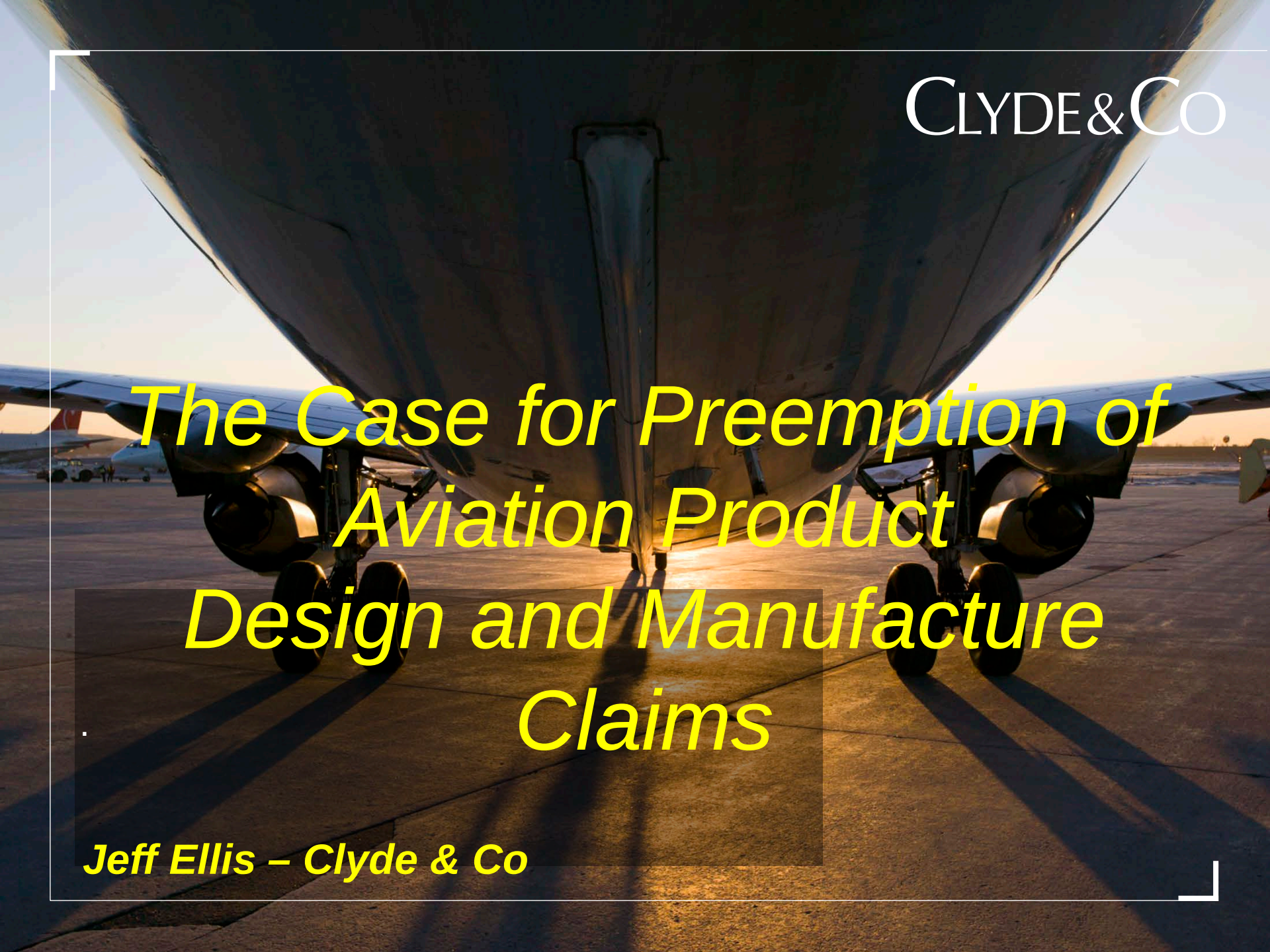

The Case for Preemption of Aviation Product Design and Manufacture Claims

Jeff Ellis – Clyde & Co

Before the FAA, Aviation was Unregulated and Accidents were Common

As Technology Advanced, the Need For Uniform Regulation became Apparent

Even Before the 1st Federal Aviation Act, the States Recognized the Need for Uniformity

At the Thirty-second Meeting of the National Conference of Commissioners on Uniform State Laws held at San Francisco, Cal., August 2-8, 1922, the following resolution was adopted on the 7th day of August, 1922:

"*Resolved*, By the National Conference of Commissioners on Uniform State Laws that the second tentative draft of an Act Concerning Aeronautics and to Make Uniform the Law Relating Thereto, be and the same is hereby approved, and that the same be submitted to the legislatures of the different states, the territories of Alaska and Hawaii, the District of Columbia, and the Insular Possessions of the United States for enactment at their next session."

. . . And Deference to Federal Laws Not Yet Enacted

SECTION 11. [Uniformity of Interpretation.] This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it, and to harmonize, as far as possible, with Federal laws and regulations on the subject of aeronautics.

Preemption Analysis

The Supreme Court has held that the "*touchstone*" for any preemption analysis should always start with Congressional intent

Congressional intent to preempt State laws governing aviation can be traced to the very first aviation legislation which it enacted less than a generation after the Wright Brothers' first flight.

The Congressional hearings for the 1926 Air Commerce Act demonstrate an intent for aviation safety to be exclusively and uniformly regulated at the federal level.

Drafters explained the legal framework by stating:

> **"There were two things that were of controlling importance. One was that there should be *exclusive* regulatory power in the Commissioner to the end that there might be *uniformity* throughout the States."**

In 1944, the Supreme Court described the federal role regarding aviation regulation:

"Congress has recognized the national responsibility for regulating air commerce."

"Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxies onto a runway it is caught up in an elaborate and detailed system of controls."

How this Story Was Supposed to End

***Abdullah v American Airlines, Inc*., held that the 1958 Federal Aviation Act preempted the standards for the entire "field" of "air safety."**

It based this holding on a careful review of that statute's legislative history and numerous prior holdings of the Supreme Court recognizing that aviation must be regulated uniformly.

***Abdullah* held that the only way to achieve uniform aviation safety standards is through exclusive federal regulation of the entire "field" of "air safety."**

Abdullah Was Based On Supreme Court Precedent and Clear Legislative History

Abdullah **cited to the Supreme Court's holding in** ***City of Burbank v. Lockheed Air Terminal, Inc*****.**

Burbank **held that "the Federal Aviation Act of 1958 requires a delicate balance between safety and efficiency"**

and

that the "interdependence of these factors requires a uniform and exclusive system of federal regulation if the Congressional objectives underlying the Federal Aviation Act are to be fulfilled."

Abdullah Recognized that "All Aspects" of Aviation Safety are Preempted

Abdullah **correctly notes that even though** ***Burbank*** **was decided by a 5-4 decision, there was actually a unanimous holding that "all aspects of air safety" are preempted.**

The minority opinion authored by Justice Rehnquist disagreed with the majority as to whether the airport noise claim at issue was preempted but noted its agreement with the majority that federal law preempts "all aspects of air safety."

Sikkelee v Precision, et al

This case involves alleged manufacturing and design defects in a Lycoming engine manufactured in 1969 and installed “factory new” on a Cessna 172 in 1998.

Lycoming holds both a type certificate and production certificate for the engine.

David Sikkelee was piloting the aircraft when it crashed shortly after taking off from Transylvania County Airport in Brevard, North Carolina in July 2005.

Plaintiff sued under Pennsylvania product liability law and alleged that the aircraft lost power and crashed “due to the faulty design of the lock tab washers” allowing vibrations from the engine to loosen screws holding the carburetor's throttle body to its float bowl.

. . . Oh, By the Way

The NTSB is charged with investigating all aviation accidents and it did not find any defect or problem with the design of the carburetor or recommend that all carburetors have lock tab washers installed

District Court Granted Summary Judgment

District Court cited to *Abdullah* to hold that federal standard of care applied.

Then held that the FAA's issuance of a type certificate must be based on its determination that the manufacturer has complied with all pertinent FAA regulations.

Thus, the federal standard of care was satisfied as a matter of law.

But the Plaintiff Appealed . . .

Plaintiff argued that:

- *Abdullah* should be reversed

- GARA preserves State Product Liability Law

- State product liability law is not within the preempted field

On Appeal, the FAA Supported Preemption

" the Federal Aviation Act of 1958 impliedly **preempts the field of aviation safety** with respect to substantive standards of safety. The Act requires the Department of Transportation, through the FAA Administrator, to **impose uniform national standards for every facet of aviation safety, including the design of aircraft and aircraft parts**."

Although the FAA explains that suits are permitted for matters which they did not approve, " **it is federal standards**" that would "govern state tort suits based on design defects in aviation manufacturing."

But the Third Circuit Panel Had a Different "Ending" in Mind

Two Weeks Ago, the Third Circuit Held:

1. The "field of aviation safety" held to be preempted in *Abdullah* does not include aviation products because the "Federal Aviation Act's safety provisions appear to be principally concerned with "operations associated with flight."

2. Cites to two cases that held that FAA standards do not preempt the design and use of external aircraft stairs in trip and fall cases

3. There is a presumption against preemption

4. Congress intended federal standards as minimums,

5. FARs only establish "*procedures*" for the issuance of certificates, not a standard of care, and

5. GARA evidences that Congress intended to preserve State Product Liability laws.

6. Remands for determination whether conflict preemption applies.

. . . Abdullah held what?

Abdullah's holding that the entire field of aviation safety was based on a recognition that Congress intended for aviation safety was intended to be regulated uniformly and that the only way to do so was through exclusively federal regulation.

This holding was supported by numerous Supreme Court holdings and well documented legislative history.

Nothing in that decision states or suggests that the "field of aviation safety" does not include the safety of aviation products.

External Aircraft Stairs are Regulated Differently than Aircraft Engines

Martin **and** ***Elassaad*** **involve falls on external aircraft stairs**

In contrast to the very few regulations addressing handrails on the foregoing, the Third Circuit acknowledged in ***Sikkelee*** **that:**

"*This certification process can be intensive and painstaking; for example, a commercial aircraft manufacturer seeking a new type certificate for a wide-body aircraft might submit 300,000 drawings, 2,000 engineering reports, and 200 other reports in addition to completing approximately 80 ground tests and 1,600 hours of flight tests*."

There is a Presumption in Favor of Preemption in Aviation Cases

If there is a presumption in favor of preemption, then the burden would be on the plaintiffs and a finding of "ambiguity" would require a finding in favor of preemption.

Tenth Circuit held in *US Airways, Inc. v. O'Donnell*, specifically held that there was a presumption in favor of preemption. It cited to decisions of both the Ninth Circuit and the Supreme Court to hold:

". . . the field of aviation safety "has long been dominated by federal interests." *Montalvo v. Spirit Airlines*. Thus, the presumption against preemption does not apply in this case. See *Buckman Co. v. Plaintiffs' Legal Comm*., 531 U.S. 341 (explaining that the presumption against preemption did not apply because the field at issue was "hardly a field which the States have traditionally occupied"

1st Circuit has also recognized that there is no presumption against preemption in the field of aviation. See, *United Parcel Service, Inc. v. Florez-Garlaza*, The Third Circuit does not cite to same.

The Nature of Aviation Requires Federal Regulation

Cooley v Board of Wardens **held more than 150 years ago that held that federal power must extend to matters that "are in their nature national, or admit only of one uniform system or plan of regulation.“**

More than 70 years ago, *Northwest v Minnesota* held:

“ Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time.

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.”

Congress Has Never Intended For the States to Regulate Aviation Safety

The legislative history of the every piece of federal aviation legislation has never indicated that the States have any role to play whatsoever.

That recognition is consistent with what the individual States acknowledged in the 1922 Uniform Aeronautics Act and consistent with the fact that no State has ever established a regulatory agency to police aviation product design or manufacture

Legislative history for the 1958 Federal Aviation Act states:

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

Congress concluded that the **only means to effectuate such a uniform and exclusive system of regulation** was to vest "**full safety rule making authority" in one federal agency** headed by an administrator with **"plenary" (complete) authority to make and enforce safety regulations governing, among other things, the design and operation of civil aircraft**.

The Supreme Court explained that the 1958 Act "***requires a delicate balance between safety and efficiency***" and that the "interdependence of these factors requires a ***uniform and exclusive system of federal regulation if the congressional objectives underlying the [1958 Act] are to be fulfilled***."

Supreme Court in Burbank also held that the scope of federal preemption extended to "**all aspects of air safety"**

GARA is not the Last Word

Two Year After GARA, Congress passed the 1996 FAA Reauthorization Act. Although it removed the FAA's dual mandate it also stated:

"The [Federal Aviation] Administration is *recognized throughout the world as a leader in aviation safety*.

The [Federal Aviation] Administration *certifies aircraft, engines, propellers, and other manufactured parts*.

The Administration's *certification means that the product meets world-wide recognized standards of safety and reliability*."

Other Courts Have Recognized that the Preempted Field is Much Broader than Just In-Flight Operations

Runway construction – Second Circuit in Goodspeed (cite with approval)

Passenger warnings- Ninth Circuit in Montalvo, Fifth Circuit in Witty

Noise – Supreme Court in Burbank - because the aviation "field" is preempted

Aircraft seating configuration – Fifth Circuit in Witty, N.D.CA in Montalvo

If No Preemption – Uniformity would be destroyed and Safety Decided by Random Jurors

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