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There Is No Complete, Implied, or Field Federal Preemption of State Law Personal Injury/Wrongful Death Negligence or Product Liability Claims in General Aviation Cases

John D. McClune

THERE IS NO COMPLETE, IMPLIED, OR FIELD FEDERAL PREEMPTION OF STATE LAW PERSONAL INJURY/ WRONGFUL DEATH NEGLIGENCE or PRODUCT LIABILITY CLAIMS IN GENERAL AVIATION CASES

JOHN D. MCCLUNE*

I. SUMMARY

IN RECENT LITIGATION against general aviation aircraft and component manufacturers, arguments have been made that there is complete, implied, or field federal preemption[1] of a plaintiff's state law personal injury and wrongful death claims involving a general aviation aircraft. *Abdullah v. American Airlines, Inc.*, an anomaly commercial airline case discussing opera-

* Mr. McClune is a partner with the law firm of Schaden, Katzman, Lampert & McClune. He attended Western Michigan University from which he graduated in 1991 magna cum laude with a BBA. He obtained his Juris Doctor degree from the Wayne State University School of Law in Detroit. Mr. McClune specializes in aviation wrongful death and personal injury litigation.

[1] Complete preemption is said to exist where there is a

> congressional intent in the enactment of a federal statute not just to provide a federal defense to a state created cause of action but to grant a defendant the ability to remove the adjudication of the cause of action to a federal court by transforming the state cause of action into a federal cause of action.

14B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3722.1 (3d ed. 2006). Implied preemption exists where Congress has impliedly precluded state regulation in an area, or when Congress did not necessarily intend preemption of state regulation in a given area but the particular state law conflicts directly with federal law or acts as a barrier to the accomplishment of federal objectives. *See generally* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983). Field preemption exists where a multiplicity of federal statutes or regulations govern and densely intertwine in a given field and the pervasiveness of such federal laws will help to sustain a conclusion that Congress intended to exercise exclusive control over the subject matter. Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of Am. v. Lockridge, 403 U.S. 274, 295-97 (1971). This author believes the latter two doctrines are essentially different ways of expressing the same principle.

tional services, is being used as a basis for this preemption argument.[2]

This article explains that both the plain language of the Federal Aviation Act of 1958 ("FAA")[3] and the case law interpreting the act make clear that the FAA does not completely or impliedly preempt state law actions for negligence and product liability regarding the design and manufacture of commercial or general aviation aircraft. There is no federal aviation negligence law in a general aviation product liability action, nor is there any federal aviation product liability law. In fact, no federal cause of action is created by the FAA, nor does the FAA create federal tort remedies. Plaintiffs need not prove violations of federal law to prove their product liability cause of action. There is a clear distinction between enacting *minimum* federal regulations pertaining to general aviation aircraft and component design and manufacture and creating a body of federal common law foreclosing state rights. States can prescribe more stringent standards than the *minimum* federal standards applicable to general aviation aircraft and components designed, manufactured, maintained, or injected into their stream of commerce, especially since the general aviation aircraft manufacturers certify the airworthiness of their own aircraft in compliance with those minimum federal regulations. In light of these minimum standards and manufacturers' prerogative to police themselves, there can be no conflict or field preemption.

United States Supreme Court case law addressing preemption issues, along with aviation case law across the country, confirms this interpretation. The facts in *Abdullah* are clearly distinguishable from a situation involving the design and manufacture of a general aviation aircraft and its components. For this and other reasons explained in this article, *Abdullah* was wrongly decided. Courts should not judicially legislate a new general aviation federal jurisdictional, negligence, or product liability statute.

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[2] Abdullah v. Am. Airlines, Inc., 181 F.3d 363 (3d Cir. 1999). *Abdullah* held, in part, that federal law establishes the applicable standards of care in the field of aviation safety and preempts the entire field, but the traditional state and territorial law remedies continue to exist for violation of those standards.

[3] Pub. L. No. 85-726, 72 Stat. 731 (1958).

II. UNDER THE FAA, THERE IS NO COMPLETE, IMPLIED, OR FIELD PREEMPTION OF A CLAIMANT'S STATE LAW NEGLIGENCE, BREACH OF WARRANTY, OR PRODUCT LIABILITY ACTIONS AGAINST GENERAL AVIATION AIRCRAFT AND COMPONENT MANUFACTURERS

The statutory history of the FAA, Supreme Court precedent, and a uniform body of case law addressing complete, implied, and field preemption hold that general aviation manufacturers cannot establish such preemption under the FAA and its amendments, or even that Congress intended to make tort actions implicating the FAA removable to federal court. Even in the commercial airline context, which is more likely to involve rates, routes, or services of an air carrier, there is no such preemption of personal injury or wrongful death claims.

A. Statutory History of the FAA and Its Amendments

The Civil Aeronautics Board ("CAB") was empowered by Congress in 1938 to regulate the interstate airline industry.[4] "[F]rom the start, the FAA has contained a 'saving clause,' stating: 'Nothing . . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.'"[5]

Although the FAA authorized the CAB to regulate fares and take administrative action against deceptive trade practices, the FAA originally contained no clause preempting state regulation.[6] In an effort to deregulate the aviation industry in 1978, Congress amended the FAA by enacting the Airline Deregulation Act ("ADA"), which added an express preemption clause pertaining to state laws that apply to "rates, routes, or services of any air carrier."[7] The "saving clause" was once again preserved. As explained by Judge Edmunds in *Margolis v. United Airlines, Inc.*:

> In [1978], Congress decided to withdraw economic regulation of interstate airline rates, routes and services. Congress therefore enacted the . . . ADA . . . "to encourage, develop, and attain an

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[4] *See* Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 222 (1995); Margolis v. United Airlines, Inc., 811 F. Supp. 318, 320 (E.D. Mich. 1993).

[5] *Wolens*, 513 U.S. at 222 (citing FAA § 1106).

[6] *Id.*

[7] Pub. L. No. 95-504, 92 Stat. 1705 § 105(a) (1978); *see Margolis*, 811 F. Supp. at 320; *Wolens*, 513 U.S. at 222.

> air transportation system which relies on competitive market forces to determine the quality, variety and price of air services . . . ." To avoid the frustration of that goal by the substitution of state regulations for the recently removed federal regulations, Congress enacted [Section] 105(a) of the ADA, which preempts any state law "relating to rates, routes, or services of any air carrier having authority . . . to provide air transportation." Section 105(a) of the ADA, the preemption provision, became section 1305(a) of the Federal Aviation Act (FAA) . . . . *Congress also retained the savings clause that preserved common law and statutory remedies.*[8]

The continued preservation of the "saving clause" clearly indicates that Congress intended state based common law tort remedies to co-exist with the federal statutory scheme.[9]

B. UNITED STATES SUPREME COURT CASE LAW REGARDING PREEMPTION AND THE FAA

The Supreme Court has emphasized that when determining whether a particular field of law is preempted, interpretation must start with the presumption that preemption is *not* intended.[10] "[W]here federal law is said to bar state action in fields of traditional state regulation. . . we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear manifest purpose of Congress.'"[11]

Prior to the Court's interpretation of the ADA in *Morales v. Trans World Airlines, Inc.*,[12] "case law concerning preemption [in aviation cases] divided fairly neatly between economic or regulatory issues and personal injury, damage or negligence issues . . . [P]reemption disputes involving traditional personal injury or negligence claims were almost uniformly resolved against preemption."[13] In 1992, the *Morales* Court held that guidelines regarding airline fare advertising were expressly preempted by the ADA amendment to the FAA, which obviously related to rates

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[8] *Margolis*, 811 F. Supp. at 320 (citations omitted) (emphasis added). *See also In re* Air Disaster, 819 F. Supp. 1352 (E.D. Mich. 1993), discussed *infra*.

[9] *Margolis*, 811 F. Supp. at 320. *See also In re* Air Crash Disaster at Stapleton Int'l Airport, 721 F. Supp. 1185, 1187 (D. Colo. 1988).

[10] N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654-55 (1995).

[11] *Id.* at 655 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

[12] Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992).

[13] Margolis v. United Airlines, Inc., 811 F. Supp. 318, 322 (E.D. Mich. 1993).

within the meaning of FAA § 1305.[14] As succinctly stated by the Court:

> In concluding that the NAAG fare advertising guidelines are pre-empted, we do not . . . set out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines. Nor need we address whether state regulation of the non-price aspects of fare advertising . . . would "relat[e] to" rates; the connection would obviously be far more tenuous. To adapt this case to our language in *Shaw*, "[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner" to have pre-emptive effect.[15]

That same year the Court addressed the issue of preemption of state law product liability and negligence claims under the Federal Cigarette Labeling and Advertising Act in *Cipollone v. Liggett Group, Inc.*[16] The Court in *Cipollone* held that state law claims based upon design defect, negligence in research and testing, failure to disclose data regarding health risks to government agencies, express warranty, and fraudulent misrepresentation were *not* preempted by a federal statute providing express preemption of state law pertaining to the advertisement and promotion of any cigarettes.[17] The Court once again declined to extend preemption into an area which had not been specifically delineated by Congress.[18]

In 1995, the Court in *American Airlines v. Wolens* revisited the FAA and ADA preemption issue and held that state law breach of contract claims for retroactive changes in the airline's frequent flyer programs were *not* preempted, even though they "relate[d] to" rates and service under the FAA and its ADA amendments.[19] The majority determined that:

> The ADA's preemption clause, [section] 1305(a)(1), read together with the FAA's saving clause, stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and

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[14] *Morales*, 504 U.S. at 390.

[15] *Id.* (quoting Shaw v. Delta Airlines, Inc., 463 U.S. 85, 100 n.21 (1983)). The Court's holding in *Morales* has been narrowly construed as limited to fare advertising guidelines and did not open the door for the preemption of other state or common laws or remedies where "the connection would be more tenuous." *Id.*

[16] Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

[17] *See id.* at 519-31.

[18] *See Margolis*, 811 F. Supp. at 323 (discussing *Cipollone*).

[19] Am. Airlines v. Wolens, 513 U.S. 219, 226 (1995).

> proves that an airline dishonored a term the airline itself stipulated [in a contract].[20]

The Court in *Wolens* explained that restricting *Morales* "makes sense of Congress' retention of the FAA's savings clause," which preserved the "remedies now existing at common law or by statute."[21] Neither the FAA nor its ADA amendment intended to "channel civil actions into federal court."[22]

The *Wolens* majority noted that *Morales* should not be considered so broadly as to preempt such personal injury or wrongful death claims as those arising from a plane crash.[23] In fact, American Airlines, as well as the United States as *amicus curiae*, admitted to the Court that state law personal injury and wrongful death claims would *not* be preempted as they pertain to the maintenance or operation of the aircraft.[24]

Justice Stevens, concurring in part and dissenting in part, explained that based upon Congress' retention of the saving clause and the Court's prior *Cipollone* opinion, neither state law fraud nor breach of contract claims are preempted by the FAA or its ADA amendments,[25] which would likewise hold true for personal injury and wrongful death claims. Justice O'Connor, concurring in part and dissenting in part, proposed a broader view of preemption than both the majority and Justice Stevens.[26] Even still, Justice O'Connor, citing Judge Rosen's opinion in *In re Air Disaster* and many other authorities cited herein, expressly noted that personal injury and wrongful death claims would not be preempted.[27]

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[20] *Id.* at 232-33.

[21] *Id.* at 232.

[22] *Id.*

[23] *Id.* at 231 n.7, 234-38.

[24] *Id.* at 231 n.7.

[25] *See id.* at 235-37.

[26] *Id.* at 242-43.

[27] *Id.*; *see In re* Air Disaster, 819 F. Supp. 1352, 1363 (E.D. Mich. 1993). *See also* Gee v. Sw. Airlines, 110 F.3d 1400, 1406 (9th Cir. 1997), *overruled on other grounds*, Charas v. Trans World Airlines, Inc., 160 F.3d 1259 (9th Cir. 1998) (stating that "the Supreme Court in *Wolens* clearly indicated that *Morales* should not be extended to preempt personal injury safety-related negligence claims, as reflected in the majority, concurring, and dissenting opinions"). In 1996, the Court in *Medtronic, Inc. v. Lohr* held that an express preemption provision in the 1976 Medical Device Amendments to the Federal Food, Drug, and Cosmetic Act did *not* preempt plaintiffs' common law claims of negligent design and manufacturing against the manufacturer of an allegedly-defective pacemaker. Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996). The Court emphasized once again that the

C. The Delegated Option Authority and the General Aviation Revitalization Act of 1994 Make Clear There is No Complete, Implied, or Field Preemption of State Product Liability, Negligence, Breach of Warranty, and Failure to Warn Claims Involving General Aviation Aircraft

The Delegated Option Authority ("DOA"), pursuant to which the Federal Aviation Administration (the "Administration") permits aircraft manufacturers to type certify their own aircraft during the design and manufacture process, supports the conclusion that such manufacturers should remain open to liability under state law.[28] Under the DOA process, the Administration establishes minimum safety regulations for the design and manufacture of aircraft and then relies upon the manufacturers' representations of compliance with the standards.[29] Manufacturers essentially fill two oft opposing roles during design and manufacture: that of a manufacturer and that of an Administration inspector.[30] It could be said that "the fox is watching the henhouse" through type certification. Because the Administration is immune from liability in this manufacturing process, plaintiffs are left without a remedy if state law causes of action against manufacturers are preempted by the FAA.

In *United States v. Varig Airlines*, a case involving a tort action brought against the Administration for negligent certification of an aircraft, the Supreme Court held that, pursuant to the discretionary function exception to the Federal Tort Claims Act, the Administration was immune from liability because it was the manufacturer who actually certified that the aircraft complied with the minimum safety regulations, not the Administration.[31] As explained by the Court:

> [The] certification process is founded upon a relatively simple notion: the duty to ensure that an aircraft conforms to [Adminis-

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States' historic police powers cannot be superseded by a federal act absent Congress' clear and manifest purpose. *Id.* at 485.

[28] *See* 14 C.F.R. pts. 23, 25, 27, 29, 31, 33, 35 (2006).

[29] *Id.*

[30] *See also* Mary Schiavo, Flying Blind Flying Safe: The Former Inspector General of the U.S. Department of Transportation Tells You Everything You Need to Know to Travel Safer by Air 51-52, 177-184 (1997) (indicating that the FAA works for the aviation industry as opposed to the flying public; the manufacturers typically police themselves and certify their own products, as the FAA engineers typically have less training and experience than their counterparts in the industry).

[31] United States v. Varig Airlines, 467 U.S. 797, 815-16 (1984).

> tration] safety regulations lies with the *manufacturer* . . . while the [Administration] retains the responsibility for policing compliance. Thus, the *manufacturer* is required to develop the plans and specifications and perform the inspections and tests necessary to establish that an aircraft design comports with the applicable regulations; the [Administration] then reviews the data for conformity purposes by conducting a "spot check" of the manufacturer's work.
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> . . . [B]ecause "[Administration] engineers cannot review each of the thousands of drawings, calculations, reports, and tests involved in the type certification process," the agency must place great reliance on the manufacturer . . . . "[I]n most cases the [Administration] staff performs only a cursory review of the substance of th[e] overwhelming volume of documents" submitted for its approval.[32]

Additionally, in 1994 Congress enacted the General Aviation Revitalization Act ("GARA"), an eighteen year statute of repose with express exceptions and re-tolling provisions that further demonstrates that state law claims are still available to plaintiffs.[33] Under section 2(b)(1) of GARA, an exception to the repose statute exists if a general aviation aircraft manufacturer knowingly misrepresents, or conceals or withholds, required information from the Administration during type certification, when such misrepresentation or omission is an alleged causal factor in a crash.[34] A failure to notify the Federal Aviation Administration pursuant to 14 C.F.R. § 21.3 and applicable law regarding "obligations with respect to continued airworthiness" of an aircraft and its components is an exception to GARA.[35]

The plain language of GARA, and its statutory history, make clear that the GARA repose statute is just that: a statute of repose only. It did not attempt to create a body of federal general aviation product liability law like its predecessor bills; state law

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[32] *Varig*, 467 U.S. at 816-17, 818 n.14 (emphasis added) (quoting NAT'L RESEARCH COUNCIL, COMMITTEE OF FAA AIRWORTHINESS CERTIFICATION PROCEDURES, IMPROVING AIRCRAFT SAFETY 6, 29-32 (1980), http://www.nap.edu/openbook/0309030919/html/R1.html).

[33] General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552 (1994) (amended 1997).

[34] *Id.* § 2(b)(1).

[35] *Id.*; 14 C.F.R. § 21.3 (2006) (requiring general aviation aircraft manufacturers to report to the FAA malfunctions, defects, and failures). *See also* Robinson v. Hartzell Propeller, Inc., 326 F. Supp. 2d 631, 657 (E.D. Pa. 2004). GARA also does not apply when the manufacturer acts in any other capacity, or when the component parts at issue have been replaced or updated within the eighteen year period.

remedies remain intact.[36] GARA was the sole surviving remnant of much larger and detailed proposals pertaining to products liability and general aviation that were considered by the 100th, 101st and 102nd Congresses.[37]

For example, in the 100th Congress a general aviation product liability bill was introduced to establish uniform federal standards on a number of issues, such as joint and several liability, standards of care, statutes of repose, and punitive damages.[38] The bill never made it to the House floor. In the 101st Congress, Second Session, the "General Aviation Accident Liability Standards Act of 1989" was proposed, which would have established federal subject matter jurisdiction for general aviation negligence, strict liability, and breach of warranty claims.[39] The proposed legislation also would have established standards for liability, rules of comparative responsibility, time limitations, and limitations on damage remedies.[40] But once again, Congress could not obtain support for the creation of a federal cause of action for general aviation accidents. Thereafter, in 1992, H.R. 5362 was proposed in the Second Session of the 102nd Congress.[41] The bill, similar to those above, also would have created federal subject matter jurisdiction over general aviation cases, overhauled the substantive requirements of a negligence action, prescribed new criteria for determining comparative responsibility, established evidentiary rules, specified requirements for punitive damage claims, and created a federal statute of limitations.[42] Like its predecessors, this attempt to preempt the entire field of general aviation and create a federal cause of action failed. GARA is the sole remnant of that prior legislation.

Judge Edmunds explains in *Wright v. Bond Air, Ltd.*, a case handled elsewhere by the author, that GARA merely serves a "gatekeeping function":

> GARA is a statute of repose and merely serves a gatekeeping function for Plaintiff's state law cause of action. There is nothing

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[36] GARA § 2(a)-(b). *See also* Wright v. Bond-Air, Ltd., 930 F. Supp. 300, 305 (E.D. Mich. 1996).

[37] 140 CONG. REC. 10, 14469 (1994).

[38] S. 473, 100th Cong. (1988).

[39] General Aviation Accident Liability Standards Act of 1989, S. 640, 101st Cong. (1990).

[40] *See id.*

[41] General Aviation Standards Act of 1989, H.R. 5362, 102d Cong. (1992).

[42] *See id.*

> in GARA's legislative history to support an argument that Congress intended GARA to create a body of federal common law. Nor does the Act preempt a state's substantive law regarding negligence or breach of warranty claims. Rather, GARA is narrowly drafted to preempt only state law statutes of limitation or repose that would permit lawsuits beyond GARA's 18 year limitation period in circumstances where its exceptions do not apply.[43]

D. Commercial and General Aviation Aircraft Case Law Across the Country Indicate No Federal Preemption of General Aviation Product Liability, Negligence, Breach of Warranty, and Failure to Warn Claims

No preemption of state law involving a general aviation aircraft is found in *Abdullah.* That case involved the commercial airline operational context only, which is clearly more likely to impact the ADA's "rates, routes, or services" express preemption provision, and did not entail a general aviation negligence or product liability cause of action.[44] Other jurisdictions, led by the Tenth Circuit decision in *Cleveland v. Piper Aircraft, Corp.*, uniformly agree that state law negligence and product liability claims in the general aviation context are not preempted by federal law.[45]

Recently, in *Monroe v. Cessna Aircraft Co.*, a general aviation case, the Eastern District of Texas held that the FAA did not preempt the entire field of aviation safety.[46] The court explained that the certification process for general aviation aircraft, as set forth in the federal aviation regulations, did not create a pervasive regulatory scheme demonstrating intent by Congress to preempt either the field of aviation safety or state defective design claims.[47] The court held:

> The certification process provides the [Administration] with a mechanism to ensure that aircraft are in compliance with the safety and design standards set out in other regulations. The regulations that do control the design and safety of an aircraft are

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[43] Wright v. Bond-Air, Ltd., 930 F. Supp. 300, 305 (E.D. Mich. 1996).

[44] *See* ADA § 105(a).

[45] *See* Cleveland v. Piper Aircraft, Corp., 985 F.2d 1438, 1445 (10th Cir.) (tort claim for defective aircraft design was not pre-empted), *cert. den.*, 510 U.S. 908 (1993); *see also* Holliday v. Bell Helicopters Textron, Inc., 747 F. Supp. 1396 (D. Haw. 1990); Elsworth v. Beech Aircraft, 691 P.2d 630, 634-35 (Cal. 1984), *cert. den.*, 471 U.S. 1110 (1985); McGee v. Cessna Aircraft Co., 188 Cal. Rptr. 542 (Cal. Ct. App. 1983).

[46] Monroe v. Cessna Aircraft Co., 417 F. Supp. 2d 824 (E.D. Tex. 2006).

[47] *Id.* at 833.

> broad and provide a non-exhaustive list of minimum requirements leaving discretion to the manufacturer.[48]

Comparing *Abdullah* with *Cleveland*, the court explained:

> *Cleveland* is more consistent with the facts of the present case in that it involves an individual bringing claims against a general aviation manufacturer for negligence and design defects, whereas *Abdullah* involves claims brought by commercial airline passengers against a large commercial airline carrier for personal injury.[49]

The *Monroe* court found that Congress's adoption of GARA to preempt state tort law pertaining to statutes of repose only indicates its recognition of the continued viability of state tort claims following adoption of the act.[50]

Addressing claims against aircraft manufacturers, the Eleventh Circuit in *Public Health Trust v. Lake Aircraft, Inc.*, citing *Morales* and *Cippollone*, held that the FAA does not preempt state negligence and strict product liability claims.[51] The court wisely observed that the FAA does not implicitly preempt common law claims for design defects because it specifically limits its application to those claims that have a connection with or reference to airline rates, routes, or services.[52]

In the airline context, the *Margolis* court duly explained that Congress has demonstrated no intent, express or implied, to preempt traditional state law claims for negligence or personal injury by the FAA or its ADA amendments.[53] "To the contrary, the [FAA] retains a savings clause addressed specifically to 'the remedies now existing at common law.'"[54] *Margolis* explained that if the FAA did preempt state law negligence claims, injured plaintiffs and their decedents would be left without a remedy since there was no federal cause of action created by the FAA, nor any federal remedies.[55] The *Margolis* court also noted that if complete preemption existed, federal regulations mandating

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[48] *Id.*

[49] *Id.* at 835.

[50] *Id.* at 830.

[51] Public Health Trust v. Lake Aircraft, Inc., 992 F.2d 291, 295 (11th Cir. 1993).

[52] *Id.*

[53] Margolis v. United Airlines, Inc, 811 F. Supp. 318, 323 (E.D. Mich. 2003).

[54] *Id.*

[55] *Id.* at 324.

airline insurance coverage for personal injury or death would be rendered nugatory.[56]

The court in *In re Air Disaster*, a commercial airline case, held that the FAA did not preempt state law claims of negligence and gross negligence, and did not confer limited removal jurisdiction on the federal courts.[57] Citing the Supreme Court's decision in *Morales* and the *Margolis* decision discussed above, Judge Rosen stated:

> Plaintiffs' negligence/gross negligence claims relate to airline services in too tenuous, remote or peripheral a manner to warrant preemption under Section 1305 [of the FAA].
>
> The Court acknowledges that there are detailed and extensive regulations regarding training of crews, operation at airports with control towers, and collision avoidance precautions, all of which are implicated in Plaintiffs' three negligence/gross negligence counts. However, Plaintiffs do not allege in their Complaint that the Defendants should be held to a different standard of care than that prescribed in the regulations, such that preemption due to a conflict between state and federal law arises. Thus, the Court does not find . . . a sufficient basis for finding that Plaintiffs' negligence and gross negligence claims are preempted . . . .[58]

Many jurisdictions also agree, in the airline context, that the FAA and the ADA do not preempt state law personal injury claims of negligence or product liability, nor rules relating to punitive damages in commercial airlines cases.[59]

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[56] *Id.*

[57] *In re* Air Disaster, 819 F. Supp. 1352, 1364-66 (E.D. Mich. 1993).

[58] *Id.* at 1363-64 (citations omitted). *See also* Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 241-42 (1995) (O'Connor, J., concurring in the judgment in part and dissenting in part). In *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1252 (6th Cir. 1996), a fraud and misrepresentation action brought by a shipper against an air freight carrier, the Sixth Circuit held that although state law fraud claims are preempted by the ADA, "in light of evidence that Congress intended . . . no federal civil remedy [under the FAA and its ADA amendments], we will not use the savings clause to create such a remedy under the rubric of 'federal common law.'"

[59] *E.g.*, Gee v. Sw. Airlines, 110 F.3d 1400, 1406-07 (9th Cir. 1997), *overruled on other grounds*, Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1265-66 (9th Cir. 1998); Hodges v. Delta Airlines, Inc., 44 F.3d 334, 336-37 (5th Cir. 1995); Smith v. Am. W. Airlines, Inc., 44 F.3d 344, 346-47 (5th Cir. 1995); Lathigra v. British Airways PLC, 41 F.3d 535, 540 (9th Cir. 1994); *In re* Mexico City Aircrash, 708 F.2d 400, 406-07 (9th Cir. 1983); *In re* Air Crash Disaster at John F. Kennedy Int'l Airport, 635 F.2d 67, 74 (2d Cir. 1980); *In re* Air Crash at Charlotte, N.C., 982 F. Supp. 1056, 1058-59 (D.S.C. 1996); Meinhold v. Trans World Airlines, Inc., 949 F. Supp. 758, 762 (C.D. Cal. 1996); Manning v. Skywest Airlines, 946 F. Supp.

E. ABDULLAH HAS BEEN READILY DISTINGUISHED OR DOUBTED; ABDULLAH IS NOT APPLICABLE TO GENERAL AVIATION CASES AND IS IN ERROR

In addition to *Monroe*, courts continue to distinguish or cast doubt upon *Abdullah*.[60] One such recent general aviation case was *Sheesley v. Cessna Aircraft Co.*[61] That court expressly rejected *Abdullah* in favor of the *Cleveland* court's reasoning:

> The court disagrees with the Third Circuit's conclusion that Congress intended to preempt the field of aviation regulation by adopting the [FAA]. First, in adopting the [FAA], Congress empowered the [Administration] to adopt *minimum* safety standards. Minimum standards of aviation safety do not preclude a finding of negligence where a reasonable person would take additional precautions. Additionally, *Abdullah* does not mention GARA and its narrow preemption of state tort law affecting aviation safety. In adopting GARA, Congress went to great lengths limiting its preemption of state tort law in a narrow set of circumstances. This would have been unnecessary if Congress had already preempted all state tort actions affecting aviation safety when it adopted the [FAA]. Instead, as indicated above, Congress did not intend the [FAA] to preempt the entire field of

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767, 773 (C.D. Cal. 1996); Stagl v. Delta Air Lines, Inc., 849 F. Supp. 179, 182 (E.D.N.Y. 1994), *rev'd on other grounds*, 52 F.3d 463, 466 (2nd Cir. 1995); Curley v. Am. Airlines, Inc., 846 F. Supp. 280, 284 (S.D.N.Y. 1994); Fenn v. Am. Airlines, Inc., 839 F. Supp. 1218, 1222-23 (S.D. Miss. 1993); Sunbird Air Servs., Inc. v. Beech Aircraft Corp., 789 F. Supp. 360, 362-63 (D. Kan. 1992); *In re* Air Crash Disaster at Stapleton Int'l Airport, 721 F. Supp. 1185, 1187 (D. Colo. 1988); McBride v. Gemini Air Cargo, Inc., 915 So. 2d 187, 188 (Fla. Dist. Ct. App. 2005); Martin v. E. Airlines, Inc., 630 So. 2d 1206, 1208-09 (Fla. Dist. Ct. App. 1994); Knopp v. Am. Airlines, Inc., 938 S.W.2d 357, 362-63 (Tenn. 1996); Cont'l Airlines, Inc. v. Kiefer, 920 S.W.2d 274, 284 (Tex. 1996).

[60] *See* Hughes v. Attorney Gen. of Fla., 377 F.3d 1258, 1270-71 (11th Cir. 2004); Hoagland v. Town of Clear Lake, Ind., 344 F. Supp. 2d 1150, 1157 (N.D. Ind. 2004), *aff'd*, 415 F.3d 693, 697-700 (7th Cir. 2005); Allen v. Am. Airlines, Inc., 301 F. Supp. 2d 370, 377 (E.D. Pa. 2003); *In re* Sept. 11 Litig., 280 F. Supp. 2d 279, 297-98 (S.D.N.Y. 2003); Stone *ex rel.* Estate of Stone v. Frontier Airlines, Inc., 256 F. Supp. 2d 28, 42 (D. Mass. 2002); *In re* Lawrence W. Inlow Accident Litig., No. IP 99-0830-C H/G, 2001 WL 331625, at *16 (S.D. Ind. Feb. 7, 2001); Skidmore v. Delta Air Lines, Inc., No. Civ.A.399CV2958G, 2000 WL 1844675, at *2-3 (N.D. Tex. Dec. 15, 2000); Sakellaridis v. Polar Air Cargo, Inc., 104 F. Supp. 2d 160, 162-63 (E.D.N.Y. 2000); Vinnick v. Delta Airlines, Inc., 113 Cal. Rptr. 2d 471, 478 (Cal. Ct. App. 2001); *In re* Commercial Airfield, 752 A.2d 13, 15 (Vt. 2000); Miezin v. Midwest Express Airlines, Inc., 701 N.W.2d 626, 629-30 (Wis. Ct. App. 2005).

[61] Sheesley v. Cessna Aircraft Co., 2006 WL 1084103 (D.S.D. Apr. 20, 2006).

> aviation safety. After considering both *Cleveland* and *Abdullah*, this court finds *Cleveland* more persuasive and adopts it here.[62]

As already noted, *Abdullah* involved a commercial flight and airline common carriage, and even if correctly decided its reasoning does not apply to general aviation product liability, negligence, breach of warranty, and failure to warn cases.[63] The DOA structure, wherein manufacturers are permitted to police themselves, mandates this conclusion.[64] Nevertheless, the reasoning in *Abdullah* is still flawed.

The *Abdullah* court confused and then intertwined two very distinct principles: the promulgation of minimum federal regulations pertaining to air transport and the creation of a federal cause of action or federal common law. It is well established that merely because a plaintiff alleges, in part, violation of minimum federal regulations, such allegations do not confer federal question jurisdiction or require federal common law.[65] There is no conflict or field preemption when a state prescribes more stringent standards that would increase safety for commercial aircraft in its stream of commerce. *Abdullah* contradicts the FAA and its history, ignores GARA, and defies an overwhelming body of case law.

III. CONCLUSION

No federal statute supports complete, implied, or field preemption of the field of general aviation; state tort law and remedies remain intact. In fact, GARA and its legislative history confirm there is no such preemption. General aviation manufacturers should cease to advocate the judicial federalization of traditional state law. They already enjoy a self-certification process, while the industry has admitted there is no such preemption by supporting the GARA repose statute and its predecessor preemption bills that were rejected in Congress.[66] Why should the several states not be allowed to regulate dangerous and defective general aviation aircraft injected into their stream of commerce that hurt and kill their domiciliaries, especially if

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[62] *Id.* at *22 (citations omitted) (emphasis in original).

[63] *See* Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 365 (3d Cir. 1999).

[64] *See* United States v. Varig Airlines, 467 U.S. 797, 816 (1984).

[65] *See* Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 809 (1986); Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 13 (1983); Wright v. Bond-Air, Ltd., 930 F. Supp. 300, 305 (E.D. Mich. 1996).

[66] *See Varig*, 467 U.S. at 816; *see also* 142 Cong. Rec. 4, S5459 (1996) (stating that "[a]ll [GARA] consisted of was a statute of repose at 18 years for aircraft. That is all that was in that reform").

such regulation increases the safety of general aviation aircraft and components? The truth is, the Tenth Amendment of the United States Constitution still preserves state sovereignty.[67]

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[67] The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. AMEND. X. *See also* Printz v. United States, 521 U.S. 898, 924-925 (1997) (striking portions of the Brady Act that required states to conduct background checks as a violation of the Tenth Amendment).


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