



Federal Aviation Administration

In recent years and with increasing frequency, aircraft manufacturers and airlines are using the existence of airworthiness certificates to preempt state law claims arising from their aircraft. The result is that aircraft manufacturers and airline companies would have complete immunity from lawsuits brought by passengers who have been injured as a result of defective or faulty equipment used by the manufacturer or airline. AAJ has alerted the Federal Aviation Administration (FAA) about this practice, but the agency has not taken any action. Therefore, we recommend that the agency respond to AAJ's comments on the matter or issue a Memorandum interpreting the agency's intent that such certificates should not be used to afford immunity to manufacturers and airlines. This has become increasingly important due to recent revelations from whistleblowers regarding certain airlines' failure to properly inspect their equipment.

The agency must amend its regulations to ensure that airworthiness certificates do not afford complete immunity to manufacturers or airlines. The most efficient and effective way to address this issue is for the agency to amend its regulations pursuant to AAJ's request made as part of the agency's periodic regulatory review. *Review of Existing Regulations*, Docket No. FAA-2007-29291, Proposed Rule, 72 Fed. Reg. 64170 (Nov. 15, 2007). As part of this docket, AAJ submitted comments which urged the agency to review and revise its agency airworthiness certification regulations to "improve the effectiveness of these regulations." AAJ's comments to the agency regarding this issue are attached here. To date, the agency continues to review comments and has not issued a final rule in this proceeding. Therefore, the Administration must direct the agency to immediately complete the process and to include this regulatory change to reaffirm Congressional intent and to ensure that airlines and aircraft companies do not intend to broadly construe recent narrow decisions to afford them immunity from all claims. Given the increasing prevalence of preemption claims made by corporate defendants, it is imperative that the quickly make this change, which will amount to a simple statement of policy that would reiterate the position held by all prior Administrations.

AAJ's comments explained that although these rules are intended to provide airworthiness certificates to manufacturers that comply with the FAA's minimum rules, certain aviation companies and manufacturers are utilizing these regulations in a manner that conflicts with congressional intent to permit injured passengers to hold negligent aircraft manufacturers accountable for defective design of their aircraft and components. With increasing frequency, aircraft manufacturers and airlines are using the existence of airworthiness certificates to preempt state law claims arising from their aircraft.

For example, Cessna Aircraft Company has argued preemption in motions for summary judgment and dismissal in several cases. In one case involving a bird strike during a flight that resulted in a fatal crash, Cessna sought to dismiss claims that it was negligent for failing to design the aircraft to withstand the damage claiming, in part, that the FAA's certification process is evidence of Congress' intent to preempt state defective design claims. *Monroe v. Cessna Aircraft Co.*, 417 F. Supp. 2d 824, 832-34 (E.D. Tex. 2006). Cessna, as well as other companies, argue that the Federal Aviation Act of 1958 and its regulations impliedly preempt state tort actions by occupying the field of airplane safety. They assert that the federal laws and



regulations govern the field in a comprehensive manner, leaving no room for state regulation and state tort claims. This is false. The mere fact that Congress enacted detailed legislation addressing a matter of a interest in aviation safety does not indicate an intent to displace state law entirely. *English v. General Elec. Co.*, 496 U.S. 72, 87 (1990). The Supreme Court has said that Congress may reserve for the federal government the exclusive right to regulate safety in a given field, yet permit the states to maintain tort remedies covering much the same territory. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 253, 104 S.Ct. 615, 624, 78 L.Ed.2d 443 (1984).

Further, Congress was clear in its passage of aviation laws. The Federal Aviation Act, which includes basic standards for aircraft certification in order to enhance public safety, contains a savings clause which states that Americans can seek remedies for injuries caused by negligent manufacturers or airline companies. 49 U.S.C. § 40120(c). Federal courts analyzing the legislative intent behind federal aviation law have found:

Neither the Federal Aviation Act itself, nor its legislative history evidence an intent by Congress to preempt the entire field of aviation safety. Instead, the Act and its legislative history demonstrate an acknowledgment by Congress that state law tort claims are viable under the Act.

Monroe, 417 F. Supp. 2d at 830.

Accordingly, AAJ requested that the FAA amend these regulations to clarify that airworthiness certification was never intended to preempt common law tort claims and to restore the effectiveness of these rules. AAJ suggested the following language be added to 14 C.F.R. §§ 21.183, 21.251: “An airworthiness certificate demonstrates the applicant’s compliance with minimum safety standards at the time of application only.”

Although the rulemaking process is the most efficient method, the Administration may be able to achieve this goal through agency memoranda. In the event that the agency is unable to promptly address AAJ’s concerns in this rulemaking, the Administration must direct the FAA’s Office of Chief Counsel to draft a Memorandum to clarify the intent of airworthiness certificates and the agency’s interest in preventing aircraft manufacturers and airline companies from obtaining complete immunity from all claims brought by injured passengers. However, we believe that amending the regulations pursuant to its regulatory review proceeding continues to be the most efficient way to address this issue. While a Memorandum could be helpful, it is not mandatory for a court to follow this guidance; whereas, it is mandatory for a court to follow the new regulations.