congressional mandate, the FAA has established a comprehensive regulatory scheme addressing virtually all areas of air safety, including the certification of aircraft.” Thus, unlike the Third Circuit, the Second Circuit would not start its analysis of a case involving engine product liability by examining whether the pervasiveness of aircraft design and certification regulations sufficiently evinces an intent to overcome a general presumption against preemption, but, rather, by yet again recognizing field preemption over all aspects of aviation safety – including engine design – and would then ask whether the state tort standards of care at issue sufficiently intrude upon the scope of that field. In that regard, we think the Second Circuit would have little difficulty concluding that they do. Like the extent of federal involvement with the physical layout of the airport in Tweed, the level of federal involvement in engine design and certification is indisputably “direct and significant,” such that state tort law standards of care that purport to govern the safety of engine design clearly intrude upon it.

**Conclusion**

The fundamental and critical circuit split on the proper analysis of implied field preemption in aviation cases, illustrated and emphasized most recently by Tweed, undermines the very purpose of the FAAAct of creating uniform and consistent standards of care for safety in the aviation industry. We hope the Supreme Court will grant certiorari and resolve it.

[1] The Third Circuit remanded the case for consideration of conflicts preemption and on subsequent review of the district court’s determination that the product liability claims were conflict preempted, it reversed and remanded for further proceedings. The pending cert petition seeks review of both preemption rulings. This article, however, is focused solely on field preemption.

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