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RECENT DEVELOPMENTS IN AVIATION LAW

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THE FOLLOWING ARTICLE addresses recent developments in aviation law and the aviation field generally over the past year, i.e., in the time frame of approximately January 2018 to January 2019. This Article will examine a selection of new laws, changes to federal regulations, and case law decisions that impact the field of aviation, including a comprehensive new set of federal statutes and cases involving federal preemption, consumer protections, aircraft leasing, and more.

I. FAA REAUTHORIZATION ACT OF 2018

One of the more significant events in the past year with respect to the field of aviation is the enactment of the Federal Aviation Administration (FAA) Reauthorization Act of 2018 (FAA Reauthorization Act), signed into law by President Trump on October 5, 2018.¹

The FAA Reauthorization Act sanctions the FAA for the next five fiscal years, 2019–2023, which represents the longest funding authorization period for FAA programs since 1982.² The FAA Reauthorization Act is extensive. In addition to the numerous FAA-related funding provisions, it also addresses, regulates, or otherwise impacts a variety of issues spanning across the aviation sphere, including airport infrastructure and safety, unmanned aerial systems (drones), consumer information and safety, air ambulance billing, and aircraft leasing. Some of the FAA Reauthorization Act's provisions serve to create new rules or regulations, while much of it either requires or empowers the Secretary of Transportation to investigate, evaluate, or otherwise

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¹ FAA Reauthorization Act of 2018, Pub. L. No. 115-254, 132 Stat. 3186.

² Ben Husch, *Congress Passes 5-Year FAA Reauthorization Act*, NCSL BLOG (Oct. 4, 2018), www.ncsl.org/blog/2018/10/04/congress-passes-5-year-faa-reauthorization-act.aspx [https://perma.cc/HLU8-QYDR].

analyze a particularly pressing issue. A selection of these new regulations, laws, and programs will be discussed below.

A. CONSUMER PROTECTIONS AND SAFETY

The FAA Reauthorization Act sets in place a host of new rules and regulations with regard to commercial air travel, consumer and aviation safety, and unmanned aircraft systems, among many others. Rules and regulations of this type often not only address recent concerns or events but also often become fertile ground for future litigation, as defense lawyers will agree.

A variety of straightforward but important consumer rules were set into place by the FAA Reauthorization Act. Section 403, for example, officially bans all cell phone calls during commercial flights.³ Specifically, that section amends 49 U.S.C. § 41725 to prohibit any individual from engaging in “voice communications” using a mobile device during a flight, excepting on-duty flight crew, flight attendants, and law enforcement officials acting in their official capacity.⁴ Section 409 bans the use of electronic cigarettes on all flights (by virtue of officially equating their use with smoking).⁵ Section 417 prohibits a passenger from putting any live animals in an overhead bin on a commercial flight.⁶

In addition to these types of specific prohibitions, the FAA Reauthorization Act generally puts a heavy focus on the flow of information to the consumer, consumer rights, and the consumer complaint process. It instructs the Secretary of Transportation to investigate, create committees, and report on a variety of consumer issues, including: the causes of airline delays or cancellations;⁷ evaluating the feasibility of processes to inform consumers of actual flight times;⁸ and the creation and display of “passenger rights” documents.⁹

Presumably in response to one highly publicized incident in 2017 involving the involuntary removal of a ticketed passenger from a commercial airliner to make space for airline employ-

³ FAA Reauthorization Act of 2018 § 403.

⁴ *Id.* (to be codified at 49 U.S.C. § 41725).

⁵ *Id.* § 409 (to be codified at 49 U.S.C. § 41706).

⁶ *Id.* § 417 (to be codified at 49 U.S.C. § 44739).

⁷ *Id.* § 413.

⁸ *Id.* § 406.

⁹ *Id.* § 429.

ees,¹⁰ Congress enacted section 425 of the FAA Reauthorization Act, entitled the “TICKETS Act” for short.¹¹ The TICKETS Act provides that an air carrier may not deny a “revenue passenger” who has a “confirmed reservation” the “permission to board” nor remove that passenger from the aircraft once the passenger: (1) has checked in for the flight prior to the deadline; and (2) has their boarding pass scanned by the gate agent.¹² Exceptions exist, of course, if the passenger poses a “safety, security, or health risk” or if the passenger is engaging in disruptive or unlawful behavior.¹³ Stated differently and in colloquial parlance, once you’re on board the flight, you can no longer get “bumped.”

B. SERVICE ANIMALS

Section 437 of the FAA Reauthorization Act reflects Congress’s attempts to address the service animal situation by ordering the Secretary of Transportation to investigate and conduct a rulemaking proceeding to develop, among other things, a definition for the term “service animal” and minimum standards for implementing related rules.¹⁴ These include, for example: examination of whether to require photo identification for a service animal and, interestingly, the type of service the animal provides to the passenger; whether to require documentation from a physician; and whether to require third-party proof of training for a service animal.¹⁵ Service animals, support animals, and the interplay between balancing consumer needs, safety regulations, and both state and federal statutes is an ongoing challenge. It is clear from the numerous sections of the FAA Reauthorization Act devoted to such issues that Congress is taking steps to address these challenges.

C. AIR AMBULANCE BILLING

Air ambulances have become “a familiar part of emergency healthcare response. All over the country, but particularly in ru-

¹⁰ See, e.g., Maggie Hassan, *Making Airline Travel Safe for All*, BOS. GLOBE (Nov. 19, 2018), <https://www.bostonglobe.com/opinion/2018/11/19/making-airline-travel-safe-for-all/dw3ybB2d19Q1xZKl1Uos7M/story.html> [<https://perma.cc/6Y YJ-H9C3>].

¹¹ FAA Reauthorization Act of 2018 § 425.

¹² *Id.* § 425(b).

¹³ *Id.* § 425(c).

¹⁴ *Id.* § 437.

¹⁵ *Id.*

ral areas, air ambulances can play a vital and life-saving role in responding to medical emergencies.”¹⁶ Often the high costs of air ambulance services, however, if not covered or fully covered by a patient’s insurance, may then be borne by the patient themselves—a practice known as “balance-billing.”¹⁷ Balance-billing, and the costs of air ambulance services in general, has been the subject of numerous lawsuits, articles, blogs, and the like.¹⁸ Congress was alerted to growing consumer concerns related to balance-billing and the FAA Reauthorization Act seeks to address the issue in various ways.

The FAA Reauthorization Act provides for increased data collection with respect to air ambulance pricing and for increased information to consumers.¹⁹ It further requires the creation of a committee of interested parties to review options to improve the disclosure of fees and costs related to air ambulance services and to “protect consumers from balance billing.”²⁰ It further provides for greater authority and oversight by the Secretary of Transportation with respect to air ambulance billing practices.²¹

Notably, the FAA Reauthorization Act also amends 49 U.S.C. § 41712(a) to include air ambulance companies within the scope of consumer protection laws regarding unfair and deceptive practices or competition.²² While Congress certainly has an interest in evaluating consumer protections with respect to any medical-billing-related circumstance, it will have to carefully balance those concerns with the obvious benefits derived from increased air ambulance operations.

D. UNMANNED AERIAL SYSTEMS

Congress devoted significant attention to the use and regulation of Unmanned Aerial Systems (UAS) (also known as drones) in the FAA Reauthorization Act. In large part, the focus of the UAS legislation involves the evaluation and development of

¹⁶ *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 757 (4th Cir. 2018).

¹⁷ *Id.*

¹⁸ *Air Evac EMS* was ultimately resolved via a federal preemption analysis, but the suit stemmed from a balance-billing related concern. *Id.* at 769–70. That case is discussed in more detail below. See also Jen Christensen, *Sky-High Prices for Air Ambulances Hurt Those They are Helping*, CNN (Nov. 26, 2018), <https://www.cnn.com/2018/11/26/health/air-ambulance-high-price/index.html> [https://perma.cc/8NFT-NF3A].

¹⁹ FAA Reauthorization Act of 2018 §§ 314, 418.

²⁰ *Id.* § 418(a).

²¹ *Id.* § 420; see also §§ 418–419.

²² *Id.* § 419(b) (to be codified at 49 U.S.C. § 41712(a)).

“plans,” for lack of a better description, to manage UAS operations moving forward in our increasingly modern aviation rubric.²³

To illustrate, section 342 requires the Secretary of Transportation to update the existing FAA comprehensive plan to “develop a concept of operations for the integration of unmanned aircraft into the national airspace system.”²⁴ The FAA Reauthorization Act provides a host of safety and certification standards for all types of public and private UAS operations as well. Section 349, for example, provides standards for permissible recreational UAS operations: (1) the UAS is flown within the visual line of site of the operator or a spotter in communication with the operator; (2) its operation does not interfere in any way with manned aircraft; (3) it remains below 400 feet above ground level; and (4) the operator has “passed an aeronautical knowledge and safety test,” among others.²⁵

Considered as a whole, the FAA Reauthorization Act reflects Congress’s understanding that UASs are here to stay. UASs serve a variety of valuable services across any number of public and private service areas but also present unique and highly consequential safety concerns. Section 362 bears out the latter, noting: “[i]t is the sense of Congress” that “the unauthorized operation of unmanned aircraft near airports presents a serious hazard to aviation safety.”²⁶ Severe penalties are authorized for those who violate UAS-related regulations and cause injury or death.²⁷

II. AIRCRAFT LEASING AND RELATED LIABILITY

Liability stemming from aviation accidents involving leased aircraft has been addressed by both a currently pending case in the Ninth Circuit, as well as the FAA Reauthorization Act discussed above.

The FAA Reauthorization Act makes two small, yet significant, changes to § 44112(b) of Title 49 of the United States Code, which limits liability for aircraft owners and long-term lessors of aircraft in the event of an aviation accident.²⁸ Originally de-

²³ See *id.* §§ 222(b)(3)(E), 342–384.

²⁴ *Id.* § 342(a).

²⁵ *Id.* § 349 (to be codified at 49 U.S.C. § 44809) (not a comprehensive list of elements).

²⁶ *Id.* § 362.

²⁷ See, e.g., *id.* § 384 (to be codified at 18 U.S.C. § 39B).

²⁸ *Id.* § 514 (to be codified at 49 U.S.C. § 44112(b)).

signed to encourage and promote the financing and purchasing of aircraft, 49 U.S.C. § 44112(b) essentially immunized aircraft owners who had leased out their aircraft and were therefore not in possession of or operating the aircraft at the time of an injury or death due to an accident.²⁹ The previous version of 49 U.S.C. § 44112(b) stated:

[a] lessor, owner, or secured party is liable for personal injury, death, or property loss or damage *on land or water* only when a civil aircraft, aircraft engine, or propeller is in the actual possession *or control* of the lessor, owner, or secured party, and the personal injury, death, or property loss or damage occurs because of—(1) the aircraft, engine, or propeller; or (2) the flight of, or an object falling from, the aircraft, engine, or propeller.³⁰

Section 514 of the FAA Reauthorization Act alters this language to strike the phrase “on land or water” and to add the word “operational” before “control.”³¹ Thus, 49 U.S.C. § 44112(b) will read:

[a] lessor, owner, or secured party is liable for personal injury, death, or property loss or damage only when a civil aircraft, aircraft engine, or propeller is in the actual possession or operational control of the lessor, owner, or secured party, and the personal injury, death, or property loss or damage occurs because of—(1) the aircraft, engine, or propeller; or (2) the flight of, or an object falling from, the aircraft, engine, or propeller.³²

The first change—striking the phrase “on land or water”—eliminates any remaining confusion regarding *where* the injured party needed to be at the time of the incident for the liability shield to apply. That is, when the former version of 49 U.S.C. § 44112(b) was strictly construed, the physical location of the injured party was significant.

To illustrate, in *Vreeland v. Ferrer* (a much discussed and somewhat novel case), the Florida Supreme Court found that 49 U.S.C. § 44112 did not preempt a Florida state law—and thus did not serve to shield a lessor of an aircraft from liability—based on the plaintiff’s physical presence in the aircraft itself.³³

²⁹ See 49 U.S.C. § 44112(b) (2012).

³⁰ *Id.*, amended by FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 514, 132 Stat. 3186, 3358 (emphasis added).

³¹ FAA Reauthorization Act of 2018 § 514 (to be codified at 49 U.S.C. § 44112(b)).

³² 49 U.S.C. § 44112(b), amended by FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 514, 132 Stat. 3186, 3358.

³³ *Vreeland v. Ferrer*, 71 So. 3d 70, 84 (2011).

In *Vreeland*, the defendant was the owner of an aircraft who had leased it for one year.³⁴ During the lease period, the aircraft crashed and fatally injured the pilot and passenger.³⁵ The plaintiff was the estate of the passenger who filed suit against the owner/lessor of the aircraft alleging state law tort claims.³⁶ Both lower courts ultimately found that 49 U.S.C. § 44112(b) applied and thus immunized the owner/lessor.³⁷

The Florida Supreme Court reversed.³⁸ The court, seizing on the “on land or water” language of the statute, held that § 44112(b) only applies to people or property that were “*physically* on the ground or in the water” (i.e., only those standing on the ground and underneath the aircraft when it crashed).³⁹ Because the plaintiff (the passenger) was *inside* the aircraft at the time of its crash and not underneath it, the *Vreeland* court found § 44112(b) inapplicable and the state law claim was allowed to proceed.⁴⁰ Congress’s enactment of section 514 of the FAA Reauthorization Act eliminates the phrase “on land or water” and thus effectively overturns the *Vreeland* court’s decision, or at least eliminates any precedential value the decision may have had.⁴¹

As of the date of this writing, another case involving an aircraft leasing issue, specifically involving the interpretation of 49 U.S.C. § 44112, is currently pending in the United States Court of Appeals for the Ninth Circuit.⁴² In *Escobar*, the plaintiff is the widow of a pilot who was operating a Eurocopter EC130 B4 helicopter in Hawaii when it crashed into mountainous terrain while giving a tour of the islands.⁴³ The company operating the helicopter employed the plaintiff’s husband.⁴⁴ Plaintiff brought state law negligence and strict product liability claims against both the manufacturer of the helicopter and the owner/lessor

³⁴ *Id.* at 72.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 72–73.

³⁸ *Id.* at 84.

³⁹ *Id.* at 80.

⁴⁰ *Id.* at 84.

⁴¹ See FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 514, 132 Stat. 3186, 3358.

⁴² See *Escobar v. Nevada Helicopter Leasing, LLC*, No. 13-00598 HG-RLP, 2016 WL 3962805, at *1 (D. Haw. July 21, 2016), *appeal docketed*, No. 17-15590 (9th Cir. Mar. 30, 2017). Wilson Elser and the author of this Article represent the defendant and respondent in this matter.

⁴³ *Id.* at *1, *4.

⁴⁴ *Id.* at *1.

of the helicopter.⁴⁵ The owner/lessor defendant, Nevada Helicopter Leasing, LLC (Nevada Leasing), is a Nevada corporation, which purchases helicopters and engages in long-term leases of those helicopters with the operator in Hawaii.⁴⁶

At the district court level, Nevada Leasing moved for summary judgment, arguing that 49 U.S.C. § 44112(b) applied because the owner/lessor of the aircraft engaged in a long-term lease.⁴⁷ Specifically, Nevada Leasing asserted that it had neither actual possession nor control over the aircraft, and thus § 44112(b) preempted the plaintiff's state law claims and immunized it from liability.⁴⁸ The district court analyzed Nevada Leasing's preemption claim under the principle of conflict preemption.⁴⁹ Reviewing the legislative history of 49 U.S.C. § 44112, the court noted that Congress "intended to make it clear that an owner or lessor of an aircraft would not be liable unless it had actual possession or control over the aircraft."⁵⁰ The court held the plaintiff's state law causes of action contravened Congress's intent in enacting § 44112; the plaintiff's claims were therefore preempted by the Federal Aviation Act.⁵¹ The court further held that 49 U.S.C. § 44112(b) exempted Nevada Leasing from liability because Nevada Leasing did not have "actual possession or control" of the helicopter.⁵² Summary judgment was granted.⁵³

Plaintiff appealed to the United States Court of Appeals for the Ninth Circuit.⁵⁴ On appeal, the plaintiff asserted that, while the helicopter may have been in the possession of the operator, the lease between the owner and the operator nevertheless gave Nevada Leasing sufficient "legal" control over the flight to remove the matter from the purview of 49 U.S.C. § 44112(b).⁵⁵

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at *1, *4.

⁴⁸ *See id.* at *1, *10.

⁴⁹ *Id.* at *6. Conflict preemption is a type of implied preemption that "arises when compliance with both federal and state law is impossible or when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the federal law." *Id.* at *5-6.

⁵⁰ *Id.* at *7.

⁵¹ *Id.* at *8.

⁵² *Id.* at *13.

⁵³ *Id.*

⁵⁴ *See generally* Plaintiff-Appellant's Opening Brief, *Escobar v. Nevada Helicopter Leasing, LLC*, No. 17-15590 (9th Cir. Oct. 10, 2017). Wilson Elser and the author of this Article served as counsel for Nevada Helicopter Leasing on appeal.

⁵⁵ Reply Brief of Plaintiff-Appellant at 2, *Escobar*, No. 17-15590 (9th Cir. Feb. 22, 2018).

Nevada Leasing countered by asserting that the incident falls squarely within the confines of 49 U.S.C. § 44112(b), which effectuates its plain language purpose of immunizing owners and lessors, such as itself, from liability where it maintains no physical, operational, or other control over the flight or the aircraft.⁵⁶ Moreover, Nevada Leasing argued that even if the terms of the lease between it and the operator were relevant to the issue of “control” within the meaning of the statute, the lease itself specifically delineates that the lessee/operator was to maintain possession and control of the aircraft at all times.⁵⁷

The *Escobar* case was argued and submitted to the Ninth Circuit in October 2018, and a final decision on the case remains pending as of the date of this writing.⁵⁸

III. FEDERAL PREEMPTION

Once again, the most significant preemption case in the last year is the most recent iteration of *Sikkelee v. Precision Airmotive Corporation*.⁵⁹ The Third Circuit’s decision in *Sikkelee* was issued on October 25, 2018, and is the most recent of what is otherwise a long and complex litigation history.⁶⁰ To better understand the issues and the scope of the new *Sikkelee* decision, some factual and legal background is appropriate.⁶¹

A. THE INITIAL PROCEEDINGS

The *Sikkelee* lawsuit was initiated in 2007, two years after a Cessna 172 pilot sustained fatal injuries during a plane crash in North Carolina.⁶² The plaintiff asserted state law strict liability and negligence claims against, among other defendants, Tex-

⁵⁶ Defendant-Appellee’s Answering Brief at 2, *Escobar*, No. 17-15590 (9th Cir. Jan. 2, 2018).

⁵⁷ *Id.* at 3.

⁵⁸ Editor’s Note: The Court of Appeals for the Ninth Circuit has since released its opinion. See *Escobar v. Nevada Helicopter Leasing, LLC*, 756 F. App’x 724 (9th Cir. 2019) (mem. op.). The court reversed the grant of summary judgment for the defendant, holding there is “a genuine dispute as to whether Nevada Leasing had ‘actual possession or control’ of the aircraft.” *Id.* at 725.

⁵⁹ *Sikkelee v. Precision Airmotive Corp.*, 907 F.3d 701 (3d Cir. 2018).

⁶⁰ See *id.* For clarity, reference to *Sikkelee* here will refer only to the recent October 2018 decision.

⁶¹ In the interest of brevity, however, both the facts and procedural history of the *Sikkelee* decision presented here are summarized versions. There are additional “offshoot” decisions related to the *Sikkelee* case as well, but a discussion of those is omitted here.

⁶² *Sikkelee*, 907 F.3d at 705, 707.

tron Lycoming Reciprocating Engine Division (Lycoming), claiming the engine had failed to function properly due to a design defect, specifically, a defect in the carburetor.⁶³

Lycoming was issued the type certificate for its engine in 1966, which included approval of the carburetor design (manufactured by a different company).⁶⁴ Lycoming subsequently asked the FAA to remove a requirement that certain bolts holding the carburetor together be secured with safety wire, in favor of using hex screws and lock tabs instead—a request the FAA permitted.⁶⁵ In the years following this adjustment, the FAA notified Lycoming on several occasions of instances where it appeared the hex screws and lock tabs were not completely effective in holding together the components of the carburetors installed in its engines.⁶⁶ Lycoming responded with a Service Bulletin in 1973, but the problems with loosening of the screws on the carburetor persisted.⁶⁷ Precision Air Motive, which had acquired the manufacturer of the carburetor, also began to “identif[y] a trend” from multiple reports that the screws were coming loose on the carburetor in the engine, and specifically on Cessna 172 aircraft.⁶⁸

The engine installed on the aircraft at issue had been overhauled in 2004 and placed back into service.⁶⁹ The carburetor had been rebuilt; however, the rebuild was performed pursuant to the active specifications and the existing certifications, which called for the use of the hex screws and lock tabs.⁷⁰ David Sikkelee rented the plane in 2005 and crashed shortly after takeoff, suffering fatal injuries.⁷¹ Plaintiff alleged it was a loosening of the screws and lock tabs on the carburetor that ultimately allowed the engine to malfunction and caused the Cessna to crash.⁷²

After some initial motion practice and an early dismissal, the plaintiff filed an amended complaint that not only asserted the state law strict products liability and negligence claims but also incorporated claims of a violation of a “federal standard of care”

⁶³ *Id.* at 704–05.

⁶⁴ *Id.* at 705.

⁶⁵ *Id.*

⁶⁶ *Id.* at 706.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 706–07.

⁷⁰ *Id.* at 707.

⁷¹ *Id.*

⁷² *See id.* at 706–07.

and alleged Lycoming had violated various FAA regulations.⁷³ Lycoming filed a motion for partial summary judgment that the district court granted by concluding that the FAA's issuance of a type certificate itself demonstrated that Lycoming had satisfied any federal standard of care.⁷⁴ Effectively, the district court's ruling concluded that the FAA regulations field-preempted the plaintiff's claims.⁷⁵

B. THE FIRST APPEAL TO THE THIRD CIRCUIT:
FIELD PREEMPTION

The United States Court of Appeals for the Third Circuit granted an interlocutory appeal to evaluate the scope of field preemption as to state law aircraft products liability claims.⁷⁶ The Third Circuit reversed the trial court's decision and held that the doctrine of field preemption did not categorically apply to state law products liability claims in the aviation field.⁷⁷ Specifically, the Third Circuit held that the regulatory authorities for aviation in the United States—the Federal Aviation Act, the General Aviation Revitalization Act of 1994, and the various Federal Aviation Regulations (FARs) promulgated by the FAA—do not reflect an intention by Congress to preempt state law in the “field” of aviation and do not create a federal standard of care for injuries resulting from aircraft-related incidents.⁷⁸ The court also specifically found that the “type certification process cannot as a categorical matter displace the need for compliance . . . with state standards of care.”⁷⁹

The Third Circuit therefore vacated the order granting of summary judgment and remanded the case back to the district court, noting that the case could proceed using a “state standard of care,” but notably also “subject to traditional principles of conflict preemption.”⁸⁰ In summary, the Third Circuit rejected the concept of a federal standard of care and, moreover, rejected the assertion that compliance with federal regulations or the issuance of a type certificate results in the application of

⁷³ *Id.* at 707.

⁷⁴ *Id.*

⁷⁵ *Id.* at 708.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

field preemption. It explicitly left open, however, the possibility that a related doctrine, conflict preemption, may apply.

C. THE REMAND TO THE DISTRICT COURT

Once back in the district court, Lycoming filed another motion for summary judgment, this time arguing the plaintiff's claims were preempted by federal law under the doctrine of conflict preemption (i.e., the proverbial "door" explicitly left open by the Third Circuit).⁸¹ While field preemption involves the analysis of whether federal law occupies an entire "field" categorically, such as aviation-related state products liability claims, conflict preemption has more layers. Two types of conflict preemption exist: (1) impossibility preemption, where a party asserts that compliance with both state *and* federal obligations or duties simultaneously is impossible; or alternatively, (2) obstacle preemption, which arises when compliance with both state and federal laws or duties is possible, but compliance with the state law is an obstacle to the purposes of the federal law.⁸² The court explains that the "question for 'impossibility' [preemption] is whether the private party could independently do under federal law what state law requires of it."⁸³

Lycoming asserted the former; that is, it claimed impossibility conflict preemption applied and asserted that its compliance with the state law duties—the alleged duty to create a safer form of lock system on the carburetor—was impossible to achieve independently and without the approval of the FAA.⁸⁴ The district court agreed with Lycoming and again granted summary judgment in favor of the defense.⁸⁵ Again, plaintiff appealed to the Third Circuit.⁸⁶

⁸¹ *Id.*

⁸² *Id.* at 709.

⁸³ *Id.* (citing *PLIVA, Inc. v. Mensing*, 504 U.S. 604, 620 (2011)).

⁸⁴ *Id.* at 708–09. Notably, the plaintiff's specific claims on remand were that Lycoming was required under state law to have used a different, safer design—specifically, the use of a "safety wire" to secure the bolts on the carburetor. *Id.* at 710. This safety wire system, as noted above, was the original design in the original type certificate. As will be shown below, this fact bears on the outcome of the case.

⁸⁵ *See id.* at 708.

⁸⁶ *Id.*

D. THE THIRD CIRCUIT'S 2018 DECISION:
CONFLICT PREEMPTION

The present *Sikkelee* decision now focuses on conflict preemption analysis. Once again, however, the Third Circuit reversed the trial court's decision and held that conflict preemption does not apply in this circumstance, or at least that the record was insufficient for summary judgment.⁸⁷

As it did at the trial court level, Lycoming argued that it could not unilaterally change its type certificate without FAA approval and thus could not alter the existing design of the carburetor, precisely what the state law allegedly required it to do.⁸⁸ It was therefore impossible for it to comply with both federal and state law.⁸⁹

The *Sikkelee* court rejected this contention. Analogizing the circumstances to a series of cases involving the Federal Drug Administration and drug manufacturing and product labels, the *Sikkelee* court acknowledged the FAA's role in type certificate changes but ultimately held that Lycoming was not entitled to the impossibility preemption defense unless it could present "clear evidence that the [FAA] would not have approved a change" to the type certificate.⁹⁰ Stated another way, although acknowledging that Lycoming would need to obtain FAA approval before compliance with both state and federal law was possible, it nevertheless was required to prove that FAA approval would not have been forthcoming to demonstrate impossibility.

Significantly, the court relied heavily on the fact that Lycoming had previously sought and obtained FAA approval for adjustments to its type certificate, to which the court commented that approval had been obtained "in short order."⁹¹ Specifically, the court seized on the fact that Lycoming had reached out to the FAA with regard to changing its original design in a successful effort to remove the requirement that safety wires be used to secure the carburetor parts in favor of hex screws and lock tabs—a fact that, not coincidentally, was at the heart of the plaintiff's claim against Lycoming.⁹² Moreover, the court emphasized that both the FAA and Lycoming had been aware of

⁸⁷ *Id.* at 714–15.

⁸⁸ *Id.* at 713.

⁸⁹ *Id.*

⁹⁰ *Id.* at 713–14 (citations and quotations omitted).

⁹¹ *Id.* at 713.

⁹² *Id.* at 713–14.

the specific issue previously, suggesting that knowledge would presumably have smoothed the way for a subsequent design change.⁹³ The Third Circuit concluded that when viewing the evidence in a light most favorable to the plaintiff (which it must on summary judgment), the FAA “likely would have approved a change [to the design].”⁹⁴

Consequently, the *Sikkelee* court again vacated the award of summary judgment and again has remanded the case back to the trial court for further proceedings.⁹⁵ As of the date of this writing, the *Sikkelee* decision stands.

E. THE DISSENTING OPINION IN *SIKKELEE*

For those in disagreement with the outcome of the *Sikkelee* decision, there is a very detailed dissenting opinion worth reviewing. The dissent notes that the majority’s recital of the applicable question of law is correct and undisputed, but to determine whether impossibility conflict preemption applies, the salient inquiry is “whether the private party could *independently* do under federal law what state law requires of it.”⁹⁶ The dissent argues, however, that the majority was not faithful to this inquiry.⁹⁷ Instead, while acknowledging Lycoming could not independently make changes to its design, the majority nevertheless required additional proof beyond the scope of that inquiry.⁹⁸

To this end, the dissenting opinion states, “[c]rucially, the question is not whether a manufacturer may ever alter its product under the applicable federal regulatory scheme. Rather, the question is whether a manufacturer may do so without prior agency approval.”⁹⁹ In essence, the dissenting opinion argues that it does not matter whether FAA approval for a design change would have been likely, welcomed, easy, or swift, but in-

⁹³ *Id.* at 714.

⁹⁴ *Id.*

⁹⁵ *Id.* at 714–15, 717. The court’s opinion also addressed and rejected Lycoming’s summary judgment on additional grounds, finding genuine issues of material fact with respect to, for example, the actual *cause* of the engine failure. *Id.* at 716. It did however affirm a partial grant of summary judgment in Lycoming’s favor on another “failure-to-notify-the-FAA” claim, but that is not entirely germane to the focus of this Article and thus that aspect is not discussed other than to note the Third Circuit again confirmed that there is no “federal standard of care.” *See id.* at 716–17.

⁹⁶ *Id.* at 719 (Roth, J., dissenting).

⁹⁷ *See id.*

⁹⁸ *Id.* at 723.

⁹⁹ *Id.* at 720.

stead only that approval on some level was *required*. It is that additional requirement, the dissent argues, that creates the basis for the application of impossibility conflict preemption.

The dissent explains this position, stating:

[the] result is readily apparent when we consider the question of impossibility in the precise language provided by the Supreme Court: Could Lycoming independently do under federal law what state law required of it, *i.e.*, alter the design of the carburetor's fastening mechanism from lock-tab washers to safety wire? Under the applicable FAA regulations, the answer to that fundamental question is clearly no¹⁰⁰

Thus, the mere fact that some additional approval by a third-party regulatory entity is required before Lycoming could comply with state law, the dissent argues, triggers the applicability of impossibility conflict preemption.

To be sure, the 2018 *Sikkelee* decision strikes a blow to the impossibility conflict preemption defense in aviation products liability cases. The reasoning of the case poses a new and unique hurdle by effectively adding a new element to the evidentiary analysis. That is, *Sikkelee* suggests a defendant asserting impossibility conflict preemption must prove more than impossibility “at the time,” but impossibility in the future, *i.e.*, that even with further efforts (such as seeking a change to a type certificate), compliance with state law would have been impossible or unlikely. That said, the emphasis on the historical facts at issue in *Sikkelee* (the long history of the FAA and others providing notice to Lycoming of the issue, the prior design change and FAA approval, etc.) appear to bear heavily on the analysis and the outcome.¹⁰¹ Accordingly, a new case without those facts may present a circumstance wherein an impossibility conflict preemption defense may be more viable.

IV. FEDERAL PREEMPTION/AIR AMBULANCES & BALANCE-BILLING

Another interesting federal preemption case comes out of the Court of Appeals for the Fourth Circuit, *Air Evac EMS, Inc. v. Cheatham*.¹⁰² While the result of the *Air Evac EMS* case is driven by federal preemption analysis, the case is also notable because it involves air ambulance billing—not only an emerging issue in

¹⁰⁰ *Id.* at 723 (footnote omitted).

¹⁰¹ *See id.* at 714 (majority opinion).

¹⁰² 910 F.3d 751 (4th Cir. 2018).

litigation nationwide but also one given significant attention by Congress in the FAA Reauthorization Act (a fact noted by the court).¹⁰³

Air Evac EMS arose out of West Virginia.¹⁰⁴ The Fourth Circuit began its analysis of the issues in that case with: (1) a detailed (and informative) history of the market-driven system for commercial air travel; (2) Congress's efforts to encourage growth and competitiveness in the aviation sector through deregulation; and (3) the advent and operation of one of its primary contemporary vehicles for doing so, the Airline Deregulation Act of 1978 (ADA).¹⁰⁵ To achieve its goals, the ADA's purpose was to avoid "duplicative and inconsistent" layers of state and federal regulatory oversight by imposing only a single layer of federal regulation, administered by the Department of Transportation (leaving aviation safety to the FAA).¹⁰⁶ To this end, the ADA contains an express preemption clause, which currently reads: "[A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart."¹⁰⁷ The provision expresses the "'broad pre-emptive purpose' that is consistent with the deregulatory aims of the statute."¹⁰⁸

One area of active and innovative growth in the aviation field is the emergence of air ambulances.¹⁰⁹ Air ambulances, while providing an extremely valuable service, are expensive and, as noted by the court, the cost of a single flight can be "tens of thousands of dollars."¹¹⁰ Some insurance companies, however, have refused to cover all or part of these costs, which in turn has prompted air ambulance companies to "[seek] payment directly from the patients."¹¹¹ This practice of seeking payment for the balance of the outstanding costs from the patient is known as "balance-billing," and "[t]he costs of these services have not gone unnoticed."¹¹² The court in *Air Evac EMS* explained that the Government Accountability Office issued a report to Con-

¹⁰³ See *id.* at 757.

¹⁰⁴ *Id.* at 758.

¹⁰⁵ See *id.* at 755–56.

¹⁰⁶ *Id.* at 756.

¹⁰⁷ *Id.* (citing 49 U.S.C. § 41713(b)(1) (2012)).

¹⁰⁸ *Id.* (internal citations omitted).

¹⁰⁹ *Id.* at 757.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

gress in 2017 on the growing concern about balance-billing costs, “specifically noting consumer concerns related to” the practice.¹¹³ Indeed, as evidenced earlier in this Article and also discussed by the court in *Air Evac EMS*, Congress devoted significant attention to the assessment and evaluation of air ambulance billing systems, data collection, and policy and rulemaking in the FAA Reauthorization Act of 2018.¹¹⁴

Many states have sought to address balance-billing concerns by attempting to legislate for lower costs or other regulatory methods, such as “regulating the amount that air ambulances can charge” patients or attempting to force acceptance of lower reimbursement rates.¹¹⁵ West Virginia did just that. Through a complex, multi-layered system, West Virginia passed state legislation that ultimately resulted in a non-negotiable, comparatively low reimbursement rate for air ambulance services while also precluding any additional recovery (i.e., balance-billing).¹¹⁶

Air Evac EMS, Inc. is an air ambulance operator, a registered air carrier, and a provider of air ambulance services in West Virginia.¹¹⁷ After years of objecting to West Virginia’s regulations, Air Evac filed suit against state administrators to enjoin the regulatory scheme.¹¹⁸ Air Evac filed a successful motion for summary judgment, which was then appealed to the Court of Appeals for the Fourth Circuit.¹¹⁹

On appeal, two primary issues were addressed: (1) whether Air Evac had Article III standing to challenge the regulations; and (2) whether West Virginia’s regulatory scheme was in violation of, and thus preempted by, the express preemption clause in the ADA.¹²⁰

The court disposed of the first issue, West Virginia’s claim that Air Evac lacked standing, rather quickly.¹²¹ The court noted that

¹¹³ *Id.*

¹¹⁴ *See id.*

¹¹⁵ *Id.* at 757–58.

¹¹⁶ *See id.* at 758. The details of the regulations West Virginia enacted are not particularly relevant for the purposes here and thus an in-depth discussion is omitted. Primarily, however, West Virginia used the state’s workers’ compensation and state-employee benefit system to develop a favorable regulatory scheme with respect to lower medical reimbursements and payments in connection with services for operations like air ambulances. *See id.*

¹¹⁷ *Id.* at 755, 758–59.

¹¹⁸ *Id.* at 759.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 759–60.

the “causal connection between the [state’s] regulations” and Air Evac’s lowered reimbursements was “undeniable,” and thus a sufficient “injury” had been identified to confer standing upon Air Evac.¹²²

The second issue was more significant. It is clear that the ADA has an express preemption clause that specifically prohibits states from enacting laws with regard to the pricing of air carrier services.¹²³ Moreover, as the court noted, while the ADA’s preemption language is certainly express, and evidently quite broad, it is not absolute.¹²⁴ For example, the ADA’s preemption clause does not reach individual contractual obligations, nor does it preempt state laws “with only a tangential relation to an air carrier’s operations.”¹²⁵

The court addressed whether the air ambulance industry comes within the purview of the preemption clause by posing the relevant question as “whether air ambulances are ‘air carrier[s] who may provide transportation.’”¹²⁶ The court explained that many courts have confronted that very question and have uniformly found air ambulances to be “air carriers” for purposes of the ADA.¹²⁷ West Virginia argued, however, that the statute defines “air carriers” to include “common carriers” which, it alleged, air ambulances are not.¹²⁸ Air ambulances, after all, do not collect tickets from their customers, for example. The court rejected this argument as well, however, noting a host of decisional authority all of which firmly conclude air ambulances qualify as common carriers.¹²⁹ Ultimately, the court appeared to have little trouble identifying air ambulances as “air carriers” and common carriers.¹³⁰ And with the obligatory confirmation that air ambulances “provide air transportation,” the court concluded that the preemption clause in the ADA reaches air ambulance providers such as Air Evac.¹³¹

¹²² *Id.* at 760.

¹²³ *Id.* at 762.

¹²⁴ *Id.*

¹²⁵ *Id.* (citations omitted).

¹²⁶ *Id.* at 763 (citing 49 U.S.C. § 41713(b) (2012)).

¹²⁷ *Id.* It is also worth noting that at least one of these other cases referenced by the court was another Air Evac case from 2018 in the District Court for the Western District of Texas. *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 763–64.

¹³¹ *Id.* at 764–66.

The *Air Evac EMS* court then provided a detailed analysis of West Virginia's statutory scheme and concluded that it both "relate[s] to a price, route or service" as well as has the "force and effect of law."¹³² Having done so, the court concluded that West Virginia's statutory scheme is preempted by the ADA.¹³³

Notably, the court offered West Virginia some conciliatory advice, suggesting that it would be "wrong to conclude that the ADA envisions no role for states like West Virginia moving forward," emphasizing the state's ability to "exert its considerable market power to obtain more favorable terms."¹³⁴ The court stated:

[t]his is not to say that West Virginia cannot, moving forward, bargain for lower payments to air ambulance companies. It would be permissible for the state to use its considerable purchasing power as the insurer of state employees to negotiate better rates up front or limit reimbursements for air ambulance services after the fact.¹³⁵

V. FEDERAL JURISDICTION

One notable federal jurisdiction case is also currently pending before the Court of Appeals for the Ninth Circuit, *Riggs v. Airbus Helicopters Inc.*¹³⁶ The litigation arises from a crash of an Airbus EC130 B4 helicopter on February 10, 2018, during a sightseeing tour of the Grand Canyon.¹³⁷ The crash occurred near Peach Springs, Arizona, and resulted in multiple fatal injuries.¹³⁸

The plaintiffs, the estate and family of one of the deceased passengers, filed the underlying action for strict products liability and negligence against, among others, the manufacturer and operator, in state court in the District Court of Clark County Nevada.¹³⁹ The suit alleges, among other things, a design defect theory against defendant Airbus Helicopters, Inc. (AHI), claiming the subject helicopter did not meet improved crash resis-

¹³² *Id.* at 766–69.

¹³³ *Id.* at 770.

¹³⁴ *Id.*

¹³⁵ *Id.* at 769.

¹³⁶ See Brief of Plaintiffs-Appellees, *Riggs v. Airbus Helicopters, Inc.*, No. 18-16396 (9th Cir. Sept. 25, 2018), 2018 WL 4830297. Wilson Elser represents co-defendant and appellee, Papillon Airways, Inc. and related parties, in both the underlying litigation and on appeal before the Ninth Circuit.

¹³⁷ *Id.* at *2.

¹³⁸ See *id.* at *2–3.

¹³⁹ *Id.* at *3.

tance standards that require incorporating certain fuel system design features.¹⁴⁰ AHI removed the matter to federal court, which was followed by motions to remand the case, filed by both the plaintiffs and the other defendants.¹⁴¹ In July 2018, the district court issued an order remanding the case, which AHI then appealed to the Ninth Circuit.¹⁴²

On appeal, AHI claimed that federal jurisdiction is appropriate under a statutory doctrine known as “Federal Officer Jurisdiction,” codified in 28 U.S.C. § 1442(a)(1).¹⁴³ The federal officer statute states in the pertinent part:

- (a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
 - (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.¹⁴⁴

The statute, generally speaking, provides a vehicle for removing a case to federal court if the conduct at issue was engaged in by a federal officer or agent acting under color of that authority. On appeal, AHI asserted that the alleged design changes at issue in plaintiffs’ claims would have required a Supplemental Type Certificate (STC) be approved by the FAA.¹⁴⁵ Further, AHI argued that the FAA gave it “Organization Designation Authorization” (ODA), or “ODA” status, providing AHI some delegated FAA functions and authority.¹⁴⁶ As an ODA holder, AHI argued, it performed authorized, delegated functions normally reserved for the FAA, including authorization to evaluate and issue STCs.¹⁴⁷ Consequently, AHI asserted that its ODA status makes it

¹⁴⁰ *See id.*

¹⁴¹ *Id.*

¹⁴² *See id.* An order to remand is appealable pursuant to 28 U.S.C. §1447(d). *Id.* at *1.

¹⁴³ *Id.* at *4.

¹⁴⁴ 28 U.S.C. § 1442(a)(1) (2012).

¹⁴⁵ Brief of Plaintiffs-Appellees, *supra* note 136, at *51.

¹⁴⁶ *Id.* at *10.

¹⁴⁷ *Id.* at *14.

a functional representative of the FAA with respect to whether an STC was or should have been issued, and therefore AHI's "actions" in this regard were undertaken as a "federal officer."¹⁴⁸

The respondents, plaintiffs, and remaining defendants reasserted the position taken by the district court and argued that AHI may have complied with existing federal regulations, but compliance does not equate with "acting" as a federal officer.¹⁴⁹ The respondents argued that an FAA ODA status is insufficient to categorically make all conduct of the designee federal-officer conduct.¹⁵⁰ Respondents suggested that permitting federal jurisdiction on the basis AHI suggests would greatly expand the scope of federal jurisdiction generally.¹⁵¹ Further, the respondents asserted that several additional elements must be satisfied for federal officer jurisdiction—elements, which they contended, AHI could not meet. These include, for example, demonstrating a causal nexus between the plaintiffs' claims and the alleged actions of AHI at issue,¹⁵² and whether AHI has a colorable federal defense, which in this case, AHI argued is federal preemption.¹⁵³

Ultimately, while the outcome of the *Riggs* matter will determine whether the case proceeds in federal or state court, the implications of the decision are more significant. As noted, the case remains pending in the Ninth Circuit and arguments were heard on February 14, 2019.¹⁵⁴

VI. CONCLUSION

In the past year, several interesting issues have arisen in the field of aviation law and, as noted above, many remain pending as of the date this Article was written. The extensive scope of the FAA Reauthorization Act, for example, not only reveals the implementation of a variety of new rules and regulations but also provides insight into the areas of Congressional concern and import spanning the aviation world as we move into a more technological age.

¹⁴⁸ See generally *id.*

¹⁴⁹ See *id.* at *19.

¹⁵⁰ See *id.* at *23.

¹⁵¹ See *id.* at *21.

¹⁵² *Id.* at *45–46.

¹⁵³ *Id.* at *47–48.

¹⁵⁴ *Riggs v. Airbus Helicopters, Inc.*, No. 18-16396 (9th Cir. argued Feb. 14, 2019).