Preemption of State Law Tort Claims in the Context of Aircraft Manufacturers

Mark A. Valetti

Follow this and additional works at: https://scholar.smu.edu/jalc

Recommended Citation
https://scholar.smu.edu/jalc/vol60/iss2/7

This Comment is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
# Preemption of State Law Tort Claims in the Context of Aircraft Manufacturers

Mark A. Valetti*

## Table of Contents

I. Introduction .................................. 700  
II. Background .................................. 703  
   A. History of Aircraft Regulation Prior to  
      the Federal Aviation Act of 1958 .......... 703  
   B. Federal Aviation Act of 1958 .............. 704  
      1. Purpose of the 1958 Act .................... 704  
         a. Certifications Issued by the FAA ...... 705  
         b. Savings Clause ........................ 709  
   C. Post-Federal Aviation Act of 1958  
      Development ................................ 709  
III. Present Status of the Law Regarding  
     Federal Preemption ........................ 711  
   A. Field Preemption ............................ 712  
   B. Conflict Preemption ........................ 713  
IV. Present Status of Case Law Regarding  
    Implied Preemption in the Context of  
    Aviation ...................................... 714  
   A. Federal Cases Pertaining Specifically to  
      Implied Preemption and Aircraft  
      Manufacturers ................................ 714  
      1. Piper Aircraft .............................. 714  
      2. Lake Aircraft .............................. 717  

---

* The author wishes to thank Mr. James Dillman of the FAA for his assistance and guidance.
I. INTRODUCTION

IT IS A cool autumn afternoon, and you have the afternoon free. The business deal you have been working on went perfectly, and the day is turning out to be just as perfect. Perfect, that is, for flying. There are not any clouds for miles, the breeze is light, and the temperature is cool but not too cold. You feel good. In fact, you feel so good that you decide to fly your plane. You bought the plane, a single-engine two-seater, a few years ago, and you have never had any problems with it in the past.

As you arrive at the airport, you decide to do something a little different. Instead of flying from your regular seat, the
pilot's seat, you decide to fly the plane from the co-pilot's seat. The controls and the view seem slightly different from the co-pilot's seat, but other-wise, flying from the co-pilot's seat seems no different.

As always, your take-off is flawless. Once you are in the air, you decide to cruise at a few thousand feet. The plane is flying like a dream, and, after a few hours, you decide to venture to a nearby lake. The lake's airport is small and only a few miles straight ahead. You have never been to this airport before, but, like every other flight of yours, your approach is perfect.

Unbeknownst to you, there is a blind spot in the field of view from the copilot's seat that is not present from the pilot's seat. Because of this blind spot, you do not see the trees in front of the runway. Before you realize it, your right wing and the bottom of your aircraft hit several trees and you spin out of control. Your plane spins to the right, skids across the runway, flips over, and finally comes to a complete stop.

Due to the accident, you incurred many medical bills, your plane was completely destroyed, and you missed several months of work. Because of the enormous bills you have accrued, and your desire to make the responsible parties "pay" for what they caused, you decide to sue the aircraft manufacturer in state court. Should you be allowed to do so? After all, it was the manufacturer's fault for not designing the aircraft correctly, and you would never have been injured if it had not been for the design flaw. In addition, you believe that companies who make a defective product should be taught a lesson. From an injured person's point of view, the company probably should be held responsible.

Consider the same situation from the perspective of the aircraft manufacturer. The aircraft manufacturer worked hard to build every aircraft to meet its customers' needs and desires, while remaining in compliance with every Federal Aviation Administration requirement. This is a difficult situation for the aircraft manufacturer. Even if its
aircraft have always complied with every Federal Aviation Administration regulation and standard, the aircraft manufacturer may still be sued based on a standard that is decided by a jury of lay persons in a state court. The aircraft manufacturer could not have designed the aircraft in view of this standard because it did not exist at that time. In addition, each state may hold it to a different standard, and each one of these standards may be more strict than the ones promulgated by the Federal Aviation Administration. In future designs which standard does an aircraft manufacturer rely upon in order to avoid future law suits? In addition, how does it design aircraft to meet standards that do not yet exist?

As the title and the previous hypothetical situation suggest, this article was written to review the arguments for and against preemption of state law tort claims in the context of aircraft manufacturers. Within the past year, two cases have addressed this issue in the United States Courts of Appeals. The first case was decided in the Tenth Circuit, and the other was decided in the Eleventh Circuit. While both courts concluded that the state common law tort claims were not preempted by federal action, there are many legitimate and persuasive arguments that support the opposite conclusion. This comment will present both sides of the argument, without relying solely on Piper Aircraft or Lake Aircraft, to allow the reader to come to his or her own conclusion.

This comment is divided into several sections. The first section addresses the history of the relevant federal aviation acts and regulations and the responsibilities and duties of the Federal Aviation Administration. The second section discusses the general status of law regarding federal preemption, and the third section discusses the status of preemption regarding the field of aviation. The last two
sections provide an analysis of the law and suggestions for change.

II. BACKGROUND

A. HISTORY OF AIRCRAFT REGULATION PRIOR TO THE FEDERAL AVIATION ACT OF 1958

In 1926, the first basic federal aviation statute, the Air Commerce Act of 1926, was created. The 1926 Act placed the responsibility of regulating air commerce on the Secretary of Commerce, but it also gave responsibility for other areas of air transportation—particularly in the military context—to the President and the Secretary of War. In addition, the 1926 Act gave the Secretary of Commerce the power to regulate aircraft design and the materials and methods used in the fabrication of aircraft. Because of the prevailing view of state and federal officials when the 1926 Act was created, however, the Act was read as regulating aircraft operating only in interstate and international commerce, and left the regulation of aircraft operating intrastate to the individual states. Because of the problems arising from various regulations adopted in the different states, Congress urged the states to adopt “uniform laws and regulations corresponding with the provisions of [the 1926 Act] and the rules and regulations that [were] promulgated under it.”

Subsequently, Congress passed the Civil Aeronautics Act in 1938 in order to unify the independent aviation agencies of the federal government. This Act created the Civil Aeronautics Authority, which was later divided into the Civil Aeronautics Board (CAB) and the Civil Aeronautics

---

5 The Air Commerce Act of 1926, ch. 344, 44 Stat. 568 (1926) (repealed in 1938) [hereinafter 1926 Act].
4 Id.
5 1926 Act, 44 Stat. at 569.
7 Id.
Administration (CAA).\(^9\) The CAB became a subordinate organization under the Department of Commerce and had responsibility for safety rule-making, economic regulation, and accident investigation in the context of air commerce. The CAA was placed under the control of the Secretary of Transportation in the Department of Commerce, and was also given limited responsibility for safety rule-making and accident investigation.

B. Federal Aviation Act of 1958

In August of 1958, the Federal Aviation Act of 1958 (the 1958 Act) was enacted.\(^10\) The 1958 Act created the Federal Aviation Agency, later known as the Federal Aviation Administration (FAA), and reaffirmed the existence of the CAB. In addition, the 1958 Act abolished the CAA and replaced it with the FAA. The 1958 Act gave the newly-created FAA the responsibility for flight safety and gave the CAB responsibility for economic regulation of commercial airlines.

1. Purpose of the 1958 Act

During the enactment of the 1958 Act, the House of Representatives stated that "[t]he principal purpose of [the Federal Aviation Act of 1958] is to establish a new Federal agency with powers adequate to enable it to provide for the safe and efficient use of the navigable airspace by both civil and military operations."\(^11\) Thus, Congress's purpose in creating the FAA was to promote safe air travel, and to protect lives and property on the land and in the air.

2. Provisions of the 1958 Act

Under the 1958 Act, the FAA's responsibility for flight safety of civil aircraft includes prescribing and revising rules, regulations and standards, as well as issuing certifica-

\(^9\) Id.


tions for aircraft, pilots, and mechanics. According to the House Report,

the [FAA] (1) would be given full responsibility and authority for the advancement and promotion of civil aeronautics generally, including the promulgation and enforcement of safety regulations . . . [t]he new Federal Aviation Agency would be headed by a civilian Administrator with plenary authority to . . . (d) [m]ake and enforce safety regulations governing the design and operation of civil aircraft.

More specifically, the Secretary of Transportation, who was charged with all of the powers and duties of the FAA, was given the authority to regulate "[s]uch minimum standards governing the design, materials, workmanship, construction, and performance of aircraft . . . as may be required in the interest of safety." In addition, the Secretary of Transportation was given the authority to prescribe "[r]easonable rules and regulations" governing the inspection of aircraft, including the manner in which such inspections may be made.

a. Certifications Issued by the FAA

In order to assure the aviation industry's compliance with the rules, regulations, and standards established by the Secretary of Transportation and the FAA, Congress established a multi-step certification process. This certification process is codified in Sections 1423(a)-(c). The first step of the certification process is the issuance of a "type certification." In order to obtain a "type certification," an aircraft

---

17 See 49 U.S.C. app. § 1423(a) (1988). Section 1423(a) specifically states:
(1) The Administrator [Secretary of Transportation] is empowered to issue type certificates for aircraft, aircraft engines, and propellers; to specify in regulations the appliances for which the issuance of type certificates is reasonably required in the interest of safety; and to issue such certificates for appliances so specified.
manufacturer must show, by appropriate analysis and testing, that the proposed design meets the applicable safety and airworthiness standards as dictated by the Secretary of Transportation and the FAA. According to Section 1423(a)(2), either the FAA or the aircraft designer is required to make "such tests during manufacture and upon completion as the Secretary of Transportation deems reasonably necessary in the interest of safety." Hence, these tests can be conducted by the aircraft designer on a prototype of the proposed aircraft. If this is the case, FAA employees or their representatives are required to review the data and conduct the further tests deemed necessary by the FAA.

Moreover, in order to start production of the aircraft, the aircraft manufacturer must obtain a second certification, referred to as "production certification." An aircraft manu-

(2) Any interested person may file with the Administrator [Secretary of Transportation] an application for a type certificate for an aircraft, aircraft engine, propeller, or appliance specified in regulations under paragraph (1) of this subsection. Upon receipt of an application, the Administrator [Secretary of Transportation] shall make an investigation thereof and may hold hearings thereon. The Administrator [Secretary of Transportation] shall make, or require the applicant to make, such tests during manufacture and upon completion as the Administrator [Secretary of Transportation] deems reasonably necessary in the interest of safety, including flight test and tests of raw materials or any part or appurtenance of such aircraft, aircraft engine, propeller, or appliance. If the Administrator [Secretary of Transportation] finds that such aircraft, aircraft engine, propeller, or appliance is of proper design, material, specification, construction, and performance for safe operation, and meets the minimum standards, rules and regulations prescribed by the Administrator [Secretary of Transportation], he shall issue a type certificate therefor. The Administrator [Secretary of Transportation] may prescribe in any such certificate the duration thereof and such other terms, conditions, and limitations as are required in the interest of safety. The Administrator [Secretary of Transportation] may record upon any certificate issued for aircraft, aircraft engine, or propellers, a numerical determination of all the essential factors relative to the performance of the aircraft, aircraft engine, or propeller for which the certificate is issued.


19 Id.

20 Id.

21 See 49 U.S.C. app. § 1423(b) (1988). Section 1423(b) specifically states:
facturer may only apply for a "production certification" after a "type certification" is properly obtained for the particular type of aircraft that is to be built. In order to obtain a "production certification," the aircraft manufacturer must prove to the FAA that it has established, and can sustain, a quality control system that will assure a consistent production of aircraft that will meet the design requirements of the "type certification." As in the case of the "type certification," the FAA "may require any such tests of any aircraft ... [a]s may be necessary to assure manufacture of each unit in conformity with the type certificate."

The third and final certification required in this certification process is the "airworthiness certification." This certi-

Upon application, and if it satisfactorily appears to the Administrator [Secretary of Transportation] that duplicates of any aircraft, aircraft engine, propeller, or appliance for which a type certificate has been issued will conform to such certificate, the Administrator [Secretary of Transportation] shall issue a production certificate authorizing the production of duplicates of such aircraft, aircraft engines, propellers, or appliances. The Administrator [Secretary of Transportation] shall make such inspection and may require such tests of any aircraft, aircraft engine, propeller, or appliance manufactured under a production certificate [a]s may be necessary to assure manufacture of each unit in conformity with the type certificate or any amendment or modification thereof. The Administrator [Secretary of Transportation] may prescribe in any such production certificate the duration thereof and such other terms, conditions, and limitations as are required in the interest of safety.


22 Id.

23 Id.

24 See 49 U.S.C. app. § 1423(c) (1988). Section 1423(c) specifically states: The registered owner of any aircraft may file with the Administrator [Secretary of Transportation] an application for an airworthiness certificate for such aircraft. If the Administrator [Secretary of Transportation] finds that the aircraft conforms to the type certificate therefor, and, after inspection, that the aircraft is in condition for safe operation, he shall issue an airworthiness certificate. The Administrator [Secretary of Transportation] may prescribe in such certificate the duration of such certificate, the type of service for which the aircraft, the type of service for which the aircraft may be used, and such other terms, conditions, and limitations as are required in the interest of safety. Each such certificate shall be registered by the Administrator [Secretary of Transportation] and shall set forth such information as the Administrator [Secretary of Transportation] may deem advisable. The certificate number, or such other individual designation as may
sification is required before any particular aircraft may be placed in service and must be obtained by the registered owner of the aircraft.\textsuperscript{25} In order to obtain an “airworthiness certification,” the FAA must find “that the aircraft conforms to the type certificate . . . and, after inspection, that the aircraft is in condition for safe operation.”\textsuperscript{26} In addition, under Section 1430, it is unlawful for any person to operate an aircraft in air commerce without a valid “airworthiness certification.”\textsuperscript{27}

An additional certification is required when an aircraft has been subjected to a major alteration in its particular design.\textsuperscript{28} This certification is referred to as a “supplemental type certificate.” In order to obtain a “supplemental type certificate,” the applicant must present test data that is sufficient to prove to the FAA that the modified aircraft meets all of the appropriate airworthiness standards.\textsuperscript{29} These airworthiness standards may be the same as the standards required to obtain a “type certification.”\textsuperscript{30}

The FAA also has the responsibility for monitoring the service history of aircraft certified by the FAA. In view of this service history, the FAA can issue an “airworthiness directive” for aircraft that are believed to require either a design modification or a manufacturing modification.\textsuperscript{31} Once a particular aircraft receives an “airworthiness directive,” it then has its “airworthiness certificate” suspended or revoked until the required changes are made. In addition, the specific type-class of aircraft may have its “type certification” suspended or revoked if a particular design or manufacturing flaw is found to be prevalent in a specific type of

\begin{itemize}
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} 49 U.S.C. app. § 1430(a) (1988).
\item \textsuperscript{28} 14 C.F.R. § 21.113 (1993).
\item \textsuperscript{29} See 14 C.F.R. § 21.115 (1993).
\item \textsuperscript{30} Id.
\item \textsuperscript{31} See 14 C.F.R. § 39.1 (1993).
\end{itemize}
aircraft. The manufacturer will be required to incorporate the design or manufacturing changes mandated by the "airworthiness directive" into all new aircraft of the particular type that received the "airworthiness directive." Furthermore, owners and operators of aircraft of the particular type-class that received the "airworthiness directive" are required to modify their aircraft so as to comply with the design or manufacturing changes mandated by the "airworthiness directive."

b. Savings Clause

In addition to including provisions that established the FAA and delegated responsibility to it, the 1958 Act included a "savings clause" provision. The savings clause states that any common law or statutory remedies that existed when the 1958 Act was enacted are not to be precluded by the 1958 Act.

C. POST-FEDERAL AVIATION ACT OF 1958 DEVELOPMENTS

In 1966, Congress enacted legislation changing the Federal Aviation Agency to the Federal Aviation Administration. With this legislation Congress also established the Department of Transportation and transferred responsibility for and control over the FAA to the newly created Department of Transportation.

Subsequently, Congress passed the Noise Control Act of 1972. This Act required the Secretary of Transportation to conduct a study of various facets of aircraft noise problems and report these problems to Congress. As a result of these studies, the Environmental Protection Agency and the FAA were given responsibility for establishing regu-

33 49 U.S.C. app. § 1506 (1988). Section 1506 specifically states: "Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." Id.
lation of aircraft noise in order to protect public health and welfare.

In 1978, Congress enacted the Airline Deregulation Act. The purpose of this Act was to promote "an air transportation system which relies on competitive market forces to determine the quality, variety and price of air services." The Airline Deregulation Act amended some of the existing provisions of the 1958 Act and added other provisions. Two provisions are particularly important: First, the Act allowed federal preemption of claims involving rates, routes, or services of an air carrier; and second, it brought about the gradual termination of the authority of the CAB.

With the addition of Section 1305(a), scholars suggest that the primary purpose of the 1958 Act and the Airline Deregulation Act of 1978 was to establish federal regulation of both air safety and the "rates, routes or services" of air carriers. In addition, the House Report regarding the Airline Deregulation Act stated that Section 1305(a) was intended to "prevent conflicts and inconsistent regulations" caused by the lack of direction regarding the division of regulatory authority between the states and the federal gov-

---

56 Airline Deregulation Act, 92 Stat. at 1705.

(1) Except as provided in paragraph (2) of this section, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under title IV of this Act to provide air transportation.

(2) Except with respect to air transportation (other than charter air transportation) provided pursuant to a certificate issued by the Board under section 401 of this Act, the provisions of paragraph (1) of this subsection shall not apply to any transportation by air of persons, property, or mail conducted wholly within the State of Alaska.

Id.
59 See Piper Aircraft, 985 F.2d at 1444 (quoting Morales v. Trans World Airlines, 112 S. Ct. 2031, 2040-41 (1992)).
ernment.\textsuperscript{40} Prior to enactment of Section 1305, however, federal and state authorities would charge different amounts for flying between cities depending on whether the excursion was interstate or intrastate.\textsuperscript{41} Therefore, a question remains as to whether Section 1305(a) addresses only the issue of rates and routes or whether it also addresses the issue of air safety.

While this point may seem to have been mooted by the repeal of Section 1305(a) in 1994, the consideration of Congress's intent is still important. The repeal of Section 1305(a) could be significant in this context because it illustrates the intentions of the present Congress. Section 1305(a) is still important, however, because it represents the intentions of Congress at the time the Airline Deregulation Act was enacted.\textsuperscript{42} Therefore, Section 1305(a) continues to be important because it illustrates the intentions of the framers of the Airline Deregulation Act regarding preemption in the context of aircraft manufacturers. The actual implications of this repeal will be determined as new cases are brought that try to interpret Congressional intent in light of the repeal.

\section*{III. PRESENT STATUS OF THE LAW REGARDING FEDERAL PREEMPTION}

Congressional power to preempt state law is derived from the Supremacy Clause of Article IV of the United States Constitution. The breadth of this power was explained, and criteria for determining whether a state law claim should be preempted were developed, in \textit{Hillsborough County v. Automated Medical Labs.}\textsuperscript{43} In \textit{Hillsborough}, the Court stated that "[u]nder the Supremacy Clause, federal law may supersede

\begin{itemize}
\item \textsuperscript{40} H.R. REP. No. 95-12611, 95th Cong., 2d Sess. 16 (1978), \textit{reprinted in} 1978 U.S.C.C.A.N. 3737, 3752.
\item \textsuperscript{42} \textit{See infra} notes 162 and 190.
\item \textsuperscript{43} 471 U.S. 707 (1985).
\end{itemize}
state law in several different ways, including express and implied congressional preemption."44

Express preemption occurs when Congress provides a specific provision in a federal law. The Supreme Court explained that "when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms."45 More recently, in English v. General Electric Co.46 the Supreme Court specifically stated that "[p]reemption fundamentally is a question of [c]ongressional intent, and when Congress had made its intent known through explicit statutory language, the courts' task is an easy one."47

In the absence of explicit preemptive language, a state law claim may still be preempted if Congress's intent to pre-empt these claims "is implicitly contained in the federal statute's structure and purpose."48 In Lake Aircraft the court specified two types of implied preemption: "field preemption" and "conflict preemption."49

A. FIELD PREEMPTION

Field preemption arises "where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation."50 In addition, the court in Hillsborough stated that "[p]re-emption of a whole field also will be inferred where the field is one in which 'the federal interest

44 Id. at 713.
45 Id. (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).
47 Id. at 78-79 (citing Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299 (1988)).
49 992 F.2d at 294 (quoting Gade v. National Solid Wastes Management Ass'n, 112 S. Ct. 2374, 2388 (1992)).
50 Hillsborough, 471 U.S. at 713 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 290 (1947)).
is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'”

In other words, “once Congress has taken up occupancy, state laws attempting to regulate within the field ‘will be invalidated no matter how well they comport with substantive federal policies.’” However, the Supreme Court, in *English*, expressed a different view. The Court stated that “[w]here . . . the field which Congress is said to have preempted includes areas that have been traditionally occupied by the States, [c]ongressional intent to supersede state laws must be clear and manifest.”

B. CONFLICT PREEMPTION

Conflict preemption arises “where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Thus, “[e]ven where Congress has not occupied the field, state law may nevertheless be preempted to the extent it actually conflicts with federal law.”

A state law claim may be preempted either by express language in a statute or by implication of congressional intent. Courts seem hesitant, however, to preempt state law claims unless congressional intent to preempt can be clearly and manifestly shown.

---

51 Id.
53 496 U.S. at 79 (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (internal quotation marks omitted)).
54 Lake Aircraft, 992 F.2d at 294 (quoting Gade v. National Solid Wastes Management Ass'n, 112 S. Ct. 2374, 2383 (1992)).
55 Holliday, 747 F. Supp. at 1400.
56 Hillsborough, 471 U.S. at 713. The Supreme Court has repeatedly held that “state laws can be pre-empted by federal regulations as well as by federal statutes.” Id.
IV. PRESENT STATUS OF CASE LAW REGARDING IMPLIED PREEMPTION IN THE CONTEXT OF AVIATION

A. FEDERAL CASES PERTAINING SPECIFICALLY TO IMPLIED PREEMPTION AND AIRCRAFT MANUFACTURERS

Two cases have been recently decided by the United States Court of Appeals that address the issue of federal preemption of state law tort claims against aircraft manufacturers. The first of these cases, *Piper Aircraft*, was decided in the Tenth Circuit in February of 1993, and the second, *Lake Aircraft*, was decided in the Eleventh Circuit in May of 1993.

1. *Piper Aircraft*

In *Piper Aircraft*, Edward Cleveland, the injured party, modified an aircraft in order to film a television commercial. With the assistance of an FAA-approved mechanic, Cleveland removed the front seat of a tail-dragger aircraft and installed a camera in its place. However, neither Cleveland nor the mechanic received the proper approval from the FAA to operate the aircraft with this modification. Prior to the date on which Cleveland planned to film the commercial, the owner of the airport became concerned about the safety of the aircraft and Cleveland's noncompliance with the FAA standards and regulations for aircraft modification. Due to this concern, the owner closed the airport. However, on the day of the accident, the owner noticed that Cleveland planned to use the runway despite the closure. In order to prevent Cleveland from proceeding with filming the commercial, the owner parked his van on the runway to prevent take-offs and landings. Although the runway was blocked by the van, Cleveland nevertheless

---

57 985 F.2d 1438 (10th Cir. 1993).
58 992 F.2d 291 (11th Cir. 1993).
59 A tail-dragger aircraft's landing gear consists of one wheel under each wing and one at the tail of the aircraft.
60 See *supra* notes 27-28 and accompanying text for a description of the required certification.
attempted to takeoff while piloting the aircraft from the back seat. During takeoff, the aircraft struck the van and Cleveland was injured. Cleveland's wife brought suit based on a state law negligence theory. Mrs. Cleveland specifically pled that Piper negligently designed the plane so that there was inadequate forward vision from the rear seat of the aircraft. She also alleged that Piper negligently failed to install shoulder harness restraints on the rear seat.

The original trial court returned a special verdict in excess of $1 million in favor of the Clevelands. On appeal, the court held that the special verdict improperly restricted jurors from allocating fault among the potentially responsible parties, and a new trial was subsequently awarded to Piper. On remand, Piper was allowed to amend its answer to include a defense that Cleveland's state law claims were preempted by the 1958 Act and its associated regulations. Subsequently, the trial court denied Piper's motion for summary judgment, and limited the trial to the issue of liability. In addition, the trial court ruled that only the evidence and witnesses of the first trial could be introduced into the second trial. Piper appealed.

Due to the FAA's extensive authority and control over aircraft design and manufacture, Piper argued that Congress intended for the FAA to have exclusive control over aircraft design and manufacture regulations. Therefore, Piper asserted that the 1958 Act impliedly preempts state tort actions by occupying the field of aircraft design safety. The Tenth Circuit Court of Appeals rejected this argument. In support of its holding, the court relied on several different theories.

First, the court relied on the fact that the 1958 Act addresses only the responsibilities of the FAA, the CAB, and the air carriers, but does not address the responsibilities of the states, if any exist. In several previous cases, however, various federal courts allowed preemption based on the premise that the 1958 Act was intended to set forth a uni-

---

61 Cleveland v. Piper Aircraft Corp., 890 F.2d 1540, 1546-51 (10th Cir. 1989).
62 Piper Aircraft, 985 F.2d at 1442.
formity of regulation. Yet, the court in Piper Aircraft chose not to follow these cases because it believed that they dealt with regulation of pilots or noise and not with regulation of aircraft manufacturers.

Second, the court relied on the presence of the savings clause in the 1958 Act and the absence of any express pre-emption clause regarding state tort claims. In the court's opinion, this is a particularly compelling reason not to pre-empt the state common law claims.

Third, the court noted that the 1958 Act generally governs two broad areas and only one of these two areas, rates and routes, contains an express preemption provision. In view of this, the court held that if Congress intended to pre-empt state tort law in the area of air safety, it would have expressly provided for this, just as it had for the issue of rates and routes.

Fourth, in response to Piper's assertion that state common law duties conflict with the 1958 Act, the court stated that in order to have "conflict preemption" there must be a "physical impossibility to comply with both state and federal law." In this case, the court found that the 1958 Act merely established "minimum standards" and noted that compliance to stricter state standards would not be physically impossible in light of the standards set by the 1958 Act.

---

64 Piper Aircraft, 985 F.2d at 1443 n.7.
66 Piper Aircraft, 985 F.2d at 1443 (citing Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031, 2034 (1992)).
67 Id.
68 Id. at 1444.
69 Id. at 1443-44 (citing Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2618 (1992)).
70 Id. at 1445 (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)) (internal quotation marks omitted).
71 See supra note 17 and accompanying text.
72 Piper Aircraft, 985 F.2d at 1445.
Finally, the court rejected Piper's argument that state tort claims should be preempted in aircraft safety cases because they are preempted in automobile safety cases. The court distinguished a series of decisions, holding that state tort claims are preempted by the National Traffic and Motor Vehicle Safety Act (NTMVSA) because the NTVMSA contains an explicit "conflict preemption" clause. In addition, the court suggested that if Congress intended to preempt state tort law in the context of air safety, it would have adopted a provision similar to that in the NTVMSA. Thus, Piper was unable to persuade the federal courts that the federal regulatory scheme preempted Cleveland's state common law tort claim, and the damage award for the Clevelands was ultimately upheld.

2. Lake Aircraft

In *Lake Aircraft* William Dee was the sole passenger of an airplane manufactured by Lake Aircraft. The pilot of the amphibious aircraft attempted to take off from a lake, but was unsuccessful. The plane crashed into a rock bank, and Dee was seriously and permanently injured. Dee sued Lake Aircraft under state common law alleging negligence and strict liability. Dee claimed that the passenger's seat in the aircraft was negligently designed and "but-for" this design defect his injuries would not have been as severe. The trial court ruled that Dee's state law tort claims were preempted by the 1958 Act.

The United States Court of Appeals for the Eleventh Circuit vacated the trial court's decision and remanded the case for further proceedings consistent with its opinion. The court relied on the fact that Congress had expressly preempted state law claims regarding rates and routes, but had not expressly preempted state law claims regarding air-

---

73 Id. at 1447.
74 Id.
75 *Lake Aircraft*, 992 F.2d at 292.
76 Id. at 295.
The court concluded that Congress had not intended to preempt state law tort claims. Relying on the decision in Piper Aircraft, the court further stated that "section 1305 reliably indicates Congress' intent on state authority to regulate civil aviation." The court further held that "[u]nder Cipollone, we conclude from section 1305 that Congress did not intend to pre-empt state laws on matters unrelated to airline rates, routes or services."

In addition, the court stated that its decision was not in "actual conflict" with the federal aircraft design regulations. The court contended that Dee merely sought to hold Lake Aircraft liable for not exceeding the minimum standards for aircraft design promulgated by the 1958 Act. In support of this conclusion, the court relied on the fact that federal aircraft design regulations permit the use of energy-absorbing seat designs, such as the ones that Dee proposed that Lake Aircraft should have used. Therefore, the court concluded that since its decision was based on the fact that energy absorbing seats should have been used in the design of the aircraft, and that federal regulations permit the use of such a design, there was no actual conflict.

B. RELATED FEDERAL AND STATE CASES

In addition to the cases discussed above, there are older federal and state cases that address issues related to those in Piper Aircraft and Lake Aircraft. The federal case, Holliday v. Bell Helicopters Textron, Inc., arose out of the district court

---

77 Id.
78 Id. at 294.
79 Id. at 295.
80 Lake Aircraft, 992 F.2d at 295. (citing Cipollone, 112 S. Ct. 2608 (holding that where there is a provision in enacted legislation which explicitly addresses the issue of preemption, then the extent of the preemptive effect of that legislation should be limited to that express language)).
81 Id. at 295 n.5.
82 Id.
83 Id.
84 Id.
in Hawaii, and the state case, *Elsworth v. Beech Aircraft Corp.*, \(^8^6\) was decided in the California Supreme Court.

In *Holliday*, William Holliday was injured when the helicopter he was flying lost power shortly after takeoff and plummeted to the ground. The helicopter was manufactured by Bell Aircraft Corporation (Bell) and had been resold several times over the course of thirteen years. Holliday alleged that the pilot's seat and seatbelt were defectively designed, and, because of this, his injuries were exacerbated when the helicopter crashed. These allegations gave rise to Holliday's crashworthiness claim. In response, Bell argued that Holliday's claim was impliedly preempted by the 1958 Act. The court responded to Bell's argument and addressed the issues of field preemption and conflict preemption.

Regarding the issue of field preemption, the court stated that Congress did not intend to preempt state law design defect claims since the 1958 Act included a savings clause which precluded a finding of such intent.\(^8^7\) In support of this, the court stated that the 1958 Act was designed to complement existing statutory and common law remedies, not to take the place of them.\(^8^8\) In addition, the court reasoned that state common law tort claims should not be impliedly preempted based solely upon an aircraft manufacturer meeting the minimum standards set out in the 1958 Act.\(^8^9\) Therefore, the court held that because of the inclusion of the savings clause and the absence of a relevant preemption clause in the 1958 Act, field preemption was not proper.\(^9^0\)

Addressing the issue of conflict preemption, the court stated that since the 1958 Act merely set forth minimum standards governing the design and manufacture of aircraft, a conflict did not arise between the 1958 Act and a


\(^{8^7}\) 747 F. Supp. at 1398 (citing West v. Northwest Airlines, 923 F.2d 657 (9th Cir. 1990)).

\(^{8^8}\) Id. at 1399 (citing Brunwasser v. Trans World Airlines, 541 F. Supp. 1338, 1345 (W.D. Pa. 1982)).

\(^{8^9}\) Id.

\(^{9^0}\) Id. at 1400.
state common law tort claim because the two could "function harmoniously rather than discordantly."91 The court stated that there was no logical reason that an injured person should be "barred from seeking recovery for their damages simply because the [FAA] overlooked or was unaware of the defective condition at the time the aircraft was certified."92 Furthermore, the court concluded that "nothing in the [1958 Act] indicates that states may not require aircraft to be more safe or better designed."93 Therefore, the court held that Holliday's state tort claims were not preempted by the 1958 Act.94

In Elsworth v. Beech Aircraft Corp.,95 Edward Miro was killed when his plane spun out of control and crashed. Miro's heirs filed an action against Beech, the aircraft manufacturer, based on negligence per se. The complaint sought damages for the accident and alleged that the accident was the result of the defective design and manufacture of Miro's aircraft as well as the failure to comply with federal safety standards. The jury held for Miro's heirs, and Beech appealed, asserting that Miro's heirs' claims were preempted by the 1958 Act.

The California Supreme Court stated that there was "nothing inherently inconsistent in the proposition that even if the federal government has entirely occupied the field of regulating an activity a state may simultaneously grant damages for violation for such regulations."96 In support of this statement, the court cited Silkwood v. Kerr-McGee Corp.,97 which allowed state common law tort claims in the context of nuclear safety regulation.98 In addition to

91 Id. at 1401 (quoting Morseburg v. Balyon, 621 F.2d 972, 978 (9th Cir.), cert. denied, 449 U.S. 983 (1980)).
92 747 F. Supp. at 1401.
93 Id.
94 Id.
96 Elsworth, 691 P.2d at 635.
98 Id. at 256 (recognizing the tension between the belief that safety regulation is the exclusive concern of federal law and the belief that a state may nevertheless award damages).
Silkwood, the California Supreme Court relied on the savings clause\textsuperscript{99} included in the 1958 Act to support its conclusion that state common law tort theories should apply to actions related to design defects by an aircraft manufacturer.\textsuperscript{100}

Addressing the issue of conflict preemption, the court reasoned that conflict preemption would apply if state law presented either an irreconcilable conflict with or an obstacle to federal laws or regulations.\textsuperscript{101} The court held that there was no irreconcilable conflict between the state and federal standards in the context of this particular case for several reasons.\textsuperscript{102} First, Miro's heirs were not challenging the authority of the FAA to adopt regulations or to certify aircraft compliance with them.\textsuperscript{103} Second, they did not seek to revoke the certification of this type of aircraft.\textsuperscript{104} For these reasons, the court concluded that as the state common law tort claim would have no effect on the FAA's authority to certify aircraft, there was no irreconcilable conflict between the state and federal standards.\textsuperscript{105}

In addition, the court held that state law claims did not pose an obstacle to the federal regulatory scheme because an inquiry in state court as to whether a manufacturer complied with federal safety regulations would assist the FAA in policing compliance with these regulations.\textsuperscript{106} Furthermore, the court stated that state courts must reinforce and strengthen the "complex and exacting scheme of regulation developed by the FAA . . . where it is apparent that high standards consistent with the regulatory scheme have not been maintained with resulting injury to persons and

\textsuperscript{100} Elsworth, 691 P.2d at 635 (stating that the 1958 Act "expressly declares that its provisions are not intended to abridge remedies that a party may have under state law . . . [and that] the doctrine of negligence per se is one of those remedies").
\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} Elsworth, 691 P.2d at 635.
\textsuperscript{106} Id. at 636.
In the context of this case, the court believed that the state tort laws reinforced and strengthened the federal regulatory scheme and that Beech failed to maintain these high standards. Therefore, the court held that Miro's heirs' state common law claims were not preempted by the 1958 Act. 108

C. ANALOGOUS FEDERAL CASES

In addition to cases that directly address the issue of implied preemption of state tort laws based on federal aircraft safety regulations in the context of aircraft manufacturers, there are several cases that address the issue of implied preemption in analogous contexts. One such area relates to state regulation of drug testing of airline pilots. Another relates to state regulation of aircraft noise, and a third relates to state-imposed curfews on airports.

1. State Regulation of Drug Testing of Airline Pilots

In French v. Pan Am Express, Inc. 109 an airline hired a pilot to fly commercial aircraft. After receiving information that the pilot used controlled substances, the airline ordered the pilot to submit to a drug test. The pilot refused to take the drug test, claiming that state law prohibited the airline from forcing him to take it. Subsequently, the airline dismissed the pilot, and the pilot filed suit based on state statutory law. The trial court dismissed the pilot's claim, and he appealed.

On appeal, the airline asserted that the 1958 Act impliedly preempted the pilot's state law claim. In response, the pilot argued that since Section 1305(a) only explicitly preempts state laws relating to "rates, routes and services," this implied that Congress only intended to preempt those limited areas and not any others. The court of appeals rejected this assertion and stated that Section 1305(a) "af-

107 Id. (quoting in agreement with Fisher v. Bell Helicopter Co., 403 F. Supp. 1165, 1172 (D.D.C. 1975)).
108 Id.
109 869 F.2d 1 (1st Cir. 1989).
fords no basis for concluding that Congress meant to leave states free to regulate on all other issues anent air safety and pilot fitness.”

Moreover, the court looked to the history and purpose of the 1958 Act to determine whether preemption of a state statute was proper. The court concluded that since the purpose of the act was to establish a uniform system of regulation in the area of air safety and that the Secretary of Transportation was given extensive authority in the field, it would be assumed that the federal system would preclude enforcement of state laws in the same subject. In addition, the court stated that if it upheld the state statute as it applied to airplane pilots and a significant number of states followed suit, then it would create fractionalized control that would severely limit the flexibility of the FAA. Therefore, the court concluded that because of the comprehensiveness of the federal regulatory scheme and the purpose of the 1958 Act, state statutory laws regarding drug testing of pilots were preempted by the 1958 Act.

\[\text{\textsuperscript{110}} \text{Id. at 3.} \]
\[\text{\textsuperscript{111}} \text{Id. at 5.} \]
\[\text{\textsuperscript{112}} \text{Id. at 5; see Northwest Airlines v. Gomez-Bethke, 34 Fair Emp. Prac. Cas. (BNA) 837 (D. Minn. 1984).} \]
\[\text{\textsuperscript{113}} \text{French, 869 F.2d at 6.} \]
\[\text{\textsuperscript{114}} \text{The court felt that the federal regulatory scheme was comprehensive enough to warrant preemption of state laws for several reasons. First, the court relied on the fact that the 1958 Act assigned the overall authority to enforce regulations relating to pilot qualification to the Secretary of Transportation and the FAA. Id. at 3. As an example of this, the 1958 Act states that it is unlawful for any pilot who has not received an “airman certificate,” see 49 U.S.C. app. § 1430(a)(2) (1988), from the FAA to fly any commercial aircraft. French, 869 F.2d at 3. Another example is that the FAA was given the authority to determine the terms, conditions, and limitations of each “airman certificate.” Id. In addition, it is unlawful for any pilot to fly commercial aircraft unless he is periodically recertified by the FAA. Id.} \]
\[\text{\textsuperscript{115}} \text{French, 869 F.2d at 6-7.} \]
2. State Regulation of Aircraft Noise and State-Imposed Curfews on Airports

In City of Burbank v. Lockheed Air Terminal, Inc.,\(^{116}\) the city council passed an ordinance which made it unlawful for a pure jet aircraft to take off during the night and early morning. In addition, the ordinance made it unlawful for the operator of the airport to allow any such aircraft to take off during that period. In a suit based on the ordinance, the district court found the ordinance to be unconstitutional. Subsequently, the court of appeals affirmed and stated that the ordinance was preempted by the 1958 Act.

Even though the 1958 Act and the Noise Control Act of 1972 do not include an express provision preempting state laws in the context of aircraft noise, the Supreme Court determined that Burbank's noise ordinance would be preempted if it conflicted with the actual federal regulations or the objectives of the federal regulation.\(^{117}\) In order to determine whether there was a conflict, the Supreme Court looked to several sources.

First, the Court reviewed both the Senate and House Committee Reports relating to the enactment of the Noise Control Act.\(^ {118}\) These reports, and the President's statement that "many of the most significant sources of noise move in interstate commerce and can be effectively regulated only at the federal level," supported the appellate court's holding that the ordinance conflicted with the Noise Control Act.\(^ {119}\)

Second, the Court looked to prior federal cases relating to the control of aircraft noise.\(^ {120}\) In view of these cases, the majority stated that "[c]ontrol of noise is of course deep-seated in the police power of the States. Yet the pervasive

\(^{117}\) Id. at 633.
\(^{118}\) Id. at 634.
\(^{119}\) Id. at 637-38 (quoting 8 WEEKLY COMP. PRES. DOCS. 1582, 1583 (Oct. 28, 1972)).
control vested . . . in the FAA . . . seems to us to leave no
room for local curfews or other local controls." In addi-
tion, the majority stated that if it were to uphold the Bur-
bank ordinance and other states followed suit, then this
would split control over aircraft noise between the states
and the FAA, limiting the flexibility of the FAA's control.

Therefore, the majority held that "the pervasive nature of
the scheme of federal regulation of aircraft noise . . . leads
us to conclude that there is pre-emption." However, the
dissent disagreed that Congress intended to preempt local
control of aircraft take-off and perceived a less extensive
federal role in the area of aircraft noise.

In San Diego Unified Port District v. Gianturco the Port
District, which owned the airport on which the suit was
based, attempted unilaterally to impose a prohibition
against all commercial jet takeoffs during specified hours
of the night. In addition, the prohibition would only allow
jets meeting a strict noise standard to land at the airport
during specified hours. However, the State of California
adopted a statute that would have required the Port District
to extend the specified hours. The Port District sought to
enjoin the enforcement of the California statute on the
grounds that "federal law preempts state regulation of air-
space management and control of the source of aircraft
noise."

Relying on the holding of City of Burbank, the court
concluded that the California statute was impliedly pre-
empted because it conflicted with the federal regulatory
scheme and its underlying assumptions and intended pur-

121 City of Burbank, 411 U.S. at 659.
122 Id. at 633.
123 Id. at 650-54 (Rehnquist, J., dissenting). The dissent stated that the history of
prior congressional action in the field of aircraft noise demonstrated an intent to
allow local regulation, and, if not, it surely did not reflect a "clear and manifest
purpose" by Congress to prohibit the exercise of "the historic police powers of the
States" to regulate noise. Id. at 653.
124 651 F.2d 1306 (9th Cir. 1981), cert. denied, 455 U.S. 1000 (1982).
125 Id. at 1309.
pose. \(^{128}\) While the court held that any attempt by the state to directly control aircraft noise was preempted by the federal regulatory scheme, it also stated that indirect state control of aircraft noise was not preempted. \(^{129}\) In view of this, the court indicated that states may adopt any means for reducing aircraft noise, so long as it does not conflict with the federal regulatory scheme or fractionalize the FAA's regulatory control over aircraft. \(^{130}\)

V. ANALYSIS OF THE AIRCRAFT MANUFACTURER'S AND THE INJURED PARTY'S ARGUMENTS

The following is an analysis of potential arguments that the aircraft manufacturer and the injured party could make in support of their respective positions. Typically, a party asserting that a state common law claim is preempted by federal law would argue that preemption is explicit in the federal law. However, in the context of this comment, this argument does not carry any weight because the applicable laws, specifically the 1958 Act, do not expressly preempt state common law tort claims regarding aircraft manufacturers. Therefore, the parties' arguments will center around the manifest intent of Congress and implied preemption.

A. FIELD PREEMPTION

1. Aircraft Manufacturer's Arguments

Congress has the authority to occupy a field at the exclusion of state laws. \(^{131}\) Therefore, in situations where Con-

\(^{128}\) Gianturco, 651 F.2d at 1311.
\(^{129}\) Id. at 1316.
\(^{130}\) See id.
\(^{131}\) See Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988). The Court in Schneidewind specifically stated that:

Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Such a purpose properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where the object sought to be obtained by the federal law and the character of the obligations imposed by it . . . reveal the same purpose.
progress intends to solely regulate a field, federal laws preempt state laws, because the federal laws and regulations govern the field in a comprehensive manner and leave no room for state laws or regulations.\footnote{199} For the most part, aircraft are utilized for traveling a long distance in a short period of time, and because of this, air travel is a major source of interstate commerce. Therefore, regulation of air travel by individual states would subject the aircraft and its pilot to many different standards within a single excursion. For this reason, many courts have concluded that regulation of air travel is a national responsibility,\footnote{200} as opposed to a state responsibility. In \textit{Northwest Airlines, Inc. v. Minnesota}\footnote{201} the Supreme Court stated that:

Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands . . . . Its privileges, rights and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.\footnote{202}

Almost twenty-five years later, this statement was generally reaffirmed by the First Circuit Court of Appeals.\footnote{203} More specifically, the court of appeals recognized Congress's in-

\textit{Id.} at 300 (internal quotation marks and citations omitted).
\footnote{199} However, federal laws have retained a role for state law tort remedies against aircraft manufacturers in instances where the aircraft manufacturer has failed to comply with FAA standards and safety requirements and was negligent in manufacturing an aircraft. \textit{See} Elsworth \textit{v. Beech Aircraft Corp.}, 691 P.2d 630 (Cal. 1984), \textit{cert. denied}, 47 U.S. 1110 (1985) (finding aircraft manufacturer liable in the design of an aircraft on the basis of its violation of FAA safety regulations).
\footnote{201} 322 U.S. 292 (1944).
\footnote{202} \textit{Id.} at 303.
\footnote{203} \textit{French v. Pan Am Express, Inc.}, 869 F.2d 1, 5 (1st Cir. 1989).
tent to establish uniform federal air safety regulations. The court stated:

The legislative history underlying the original [1958] Act stressed the importance of a single uniform system of regulation especially with regard to air safety. The [H]ouse report explained, in a section entitled “Purpose of Legislation,” that “the administration of the new Federal Aviation Agency (1) would be given full responsibility and authority for the . . . promulgation and enforcement of safety regulations.” In a letter to the House Committee on Interstate and Foreign Commerce, included as part of the House Report, a representative of the Executive Branch characterized the impetus behind the proposed legislation as follows: [“]It is essential that one agency of government, and one agency alone, be responsible for issuing safety regulations if we are to have timely and effective guidelines for safety in aviation.[”]138

In summation, the court stated that the “establishment of a single uniform system of regulation in the area of air safety was one of the primary ‘objects sought to be obtained’ by passage of the [1958] Act.”159 In addition, the court in French stated, in agreement with the Court of Appeals of the Second Circuit, that Congress passed the 1958 Act to give the FAA authority to establish rules for the safe use of the nation’s airspace so that only one authority would have this responsibility.140

In view of the above, an aircraft manufacturer would assume that Congress intended only federal laws and regula-

137 *Id.* See Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) (holding that states and localities could not regulate aircraft noise and stating that “[i]t is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption”) (Rehnquist, J., dissenting). In dissent, Justice Rehnquist stated that “[t]he paramount substantive concerns of Congress were to regulate federally all aspects of air safety,” and that “Congress clearly intended to pre-empt the States from regulating aircraft in flight.” *Id.* at 644. See also Bieneman v. City of Chicago, 864 F.2d 463 (7th Cir. 1988) (holding that imposition of state tort law to dictate aircraft design standards to regulate aircraft noise is preempted), *cert. denied*, 490 U.S. 1080 (1989).

138 *French*, 869 F.2d at 5 (citations omitted).

159 *Id.*

140 *Id.*
tions to govern the field of aircraft safety. Therefore, federal law should not permit the use of state common law, as applied through a jury, to hold an aircraft manufacturer to a standard that is derived by the jury.

2. Injured Party’s Arguments

A party, injured as a result of a defectively designed aircraft, would contend that while Congress has the power and authority to regulate a field to the exclusion of the states, Congress did not intend to occupy the field of aircraft safety in this manner. Therefore, Congress did not intend to preempt state tort law regarding aircraft safety. Furthermore, the injured party could find support for this argument in English v. General Electric Co.\(^1\) The Supreme Court, in English, emphasized that when the United States has traditionally occupied a field, there must be “clear and manifest” intent by Congress to supersede state laws.\(^2\) Therefore, since states have traditionally occupied the field of aircraft regulation,\(^3\) state common law claims with respect to defectively designed aircraft should not be preempted unless it can be clearly and manifestly shown that Congress intended otherwise. In addition, due to the inclusion of a savings clause\(^4\) in the 1958 Act and the strict requirements that the Supreme Court has dictated in order for preemption to apply, state common law tort claims in this context should not be preempted.

a. Savings Clause

As originally enacted, the 1958 Act included a savings clause.\(^5\) The savings clause states that the 1958 Act shall not “abridge or alter the remedies now existing at common

\(^{1}\) 496 U.S. 72 (1990).
\(^{2}\) Id. at 79 (holding that a state law claim against a nuclear industry company for intentional infliction of emotional distress on a former employee was not preempted by federal law); see also Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).
\(^{3}\) See, e.g., supra note 6 and accompanying text.
\(^{5}\) Id. See supra notes 32-33 and accompanying text.
law or by statute, but the provisions of this Act are in addition to such remedies."\textsuperscript{146} In \textit{Brunwasser v. Trans World Airlines} the court held that Section 1506 "recognizes that the statutory scheme established by the Federal Aviation Act is designed merely to complement existing statutory and common law remedies, not to supplant them."\textsuperscript{147} In addition, the court stated that it was "clear that 49 U.S.C. § 1506 applies to remedies arising under state law as well as those created under federal law."\textsuperscript{148} In view of this and by the very nature of the wording of the savings clause, the savings clause leaves in place statutory and common law remedies that existed at the time the 1958 Act was enacted.

What statutory and common law remedies existed at the time Section 1506 was enacted? In \textit{Piper Aircraft}, the court stated that "[t]ort liability for design defects was established in the law of many states by the late 1950s and had been extended to airplane crash cases."\textsuperscript{149} The savings clause allows state law remedies for torts. In fact, many courts have found that Congress intended the savings clause to exclusively occupy the field of aircraft safety and "to allow state common law to stand side by side with the system of federal regulations. . . ."\textsuperscript{150}

\textsuperscript{146} \textit{Id.}

\textsuperscript{147} 541 F. Supp. 1338, 1345 (W.D. Pa. 1982) (holding that state common law claims remained unaffected by the federal regulation of air travel).

\textsuperscript{148} \textit{Id. See also In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975, 635 F.2d 67, 74-75 (2d Cir. 1980); Porter v. Southeastern Aviation, 191 F. Supp. 42, 43 (M.D. Tenn. 1961); Nader v. Allegheny Airlines, 426 U.S. 290, 298-300 (1976).

\textsuperscript{149} 985 F.2d at 1443 (citing DeVito v. United Air Lines, 98 F. Supp. 88, 96-97 (E.D.N.Y. 1951); see also Dix W. Noel, \textit{Manufacturer's Negligence of Design or Directions for Use of a Product}, 71 YALE L.J. 816, 821 (1962)).

\textsuperscript{150} 985 F.2d at 1444. \textit{See Sunbird Air Servs., Inc. v. Beech Aircraft Corp., 789 F. Supp. 360, 362 (D. Kan. 1992) (holding that injured party's state law claims were not preempted by the 1958 Act); Elsworth v. Beech Aircraft Corp., 37 Cal. 3d 540, 549 (Cal. 1984), cert. denied, 471 U.S. 1110 (1985) (holding aircraft manufacturer liable for negligence in design of an aircraft); In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975, 635 F.2d 67, 74-75 (2d Cir. 1980) (stating that the federal statute does not preclude common law remedies based on the inclusion of the savings clause in the 1958 Act); Holliday v. Bell Helicopters Textron, Inc., 747 F. Supp. 1396, 1399 (D. Haw. 1990) (holding that the injured party's crashworthiness claims were not preempted by the 1958 Act).
In addition to the inclusion of the savings clause, the 1958 Act was amended to include a provision which stated that "no State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services" of any air carrier.\textsuperscript{151} There is an express provision in the 1958 Act stating that nothing shall abridge existing common law remedies,\textsuperscript{152} and a provision expressly preempts state law regarding rates, routes and services, but not the state law regarding aircraft safety.\textsuperscript{153} In 1992, the Supreme Court addressed the issue of the 1958 Act's savings clause impact on state laws prohibiting deceptive advertising of air fares.\textsuperscript{154} The Court determined that because the 1958 Act contained the savings clause and did not contain any express preemption clause, the states retained their traditional powers in the field.\textsuperscript{155}

b. Standards for Preemption as Elaborated by the Supreme Court in \textit{Cipollone}

An injured party would argue that the 1958 Act and its subsequent amendments, govern only two basic areas of aviation: (1) aircraft safety and (2) airline rates and routes.\textsuperscript{156} The Airline Deregulation Act of 1978 amended the 1958 Act to include a provision whereby state common law claims were expressly preempted regarding airline "rates, routes and services."\textsuperscript{157} Neither the 1958 Act nor the Airline Deregulation Act, however, included a provision expressly preempting state common law tort claims regarding aircraft safety. In situations where Congress has expressly pre-

\textsuperscript{156} \textit{See supra} note 39-40 and accompanying text.
\textsuperscript{157} \textit{See supra} note 37 and accompanying text.
empted some types of state law actions but not others, the “courts are cautious about relying on implied pre-emption theories to limit state authority further.”

In 1991, the Supreme Court addressed the issue of implied preemption versus express preemption in the context of cigarette labeling and advertising. In *Cipollone*, the majority stated that

> [w]hen Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation. Such reasoning is a variant of the familiar principle of expression unius est exclusio alterius: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted. . . . Therefore, [courts] need only identify the domain expressly pre-empted by each of those sections.

The 1958 Act and its subsequent amendments only explicitly preempt state laws with regard to rates and routes, and not to aircraft safety, therefore, state common law claims regarding aircraft safety should not be preempted. In addition, Justice Scalia stated in his dissenting opinion that, with respect to field preemption, “[t]he existence of an express pre-emption provision tends to contradict any inference that Congress intended to occupy a field broader than the statute’s express language defines.”

In the present context, Congress considered the issue of preemption and enacted Section 1305(a). Furthermore, Section 1305(a) provides a “reliable indicium of congres-

---

158 Lake Aircraft, 992 F.2d at 294.

159 Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608 (1992) (refusing to apply implied preemption but interpreting the express preemption provisions to preempt selective state common law claims).

160 *Id.* at 2617-18 (internal quotation marks and citations omitted).

161 *Id.* (Scalia, J., dissenting in part).
sional intent with respect to state authority." Therefore, in view of Cipollone, preemption should be limited to the express language of Section 1305(a), and state tort law claims should not be preempted because they do not fall within the domain of the state actions expressly preempted by Section 1305(a).

Even though Section 1305(a) was not enacted as part of the 1958 Act, its inclusion in the Airline Deregulation Act of 1978 establishes that the 1958 Act lacked general preemptive authority. Congress considered safety concerns when enacting the Airline Deregulation Act, yet, did not include an express preemption provision regarding safety. Instead, Congress merely directed the Secretary of Transportation to prepare annual reports on air safety, to prevent degradation in air safety; and gave the Secretary of Transportation the power to promulgate new safety regulations as needed. These requirements are consistent with current state common law duties, and they show Congress's lack of intent to preempt state common law claims regarding aircraft design defects.

Therefore, Congress did not intend to preempt state common law regarding aircraft safety. Moreover, even if Congress intended for the federal government to have an

---

162 See Cipollone, 112 S. Ct. at 2618 (quoting Malone v. White Motor Corp., 497 U.S. 505 (1978)). The importance of Section 1305(a) lies in the fact that in the enactment of the Airline Deregulation Act, Congress specifically did not preempt state action regarding aircraft safety. Therefore, Congress must not have intended for such actions to be preempted because they specifically preempted other facets of air travel and not aircraft safety. Therefore, the repeal of Section 1305(a) in 1994, does not change the fact that Congress did not, and still has not, expressed an intent to preempt state actions involving aircraft safety.

163 See Piper Aircraft, 985 F. 2d at 1444. The court in Piper Aircraft relied on the fact that the 1958 Act and its subsequent amendments govern two areas and only one, rates and routes, contains an express preemption provision. In view of this, the court concluded that "under Cipollone, this implies that the other broad area of congressional concern — air safety — is not preempted because it is 'beyond [the] reach' of the express preemption provision." Id. (citing Cipollone, 112 S. Ct. at 2618).

164 Id.
165 Id. n.17.
167 Piper Aircraft, 985 F. 2d at 1444 n.17.
exclusive right to regulate safety in a field, the states are allowed to maintain tort remedies covering the same basic field. In fact, the recovery of damages based on a state common law tort theory may be permitted even if the result is direct state regulation.

3. Aircraft Manufacturer's Rebuttal

a. Savings Clause

As illustrated above, an injured party may argue that federal preemption does not apply in the context of allegedly defective aircraft design. The inclusion of the savings clause in the 1958 Act arguably demonstrates that Congress did not intend to exclusively occupy the field of aircraft safety and, instead intended for state common law to stand side by side with federal regulations. This, however, does not seem to be the intent of Congress when it enacted the savings clause in 1958.

The central issue in the instant case, an aircraft manufacturer would argue, is not whether the states have any interest in aircraft safety but whether the states can subject an aircraft manufacturer to stricter standards and regulations than those dictated by the federal government. The savings clause does not address this issue. The savings clause specifically protects "the remedies now existing at common law or by statute." Therefore, Congress has only preserved state common law remedies and retained for the states a limited place in the field of aircraft safety. It is important to reiterate, however, that the savings clause merely preserves "remedies" that existed under state common law at the enactment of the 1958 Act and says nothing about preserving state standards or regulations, or state common law lia-

170 See 992 F.2d at 295.
171 See id. at 295 n.5.
bility in the context of aircraft safety. Therefore, the injured party's argument that a state common law tort liability claim is preserved by the preservation of remedies in the savings clause is unfounded because these are two completely separate and distinct legal concepts.

The opinion of the Court of Appeals in Bieneman v. City of Chicago supports this conclusion. The court addressed the limited effect of the savings clause in the 1958 Act on implied preemption and stated that "[s]tatutes of this sort save common law remedies even when federal law exclusively determines the content of substantive rules." In addition, the court found that "[s]tate courts award damages every day in air crash cases, notwithstanding that federal law preempts the regulation of safety in air travel." Furthermore, the court stressed that "[t]he essential point [was] that the state may employ damages remedies only to enforce federal requirements." The court concluded that the injured party's complaints about alleged noise related design defects were governed by the 1958 Act and its subsequent amendments, and held that "a state may not use common law procedures to question federal decisions or extract money from those who abide by them." Therefore, the

---

173 If an aircraft manufacturer is held liable under state common law for damages sustained by an injured party to himself and his aircraft due to an allegedly defective aircraft design, then does that not prescribe a standard upon the aircraft manufacturer that is dictated by the state? In addition, in a case where the aircraft manufacturer has completely followed all FAA regulations but is still held liable under state common law, are the courts not displacing the elaborate and exclusive federal system for regulating aircraft design and replacing it with standards dictated by state common law?

174 Liability is defined as "an obligation to do or refrain from doing something; a duty which eventually must be performed. . . ." BARRON'S LAW DICTIONARY 275 (3rd ed. 1991). Whereas a remedy is defined as a procedural device by which a "means [is] employed to enforce or redress an injury." Id. at 409.

175 864 F.2d 463 (7th Cir. 1988), cert. denied, 490 U.S. 1080 (1989) (addressing the issue of implied preemption with respect to noise related aircraft design).

176 Id. at 471 (emphasis added). Therefore, an injured party would only retain the ability to receive compensatory remedies for a manufacturer's violation of an applicable standard of design safety. However, those remedies should only be exercised in a manner that furthers compliance with federal safety standards.

177 Id.

178 Id. at 473.

179 Id. In support of this conclusion the court stated that:
savings clause does not preserve state common law claims and will only support state common law remedies where they are in accordance with federal regulations or within federally-sanctioned state authority.\textsuperscript{180}

Finally, the Supreme Court, in \textit{Morales}, stated that "[a] general 'remedies' savings clause cannot be allowed to supersede" a more specific showing of Congressional intent to preempt state common law claims.\textsuperscript{181} In view of this statement, and statements of the the court of appeals in \textit{Bieneman}, the savings clause should not preserve a state common law claim.

b. Standards for Preemption as Elaborated in \textit{Cipollone}

The injured party's arguments misconstrued or misapplied the recitations of \textit{Cipollone}. First, the injured party relied on the statement that "the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress."\textsuperscript{182} Aircraft design does not involve any historic police powers of the states and it is not "a subject traditionally governed by state law."\textsuperscript{183} Prior to the 1958 Act, Congress urged the states to adopt "uniform laws and regulations corresponding with the provisions of [the 1926 Act] and the rules and regulations that [were] promulgated under it."\textsuperscript{184} In response, forty-seven states adopted provisions similar to that

\begin{footnotesize}
\\textsuperscript{180} See 864 F.2d at 473.
\textsuperscript{181} 112 S. Ct. at 2037.
\textsuperscript{182} 112 S. Ct. at 2617 (quotation marks omitted).
\textsuperscript{183} CSX Transp., Inc. v. Easterwood, 113 S. Ct. 1732, 1737 (1993).
\textsuperscript{184} S. Rep. No. 2, 69th Cong., 1st Sess. 8 (1925), \textit{reprinted in Civil Aeronautics: Legislative History of the Air Commerce Act of 1926 at 29 (Rev. ed. 1943).}
\end{footnotesize}
of the 1926 Act by the mid to late 1930s. Moreover, since the late 1930s, the design standards promulgated by the federal government have effectively governed the designs of all U.S. aircraft, whether used in interstate or intrastate travel. In addition, the House Report regarding the enactment of the 1958 Act made it clear that Congress intended to give the FAA "full responsibility and authority for the advancement and promotion of civil aeronautics generally, including the promulgation and enforcement of safety regulations . . . [and] plenary authority to . . . [m]ake and enforce safety regulations governing the design and operation of civil aircraft.”

Second, the injured party's argument relies on the recitation in Cipollone that where Congress has included an express preemption provision in enacting legislation and where that provision provides a "reliable indicium" of intent to preempt, then "there is no need to infer congressional intent to preempt state laws." By enacting Section 1305(a) Congress did not provide a "reliable indicium" of intent. This can be seen from the fact that the 1958 Act established the FAA and gave it the authority to regulate aircraft safety. In addition, the 1958 Act explicitly established the standards and regulations regarding aircraft design safety. Furthermore, Section 1305(a) was not enacted until 1978, therefore, it is not possible that an express preemption provision, enacted twenty years after the FAA was established, could provide a "reliable indicium of congressional intent" with respect to the dominion of the FAA. In addition, the Airline Deregulation Act of 1978, which included Section 1305(a), was enacted to address commercial

---

186 See id.
188 See 49 U.S.C. app. § 1305(a) for the express preemption provision.
airline operations and not aircraft design. In view of this, there is no reason to believe that Congress did not intend to occupy the field of aircraft design regulation.

In support of this conclusion, the court in *French v. Pan Am Express, Inc.* preempted a state claim to enjoin an airline from testing a pilot for drugs. This case was decided after the enactment of Section 1305(a) and was based on implied preemption. In response to the injured party’s contention that “by specifically defining certain areas of aviation which Congress intended to preempt, [this] implies that Congress intended to limit the areas preempted to those named,” the court stated that Section 1305(a) “affords no basis for concluding that Congress meant to leave states free to regulate on all other issues anent air safety.”

Another reason for not using the injured party’s interpretation of *Cipollone* is that by following the injured party’s reasoning, at least one seminal case would now be decided the opposite way. *City of Burbank* concluded that implied preemption applied in the area of aircraft noise. The only dispute in the case was the scope of the preemption. *City of Burbank*, however, was decided prior to the enactment of Section 1305(a). Therefore, under the injured party’s interpretation of *Cipollone*, if *City of Burbank* would have been decided in 1979, then the outcome of the case would have been the exact opposite. States would have been able to regulate aircraft because “the pervasive nature of the scheme of federal regulation of aircraft noise” would

---

190 This is reflected in the wording of Section 1305(a). Section 1305(a) provides that state claims are preempted with respect to “rates, routes or services of any air carrier.” This does not even hint of aircraft design. Also note that whatever effect Section 1305(a) had before 1994, it no longer has because it has been repealed. Therefore, not only does it not apply regarding aircraft design, it no longer applies to rates and routes.

191 869 F.2d 1 (1st Cir. 1989).

192 Id. at 3 (relying on *City of Burbank* and stating that the Supreme Court seemingly rejected the idea that Congress intended for Section 1305(a) to be interpreted in such a way that all areas outside of those covered in Section 1305(a) were not subject to implied preemption).


194 Id. at 640.
have been overlooked in light of Section 1305(a). This result is clearly in contradiction to the accepted holdings of the courts today. Therefore, the injured party's analysis of Cipollone should not be followed and implied preemption is proper in both City of Burbank and the present context.

B. Conflict Preemption

1. Aircraft Manufacturer’s Arguments

Many courts, including the United States Supreme Court, have held that “state law is pre-empted when it actually conflicts with federal law.” In a situation where the federal government has enacted a detailed and pervasive regulatory scheme in a specific field and a state also attempts to regulate that same field, the state regulations should be preempted unless they are consistent with the federal regulations. Hence, an injured party’s state common law tort claim should be preempted if an aircraft manufacturer can show that (1) the federal regulatory scheme regarding aircraft safety is both pervasive and detailed, and (2) the injured party’s claim is a form of state-imposed regulation which is inconsistent with the federal regulatory scheme.

In the field of aircraft safety, Congress has enacted detailed and pervasive regulatory schemes. First, all aircraft designs must receive a type certification and a production certification from the FAA before an aircraft can be manufactured. These certifications require that the aircraft be of “proper design, material, specification, construction, and performance... and meet[ ]the minimum standards, rules, and regulations prescribed by the” FAA. Second, all aircraft must receive an “airworthiness certificate” before any person can operate the aircraft. This certifica-

---

195 Id. at 633.
197 49 U.S.C. app. § 1423(a)(b) (1988); see supra notes 17-20 and accompanying text.
198 49 U.S.C. app. § 1423(b) (1988); see supra notes 21-23 and accompanying text.
tion gives the FAA the discretion to prescribe "the type of service for which the aircraft may be used, and such other terms, conditions, and limitations, as are required in the interest of safety."201 Third, the FAA has the discretion to forbid an aircraft from flying due to modifications to the aircraft and to forbid a class of aircraft from flying in view of its service history.202

The federal regulatory scheme is pervasive and the injured party's claim, based on state common law tort theory, is directly and overtly regulatory. The Supreme Court has long recognized that "'regulation can be as effectively exerted through an award of damages as through some form of preventive relief.'"203 Furthermore, if an aircraft manufacturer is found liable for an alleged design defect by one state court, then the manufacturer may be held to the standard dictated by that state court in other state courts. Therefore, the standard dictated by the court is a form of regulation,204 and if it is not entirely consistent with the accepted regulatory scheme then it should be preempted.

2. Injured Party's Arguments

A conflict between federal law or regulatory scheme and state law exists "when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."205 In the context of aircraft safety, a conflict between state law and the federal regulatory

201 Id.
203 Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2620 (1992) (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959)). The majority stated that common law standards of care impose "requirements or prohibitions" on alleged tortfeasors and, therefore, rejected the view that preemption was limited to positive enactments by legislatures and agencies. Cipollone, 112 S. Ct. at 2619.
204 Note also that a large award for the injured party places substantial economic pressure on aircraft manufacturers to design their aircraft to the standards dictated by courts.
scheme should not be found to exist for at least two reasons. First, "the federal law at issue does no more than set forth '[s]uch minimum standards governing the design, materials, workmanship, construction, and performance of aircraft . . . as may be required in the interest of safety.' "

As can be seen from this quote, neither this regulation, nor any of the other regulations, dictates a precise design of an aircraft. Therefore, if a state court finds an aircraft manufacturer liable because a particular element of an aircraft was defective, the decision would not conflict with the federal regulations since they do not specify the particular requirement of the element.

In addition, the federal regulatory scheme only authorizes the promulgation of "minimum standards." Standing alone, "minimum standards such as these are not conclusive of Congress's preemptive intent." By designating the regulation as "minimum," Congress has "indicated that it did not want to bar states from adopting additional or more stringent standards." Furthermore, the federal regulatory scheme merely authorizes the FAA to provide certification of aircraft. By suing an aircraft manufacturer under state common law

---

subject to federal regulation, but whether the two laws function harmoniously rather than discordantly.")


208 Id.; see Holliday, 747 F. Supp. at 1401 (stating that "nothing in the [1958 Act] indicates that states may not require aircraft to be more safe or better designed"); Sunbird Air Servs., Inc. v. Beech Aircraft Corp., No. 89-2181-V, 1992 WL 167279 at *3 (D. Kan. June 10, 1992) (stating that "states are thus free to impose 'stronger' safety standards by setting a legal standard of liability for aircraft safety"); see also Perry v. Mercedes Benz of N. Am., Inc., 957 F.2d 1257, 1264-65 (5th Cir. 1992) (addressing "minimum standards" requirement for automobiles). In Piper Aircraft, the aircraft manufacturer argued that Congress intended the "minimum standards" limitation to allow manufacturers to adopt designs and methods that would improve safety beyond the standards required by the federal regulatory scheme, and did not intend to allow states to establish regulations which would heighten the safety standards. In response to this argument, the court stated that since there were no "clear and manifest indicators" of such an intent, then such an intent would not be presumed. Piper Aircraft, 985 F.2d at 1445.

tort theory, the injured party "does not challenge the power of the FAA to adopt safety regulations or to certify aircraft as complying with those regulations." A claim based on state common law tort theory does not even effect the validity of the FAA's certification decisions.

Second, if a court were to find a conflict, an aircraft manufacturer could escape liability for a defectively designed product by merely complying with the "minimum standards" promulgated by the FAA. In some circumstances, a design defect will not be found upon the initial testing of the aircraft. In fact, "[e]xperience has shown that defects in design and manufacture of an aircraft may not become evident until after an aircraft has been in operation for some time." Therefore, an injured party's state common law tort claim should not be barred because the FAA "overlooked or was unaware of the defective condition [of the aircraft] at the time the aircraft was certified."

3. Aircraft Manufacturer's Rebuttal

As was noted in the injured party's argument, Congress, through the 1958 Act, has given the FAA the duty and authority to prescribe and revise "[s]uch minimum standards . . . as may be required in the interest of safety." However, the injured party's interpretation of "minimum standards" is erroneous for two basic reasons. First, the injured party's interpretation is contrary to Supreme Court prece-

---

210 Elsworth, 691 P.2d at 635.
211 Id.
212 See Holiday, 747 F. Supp. at 1401.
213 Id.
214 Id. If conflict preemption applies and the injured party's claim is barred, then two undesirable effects may result. One effect is that this may "encourage aircraft manufacturers to cut corners in order to obtain an airworthiness certificate at the earliest possible date, without sufficient consideration of potential design problems, since once the airworthiness certificate is issued, the manufacturer is . . . effectively immunized from all liability under state tort law." Id. Another effect is that it would force the federal courts to adopt their own common law tort theories so as to compensate the multitude of injured persons who would have no other means of receiving compensation.
Second, this interpretation is contrary to the congressional purpose and intent of the 1958 Act and its predecessors.

In *Ray* the owners and operators of oil tankers challenged state imposed safety regulations on ships on the basis that the state regulations were preempted by the federal regulatory scheme. Congress enacted legislation which delegated to the Secretary of Transportation and the Coast Guard the duty and authority to promulgate "minimum standards" of design and construction of ships to promote ship safety and the protection of the environment. In order to accomplish this duty, Congress gave the Secretary of Transportation the responsibility to certify each ship and to make periodic inspections of each ship.

Even though the federal regulations merely provided "minimum standards" regarding design safety, the Supreme Court in *Ray* concluded that these regulations preempted state safety laws addressing the same subject matter. In so holding, the Court rejected the contention that a statute merely involving the promulgation of "minimum standards" evidences a Congressional intent to allow the states to enact regulations addressing the same schemes. Furthermore, the Court concluded the following:

[t]his statutory pattern shows that Congress, insofar as design characteristics are concerned, has entrusted to the Secretary [of Transportation] the duty of determining which oil tankers are sufficiently safe . . . [and that] [t]his indicates to us that Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements. In particular, as we see it, Congress did not antici-

---

218 *Id.*
219 *Ray*, 435 U.S. at 163-64.
220 *Id.* at 168 n.19. The court specifically rejected the proposition that since the federal scheme speaks of "minimum standards" that *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), "requires recognition of state authority to impose higher standards than the Secretary has prescribed." *Ray*, 435 U.S. at 168 n.19.
pate that a vessel found to be in compliance with the Secretary's design and construction regulations and holding a Secretary's permit, or its equivalent . . . would nevertheless be barred by state law from operating in the navigable waters of the United States on the ground that its design characteristics constitute an undue hazard.221

In view of the statements by the Supreme Court and its ultimate holding in *Ray*, the 1958 Act should preempt a state common law tort claim based on aircraft safety. This argument seems especially compelling since the federal regulatory scheme at issue in *Ray* is identical to the regulatory scheme as defined by the 1958 Act.222 As in *Ray*, the Secretary of Transportation and the FAA have "promulgated a comprehensive set of regulations" in accordance with their responsibilities and duties.223 Therefore, in view of *Ray*, the statutory scheme of the 1958 Act makes it clear that Congress "intended uniform national standards"224 in the context of aircraft safety, set by a singular federal agency for the design and construction of aircraft.

IV. CONCLUSION

The arguments for each side appear to be both credible and persuasive. If the conclusion is that there is no preemption, then the aircraft manufacturers will face differing standards and liability issues every time one of their aircraft enters a different state, and the FAA will basically be rendered toothless. However, if the conclusion is that preemption applies, the injured parties will be at the mercy of a federal organization to provide for their losses. This becomes extremely unpalatable when one considers that most federal organizations are overworked, and do not have the time nor the resources to give every claim proper treatment.

---

221 *Ray*, 435 U.S. at 163-64.
222 Compare ship safety statutes, *supra* note 203 and accompanying text, with aircraft safety statutes, *supra* notes 16-23 and accompanying text.
224 *Ray*, 435 U.S. at 152.
In view of this fact, the best solution may be for Congress to pass explicit legislation that establishes guidelines for every aircraft manufacturer and state to follow. If this legislation includes a provision allowing state laws to address these issues, then the standard set out in these state laws must be consistent with all other states and must be acceptable to the FAA. Therefore, the standards would be set by both the states and the federal government. However, these standards need to be established promptly and made relatively difficult to change, because aircraft manufacturers must be given a chance to adapt their designs to conform to these new regulations. Adopting regulations on an ad hoc basis would allow injured parties to recover for damages at the expense of the aircraft manufacturers and owners, but it would not give the aircraft manufacturers a chance to alter their designs to comply with these regulations before subjecting themselves to potential liability. The best system of regulation would be one that the aircraft manufacturers knew of and could follow, and that would require aircraft that are free from design defects.

If, however, the legislation includes a provision expressly preempting state common law claims, then at least two additional steps must be taken. First, there must be a procedure to establish a periodic review of the FAA regulations by an impartial organization. The impartial organization should be comprised of experts in the aircraft industry who are familiar with both the technical and the legal aspects of aircraft safety. In addition, if, from this review, the FAA regulations are found to be lacking, then the regulations should be quickly amended to correct the defect. There should then be some form of compensation provided to parties who were injured due to a defectively designed aircraft that complied with the erroneous regulation. Second, a low-cost system of compensation must be established for persons who were injured due to an alleged defect in an aircraft. Therefore, if an aircraft design has complied with all of the federal regulations, and the federal regulations are not defective in any way, an injured party can at least
recover for some of his or her expenses. This system could be similar to the present insurance system, but instead of just the aircraft owner or the aircraft manufacturer purchasing the policy, both parties should contribute to the payment of the policy. In this way, neither party would bear the entire burden of paying for the insurance.
Current Literature