

14-4193

IN THE
United States Court of Appeals
FOR THE THIRD CIRCUIT

JILL SIKKELEE, Individually and as Personal Representative
of the ESTATE OF DAVID SIKKELEE, deceased,

Plaintiff-Appellant,

against

PRECISION AIRMOTIVE CORPORATION; PRECISION AIRMOTIVE LLC, Individually and as Successor-In-Interest to Precision Airmotive Corporation; BURNS INTERNATIONAL SERVICES CORPORATION, Individually and as Successor-In-Interest to Borg-Warner Corporation, and Marvel-Schebler, a Division of Borg-Warner Corporation; TEXTRON LYCOMING RECIPROCATING ENGINE DIVISION, A Division of Avco Corporation; AVCO CORPORATION; KELLY AEROSPACE, INC., Individually and Joint Venturer and a Successor-In-Interest;

(Additional Caption on the Reverse)

*On Appeal from the United States District Court
for the Middle District of Pennsylvania*

**BRIEF FOR PLAINTIFF-APPELLANT
AND VOLUME I OF APPENDIX
Pages A1 to A69**

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I. INTRODUCTORY STATEMENT

The complaint in this products liability and negligence action alleges that on July 10, 2005, David Sikkelee’s single-engine aircraft lost power due to a design defect in its carburetor, resulting in a crash and fire that killed him. David’s widow, appellant Jill Sikkelee, sued appellee AVCO Corp. and its Lycoming Engines Division (Lycoming), which designed the aircraft engine and chose the carburetor (having a Lycoming part number). As amended, Sikkelee’s complaint alleges that Lycoming’s design violates the standards of care set forth in numerous federal aviation regulations, and that Lycoming concealed or failed to report known defects with its design and to take other steps to ensure the continued airworthiness of its products. Some of these design regulations are the same ones at issue in the “type certification” process—a design approval process overseen by the Federal Aviation Administration (Administration), which is a prerequisite to manufacturing any aircraft, engine, or propeller.

This case has a lengthy procedural history—it has been pending in the district court for over seven years. Sikkelee’s original complaint alleged claims under state law, but the district court held that under this Court’s decision in *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999), she was required to plead violations of federal standards of care. She did so, and the case proceeded to discovery, which has revealed a wealth of evidence that Lycoming’s design was

defective, that Lycoming knew of and concealed the defects, and that those defects caused the crash that killed David Sikkelee. Lycoming unsuccessfully moved for summary judgment—and then for reconsideration, twice. Each time it lost because the record contains ample evidence of its culpability.

Nevertheless, on the eve of trial, the district court found itself dissatisfied with the parties' proposed jury instructions, and so it *sua sponte* requested that Lycoming file another motion for summary judgment, which the court granted in part. The district court thus held that all of Sikkelee's claims alleging violations of federal design regulations that the Administration considered during type certification must fail because the Administration's decision to grant the type certificate constitutes a conclusive determination that Lycoming's design is safe. The district court denied Lycoming's motion for summary judgment with regard to Sikkelee's claim alleging that Lycoming failed to report a known design defect to the Administration in violation of 14 C.F.R. § 21.3.

As this brief will explain, the district court's decision to grant summary judgment to Lycoming is literally unprecedented. Sikkelee has not found another case holding that the issuance of a type certificate immunizes a general aviation manufacturer from liability for a defective design. Numerous courts have reached the very opposite conclusion. The decision in favor of Lycoming should be reversed, and all of Sikkelee's claims against Lycoming should proceed to trial.

II. JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1332 because the parties are diverse and the amount in controversy exceeds the minimum threshold.

This Court has jurisdiction under 28 U.S.C. § 1292(b). On September 10, 2014, the district court granted Lycoming's motion for summary judgment in part and contemporaneously certified its order for interlocutory appeal. Sikkelee filed a petition seeking this Court's review on September 22, 2014; Lycoming filed a cross-petition on September 24, 2014. On October 16, 2014, this Court granted Sikkelee's petition and denied Lycoming's. Thus, the Court has exercised jurisdiction over the appeal from the district court's decision granting summary judgment—but not the part of the decision that denied summary judgment.

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

ISSUE NO. 1

Before a general aviation aircraft or engine may be manufactured and sold, the manufacturer must obtain from the Administration a “type certificate” approving of the design. The Administration lacks the resources to independently test and analyze each component in a design. Therefore, in determining whether to issue a type certificate, the Administration relies upon the manufacturer's representations as to compliance with applicable regulations, and conducts only a spot check of the manufacturer's work. The first issue for review is whether the

issuance of a type certificate immunizes a manufacturer from liability in a general aviation products liability case in which the plaintiff proves that the manufacturer's design violates federal regulations.

Sikkelee's suggested answer: "No."¹

ISSUE NO. 2

In *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 371-72 (3d Cir. 1999), this Court held that federal regulations governing the operation of a commercial aircraft establish a federal standard of care that preempts any contrary state standard relating to the use of seat belts on a commercial flight. The Court also held that notwithstanding the preemption of state and territorial standards of care, state and territorial remedies, including damages, remain available for violations of federal standards. *See id.* at 375. *Abdullah* analyzed the laws regulating the operation of commercial aircraft—and not the distinct statutory and regulatory provisions governing the design of general aviation aircraft and their components. The second issue for review is whether the preemption holding of *Abdullah* applies in general aviation design defect cases where the applicable federal regulations do

¹ This issue was raised and adjudicated at: J.A., A43-48, A58, A158, A371, A378-379, A397, A404-405; ECF No. 463, pgs.15-16, Pls. Brief re: Court Order on Fed. Regs.; ECF No. 475, pgs.4-6, Pls. Reply re: Federal Regulations; ECF No. 487, pgs.38-42, Pls. Brief in Opp. re: Motion for Summary Judgment.

In this brief, citations to "ECF" refer to documents filed in the district court's electronic docket. Citations to "J.A." refer to the Joint Appendix filed with this brief.

not require manufacturers to adopt specific designs, but instead define broad minimum safety standards.

Sikkelee's suggested answer: "No."²

IV. STATEMENT OF RELATED CASES

Sikkelee is unaware of any related cases pending in this Court.

V. STATEMENT OF THE CASE

A. Legal Background

Because this appeal involves broad theories of federal preemption and immunity, it makes sense to survey the legal background including federal aviation statutes, the type certification process, and this Court's decision in *Abdullah v. American Airlines, Inc.*, 181 F 3d 363 (3d Cir. 1999), which the district court found critical.

1. Federal Aviation Statutes

Congress enacted the Federal Aviation Act (FAAct) in 1958.³ Although the statute authorized the Administration to regulate fares and take administrative action against deceptive trade practices, the FAAct originally contained no clause preempting state regulation. Instead, "from the start, the [statute] has contained a

² This issue was raised and adjudicated at: J.A., A5, A6, A11, A31-34, A35-43, A158, A371, A424-25; ECF No. 116, pgs.9-31, Pls. Brief in Opp. re: Preemption Motion; ECF No. 475, pgs.2-3, Pls. Reply re: Federal Regulations; ECF No. 487, pgs.38-42, Pls. Brief in Opp. re: Motion for Summary Judgment.

³ Pub. L. No. 85-726, 72 Stat. 731, *codified at* 49 U.S.C. ch. 1.

‘saving clause,’ stating: ‘Nothing . . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.’” *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995).⁴ The FAA Act likewise included an insurance clause requiring air carriers to maintain insurance policies to cover bodily injury or death resulting from the operation or maintenance of an aircraft. *See* 49 U.S.C. § 1371(n)(1) (1964), *recodified as* 49 U.S.C. § 41112(a), Pub. L. 103-272 § 1(e) (1994). Because the FAA Act did not provide a federal cause of action for such injuries, the insurance clause was always understood to require insurance against state-law personal injury actions. *See Wolens*, 513 U.S. at 231 n.7.

In 1978, Congress enacted the Airline Deregulation Act (ADA), Pub. L. 95-504 (1978), which introduced, for the first time, a preemption clause into the FAA Act. That clause provides that the states “may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.” 49 U.S.C. § 41713.⁵ Under the ADA, claims relating to economic

⁴ The savings clause was subsequently amended to provide that “[a] remedy under this part is in addition to any other remedies provided by law.” 49 U.S.C. § 40120(c). The word “part” refers to all air commerce and safety law.

⁵ The “subpart” in question is Title 49 (transportation), Subtitle VII (aviation), Part A (air commerce and safety), subpart ii (economic regulation). It governs the operations of commercial air carriers only.

issues were often held expressly preempted. *See, e.g., Morales v. Trans World Airlines*, 504 U.S. 374, 391 (1992) (holding that state fare advertising guidelines were preempted because they “related to” rates). However, “preemption disputes involving traditional personal injury or negligence claims were almost uniformly resolved against preemption.” *Margolis v. United Airlines, Inc.*, 811 F. Supp. 318, 322 (E.D. Mich. 1993).

Importantly, the ADA relates only to “air carriers” providing “air transportation,” *i.e.*, commercial aviation. It does not address general aviation, which encompasses all aviation that is neither common carrier transportation nor military—everything from the private jet to the crop duster to the stunt plane. Congress has expressly addressed liability in the general aviation context only once: when it enacted the General Aviation Revitalization Act of 1994 (GARA), Pub. L. 103-298 (1994), *reprinted in* 49 U.S.C. § 40101 note. GARA enacts only a statute of repose; it provides that “no civil action for damages . . . arising out of an accident involving a general aviation aircraft may be brought against the manufacturer of the aircraft or the manufacturer of any new component, system, subassembly, or other part of the aircraft . . . if the accident occurred” more than eighteen years after the aircraft was delivered, or, in the case of a new aircraft component, eighteen years after the component was placed into the aircraft. GARA

§ 2(a)⁶ The statute preempts “any State law to the extent that such law permits a civil action described in subsection (a) to be brought after the applicable limitation period for such civil action established by subsection (a).” *Id.* § 2(d).

GARA also contains exceptions. For example, the limitations period does not apply if the manufacturer made knowing misrepresentations or concealed or withheld required information to the Administration, or if new components were installed within the repose period. *Id.* § 2(a)-(b). Other exceptions state that the statute of repose does not apply if the person injured was a passenger for purposes of receiving medical or emergency treatment; if the person injured was not on board the aircraft at the time of the accident; or if the action is to enforce an otherwise-enforceable warranty. *Id.*

The House Report accompanying GARA discusses its purpose and operation in detail. The Report explains that “[t]he liability of general aviation aircraft manufacturers is governed by tort law . . . While the specific contours have ebbed and flowed, the public’s right to sue for damages is ultimately grounded in the experiences of the legal system and values of the citizens of a particular State.”

⁶ GARA defines “general aviation aircraft” to mean: “any aircraft for which a type certificate or an airworthiness certificate has been issued by the Administrator of the Federal Aviation Administration, which, . . . had a maximum seating capacity of fewer than 20 passengers, and which was not, at the time of the accident, engaged in scheduled passenger-carrying operations . . .” GARA § 2(c). This includes almost every general aviation aircraft.

H.R. Rep. No. 103-525(II), at 3-4 (1994). Respect for federalism and common law tradition had caused Congress “to tread very carefully when considering proposals . . . that would preempt State liability law.” *Id.* at 4. Thus, whereas prior legislative efforts had sought “to revise substantially a number of substantive and procedural matters relating to State tort law,” GARA “is limited to creating a statute of repose.” *Id.* at 6. After considering the costs of tort liability, as well as the substantial federal regulatory oversight of the industry, “the Committee voted to permit, in this exceptional instance, a very limited Federal preemption of State law.” *Id.* “In essence, the bill acknowledges that, for those general aviation aircraft and component parts in service beyond the statute of repose, any design or manufacturing defect not prevented or identified by the Federal regulatory process by then should, in most instances, have manifested itself,” so that civil liability is unnecessary. *Id.* at 6. However under GARA, “in cases where the statute of repose has not expired, State law will continue to govern fully, unfettered by Federal interference.” *Id.* at 7.

2. The Type Certification Process

Part of the aviation manufacturing process is type certification. A type certificate represents the Administration’s finding that, based upon the manufacturer’s representations to the Administration, a particular design “meets the regulations and minimum standards prescribed under” the FAA Act. 49 U.S.C.

§ 44704(a)(1). Type certificates must be issued for all aircraft designs, engine designs, and propeller designs *before* those designs can be manufactured. *See id.*; *see also* 14 C.F.R. § 21.11. Thus, literally every regulated aircraft, engine, and propeller in the United States has a type certificate.

The type certification process is not new—indeed, it was part of the FAA Act in 1958. *See* 49 U.S.C. § 1423(a)(1) (1964). Its purpose is to determine, before manufacture, whether a design complies with applicable regulations. Which regulations apply depends on the design. For example, the regulation relating to fuel and induction systems for reciprocating aircraft engines—one of the regulations that Sikkelee alleges was violated here—provides, in part, that “[t]he fuel system of the engine must be designed and constructed to supply an appropriate mixture of fuel to the cylinders throughout the complete operating range of the engine under all flight and atmospheric conditions.” 14 C.F.R. § 33.35(a).⁷ The regulation does not prescribe how the design should accomplish this goal, and manufacturers may obtain a type certificate by successfully representing that whatever design they adopt meets the regulation.

The certification process itself involves the submission of an application to the Administration. Applications nominally are evaluated by Administration field

⁷ It further provides that the design must have elements to address ice accretion, fuel filtering, and draining. *See* 14 C.F.R. § 33.35(b)-(d).

offices. As a matter of practice, however, the compliance function is largely outsourced, or delegated, to the private sector. Congress authorized this delegation in 1958. *See* 49 U.S.C. § 1355 (1964). The Administration thus promulgated regulations permitting it to designate industry representatives to take over parts of the type certification process. *See* 14 C.F.R. § 183.29(e). Engineering designees “are usually nominated by the applicant (*i.e.*, aircraft manufacturer),” and approved by the Administration. Nat’l Academy of Sciences, *Improving Aircraft Safety: FAA Certification of Commercial Passenger Aircraft* 30 (1980).⁸ Thus, while the Administration ultimately issues a type certificate, the manufacturers themselves perform the overwhelming majority of the underlying testing and analysis: a 2004 report by the Government Accountability Office (GAO) stated that designees perform “more than 90 percent of [the Administration’s] certification activities.” GAO, *Aviation Safety: FAA Needs to Strengthen the Management of its Designee Programs*, GAO-05-40, at 3 (2004).⁹ In fact, under this system, “[s]ome manufacturers are able to grant themselves a type certificate.” *Robinson v. Hartzell Propeller, Inc.*, 454 F.3d 163, 166 (3d Cir. 2006).

Because of the number of type certification applications the Administration receives and the many demands on its resources, the degree of delegation has only

⁸ Available at http://www.nap.edu/openbook.php?record_id=557.

⁹ Available at <http://www.gao.gov/assets/250/244458.pdf>.

increased over time. A recent report commissioned by the Administration itself shows that since 2002, the Administration has received between 3500 and 4500 applications for design approval each year. *See Aviation Certification Process Review and Reform Aviation Rulemaking Committee, Recommendations on the Assessment of the Certification and Approval Process* 6 (2012).¹⁰ The “steady number of projects is a result of [the Administration’s] certification capacity limit.” *Id.* Moreover, even though the number of applications has remained steady, “the actual [Administration] aircraft certification workload has increased significantly as a result of demand on [Administration] resources to address projects relating to increased complexities in aircraft technologies and the globalization of aircraft design.” *Id.* The Administration responded in 2005 by adopting a program to designate organizations, which can oversee a larger number of private individuals performing certification work. *See id.*

The volume of work and the degree of delegation exact a cost. The Supreme Court has explained that because the Administration lacks the resources to perform its own testing, it instead “conduct[s] a ‘spot check’ of the manufacturer’s work.” *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 817 (1984). That review is narrow: “[Administration] engineers

¹⁰ Available at http://www.faa.gov/regulations_policies/rulemaking/committees/documents/media/ACPRR.ARC.RR.May.22.2012.pdf.

cannot review each of the thousands of drawings, calculations, reports, and tests involved in the type certification process,” and therefore “must place great reliance on the manufacturer” to ensure its own compliance. *Id.* at 818 n.14 (quoting *Improving Aircraft Safety* 6, 9, 21). Indeed, “in most cases the [Administration] staff performs only a cursory review of the substance of th[e] overwhelming volume of documents’ submitted for approval.” *Id.* (quoting *Improving Aircraft Safety* 31-32).

The Administration’s capacity limits and reliance on manufacturers raise serious questions about the efficacy of the type certification process. In 1993, the GAO concluded that the Administration “has not ensured that its staff are effectively involved in the certification process,” and has “increasingly delegated duties to manufacturers without defining such a role.” GAO, *Aircraft Certification: New FAA Approach Needed to Meet Challenges of Advanced Technologies*, GAO/RCED-93-155, at 3-4 (1993).¹¹ Citing internal Administration reviews, the GAO found that the Administration’s approach was “too ad hoc and unmeasured to ensure a minimum effective level of involvement” in the certification process. *Id.*

5. The office concluded that the Administration “needs to establish basic guidance that describes the critical activities requiring staff members’ involvement, establishes measures to evaluate staff members’ performance, and defines when

¹¹ Available at <http://www.gao.gov/assets/160/153711.pdf>.

experts should be consulted. The lack of such guidance—combined with inadequate training—has brought into question the value added by FAA’s activities.” *Id.* at 6. In 2004, the GAO reaffirmed that the Administration’s “inconsistent monitoring of its designee programs and oversight of its designees are key weaknesses of the programs.” *FAA Needs to Strengthen the Management of its Designee Programs* 3. In 2010, it noted that the process had long produced inconsistent results—as reported by studies over a fourteen-year period. *See GAO, Aviation Safety: Certification & Approval Processes Are Generally Viewed as Working Well, but Better Evaluative Information Needed to Improve Efficiency*, GAO-11-14, at 11 (2010).¹² And a 2014 report clarifies that while the Administration is attempting to improve the certification process, it lacks clear metrics to measure whether it is succeeding. *GAO, Aviation Manufacturing: Status of FAA’s Efforts to Improve Certification and Regulatory Consistency*, GAO-14-829T, at 2, 13 (2014).¹³

Once a type certificate issues, the certificate holder remains responsible for ensuring that the design is compliant and safe. The ultimate “duty to ensure that an aircraft conforms to [Administration] safety regulations lies with the manufacturer and operator” *Varig Airlines*, 467 U.S. at 816; *see also Robinson*, 454 F.3d at

¹² Available at <http://www.gao.gov/assets/320/311045.pdf>.

¹³ Available at <http://www.gao.gov/assets/670/665131.pdf>.

166 (“Following certification, an entity with [delegated opinion authority] also ‘is responsible to ensure that the product design is in accordance with the regulations and has no characteristics which may detract from flight safety.’ Service difficulties, such as a failure, malfunction, or defect in any part . . . are to be ‘reviewed, reported, and resolved.’”). In this case, the Administration itself has found that Lycoming, as the certificate holder for its engine type design, is responsible for all service-related issues involving MA series carburetors (including the one at issue here). (ECF No. 234-13, 1972 FAA Memo re: MA series carburetors; J.A., A378, A384, A385-86) Lycoming sits at the top of the aviation food chain as to its engine fuel system, and thus, pursuant to the federal regulations has a responsibility—like any other engine type certificate holder—to ensure the safety of all components composing its type certificated engine.¹⁴

3. The *Abdullah* Decision

In 1999, this Court decided *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999). In *Abdullah*, the plaintiffs were passengers aboard a commercial flight. *See id.* at 365. The plane encountered a patch of rough weather that resulted in turbulence. The flight crew had illuminated the “fasten seat belt”

¹⁴ *See Pridgen v. Parker Hannifin, Corp.*, 916 A.2d 619, 623 (Pa. 2007) (ECF No. 160, ¶ 60). *See also Godfrey/Grace v. Precision Airmotive*, 46 So. 3d 1020, 1023 (Fla. Dist. Ct. App. 2010); *Stewart v. Precision Airmotive, LLC*, 7 A.3d 266, 273 (Pa. Super. 2010).

sign, but the pilot did not change the plane's course to avoid the choppy weather; moreover, the crew did not further advise the passengers of impending turbulence, and some passengers were injured as the plane shook. *Id.* They sued, accusing the crew of negligence for failing to avoid the turbulent conditions, and for failing to give reasonable warnings. *Id.* The claims were based on the law of the Virgin Islands. *See id.* at 366. The questions for this Court were (1) whether federal law preempts the application of the territorial standard of care, and (2) if so, whether a territorial damages remedy is nevertheless available for violations of a federal standard of care. *Id.*

This Court answered both questions “yes.” In finding preemption, the Court reviewed the legislative history and early cases interpreting the FAA Act, and concluded that Congress wished to centralize responsibility over air safety in the Administration. *See id.* at 367-69. It noted that courts had found preemption with regard to “airspace management, flight operations, and aviation noise, because of the promulgation of specific federal regulations over those aspects of air safety.” *Id.* at 371 (citing cases). From there, the Court determined that “it would be illogical to conclude that, while federal law preempts state and territorial regulation of matters such as pilot licensing, it does not preempt regulations relating to the exercise of the specific skill for which licensing is necessary—pilots’ operation of aircraft.” *Id.*

Finally, the Court noted that the applicable regulations include a catch-all, 14 C.F.R. § 91.13, which provides that “[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.” *See Abdullah*, 181 F.3d at 371. Thus, “[i]n a case then where there is no specific provision or regulation governing air safety, § 91.13(a) provides a general description of the standard required for the safe operation of aircraft.” *Id.* Because “the [FAAct] and relevant federal regulations establish complete *and* thorough safety standards for interstate and international air transportation,” the Court found the field of aviation safety preempted. *Id.* at 364 (emphasis added).

Thus, under *Abdullah*:

The applicable standard of care is not limited to a particular regulation of a specific area; it expands to encompass the issue of whether the overall operation or conduct in question was careless or reckless. Moreover, when a jury is determining what constitutes careless or reckless operation of an aircraft, expert testimony on various aspects of aircraft safety may be helpful to the jury. In the present case, for example, the regulations on the use of seat belts and on the illumination of the “fasten seat belt” sign set the standard for determining both whether American operated the aircraft carelessly or recklessly and whether the passengers, who had not fastened their seatbelts, were contributorily negligent. In addition, expert testimony may help the jury to understand whether the way in which warnings of turbulence and/or illumination of seatbelt signs were conveyed to the passengers constituted careless or reckless operation.

Id. at 371-72 (footnote omitted).

The Court acknowledged that its decision created a circuit split. *See id.* at 372. Some other courts had held, for instance, that because the ADA only preempts

claims “related to rates, routes, and services,” claims relating to aviation safety are not preempted. *See id.* The Court rejected this *expressio unius* argument because in the Court’s view, it “stood on the faulty premise that all possible alternatives or supplemental provisions were necessarily considered and rejected by the legislative draftsmen.” *Id.* (quotation marks and citation omitted). Because “safety of an airline’s operations would not appear to fall within the ambit of the ADA and its procompetition preemption clause,” there was no reason to infer that the ADA’s silence regarding safety mattered. *See id.* at 373.

Second, the Court disagreed with other courts’ conclusion that state regulations do not conflict with the applicable federal ones—for two reasons. It reasoned first that “there is no gap in the federal standards to fill with a state common law standard” because the catch-all federal regulation, 14 C.F.R. § 91.13(a), covers any possible claim relating to the operation of aircraft. *Abdullah*, 181 F.3d at 374. The Court also concluded that field preemption renders the lack of conflict between federal and state law irrelevant. *Id.*

Third, the Court rejected other courts’ reliance on the savings and insurance clauses of the FAA Act as evidence against preemption of state standards of care, reasoning that because state remedies remain available for violations of federal law, those provisions still have work to do even if state standards of care are preempted. *See id.* at 374-75.

Finally, the Court rejected the argument that states have inherent police power over aviation safety as question-begging, explaining that “whether the states may invoke their police powers depends on whether the field is federally preempted.” *See id.* at 375.

Having decided that federal standards of care relating to the operation of aircraft preempt territorial ones, the Court then proceeded to the second question presented—which was whether state and territorial remedies remain available for violations of federal standards of care, and concluded that the answer was “yes.” *See id.* The Court explained that there is “no irreconcilable conflict between federal and state standards,” and the imposition of state remedies would not “frustrate the objectives of federal law.” *Id.* (quotation marks omitted). “Quite to the contrary, it is evident in both the savings and the insurance clauses of the FAA[ct] that Congress found state damage remedies to be compatible with federal aviation safety standards.” *Id.* The Court therefore permitted the plaintiffs to attempt to prove their claim for damages by showing that American Airlines violated the federal standards of care embodied in the applicable federal regulations.

B. Factual Background And Procedural History¹⁵

The Cessna 172N Skyhawk is a single-engine, four-seat aircraft. David Sikkelee rented one, and in 1998, a “factory new” Lycoming O-320 engine was installed in it. (Lycoming’s Petition for Interlocutory Appeal, No. 14-8124, Document: 003111747885, at 2 (3d Cir.); J.A., A136, A163) In 2004, the plane’s engine, including its Marvel-Schebler MA-4SPA carburetor,¹⁶ were overhauled pursuant to Lycoming’s instructions. (J.A., A378, A384) The overhaul was performed “pursuant to the strict requirements and direction of Lycoming’s manuals and service bulletins,” and therefore “was, in essence, a Lycoming-controlled remanufacture of the engine and its component parts.” (J.A., A384) Indeed, Lycoming designed the engine and chose the MA-4SPA carburetor, approving its specific design (ECF No. 234-12, Lycoming Eng. Chg. Order re: bowl screws (filed under seal as ECF No. 233))—and was therefore found to be the

¹⁵ This case is in a summary judgment posture. All facts are stated in the light most favorable to Sikkelee, the nonmoving party. *See, e.g., Montone v. City of Jersey City*, 709 F.3d 181, 189 (3d Cir. 2013).

¹⁶ Broadly speaking, a carburetor is a device that combines air with fuel to facilitate combustion in an internal combustion engine. The MA-4SPA carburetor, which has a Lycoming part number, was a part specifically approved by Lycoming for use in its engine design.

de facto manufacturer of the engine and carburetor at the time of the overhaul.¹⁷

In fact, the carburetor design could not be changed without Lycoming's approval.¹⁸

Since at least 1971, Lycoming has known that the screws that attach the throttle body to the carburetor bowl on Lycoming O-320 series engines have a tendency to loosen due to vibration in the engine.¹⁹ When that happens, fuel can leak from the gasket between the throttle body and bowl, and the aircraft can lose power. Despite Lycoming's knowledge of the defect, however, it did not report it to the Administration, and the fixes that it proposed were inadequate to address the danger.²⁰

On July 10, 2005, David Sikkelee's Cessna 172N lost power shortly after takeoff and crashed. The crash resulted in a fire, and David burned to death.

¹⁷ (J.A., A379-380, A384, A388; A420, reiterating conclusion that Lycoming was *de facto* manufacturer; A441, recognizing that even if Lycoming did not directly sell the part, it could be treated, for legal purposes, as the seller)

¹⁸ (ECF No. 234-3, Lycoming Eng. Dwg. re: MA-4SPA; ECF No. 234-12, Lycoming Eng. Chg. Order re: bowl screws (filed under seal as ECF No. 233))

¹⁹ On multiple occasions in the early 1970s, the Administration approached Lycoming to raise problems concerning Marvel-Schebler carburetors, including loose throttle body to bowl screws in O-320 series engines. (*See* ECF No. 320-3, 1970 FAA Letter re: Marvel Schebler Service Literature (filed under seal as ECF No. 317); ECF No. 234-8, 1972 FAA Letter re: loose throttle body to bowl screws; ECF No. 234-13, 1972 FAA Memo re: MA series carburetors)

²⁰ (ECF No. 234-5, Lycoming DER Dep.; ECF No. 234-7, Lycoming Vice President of Eng. Depo., at 51-52; ECF No. 234-6, at 12, 14, Expert Rep. of Sommer; ECF No. 234-5, at 15-16, Expert Rep. of Twa)

In May 2007, David’s widow, appellant Jill Sikkelee, filed this lawsuit against Lycoming and sixteen other defendants (which—due to their relationships with each other—were essentially three defendants), for their respective roles in causing the crash that led to David’s death. The original complaint stated claims under Pennsylvania state law, alleging, among other things, that the known defect in Lycoming’s engine design caused the crash that killed David Sikkelee. (ECF No. 1, at 78-91)

One set of defendants, led by Precision Airmotive Corp., filed a motion for judgment on the pleadings; Lycoming filed a brief joining in that motion. The motion argued that under *Abdullah*, federal law preempts Sikkelee’s state law claims—even though *Abdullah* was not a general aviation products liability case. Both defendants argued that various federal regulations (including design regulations) applied to Sikkelee’s claims.²¹

On August 13, 2010, U.S. District Judge John E. Jones III granted the defendants’ motion on the pleadings in part, concluding that *Abdullah* applies to

²¹ Lycoming argued that “[t]he Federal Aviation Regulations (‘FARs’) are found in Title 14 of the Code of federal Regulations and encompass the design, materials construction, quality of work, and performance standards for aircraft and aircraft engines. *See* 14 C.F.R. pts 21, 25, 33, 43, and 65.” ECF No. 111, at 10. “If any liability is to attach in this case, it must be based on a violation of a standard set forth by the [Administration].” *Id.* at 12. But “[i]f a violation of a federal standard of care is established, a plaintiff may seek whatever damages are permitted by the applicable states’ laws.” *Id.* at 9 n.2.

this action and bars any claim against Lycoming based on state law. (J.A., A152-153) The court acknowledged that the decision was “not . . . easy to reach,” *id.* at A139, admitted that Sikkelee’s logic was “alluring,” and “perceive[d] the wisdom of the various decisions in other Circuits that have failed to find preemption in circumstances similar to the case at bar,” *id.* at A152. But the court concluded that aircraft manufacturing is an aspect of “aviation safety,” and therefore falls within the scope of *Abdullah*’s statement that the entire field of aviation safety is preempted. *Id.* The district court granted Sikkelee “leave to amend the Complaint and assert claims under federal standards of care.” *Id.* at A154.

Ten days after the district court’s preemption ruling, Sikkelee filed the operative complaint in this case, her Second Amended Complaint, which alleges violations of federal design standards of care (14 C.F.R. §§ 33.15, 33.19 and 33.35, formerly CAR §§ 13.100, 13.101, 13.104 and 13.110), violations of continued airworthiness obligations, 14 C.F.R. § 33.4, and violations of the specific federal standard of care requiring Lycoming to report failures, malfunctions and defects to the Administration, 14 C.F.R. § 21.3. (J.A., A275-285, A286-297) Consistent with the district court’s order and with *Abdullah*, Sikkelee sought state law remedies for those violations. (*Id.*)

Motions practice and discovery continued in the district court. The case having been narrowed by settlements and dismissals, Lycoming became the only

remaining defendant. The claims against Lycoming form Counts IV and VI of the Second Amended Complaint. Count IV alleges strict liability, and Count VI alleges negligence—all based on violations of federal regulations. (J.A., A275-285, A286-297)

Lycoming moved for summary judgment in two stages. On August 8, 2011, Lycoming filed a brief arguing that because it did not manufacture, sell, or supply the overhauled replacement carburetor in 2004, it could not be liable for any injury caused by the overhaul. (ECF No. 223, at 6-7) On October 17, 2011, Lycoming filed another brief arguing that North Carolina law governs this action (and bars Sikkelee’s claims), that the Administration’s decision to grant a type certificate to Lycoming “preempts” Sikkelee’s claims, and that the evidence was insufficient to show that the engine was defective when manufactured in 1969. (*See* ECF No. 257, at 6-14)²²

The district court held that Pennsylvania law, not North Carolina law, applies. (ECF No. 288) Then, on July 3, 2012, the district court granted Lycoming’s motion for summary judgment as it related to the 1969 engine manufacture, but otherwise denied the motion. (J.A., A404) The district court concluded first that Lycoming was the *de facto* manufacturer of the defective engine/carburetor because:

²² Sikkelee has no claim of defective manufacturer.

it would entirely defy concepts of fairness and justice and run counter to the considered history of products liability policy to hold that a Type Certificate holder who exclusively controls the design and manufacture of replacement component parts and mandates the installation of said parts during an overhaul of its engine could escape liability for a defect in a component part simply because it is not physically involved in the manufacture and installation process. Indeed, in our opinion, sufficient evidence has been submitted from which a reasonable jury could find that, while Lycoming's hands were not physically present in the plant during the manufacture or in the shop during the overhaul, its invisible hands were undeniably present as it was Lycoming's design directive which caused the allegedly defective carburetor to be produced and placed in the engine, ultimately leading to the 2005 crash.

(J.A., A385-386). Turning to whether the design was defective (as necessary to support a claim for strict liability), the district court held that Sikkelee had “provide[d] abundant evidence to satisfy her burden at the summary judgment stage. Plaintiff’s experts have concluded that the defective throttle body to bowl assembly—installed pursuant to Lycoming’s type certificate design for its O-320 engine—was the cause of the accident.” (J.A., A394-395) The court likewise found “ample evidence” for Sikkelee’s claim that Lycoming had failed to warn others of the defect. (J.A., A397) For instance, Sikkelee discovered a 2004 letter from co-defendant Precision Airmotive to Lycoming admitting the problem unique to the O-320 series engines on Cessna 172 series aircraft, asking for help from Lycoming as type certificate holder in finding a remedy; an internal Lycoming memo dated two years before the accident attempting to “resurrect” a change to its service bulletin pertaining to the carburetor (addressing the known problem of loose

throttle body to bowl screws) which was never adopted; and a post accident internal Lycoming email admitting that the problem was caused by vibration (*i.e.*, a design defect) rather than a service issue.²³

Addressing next the negligence claim, the district court denied Lycoming's motion. The court cited the allegations in the Second Amended Complaint, together with citations to the applicable federal regulations, including that Lycoming had breached "copious federal standards":

— by not submitting truthful submissions to the FAA, including mandated reports of malfunctions and defects, in violation of 14 C.F.R. §§ 21.2, 21.3, 21.14, 21.21, 33.35, and 33.4;

— by incorporating design features or details which experience has shown to be hazardous or unreliable in violation of 14 C.F.R. § 33.15 and CAR § 13.100, 13.101, and by willfully concealing the same from the FAA in violation of mandatory reporting requirements;

— knowingly designing or constructing an engine part which permits an unsafe condition of the engine between overhaul periods in violation of 14 C.F.R. § 33.19 and Civil Air Regulation ("CAR") § 13.104

— by designing and constructing a fuel supply system which did not ensure an appropriate mixture of fuel to the cylinders under all flight and atmospheric conditions in violation of 14 C.F.R. § 33.35 and CAR § 13.110;

²³ (ECF No. 234-14, 2004 Precision Letter to Lycoming requesting help; ECF No. 320-4, Lycoming internal email re: SB 366; ECF No. 320-5, Lycoming internal email re: loose bowl screw design problem (filed under seal as ECF No. 317))

— by issuing continued airworthiness instructions which were defective as to the throttle body to bowl assembly for the MA-4SPA carburetor in violation of 14 C.F.R. § 33.4;

— by holding the Type Certificate for a defective product and failing to report known malfunctions to the FAA regarding that defective product within twenty-four (24) hours after it discovered said malfunctions in violation of 14 C.F.R. §§ 21.3, 21.303;

— by operating as an FAA licensed and certified repair facility and failing to make known to the FAA the defect in the carburetor design within ninety-six (96) hours of discovery of the defect in violation of 14 C.F.R. § 145.221(a);

— and by knowingly misrepresenting and willfully concealing the defect in the throttle body to bowl screws and attachment problems to the FAA in violation of 14 C.F.R. § 21.3.

(J.A., A399-400). Considering the evidence, including the expert evidence and internal documents from Lycoming and its codefendants, the court concluded that “Plaintiff has created a genuine issue of material fact for the jury with respect to whether Lycoming breached the applicable federal standards of care by negligently designing a defective product that proximately caused the death of the Plaintiff’s decedent and substantial injury to the Plaintiff’s brother.” *Id.*

After this order, Lycoming sought an interlocutory appeal to challenge the district court’s determination that Pennsylvania courts would apply the Restatement (Second) of Torts rather than the Restatement (Third). The appeal was denied, but the order denying the appeal clarified that the Restatement (Third)

should apply. *Sikkelee v. Precision Airmotive Corp.*, 2012 WL 5077571 (C.A.3 (Pa.))

The court invited the parties to file motions for reconsideration based on that development. (ECF No. 324, at 2) Lycoming did so on October 31, 2012. Resolution of that motion was delayed because the case was assigned to a new district judge, the honorable Matthew W. Brann on January 17, 2013. Judge Brann denied Lycoming's motion for reconsideration on June 3, 2013. (ECF No. 359) Lycoming moved for reconsideration again. (ECF Nos. 360-61) The district court denied that motion as well, noting that Lycoming's litigation tactics were "overstepping the bounds of tactfulness." (ECF No. 363)

As trial approached, the district court found it difficult to craft appropriate jury instructions based on the federal standards of care. Frustrated, the court concluded that, perhaps, the federal design regulations did not establish such standards. (J.A., A9-13) Thus, two and a half years after summary judgment practice was cut off,²⁴ over six years after the case was filed, and after a motion for summary judgment and two motions for reconsideration had been denied, the district court—*sua sponte* and over Sikkelee's objection—invited Lycoming to file yet another motion for summary judgment. Indeed, the court went further, and

²⁴ Discovery cut-off was in August 2011, and the summary judgment deadline was in October 2011. (ECF No. 210)

provided Lycoming with advice as to which arguments it should make. (J.A., A456-457, A459-463; A611-612) (docket entry 478 orders Lycoming to file a motion, and states that “[p]ermissible grounds for argument shall encompass defendants arguments in ECF No. 470 and reasonable elaborations and extensions thereof”). That motion was filed on March 19, 2014. (*See* ECF Nos. 482-84) Following the district court’s guidance, Lycoming argued that the federal regulations cited by Sikkelee did not create federal standards of care, or did not support a claim against Lycoming. In the alternative, Lycoming argued that the issuance of a type certificate to Lycoming conclusively established that the federal standards were met. (*See* ECF No. 484)

On September 10, 2014, the district court granted Lycoming’s motion in part. (J.A., A3-A66) Implying that it might reach a different result if deciding the issue *de novo*, the court refused to revisit *Abdullah*’s applicability despite “compelling” reasons to do so. (J.A., A32)

The court recognized that it was difficult to “adapt *Abdullah* to” this case. (J.A., A35-36) That is because the federal design regulations at issue here do not resemble the regulations governing the operation of aircraft in flight. (*See* J.A., A36) In particular, the catch-all regulation, 14 C.F.R. § 91.13—which prohibits the careless or reckless operation of an aircraft, and which supplied a comprehensive standard of care in *Abdullah*—does not, by its terms, apply to aircraft design. (J.A.,

A36-37) Faced with a potential gap in the regulations, the district court felt compelled to choose between “read[ing] an ‘overall concept’ of careful conduct into the federal regulations,” or instead “apply[ing] only the standards specifically enunciated in the relevant federal regulations, leaving gaps unfilled by any overall concept of care.” (J.A., A37) The court determined that the second option was the “better choice,” even though it “tak[es] a sledgehammer to one of the pillars” underlying the “finding of preemption in *Abdullah*,” *i.e.*, this Court’s conclusion that there are no gaps in the federal regulations because § 91.13 fills them all. (*Id.*) The court further acknowledged that “gaps are problematic in the sense that they give one pause before concluding that the case at bar is within the field of preemption identified in *Abdullah*.” (J.A., A41) But it nevertheless determined to stay the course of applying *Abdullah*.

Pressing ahead, the district court then asked whether genuine questions of material fact exist regarding Lycoming’s compliance with particular regulations. Importantly, the court did not quarrel with the factual assessments in the previous denial of summary judgment; thus, the prior holdings that Sikkelee had introduced substantial evidence that Lycoming violated numerous federal regulations, and that those violations caused David Sikkelee’s death, were left undisturbed. (*Compare* J.A., A376-379 to A413-415 to A15-17; A456, lines 10-13) But the district court concluded that because Lycoming had obtained a type certificate for its engine

design, that was the end of the matter vis-à-vis the regulations underlying the certification process. (*See* J.A., A43, A47-48) As the court explained, “each of the cited regulations establishes a requirement that applicants must satisfy *in order to obtain a type certificate*, and it is the Administrator alone who decides whether a certificate should be issued.” (J.A., A47)

The district court rejected the argument that flaws in the type certification process—which prevent the Administration from detecting design defects—justify a different conclusion. The court did not dispute the premise that the type certification process is flawed, but it concluded that permitting a jury to second-guess the Administration’s type certification determinations would impose unpredictable standards on aircraft manufacturers. (*See* J.A., A48, A51) The court thus held that “the Administrator’s issuance of a type certificate for the O-320-D2C is conclusive of the engine’s compliance with the design and construction regulations.” (J.A., A55)

The district court further rejected Sikkelee’s claims relating to continued airworthiness regulations, which require type certificate holders to ensure that their products conform to the approved design and are “in a condition for safe operation.” 14 C.F.R. § 21.165; CAR § 13.21. (J.A., A56-57)

However, the court ruled that Sikkelee’s claim alleging a violation of 14 C.F.R. § 21.3, which requires type certificate holders to “report any failure,

malfunction, or defect in any product, part, process, or article” upon learning that the item would cause various hazardous conditions, including engine failure.

Because this regulation is not part of the type certification process, and because Sikkelee had proffered “a variety of evidence tending to show that Lycoming knew of a defect in the O-320-D2C (namely the MA-4SPA carburetor), but hid the defect from the FAA, arguably preventing the Administrator from ordering ‘design changes . . . to correct the unsafe condition’ under § 21.99,” the claim could proceed to trial. (J.A., A61)

The district court concluded its opinion with the following paragraph:

The watchword in *Abdullah* was Congressional intent. Yet having endeavored to reconcile *Abdullah* with the federal regulatory scheme that governs aviation design and manufacturing, this Court—either by way of its own error or that of the precedents it has followed—has reached holdings that it imagines have little to do with Congressional intent. Fortunately, whether this Court has been pushed to pier’s end by precedent or has stumbled to the edge itself, the Circuit Court has the authority to pull it back to safety.

(J.A., A65-66)

In the order accompanying the memorandum, the district court likewise stated that “whether this Court has properly reconciled *Abdullah v. Am. Airlines*, 181 F.3d 363 (3d Cir. 1999), with the facts and aviation regulations at issue in this case” constituted a controlling question of law as to which there is substantial ground for difference of opinion, and certified its summary judgment order for immediate interlocutory appeal. (J.A., A68-69)

This appeal followed.

VI. SUMMARY OF THE ARGUMENT

The district court has essentially asked this Court to reverse the judgment below, and this Court should kindly oblige it. Sikkelee presented compelling evidence that Lycoming's design violated federal regulations and killed her husband. The evidence further shows that Lycoming has long known about and concealed the flaws in both its design and continued airworthiness instructions—also in violation of federal regulations. *Abdullah*'s holding entitles Sikkelee to a state law remedy if she can prove these federal regulation violations to a jury. But the district court used *Abdullah*'s dictum to shield Lycoming from liability. That result is precisely backwards—and this Court can fix it in two different ways.

First, the Court should address the district court's most egregious error: its conclusion that a type certificate constitutes a conclusive defense to products liability claims alleging violations of federal design and continued airworthiness regulations. This is a truly remarkable result: the district court held first that federal standards of care preempt state standards—thus extinguishing state products liability law in the aviation context; it then held that the issuance of a type certificate constitutes conclusive evidence of compliance with the federal standards, thus extinguishing the only remaining remedy for a federal law violation. In essence, the district court granted blanket immunity to every certificate holder for

all of its type certificated designs. To the best of Sikkelee's knowledge, no other court has ever done so before.

The district court's conclusion also cannot be reconciled with Lycoming's prior admission that state law provides Sikkelee with a remedy for violations of federal law, and it is at odds with this Court's precedents, including especially *Abdullah*, which expressly preserves state law remedies for violations of federal law. Moreover, both the Supreme Court and this Court have held that Congress would not strip injured individuals of their sole means of redress without a clear statement.

Far from a clear statement of intent to displace private causes of action, Congress's enactments have only reaffirmed that private parties injured by aviation mishaps have the right to seek redress in court. The statutory provisions relating to type certification—which never mention immunity from liability—were enacted in the original FAA Act, which also included a savings clause preserving existing causes of action. Congress did not seek to limit personal injury actions until it enacted GARA in 1994, where it acknowledged that products liability claims against type certificate holders are the norm. There would have been no need for GARA if Congress had already granted manufacturers immunity through type certification. And of course, GARA itself preserves private causes of action against manufacturers except in very limited circumstances.

It makes sense that Congress would preserve civil liability, because the well-documented flaws with the type certification process indicate that the district court's holding will only undermine aviation safety. Without the prospect of civil liability, the only check on manufacturers will be the Administration—an entity that is so overworked that it has already outsourced ninety percent of the certification process to the manufacturers themselves, despite rampant evidence that manufacturers willfully conceal design defects from the Administration.

In light of these authorities and realities, this Court should hold that a type certificate does not confer immunity upon the certificate holder, and thus permit all of Sikkelee's claims against Lycoming to proceed to trial.

Second, this Court can decide the case by holding that *Abdullah's* preemption holding does not apply to general aviation products liability claims. A finding of preemption requires clear evidence of congressional intent to bar the application of state law—and such evidence is lacking here. In fact, the most specific statute, GARA, preserves state law claims unless the statute of repose has lapsed. *Abdullah* never considered GARA because the regulatory regime governing the operation of commercial aircraft is entirely distinct from the design regulations at issue here. Unlike the regulations at issue in *Abdullah*, which set forth detailed instructions relating to seat belts as well as comprehensive standards relating to the operation of aircraft, aviation design regulations are less detailed and

less sweeping. The district court arrived at the contrary result by misconstruing *Abdullah*—a mistake that this Court can correct in short order by distinguishing *Abdullah* and permitting Sikkelee to plead and prove state-law claims.

The Court need not decide both of these questions in order to resolve this appeal: deciding either one in Sikkelee’s favor will compel reversal of the district court’s decision granting summary judgment to Lycoming.

VII. STANDARD OF REVIEW

In reviewing the district court’s decision granting summary judgment to Lycoming, the standard of review for each issue presented is *de novo*. *Azur v. Chase Bank, USA, Nat’l Ass’n*, 601 F.3d 212, 216 (3d Cir. 2010). The court is required to apply the same test the district court should have utilized initially. *Chambers ex rel. Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 181 (3d Cir. 2009) (internal quotation marks omitted).

VIII. ARGUMENT

A. A Type Certificate Does Not Immunize Lycoming From Civil Liability.

The narrowest way to decide this case is to reverse the district court’s conclusion that a type certificate for a design immunizes the certificate-holder from civil liability for that design. As Chief Judge Conner of the district court explained, when this Court decided *Abdullah*, it “[c]learly . . . did not intend the absurd result of immunizing airplane or airplane component part manufacturers

from tort liability.” *Pease v. Lycoming Engines*, No. 4:10-CV-00843, 2011 WL 6339833, at *23 (M.D. Pa. Dec. 19, 2011). In fact, the court below is the *only* court known to Sikkelee to have ever reached that conclusion—which means that its decision conflicts with literally every state and federal case imposing liability on a general aircraft manufacturer for a type certificated design.²⁵

As an initial matter, the district court’s type certification holding is foreclosed by this Court’s precedents, including *Abdullah*. There, this Court held that federal standards of care, embodied in federal aviation regulations, govern claims relating to aviation safety, but state tort remedies are available for violations of those standards. 181 F.3d at 375. The district court, however, decided that Sikkelee should have no remedy whatsoever, even if she proves that Lycoming violated federal aviation regulations. If *Abdullah* applies, then that conclusion cannot be correct.

This Court’s decision in *Robinson v. Hartzell Propeller, Inc.*, 454 F.3d 163 (3d Cir. 2006), is also instructive. There, the district court had denied summary

²⁵ For a few examples: ECF No. 354-1, *Becker v. AVCO Corp.*, No. 10-2-26593-7 SEA, King County, Washington; J.A., A444, *Pridgen* jury verdict; *see also Pease v. Lycoming Engines*, 2011 WL 6339833 (M.D. Pa. Dec. 19, 2011); *Lewis v. Lycoming*, 2013 WL 3761179 (E.D. Pa. July 17, 2013); *Pridgen v. Parker Hannifin, Corp.*, 916 A.2d 619 (Pa. 2007); *Robinson v. Hartzell Propeller, Inc.*, 326 F. Supp. 2d 631 (E.D. Pa. 2004); *Datskow v. Teledyne Continental Motors*, 826 F. Supp. 677 (1993); *Hinkle v. Cessna Aircraft Co.*, No. 247099, 2004 WL 2413768 (Mich. Ct. App. Oct. 28, 2004); *Estate of Kennedy v. Bell Helicopter Textron, Inc.*, 283 F. 3d 1107 (9th Cir. 2002).

judgment to a type certificate holder, which had argued that the GARA statute of repose barred the products liability claims against it. The plaintiffs had alleged both that the type certificated design was defective and that the manufacturer made false statements in its type certificate application; they sought relief under state law for, *inter alia*, negligence and strict liability. *See id.* at 165-67; *see also Robinson v. Hartzell Propeller, Inc.*, 326 F. Supp. 2d 631, 635 (E.D. Pa. 2004). This Court considered whether it had jurisdiction to hear the manufacturer's appeal by asking whether the manufacturer's defense was "comparable to an immunity from suit." 454 F.3d at 169. The Court concluded that the answer was "no," and remanded the case. *Id.* at 174. The district court's holding in this case that a type certificate constitutes a conclusive determination that a design complies with federal standards cannot be reconciled with that result: if the district court is correct, then this Court in *Robinson* should have concluded that it had appellate jurisdiction because the type certificate holder was immune whether GARA applied or not.²⁶

Elassaad v. Independence Air, Inc., 613 F.3d 119 (3d Cir. 2010), likewise supports Sikkelee's position. There, this Court found no preemption in a commercial aviation case and confirmed, "[w]e did not conclude in *Abdullah* that the passenger's common law negligence claims themselves were preempted;

²⁶ At the very least, it would have been odd for this Court to remand the case for further proceedings without even commenting on such an obvious defense.

instead, we determined only that the standard of care used in adjudicating the claims was preempted.” *Id.* at 125. The Court then cited Justice Stevens’ opinion in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), stating that “‘Congress did not intend to give airlines free rein to commit negligent acts subject only to the supervision of the Department of Transportation, any more than it meant to allow airlines to breach contracts with impunity,’” because “‘the standard of ordinary care, like contract principles, ‘is a general background rule against which all individuals order their affairs.’” *Id.* at 127 (Stevens, J., concurring in part and dissenting in part). That analysis applies with equal force to manufacturers: Congress did not intend for them to have free rein to implement defective designs subject only to Administration oversight—if it had so intended, it would have said so.²⁷

But Congress did not say so. Type certification and products liability claims have coexisted since the FAA Act was enacted in 1958. In that entire period, Congress has *never* suggested that the decision to grant a type certificate

²⁷ Lycoming may respond that neither *Abdullah* nor *Elassaad* involved type certification. That, of course, is true. But the only reason that type certification matters in this case is because the district court held that *Abdullah* applies so that the federal design regulations apply. Without that holding, Sikkelee’s claims would still be based on state law. Lycoming cannot simultaneously rely on *Abdullah* to make type certification relevant while disavowing *Abdullah*’s second holding. Furthermore, this Court in *Robinson* expressly addressed the type certification process and never so much as suggested that a certificate insulates a manufacturer from liability.

forecloses civil liability against the manufacturer. That silence speaks volumes because “[i]t is, to say the least, ‘difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.’” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487 (1996) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)); *see also Wyeth v. Levine*, 555 U.S. 555, 574-75 (2009) (explaining that Congress’s “silence on the issue” of “state-law-suits,” “coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend [Food and Drug Administration] oversight to be the exclusive means of ensuring drug safety and effectiveness”).

And there is more. In 1994, Congress expressly recognized in enacting GARA that “[t]he liability of general aviation aircraft manufacturers is governed by tort law.” H.R. Rep. No. 103-525(II), at 3-4 (1994). Congress was concerned specifically about claims alleging “design or manufacturing defect[s].” *Id.* at 6. The vast, vast majority of those designs were type certificated—as Congress recognized both in GARA’s legislative history, *id.* at 5 (describing the type certification process), and when it defined a “general aviation aircraft” as a subset of aircraft with a “type certificate,” GARA § 2(c). If type certification protected manufacturers from liability, then the GARA statute of repose would have been unnecessary. *Cf. Silkwood*, 464 U.S. at 251 (explaining that when “the

only congressional discussion concerning the relationship between the Atomic Energy Act and state tort remedies indicates that Congress assumed that such remedies would be available,” no finding of immunity was warranted).

The specific provisions of GARA further reinforce that tort claims remain available against manufacturers for type certificated designs. Congress enacted an eighteen-year statute of repose because it determined that “any design or manufacturing defect not prevented or identified by the Federal regulatory process by then should, in most instances, have manifested itself.” H.R. Rep. No. 103-525(II), at 6. Congress thus recognized that the type certification process will not catch all design defects, and it ensured that in cases relating to defective designs, “where the statute of repose has not expired, State law will continue to govern fully, unfettered by Federal interference.” *Id.* at 7. Congress also provided that when, as here, a manufacturer conceals a defect from the Administration, the statute of repose does not protect the manufacturer at all. *See* GARA § 2(b). Congress thus recognized that tort liability and federal regulations serve a common purpose: ensuring that manufacturers create safe designs, and that they promptly report and cure any defects.

Congress’s recognition that the type certification process alone cannot ensure aviation safety is well-founded. As explained in Part V(A)(2), *supra*, the Administration is overwhelmed. It has more certification applications than its

engineers can deal with, and it has for years been outsourcing more than ninety percent of the process to aircraft manufacturers themselves. As the Supreme Court explained in *Varig Airlines*, the Administration does not do its own testing, but instead relies on the data submitted by the manufacturers; and “in most cases the [Administration] staff performs only a cursory review of the substance of th[e] overwhelming volume of documents submitted for its approval.” 467 U.S. at 797. And as this Court recognized, “[s]ome manufacturers are able to grant themselves a type certificate.” *Robinson*, 454 F.3d at 166 (emphasis added). Consequently, the quality of the certification process has, for decades, been uncertain and inconsistent.

This uncertainty would be sufficient to reject Lycoming’s argument even if aircraft manufacturers always operated in good faith. But they do not. A recent investigative report shows that “[w]ide-ranging defects have persisted for years as manufacturers covered up problems, lied to federal regulators and failed to remedy known malfunctions” Thomas Frank, *Safety Last: Lies and Coverups Mask Roots of Small-Plane Carnage*, USA Today (June 2, 2014).²⁸ It is obvious that “the [Administration] cannot fulfill its obligation to promote civil aircraft safety if information which may be highly relevant to safety is withheld in the first

²⁸ Available at <http://www.usatoday.com/story/news/nation/2014/06/12/lies-coverups-mask-roots-small-aircraft-carnage-unfit-for-flight-part-1/10405323/>.

instance.” *Butler v. Bell Helicopter Textron, Inc.*, 109 Cal.App.4th 1073, 1086 (Cal. Ct. App. 2003). That concern is salient in this very case: as the district court concluded, Sikkelee’s claim alleging a violation of 14 C.F.R. § 21.3, which governs failure to report a known defect, merits a trial because she has presented ample evidence that Lycoming concealed the design defects at issue here.

In this context, treating a type certificate as a permanent and absolute defense to liability would be inimical to congressional intent. On the other hand, allowing Sikkelee’s suit to proceed would have a “salutary effect” because “[a]n inquiry . . . into whether the manufacturer in fact complied with the regulations . . . would assist the [Administration] in policing a manufacturer’s compliance rather than hampering the agency in this regard.” *Pease*, 2011 WL 6339833, at *23 (citation omitted); *see also Lewis v. Lycoming*, 957 F. Supp. 2d 552, 559 (E.D. Pa. 2013) (“State products liability, negligence and breach of warranty claims for aircraft design or manufacture will only help, not harm, Congress in obtaining its goal of maximum safety.”).

The district court resisted these arguments, reasoning that in order for a lawsuit to enforce federal regulations to have the “salutary effect” of ensuring compliance with the regulations, the jury must “interpret and apply the FAA regulations as would the Administrator himself”—a prospect the district court found unlikely. (J.A., A51) This contention ignores two important facts. First, the

“Administrator” is not a single person adjudicating every type certification application using uniform and consistent criteria. Instead, applications are being handled by Administration field offices and by thousands of private sector engineers—such that one of the principal complaints about the process is that it produces inconsistent and unpredictable results. *See, e.g., GAO, Aviation Safety: Certification & Approval Processes Are Generally Viewed as Working Well, but Better Evaluative Information Needed to Improve Efficiency*, GAO-11-14, at 11 (2010) (“[T]he agency’s requirements for the various approvals—such as type certificates and supplemental type certificates—varied substantially because of differences in standards and inconsistent application of those standards by different FAA field offices.”). Variation is thus built into the system, and permitting courts to determine whether manufactured designs actually violate federal regulations poses no conflict with the type certification scheme.

Second, aircraft are crashing and people are dying. If the type certification process is meant to ensure “the highest degree of safety in air transportation,” 49 U.S.C. § 40101(a)(3), then it is failing miserably. “Nearly 45,000 people have been killed over the past five decades in private planes and helicopters—almost nine times the number that have died in airline crashes,” and in many instances “crashes, deaths and injuries were caused by defective parts and dangerous designs, casting doubt on the government’s official rulings and revealing the inner

workings of an industry hit so hard by legal claims that it sought and won [GARA statute of repose] liability protection from Congress.” *Safety Last, supra*.

Finally, it is worth briefly addressing the difficulty that led the district court to suggest that Lycoming file a summary judgment motion in the first instance: the notion that it would be difficult to formulate jury instructions around the federal design regulations. (*See J.A.*, A459-463, A465-470) This concern is both irrelevant and unfounded. It is irrelevant because no amount of difficulty in formulating jury instructions justifies the district court’s holding that a type certificate grants immunity to the certificate-holder: the two issues are doctrinally and logically unrelated. Put more broadly, no amount of difficulty in fashioning jury instructions would justify granting judgment to Lycoming if it engaged in culpable conduct.

The district court’s concern is also unfounded. The applicable regulations are sufficiently straightforward that a jury can understand them. For instance, one of the principal design regulations at issue here provides that “[t]he fuel system of the engine must be designed and constructed to supply an appropriate mixture of fuel to the cylinders throughout the complete operating range of the engine under all flight and atmospheric conditions.” 14 C.F.R. § 33.35(a). These terms themselves can form a jury instruction—which is, in fact, what one state court in Pennsylvania already did, in a case where Lycoming was held liable for withholding information regarding a defect relating to its carburetor design. *See*

(J.A., A533; Jury Charge Conference, *Pridgen v. Lycoming Engines*, Nos. 3838, 4008, at 25 (Pa. Ct. Common Pleas April 5, 2010), *transcript filed in the district court as* ECF No. 468-2 (setting forth the regulation and stating that “[t]his Federal regulation dictates the duty of care required of someone in the same situation as the defendant.”)) To the extent that any of the terms in the regulation are unusual, “expert testimony on various aspects of aircraft safety may be helpful to the jury.” *Abdullah*, 181 F.3d at 371. Sikkelee has also endorsed and provided a detailed expert report of a former Administration engineer, and other aviation experts’ reports supporting her claims. (ECF No. 234-5, Expert Rep. of Twa; ECF No. 234-6, Expert Rep. of Sommer) And to the extent that the regulations leave a genuine gap, background principles of negligence or strict liability law should be invoked to fill those gaps. That is because open-ended regulations necessarily assume that regulated parties will exercise ordinary care. *See, e.g., American Airlines, Inc. v. Wolens*, 513 U.S. 219, 236-37 (1995) (Stevens, J., concurring in part and dissenting in part) (“Like contract principles, the standard of ordinary care is a general background rule against which all individuals order their affairs. Surely Congress did not intend to give airlines free rein to commit negligent acts subject only to the supervision of the Department of Transportation, any more than it meant to allow airlines to breach contracts with impunity.”). Establishing what the ordinary standard of care requires is a question of proof—not instructions.

Ultimately, jury instructions relating to the federal regulations at issue here are not likely to be substantially more complicated than instructions in other products liability cases, or medical malpractice cases, or nuclear disaster cases, or patent cases—all of which involve technical fields and potentially unfamiliar standards of care. Courts have been overseeing such trials for decades, and they can create satisfactory jury instructions around federal aviation design regulations.

In sum, the district court's holding regarding type certification cannot be reconciled with controlling authority. The fact that the Administration makes the initial determination as to regulatory compliance was never intended to be an absolute and permanent bar to suit when designs actually prove unsafe. This Court should not countenance that result, especially since the Administration itself demanded that Lycoming fix the possible O-320 series engine design-related issue as to throttle body to bowl screws loosening, and has stated that Lycoming is responsible for all service related issues in MA series carburetors related to design. (J.A., A633-634; ECF No. 234-8, 1972 FAA Letter re: loose throttle body to bowl screws; ECF No. 234-13, 1972 FAA Memo re: MA series carburetors)

B. In The Alternative, This Court Should Hold That *Abdullah* Preemption Does Not Apply To Sikkelee's Claims Against Lycoming.

The Court would be on equally solid footing if it issues a broader holding that federal aviation law does not preempt state law products liability claims

against general aviation manufacturers except to the limited extent provided by the GARA statute of repose. Under this rule, state standards of care—in addition to or instead of federal ones—would govern Sikkelee’s claims against Lycoming.

“In every preemption case,” this Court’s “inquiry is guided by two principles.” *Farina v. Nokia Inc.*, 625 F.3d 97, 115 (3d Cir. 2010). First, that “the intent of Congress is the ‘ultimate touchstone’ of preemption analysis.” *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). “Second, we ‘start[] with the basic assumption that Congress did not intend to displace state law.’” *Id.* at 116 (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). “Only a clear and manifest conflict with federal law, or clear and manifest Congressional intent to override state choices, will overcome the presumption against preemption.” *PPL Energyplus, LLC v. Solomon*, 766 F.3d 241, 250 (3d Cir. 2014).

This Court has recognized, at least since *Abdullah*, that private remedies in the field of aviation do not conflict with federal objectives. In fact, “it is evident in both the savings and the insurance clauses of the [FAAct] that Congress found state damage remedies to be compatible with federal aviation safety standards.” 181 F.3d at 375. Thus, preemption is only possible if the Court finds “clear and manifest Congressional intent to override state choices.” *PPL Energyplus*, 766 F.3d at 250.

Congress has never clearly stated its intent to preempt claims like Sikkelee's. Prior to this case, state products liability claims had always been a part of aviation law. This was true after the FAA Act was enacted in 1958; after Congress enacted the express preemption provision in the ADA in 1972; and after Congress enacted the GARA statute of repose in 1994. At every juncture, Congress has been aware that general aviation aircraft manufacturers can be sued for design defects; and at every juncture, Congress has refused to interfere with such claims even as it has preempted other claims in other contexts. *See, e.g., Monroe v. Cessna Aircraft Co.*, 417 F. Supp. 2d 824, 830-36 (E.D. Tex. 2006) (finding no field preemption).

Again, the most specific statute is GARA. It is clear that none of the laws enacted prior to GARA preempted state law claims against general aviation manufacturers—otherwise, GARA would have been unnecessary. In enacting GARA itself, Congress acknowledged that “the public’s right to sue for damages is ultimately grounded in the experiences of the legal system and values of the citizens of a particular State.” H.R. Rep. No. 103-525(II), at 3-4 (1994). It further recognized that no prior law had preempted such claims, and that Congress had chosen “to tread very carefully when considering proposals . . . that would preempt State liability law.” *Id.* at 4. The GARA statute of repose is a “very limited” preemption provision, not the sweeping field preemption found in *Abdullah*. *See*

id. at 6. And Congress recognized that outside the narrow scope of GARA, “State law will continue to govern fully, unfettered by Federal interference.” *Id.* at 7.

In the face of GARA, and applied to this distinct field of general aviation design regulation, *Abdullah* preemption is a poor fit, and this Court should distinguish the case. Whatever *Abdullah*’s merits on its own facts, the general aviation design regulations here are different. *See, e.g., Lewis v. Lycoming*, 957 F. Supp. 2d 552, 558-59 (E.D. Pa. 2013) (“The claims before us are simply outside the bounds of both *Abdullah* and *Elassaad*. Neither case addressed whether federal law preempts the standard of care in actions involving the design or manufacture of aircraft or aircraft components . . .”).

Moreover, the broad language in *Abdullah* stating that the entire field of aviation safety is preempted constitutes dictum with regard to products liability claims against general aviation manufacturers. *See, e.g., id.* at 557; (J.A., A32) (district court stating that it found this reasoning “compelling”). *Abdullah* dealt with the in-air operation of a commercial aircraft. It never discussed products liability law, including GARA—and that silence strongly suggests that the Court intended to limit its holding to the operation of commercial aircraft.²⁹ The Court’s later holding in *Elassaad*—that *Abdullah* does not suggest preemption of personal

²⁹ Either that, or the Court’s analysis was fundamentally flawed because it overlooked a major relevant statutory development.

injury claims arising out of disembarkment from a commercial airliner—reinforces that narrow reading of *Abdullah*. 613 F.3d at 130-31.³⁰

A close review of the relevant regulations further confirms that *Abdullah* is distinguishable. Unlike the detailed and comprehensive regulations governing the operation of commercial aircraft, federal aviation design regulations are less detailed and less sweeping. Contrast, for example, the seat belt regulation at issue in *Abdullah*, 14 C.F.R. § 121.317, with the design regulation governing fuel metering systems, 14 C.F.R. § 33.35. The seat belt regulation provides, among other things, that “no person may operate an airplane” unless it has seat belt signs, which “must be constructed so that the crewmembers can turn them on and off”; that “the ‘Fasten Seat Belt’ sign shall be turned on during any movement on the surface, for each takeoff, for each landing, and at any other time considered necessary by the pilot in command”; that each passenger “shall fasten his or her safety belt about him or her and keep it fastened while the ‘Fasten Seat Belt’ sign is lighted”; and that passengers must comply with any crew member instructions relating to the seat belt sign. *Id.* § 121.317(a), (b), (f), (k). The regulation is

³⁰ In *Elssaad*, this Court also stated that the “primary holding” of *Abdullah* is that the field of aviation safety is preempted. 613 F.3d at 125. And it cited regulations relating to certification as an example of aviation safety regulations. *See id.* at 128. These statements, however, were dictum in *Elssaad*, where neither the parties nor the Court ever had any reason or occasion to consider whether *Abdullah* applies to products liability claims against general aviation manufacturers.

specific, and is phrased in mandatory terms. Thus, the airline in *Abdullah* reasonably argued that the actions of its crew members were dictated by the regulations, and that the passengers—or at least those who failed to fasten their seat belts—were negligent for failing to comply with the regulations.

The regulations at issue in this case do not afford Lycoming anything close to the same degree of guidance—and therefore do not afford the same protection. As an example, the foregoing fuel metering regulation provides that “[t]he fuel system of the engine must be designed and constructed to supply an appropriate mixture of fuel to the cylinders throughout the complete operating range of the engine under all flight and atmospheric conditions.” 14 C.F.R. § 33.35(a). But it does not dictate that the aircraft engine manufacturer must use a carburetor as opposed to fuel injection, for example. And if the manufacturer does use a carburetor, the regulation does not dictate a specific design. Instead, manufacturers are permitted to implement their own designs, and are ultimately responsible for ensuring their safety. In this case, Lycoming itself approved the engineering change to throttle body to bowl screws and lock washers. (ECF No. 234-12, Lycoming Eng. Chg. Order re: bowl screws (filed under seal as ECF No. 233)) Various feasible alternatives—including a safety lock wire, fuel injection, a different gasket material—existed that would have been safer and would have complied with the regulation. (ECF No. 234-6, at 28-29, Expert Rep. of Sommer)

Because the design and continued airworthiness regulations at issue here are substantially less detailed and more permissive than those in *Abdullah*, the inference of field preemption is far weaker as it relates to aircraft design and manufacturing. *See Estate of Sesay v. Hawker Beechcraft Corp.*, No. 2:11-CV-04637-JHN, 2011 WL 7501887, at *3 (C.D. Cal. Dec. 9, 2011) (“There is no indication that the [FAAct] has pervasively regulated every aspect of plane design.”).

Perhaps the easiest way to see why *Abdullah* does not apply is to walk through Section B of the *Abdullah* opinion, where the Court explained its disagreement with other courts regarding four important arguments. Had the *Abdullah* Court been confronted with the facts of this case, the analysis and the result would have been different.

Abdullah first rejected the argument that because the ADA contains a limited express preemption provision, there is no reason to infer broad field preemption. *See Abdullah*, 181 F.3d at 372 (collecting cases). This Court rejected that argument for two reasons: first, there was no guarantee that “possible alternatives or supplemental provisions were necessarily considered and rejected by the legislative draftsmen”; and second, the ADA was concerned with competition, and not safety, so the fact that the ADA did not discuss preemption in the field of safety was not probative. *Id.* at 373.

In this case, the relevant contrasting statute is not the ADA, but GARA. GARA's history establishes that the "legislative draftsmen" did consider broader laws that would have "revise[d] substantially a number of substantive and procedural matters relating to State tort law"; but they ultimately enacted a "very limited" statute of repose. H.R. Rep. No. 103-525(II), at 6. *See also Wong v. Precision Airmotive, LLC*, No. 05CV1604WWE, 2008 WL 160212, at *2 (D. Conn. Jan. 10, 2008) (describing the bills that were rejected before the enactment of GARA and finding no field preemption). Moreover, unlike the ADA, GARA does address safety: the statute deals with products liability claims where it is applicable, and expressly preserves state law claims for crash victims when manufacturers conceal defects from the Administration and provides a re-tolling provision. Thus, the *expressio unius* inference is compelling: Congress had the option to preempt state law products liability claims more broadly, and it chose not to. *See, e.g., Sheesley v. Cessna Aircraft Co.*, No. Civ. 02-4185-KES, 2006 WL 1084103, at *22 (D.S.D. Apr. 20, 2006).

Second, *Abdullah* rejected the argument that state standards could supplement federal ones by noting that "there is no gap to fill with a state common law standard" because 14 C.F.R. § 91.13 broadly prohibits "'careless or reckless' operation of an aircraft," and thus "occupies the apparent void beyond the specified 'minimum' standards." *Abdullah*, 181 F.3d at 374. But it cannot be disputed that

there is no counterpart to § 91.13 in the design context, which means that there *is* a “gap to fill.” As the district court acknowledged, the existence of gaps is “a sledgehammer to one of the pillars” underlying *Abdullah*’s field preemption holding. (J.A., A37)

Third, *Abdullah* acknowledged that other courts had relied upon the savings and insurance clauses of the FAAct to find that state standards were not preempted. *See* 181 F.3d at 374. The Court acknowledged that “[t]hese two sections do demonstrate that Congress intended to allow for compensation of persons who were injured in aviation mishaps,” but held that the part of its decision preserving state remedies for violations of federal standards of care gave them meaning. *Id.* at 375. Of course, the savings clauses are also fully consistent with liability under state law. *See, e.g., Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1442 (10th Cir. 1993) (collecting cases relying upon the savings and insurance clauses to find no preemption).

Finally, *Abdullah* brushed aside the notion that the states may regulate aviation safety under their police powers. *See* 181 F.3d at 375. It is one thing to hold that state police powers are not relevant to commercial air travel involving seatbelt warnings—travel which often takes place between many states and countries aboard a very sophisticated machine. It is quite another to apply that reasoning to general aviation, involving aircraft that are far less sophisticated and

obviously limited in scope of travel. Moreover, as *Abdullah* itself recognized, the police powers argument stems from the presumption against preemption—which is not overcome with regard to general aviation products liability. *See id.*

In sum, state tort liability, enforcing state standards of care, has always been part of the regulatory framework for general aviation manufacturers. Congress has only ever addressed that once, in GARA, which enacted only “very limited” preemption, *i.e.*, a statute of repose. H.R. Rep. No. 103-525(II), at 6 (1994); *Wright v. Bond-Air Ltd.*, 930 F. Supp. 300, 305 (E.D. Mich. 1996). “[I]n cases where the statute of repose has not expired,” Congress understood that “State law will continue to govern fully, unfettered by Federal interference.” H.R. Rep. No. 103-525(II), at 7. This Court should effectuate Congress’s intent by holding that *Abdullah* preemption does not preempt state standards of care in this case.

Importantly, the Court need not overrule or modify *Abdullah* in order to distinguish it. As *Abdullah* itself explained, even though “field preemption” carries broad connotations, “the scope of a field deemed preempted by federal law may be narrowly defined.” 181 F.3d at 367. This Court can easily clarify that the “field” of “aviation safety” preempted by the FAA Act is not broad enough to cover general aviation aircraft design and required continued airworthiness obligations. That

result would be consistent with a large number of courts that have considered the question.³¹

IX. CONCLUSION

This Court should reverse the district court's September 10, 2014 decision insofar as it grants summary judgment to Lycoming, and remand this case for a jury trial on all of Sikkelee's claims against Lycoming.

³¹ See generally *Trust v. Lake Aircraft, Inc.*, 992 F.2d 291 (11th Cir. 1993); *Lucia v. Teledyne Continental Motors*, 173 F. Supp. 2d 1253, 1266 (S.D. Ala. 2001); *Sunbird Air Services, Inc. v. Beech Aircraft Corp.*, 789 F. Supp. 360, 363 (D. Kan. 1992); *Elsworth v. Beech Aircraft Corp.*, 691 P.2d 630 (Cal. 1984); *Holiday v. Bell Helicopter Textron, Inc.*, 747 F. Supp. 1396, 1399-1400 (D. Hawaii 1992); *Maitra v. Mitsubishi Heavy Industries, Ltd.*, No. CIV.A.SA01CA0209FBNN, 2002 WL 1491855, *6 (W.D. Tex. 2002); *Damian v. Bell Helicopter Textron, Inc.*, 352 S.W.3d 124, 137 (Tex. App.—Fort Worth 2011); see also *Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc.*, 555 F.3d 806, 811 (9th Cir. 2009) (case law “neither precludes all claims except those based on violations of specific federal regulations, nor requires federal courts to independently develop a standard of care when there are no relevant federal regulations. Instead, it means that when the agency issues ‘pervasive regulations’ in an area, like passenger warnings, the FAA preempts all state law claims in that area. In areas without pervasive regulations or other grounds for preemption, the state standard of care remains applicable.”); *In re September 11th Litig.*, 280 F. Supp. 2d 279, 289 (S.D.N.Y. 2003) (applying state law to tort claims concerning aviation safety—no showing of any inconsistency between the law of duty provided by New York law and federal statutes or regulations).

Respectfully submitted this 5th day of January, 2015.

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CERTIFICATES OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), I hereby certify that this brief was produced in Times New Roman (a proportionally-spaced typeface), 14- point type and contains 13,631 words (based on the Microsoft Word 2011 for Mac word count function), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify pursuant to L.A.R.31.1(c) that the electronic copy of this brief filed with the Court is identical in all respects to the hard copy filed with the Court, and that a virus check was performed on the electronic version using Virustotal.com. No computer virus was found.

Dated January 5, 2014

/s/ John D. McClune
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CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit and remain a member in good standing of the Bar of this Court. Tejinder Singh is also a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Dated January 5, 2014

/s/ John D. McClune
KATZMAN, LAMPERT & MCCLUNE

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of January, 2015, a true and correct copy of the foregoing was served via this Court's CM/ECF.

Dated January 5, 2014

/s/ John D. McClune
KATZMAN, LAMPERT & MCCLUNE

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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

October 7, 2014

DCO-001

Nos. 14-8120 & 14-8124

JILL SIKKELEE,
Individually and as Personal Representative
of the Estate of David Sikkelee, deceased,

v.

PRECISION AIRMOTIVE CORPORATION;
PRECISION AIRMOTIVE LLC,
Individually and as Successor-In-Interest
to Precision Airmotive Corporation;
BURNS INTERNATIONAL SERVICES CORPORATION,
Individually and as Successor-In-Interest to Borg-Warner Corporation,
and Marvel-Schebler, a Division of Borg-Warner Corporation;
TEXTRON LYCOMING RECIPROCATING ENGINE DIVISION, A Division of Avco
Corporation;
AVCO CORPORATION; KELLY AEROSPACE, INC.,
Individually and Joint Venturer and a Successor-In-Interest;
KELLY AEROSPACE POWER SYSTEMS, INC.,
Individually and as Joint Venturer and Successor-In-Interest
a/k/a Electrosystems, Inc.
a/k/a Confuel Inc.;

ELECTROSYSTEMS, INC., Individually and as Joint Venturer and as Successor-In-
Interest
a/k/a Consolidated Fuel Systems, Inc.
a/k/a Confuel, Inc.;

CONSOLIDATED FUEL SYSTEMS, INC., a/k/a Confuel, Inc.

Jill Sikkellee, Individually and as Personal
Representative of the Estate of David Sikkelee,
deceased,

Petitioner in No. 14-8120

AVCO Corporation,
Petitioner in No. 14-8124

(M.D. Pa. No. 4-07-cv-00886)

A2

Present: FISHER, SHWARTZ and SLOVITER, Circuit Judges.

1. Petition for Permission to Appeal under 28 U.S.C. Section 1292(b) by Petitioner/Cross-Respondent Jill Sikkelee.
2. Cross-Petition for Permission to Appeal under 28 U.S.C. Section 1292(b) by Avco Corp.
3. Response by Respondent in 14-8124 Jill Sikkelee in Opposition to Cross-Petition for Permission to Appeal under 28 U.S.C. Section 1292(b) by Avco Corp.

Respectfully,
Clerk/tmk/tyw

ORDER

The foregoing Petition for Permission to Appeal under 28 U.S.C. Section 1292(b) by Petitioner/Cross-Respondent Jill Sikkelee is granted; Cross-Petition for Permission to Appeal under 28 U.S.C. Section 1292(b) by AVCO is denied.

By the Court,

s/Dolores K. Sloviter
Circuit Judge

Dated: October 16, 2014
tmk/cc: all counsel of record



Marcia M. Waldron

Marcia M. Waldron, Clerk

A3

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JILL SIKKELEE, individually and : Case No. 4:07-cv-00886
as personal representative of the :
estate of DAVID SIKKELEE, :
deceased, :

Plaintiff : (Judge Brann)

v. :

PRECISION AIRMOTIVE :
CORPORATION, PRECISION :
AIRMOTIVE LLC, PRECISION :
AEROSPACE CORPORATION, :
PRECISION AEROSPACE :
SERVICES LLC, PRECISION :
AVIATION PRODUCTS :
CORPORATION, PRECISION :
PRODUCTS LLC, ZENITH FUEL :
SYSTEMS LLC, BURNS :
INTERNATIONAL SERVICES :
CORPORATION, FORMER FUEL :
SYSTEMS, INC., MARK IV :
INDUSTRIES, INC., TEXTRON :
LYCOMING RECIPROCATING :
ENGINE DIVISION, TEXTRON, :
INC., AVCO CORPORATION, :
KELLY AEROSPACE, INC., :
KELLY AEROSPACE POWER :
SYSTEMS, INC., :
ELECTROSYSTEMS, INC., :
CONSOLIDATED FUEL :
SYSTEMS, INC., :

Defendants. :

MEMORANDUM

September 10, 2014

For the following reasons, the motion for summary judgment of AVCO Corporation, on behalf of its Lycoming Engines Division (hereinafter, “Lycoming”), is granted in part and denied in part.

I. Background

Before turning to Lycoming’s pending motion for summary judgment, the Court should review the relatively long history of this products liability case. Commenced in May 2007 by way of a 103-page Complaint, the case was originally assigned to the Honorable John E. Jones III, and was reassigned to the undersigned almost six years later on January 17, 2013.

Plaintiff is Jill Sikkelee (hereinafter, “Sikkelee”), individually and as personal representative of the estate of David Sikkelee (hereinafter, “David”); David was Jill’s husband when he died piloting an airplane in 2005. Sikkelee’s Complaint asserts that David’s “aircraft lost power as a result of an engine fuel delivery system [i.e., carburetor] malfunction/defect [that, in turn, caused] the aircraft and its pilot [i.e., David] to lose control and crash” shortly after takeoff from Transylvania County Airport in Brevard, North Carolina. (Complaint, May 16, 2007, ECF No. 1 ¶ 11). The Complaint asserts claims against seventeen

defendants associated with the alleged “malfunction/defect” that supposedly caused David’s crash and death. Sikkelee predicated her claims on state law theories of strict liability, breach of warranty, negligence, misrepresentation, and concert of action.

Sikkelee’s claims against five defendants were dismissed by stipulation on Dec. 22, 2008 (ECF No. 102); two more defendants were dismissed by stipulation on April 14, 2010 (ECF No. 140); and settlement with four more defendants was approved on July 13, 2010. (ECF No. 146).

On August 13, 2010, more than three years after the Complaint was filed, Judge Jones dismissed Sikkelee’s claims against the remaining defendants. A decade before, in Abdullah v. Am. Airlines, 181 F.3d 363 (3d Cir. 1999), the United States Court of Appeals for the Third Circuit held “that federal law establishes the applicable standards of care in the field of air safety, generally, thus preempting the entire field from state and territorial regulation,” though “traditional state and territorial law remedies continue to exist for violation of those [federal] standards.”¹ Id. at 367, 375. Ten years later, Judge Jones concluded

¹Which is to say, the Circuit Court “did not conclude in Abdullah that the [plaintiffs’s] common law negligence claims themselves were preempted; instead, [the Circuit Court] determined only that the standard of care used in adjudicating those claims was preempted. Local law still governed the other negligence elements (breach, causation, and damages), as well as the choice and availability of

that Abdullah compelled dismissal of Sikkelee's Complaint: "[B]ased upon the state of the controlling law, this action is indeed controlled by Abdullah." Sikkelee v. Precision Airmotive Corp., 731 F. Supp. 2d 429, 438-39 (M.D. Pa. 2010) (hereinafter, "Sikkelee I"). Therefore, continued Judge Jones, "any claims that Plaintiff asserts under a state-law standard of care" – *i.e.*, all of Sikkelee's claims in the Complaint – "must necessarily be dismissed." Sikkelee I, 731 F. Supp. 2d at 438-439.

Although she had opposed the extension of Abdullah to her claims partly on the ground that "there is no specific federal regulation pertaining to the actual design, construction, inspecting, and testing [of the] carburetor/engine fuel system at issue [in this case. . . ., *i.e.*,] [t]here is a gap, unlike the facts in Abdullah" (Pl. Br., May 6, 2009, ECF No. 117 at 20), Judge Jones nevertheless granted Sikkelee "leave to amend the Complaint and assert claims under federal standards of care." Sikkelee I, 731 F. Supp. 2d at 439. On August 31, 2010, Sikkelee filed a 155-page Amended Complaint. (ECF No. 160).

As the case neared its fourth anniversary, Judge Jones granted Lycoming's motion to dismiss Sikkelee's claims for breach of warranty, misrepresentation, and concert of action. 2011 WL 1344635, at *4 (M.D. Pa. Apr. 8, 2011). Sikkelee

remedies." Elassaad v. Independence Air, Inc., 613 F.3d 119, 125 (3d Cir. 2010).

followed with a Second Amended Complaint (137 pages, for those keeping track) on April 18, 2011 (ECF No. 205), and by the time Judge Jones decided on March 13, 2012, that “Pennsylvania law will apply to the liability issues remaining in th[is] case,”² the termination of additional parties left Lycoming as the only defendant in the case. (ECF No. 288 at 1-2).

Just past the wooden anniversary, with the matter pared down to Sikkelee’s claims asserting Lycoming’s negligence and strict liability, Judge Jones decided two Lycoming motions for summary judgment on July 3, 2012 in an opinion reported at 876 F. Supp. 2d 479 (2012) (hereinafter, “Sikkelee II”). Upon consideration of the parties’s briefs, which “focus[ed] primarily on the issue of whether or not Lycoming is a manufacturer” subject to potential liability under Pennsylvania products liability law, Judge Jones denied Lycoming’s motions in part, holding that “genuine issues of material fact remain with regard to whether Lycoming is a manufacture [sic] relative to the defective carburetor and overhaul of the engine in 2004, whether a defect existed, and whether said defect proximately caused the Plaintiff’s injuries.” Sikkelee II, 876 F. Supp. 2d at 493, 495. He also, however, “grant[ed] summary judgment to the limited extent that

²Given Judge Jones’s previous determination that Abdullah applies and that, accordingly, federal law supplies the standard of care in this case, Pennsylvania law is preempted insofar as it imposes a standard of care on Lycoming.

Plaintiff's claims may be construed to allege a defect in the engine in 1969," reasoning that "Plaintiff has offered no evidence . . . demonstrating that the engine was defective when it left the Lycoming's Williamsport manufacturing plant in 1969 or that a defect existing at that time caused the 2005 aircraft accident." Id. at 486. Judge Jones ordered that "[t]he case shall proceed on the negligence and strict liability design defect theories asserted by the Plaintiff as they relate to the 2004 engine overhaul." Id. at 495.

On July 26, 2012, at Lycoming's urging, Judge Jones amended the Order that accompanied Sikkelee II to include a statement under 28 U.S.C. § 1292(b) encouraging the Third Circuit to hear an interlocutory appeal on the issue of "whether the Pennsylvania Supreme Court would adopt the RESTATEMENT (THIRD) OF TORTS or continue in its application of the RESTATEMENT (SECOND) OF TORTS." (ECF No. 306). Judge Jones had predicted in Sikkelee II that the Pennsylvania Supreme Court would be guided by the Restatement (Second) of Torts, and denied Lycoming's motions for summary judgment based on his application of the Restatement (Second). Deeming the Restatement (Second) versus Restatement (Third) issue "a controlling question of law" (ECF No. 306), Judge Jones suspended briefing on Lycoming's then-pending motion for reconsideration in order to give the parties the benefit of the Third Circuit's

expected disposition of Lycoming's interlocutory appeal (July 26, 2012, ECF No. 307).

On September 14, 2012, a panel of the Third Circuit denied Lycoming's Petition for Permission to Appeal Judge Jones's July 3, 2012 Order. 2012 WL 4953074 (3d Cir. Sept. 14, 2012). Lycoming petitioned for rehearing en banc and panel rehearing. The Third Circuit likewise rejected these petitions on October 17, 2012, but its Order decidedly instructed that "federal courts sitting in diversity and applying Pennsylvania law to products liability cases should look to sections 1 and 2 of the Restatement (Third) of Torts." 2012 WL 5077571 (3d Cir. Oct. 17, 2012) (emphasis added). The same day, Judge Jones denied as moot Lycoming's pending motion for reconsideration of Sikkelee II and provided that "[t]he parties MAY, at their election, file new motions for reconsideration, guided by the Circuit's direction that the RESTATEMENT (THIRD) is applicable to this action." (ECF No. 324). On October 31, 2012, Lycoming filed a motion for reconsideration of Sikkelee II to the extent it denied Lycoming's motion for summary judgment. (ECF No. 332). That motion for reconsideration was pending at the time this case was reassigned to the undersigned in January 2013.

On June 3, 2013, applying against Lycoming the demanding standard that

confronts a motion for reconsideration,³ this Court held that neither an intervening change in law nor supposed clear error warranted reversal of Sikkelee II, 2013 WL 2393005 (M.D. Pa. June 3, 2013), a determination the Court reinforced and elaborated upon in an Order dated July 9, 2013, 2013 WL 3456953 (M.D. Pa. July 9, 2013)), at oral argument on November 13, 2013 (Tr., Nov. 25, 2013, ECF No. 459 at 199-204), and in a Memorandum dated November 20, 2013 (ECF No. 456 at 4 n.2). Trial was then scheduled for December 2, 2013.

Some months before trial, however, it became clear that Sikkelee had hurdled the fence of the Restatement (Third) only to be confronted by the menacing hound that is Abdullah lurking on the other side. On October 24, 2013, Sikkelee proposed jury instructions incorporating some eighteen federal regulations and pronouncements of the Federal Aviation Administration (hereinafter, the “FAA”) and Civil Aeronautics Board, the FAA’s predecessor.

³See page *2 of the Court’s Memorandum:

The Court may amend its prior ruling “if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice.” Howard Hess Dental Lab. Inc. v. Dentsply Int’l, Inc., 602 F.3d 237, 251 (3d Cir.2010) (quoting Max’s Seafood Cafe v. Quinteros, 176 F.3d 669, 677 (3d Cir.1999)).

(ECF No. 409-7). The Court reviewed the proposed charge with a raised eyebrow, puzzled by Sikkelee's derivation of a standard of care from certain regulations, and unable to grasp the causal relevance of the alleged breach of others.

At a November 13, 2013 hearing, the Court expressed doubt concerning the validity of Sikkelee's proposed instructions and heard her counsel's attempts to justify them. By way of a November 20, 2013 Memorandum, the Court – after explaining the difficulty that courts have had fashioning jury instructions consistent with Abdullah generally⁴ – recounted the hearing as follows:

[P]laintiff's counsel was all but completely unable to assist the Court in, to use Chief Judge Conner's phrase, "formulating an intelligible statement of applicable law." The Court's confidence in the capacity of plaintiff's proposed instructions to guide the Court steadily diminished throughout the argument, and was lost completely when plaintiff's counsel made the incredible suggestion that the Court could fulfill its duty to instruct the jury by delivering Pennsylvania pattern instructions on negligence. See Abdullah, 181 F.3d at 376 (remanding case to district

⁴At pages 2-3, the Court wrote,

As Chief Judge Conner has explained, "FAA regulations relating to the design and manufacture of airplanes and airplane component parts were never intended to create federal standards of care." [Pease v. Lycoming Engines, 2011 WL 6339833, at *22 (M.D. Pa. Dec. 19, 2011)]. This makes construing the regulations as standards of care, which Abdullah requires, "arduous and impractical." Pease, 2011 WL 6339833, at *23. Chief Judge Conner found under similar circumstances that "[t]he court's obligation to instruct the jury with these obscure regulations will be severely challenged, and there is no jurisprudential guidance to assist the court in formulating an intelligible statement of applicable law." Id.

court to “evaluate whether the evidence on standards of care and the instructions given to the jury conformed to the federal aviation safety standards as we have described them”).

(ECF No. 456 at 5-6).

With trial approaching, the Court found itself “without sufficient guidance from either precedent or the parties as to the law that will govern not only the jury’s deliberations, but also the Court’s rulings on the relevance of evidence, motions pursuant to Fed. R. Civ. P. 50, and other questions.” (*Id.* at 6). The Court postponed trial to March 10, 2014 and ordered Sikkelee to submit a brief showing why the regulations she cited constitute the standard of care applicable to Lycoming; Lycoming was given the opportunity to respond. (Nov. 20, 2013, ECF No. 457).

Upon review of the parties’s papers, the Court determined that the issues raised would profit from examination in the posture of summary judgment. Not incidentally, an order resolving a motion for summary judgment would, in the Court’s view, be conducive of interlocutory consideration by the Third Circuit under 28 U.S.C. § 1292(b), consideration which this Court resolved to encourage in light of the vexation these issues have caused this Court and others. Compare Lewis v. Lycoming, 957 F. Supp. 2d 552 (E.D. Pa. 2013), with Pease v. Lycoming

Engines, 2011 WL 6339833, at *22 (M.D. Pa. Dec. 19, 2011).⁵ On February 10, 2014, the Court ordered summary judgment briefing limited to Lycoming's contention that, in view of the parties's evidence, no reasonable jury could conclude that Lycoming's allegedly tortious conduct breached a federal standard of care and caused David's crash thereby. Trial was postponed. (ECF No. 478). In accordance with the Court's Order, Lycoming moved for summary judgment on March 19, 2014. (ECF No. 482).

II. Summary Judgment Standard

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" where it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is "genuine" where "the evidence is such that a reasonable jury," giving credence to the evidence favoring the nonmovant and making all reasonable inferences in the nonmovant's favor, "could return a verdict for the nonmoving party." Id.

⁵The Third Circuit has permitted appeals of analogous issues in the past. See In re TMI, 67 F.3d 1105, 1106 (3d Cir. 1995) (certified question involving whether specified federal regulations constituted standard of care in case involving claims arising from the Three Mile Island nuclear meltdown).

For movants and nonmovants alike, the assertion “that a fact cannot be or is genuinely disputed must” be supported by “citing to particular parts of materials in the record,” or by “showing that the materials cited [by an adverse party] do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” Fed. R. Civ. P. 56(c)(1). “If a party fails to properly support an assertion of fact or fails to properly address another party’s assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion.” Fed. R. Civ. P. 56(e)(2).

Thus, where the moving party’s motion is properly supported and his evidence, if not controverted, would entitle him to judgment as a matter of law, the nonmoving party, to avoid summary judgment in his opponent’s favor, must answer by setting forth “genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” Anderson, 477 U.S. at 250. In the face of the moving party’s evidence, the nonmoving party’s mere allegations, general denials or vague statements will not create a genuine factual dispute. See Bixler v. Cent. Pennsylvania Teamsters Health & Welfare Fund, 12 F.3d 1292, 1302 (3d Cir. 1993). Only citation to specific facts is sufficient. Anderson, 477 U.S. at 250.

Where the nonmoving party has had adequate time for discovery and will

bear the burden of proof at trial, “a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial,” and summary judgment is warranted. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

III. Facts⁶

Sikkelee claims that Lycoming is liable for alleged defects in the “engine, . . . carburetor, . . . [and] fuel delivery system” (as well as various “manuals and instructions” related to these components) installed in the aircraft (a Cessna 172N) that David was piloting when he crashed fatally in 2005 (hereinafter, the “accident aircraft”). (2d Am. Compl., Apr. 18, 2011, ECF No. 205 ¶¶ 141, 144, 162). The nature of Lycoming’s association with the components at issue is important to the Court’s analysis and will be set forth in some detail.

In 1969, Lycoming manufactured the engine – a model O-320-DC2 bearing the serial number L-6590-39A (hereinafter, the “subject engine”) – that was installed in the accident aircraft at the time of David’s crash. (Def. Facts, Mar. 19, 2014, ECF No. 483 ¶¶ 6, 8 (hereinafter, “Def. Facts I”). Most of the subject

⁶Where the parties’s accounts differ, the Court views the facts and draws reasonable inferences therefrom in Sikkelee’s favor. See Montone v. City of Jersey City, 709 F.3d 181, 189 (3d Cir. 2013) (facts and reasonable inferences drawn therefrom must be favorable to party opposing motion for summary judgment).

engine's 35-plus years were spent in storage: Lycoming shipped the engine to Beagle Aircraft, Inc., in September of 1969, and it was not until 1998 that the engine was installed "factory new" on the accident aircraft. (Def. Facts I ¶ 7; Pl. Facts, Apr. 28, 2014, ECF No. 488 ¶ 7 (hereinafter "Pl. Facts")).

When the subject engine left Lycoming's control in 1969, it shipped with a carburetor⁷ – setting 10-3678-32, serial number A-25-15850 (hereinafter, the "original carburetor") – but the carburetor installed in the subject engine when the accident aircraft crashed in 2005 was not the original carburetor. (Def. Facts I ¶¶ 7, 9, 11; Pl. Facts ¶ 9). When the engine came out of storage in 1998, an overhauled Marvel-Schebler/Precision Airmotive Corp. (hereinafter, "Precision") model MA-4SPA carburetor bearing serial number CK 6 11739 was installed in accordance with the O-320-DC2's type-certificated design (more on FAA "type certification" shortly), which calls for installation of the MA-4SPA. (Pl. Ex., ECF No. 234-1; Pl. Ex., ECF No. 234-6 at 8).

Then, just under a year before David's accident, Kelly Aerospace, Inc. (hereinafter, "Kelly"), an FAA certified repair station, overhauled another MA-4SPA carburetor – this one bearing serial number CK 6 10964 and originally

⁷A "carburetor" is defined at Merriam-Webster.com as "the part of an engine in which gasoline is mixed with air so it will burn and provide the engine with power."

manufactured by Precision in 1978 (hereinafter, the “replacement carburetor”) – and installed it on the subject engine, again in accordance with Lycoming’s type-certificated design. (Pl. Facts ¶ 10; Pl. Ex., ECF No. 234-6 at 8; Pl. Ex., ECF No. 54 ¶ 101; Pl. Ex., ECF No. 207 ¶ 22). In performing the overhaul, Kelly was required to “use the methods, techniques and practices prescribed in [Lycoming’s] maintenance manual or Instructions for Continued Airworthiness,” 14 C.F.R. § 43.13(a) (2004), and did so (Pl. Ex., ECF No. 234-6 at 9-10). As part of the overhaul, Kelly removed parts from the replacement carburetor and replaced them with parts⁸ that Kelly had manufactured under its FAA-issued Parts Manufacturer Approval (hereinafter, “PMA”) (more on PMA shortly). (Def. Facts I ¶ 10). The Kelly-overhauled replacement carburetor was powering the subject engine when David was piloting the accident aircraft in 2005.

Those are the basics. To better understand Lycoming’s association with – and duties with regard to – the allegedly defective components, however, it is necessary to specify where Lycoming is situated in the context of the Civil Air Regulations (hereinafter, the “CARs”) and the Federal Aviation Regulations

⁸These parts include the “pump plunger assembly,” the “valve and seat assembly,” the “single piece venturi,” the “throttle shaft,” and the “carburetor float,” the last of which was actually manufactured by a vendor to Kelly. (Def. Facts I ¶¶ 12-13).

(hereinafter, the “FARs”). General background for the CARs and the FARs is provided in the margin.⁹

⁹The Kreindler Treatise provides a helpful guide through the statutory and regulatory evolution generally relevant to the case at bar:

As early as 1938, . . . Congress . . . enacted the Civil Aeronautics Act of 1938 (CAA), the predecessor to the Federal Aviation Act.

Originally, under the CAA, the Civil Aeronautics Board (CAB), an agency within the Department of Commerce, was the agency responsible for the regulatory aspects of aviation safety, including promulgating safety rules [and] inspecting and certifying aircraft,

In 1958, the Federal Aviation Act (the Act) was passed and continues to be the basic law of the land concerning aviation. With the enactment of the Federal Aviation Act of 1958, the regulatory functions of the CAB were transferred to a newly created Federal Aviation Agency. Subsequently, Congress enacted the Department of Transportation Act of 1966, which transferred the duties of the Federal Aviation Agency, in their entirety, to the newly created Department of Transportation (DOT) and its Secretary of Transportation. The Department of Transportation Act did not change the substance of the Federal Administration Act, but rather only reorganized the administrative hierarchy.

The Federal Aviation Agency, renamed as the Federal Aviation Administration (FAA), remains as an agency within the DOT and acts for the Secretary of Transportation in the safety rule-making, air-traffic controlling, and certification processes. The CAB was stripped of its safety and investigatory functions

. . . .

The Federal Aviation Regulations (FARs) are promulgated pursuant to the Federal Aviation Act and have the full force and effect of law. The FARs are a voluminous body of ever-changing rules and regulations

IV. Regulatory Structure

Lycoming is the holder of a “type certificate” for the Lycoming O-320-D2C model engine. (Def. Facts I ¶ 2). To obtain this status, which it did in 1966, Lycoming demonstrated the O-320-D2C’s compliance with certain “airworthiness” standards, see CAR § 13.10 (1964),¹⁰ and type certification denotes that, in the view of the Federal Aviation Administrator (the head of the FAA, hereinafter, the “Administrator”), the engine “is of proper design, material specification, construction, and performance for safe operation, and meets the minimum standards, rules, and regulations” prescribed by the FAA. 49 U.S.C. § 1423(a)

governing the qualifications, certification, and operation of aircraft, pilots, instructors, air carriers, and air traffic controllers. . . . In large part, they constitute a broad recodification of the former Civil Air Regulations, which were originally issued by the Secretary of Commerce, then by the Civil Aeronautics Board (CAB), then by the Federal Aviation Agency, and finally by the Federal Aviation Administration (FAA). They are codified in Title 14 of the Code of Federal Regulations.

2 Kreindler, Aviation Accident Law § 9.01(1)-(2) (Matthew Bender).

¹⁰When discussing type certification of the O-320-D2C, the Court refers to the CARs and relevant provisions of the Federal Aviation Act as they stood in 1964 because, in the Court’s understanding, the 1964 regulations and statute governed Lycoming’s 1966 application for type certification. Otherwise, the Court refers to the FARs and Federal Aviation Act as they stood in 2004, doing so on the understanding that the 2004 regulations and statute governed at the time of David’s accident.

(1964). The MA-4SPA carburetor, which is actually manufactured by Precision (or, in the past, Precision's predecessors), is a component of the O-320-D2C's type-certificated design.¹¹ (Pl. Ex., ECF No. 234-9).

By virtue of its status as a type certificate holder, Lycoming has the privilege of "obtain[ing] a production certificate" for the O-320-D2C. 14 C.F.R. § 21.45 (2004). A production certificate holder is permitted to produce duplicates of the certificated product, 49 U.S.C. § 44704(c) (2004), and Lycoming obtained such a certificate (although when it did so is not clear from the record) for the O-320-D2C (Pl. Ex., ECF No. 234-5 at 12) by demonstrating that it maintains a quality control system adequate to ensure that "each [O-320-D2C produced] will meet the design provisions of the [O-320-D2C] type certificate," 14 C.F.R. § 21.139 (2004), and that it has developed "procedures necessary to ensure that each article produced conforms to the type design and is in a condition for safe operation," 14 C.F.R. § 21.143(a) (2004). The FARs take account of the fact that a type certificated product (e.g., an engine) is often an assemblage of smaller components (e.g., a carburetor) purchased from outside suppliers (e.g., Precision), making clear that a production certificate holder must establish procedures for ensuring the quality and

¹¹Since at least the 1970s, it appears, Lycoming has licensed its design of the MA-4SPA to Precision or Precision's predecessors in interest. (Pl. Opp'n Br., Apr. 28, 2014, ECF No. 487 at 12; Pl. Ex., ECF No. 152-4 at 9; Pl. Ex., ECF No. 234-13).

conformity of all components integrated in the certificated product. 14 C.F.R. § 21.143(a)(2) (2004). Once a production certificate is obtained, the holder is responsible for maintaining its quality control system and for “[d]etermin[ing] that each part and each completed product . . . submitted for airworthiness certification or approval conforms to the approved design and is in a condition for safe operation.” 14 C.F.R. § 21.165 (2004). The subject engine is one of many O-320-D2Cs produced under Lycoming’s production certificate.

Like all machines, aircraft engines must be maintained to ensure proper functioning, and the FAA would prefer that you not rely on your handy uncle to do the job. Accordingly, only persons designated qualified by the FARs are permitted to “maintain, rebuild, alter, or perform preventative maintenance on an . . . aircraft engine,” a designation which includes agents of “[t]he holder of a repair station certificate.” 14 C.F.R. §43.3(a) & (e) (2004). Kelly held such a certificate when it overhauled the replacement carburetor. Under federal regulations, type certificate holders are required to “prepare and make available an approved manual containing instructions for the installation, operation, servicing, maintenance, repair, and overhaul of the engine,” CAR § 13.21 (1964), and as noted above, Kelly was required to follow Lycoming-prepared manuals and instructions in performing the overhaul. 14 C.F.R. § 43.13(a) (2004).

Finally, sometimes parts of aircraft engines should be replaced to ensure proper functioning. Rather than give the holder of a production certificate or his supplier a monopoly on replacements, however, the FARs permit others to “produce a modification or replacement part for sale for installation on a type certificated product . . . pursuant to a Parts Manufacturer Approval issued” by the Administrator. 14 C.F.R. § 21.303(a) (2004). An applicant obtains a PMA once the “Administrator finds, upon examination of the design and after completing all tests and inspections, that the design meets the airworthiness requirements of the Federal Aviation Regulations applicable to the product on which the part is to be installed” – unless “the design of the part is identical to the design of the part that is covered under a type certificate,” in which case no such showing is necessary – and the applicant “submits a statement certifying that he has established” a system for “ensur[ing] that each completed part conforms to its design data and is safe for installation on applicable type certificated products.” 14 C.F.R. § 21.303(d) & (g) (2004). Once a manufacturer has obtained a PMA, he is responsible for “determin[ing] that each completed part conforms to the design data and is safe for installation on type certificated products.” 14 C.F.R. § 21.303(k) (2004). A number of the parts that Kelly installed on the replacement carburetor were manufactured under a “Parts Manufacturer Approval.” (Pl. Facts ¶ 10).

In sum, the regulatory framework attempts to ensure – by way of issuing various certificates/authorizations and imposing responsibilities on their holders – that the design of an aircraft engine is safe (type certification), that duplicate engines manufactured for the public conform to the approved design (production certification), that engine maintenance and repairs are performed in accordance with manuals and instructions prepared by the manufacturer, 14 C.F.R. § 43.13 (2004), and that any replacement parts for the engine are either identical to the original parts described in the type certificate or otherwise airworthy (PMA). But in recognition of the fact that the Administrator’s authorization of an engine’s design and manufacture is an imperfect predictor of the engine’s future performance in the field, holders of type certificates and PMAs are required to “report any failure, malfunction, or defect in any product, part, process, or article” that they have manufactured when they determine that the item “has resulted in any of [various] occurrences,” including “engine failure.” 14 C.F.R. § 21.3(a) (2004). If the item left the holder’s quality control system, the holder must report any defect “that it determines could result in any of [various] occurrences,” again including “engine failure.” 14 C.F.R. § 21.3(b) (2004). Such reports are “made to the Aircraft Certification Office in the region in which the person required to make the report is located.” 14 C.F.R. § 21.3(e) (2004).

When the Administrator determines that an “unsafe condition exists” in an engine and that the “condition is likely to exist or develop in other [engines] of the same type design” and, further, that “design changes are necessary to correct the unsafe condition,” the type certificate holder must change the design and, upon the Administrator’s approval of the design, “make available the descriptive data covering the changes to all operators of [engines] previously certificated under the type certificate.” 14 C.F.R. §§ 21.99 & 39.5 (2004). Absent an unsafe condition, if the Administrator or the type certificate holder finds “through service experience that changes in type design will contribute to the safety of the [engine], the holder of the type certificate may submit appropriate design changes for approval.” 14 C.F.R. § 21.99(b) (2004). Upon approval, “the manufacturer shall make information on the design changes available to all operators of the same type of product.” Id.

Sikkelee asserts that David’s crash was caused by Lycoming’s violation of various federal regulations that govern type certification and breaches of the duties of type certificate and production certificate holders. In particular, Sikkelee argues that Lycoming’s design of the O-320-D2C engine (and its MA-4SPA carburetor) violated a number of design-related requirements that an engine must satisfy for type certification and that Lycoming failed to provide an adequate instruction

manual (CARs §§ 13.21, 13.100(a), 13.101, 13.104 & 13.110(a) (1964)); that Lycoming breached the duty of a production certificate holder to ensure that “each part and each completed product . . . submitted for . . . approval [by the certificate holder] conforms to the approved design and is in a condition for safe operation” (14 C.F.R. § 21.165 (2004)); and that Lycoming breached the duty of a type certificate holder to report engine defects to the Administrator and to suggest design changes in order to make the O-320-D2C safer (14 C.F.R. §§ 21.3 & 21.99 (2004)).

V. Discussion

Lycoming calls for summary judgment in its favor on various grounds: (1) Sikkelee fails to set forth federal regulations establishing a standard of care applicable to Lycoming’s allegedly tortious conduct; (2) assuming arguendo that the regulations cited by Sikkelee establish an applicable standard of care, Sikkelee adduces no evidence from which a reasonable jury could infer that Lycoming violated the regulations; and (3) assuming arguendo that Lycoming violated regulations that establish an applicable standard of care, Sikkelee proffers no evidence from which a reasonable jury could infer that the violation caused David’s crash. (Def. Supp. Br., Mar. 19, 2014, ECF No. 484 at 8 (hereinafter, “Def. Supp. Br.”)). In particular, Lycoming argues that (4) FAA type certification

of the O-320-D2C (including its carburetor, the MA-4SPA) “conclusively establishes” that the engine met any design-related standard of care established by federal regulations. (Def. Supp. Br. at 9).

Sikkelee retorts with her own battery of arguments: (1) Judge Jones “held that [Sikkelee] presented genuine issues of material fact as to whether Lycoming breached federal standards of care,” and the law of the case doctrine dictates that the Court should adhere to this ruling (Pl. Opp’n Br., Apr. 28, 2014, ECF No. 487 at 6, 8, 48 (hereinafter, “Pl. Opp’n Br.”)); (2) Lycoming has previously admitted that certain federal regulations apply in this litigation (Pl. Opp’n Br. at 7); and (3) by their terms, various federal regulations govern Lycoming’s allegedly tortious conduct, namely 14 C.F.R. §§ 21.3, 21.99 & 21.165 (2004), and CAR §§ 13.21, 13.100, 13.101, 13.104 & 13.110 (1964). Sikkelee also argues that (4) Judge Jones’s determination that federal law preempts the field of aviation safety and supplies the standard of care for this case dictates per force that federal regulations reach Lycoming’s allegedly tortious conduct because “[t]here can be no pervasive regulation [of the field of aviation safety, thus preempting the field from state regulation,] if there are no regulations applicable to [Lycoming’s] aircraft engine design.” (Pl. Opp’n Br. at 43). Further, (5) Sikkelee extrapolates from the “premise” of Abdullah that, where no specific federal regulation governs

Lycoming's conduct, the Court must recognize a federally supplied "overall concept" of appropriate behavior requiring reasonably careful conduct from aircraft designers, and corresponding liability for carelessness or recklessness that causes injury. (*Id.* at 45-46). Finally, (6) Sikkelee argues that the FAA's issuance of a type certificate for the O-320-D2C does not preclude a jury from finding that Lycoming's design fell short of the standards set by federal regulation.

As a mode of proceeding, the Court will first address briefly Sikkelee's arguments (1) and (2), holding that neither the law of the case doctrine nor the doctrine of judicial estoppel defeat Lycoming's motion for summary judgment. The Court will then skip to Sikkelee's arguments (4) - (6), rejecting each and explaining why Lycoming is therefore entitled to summary judgment in relation to Sikkelee's claims alleging violations of design-related regulations. After granting Lycoming summary judgment in relation to two additional regulatory bases for Sikkelee's claims, the Court will then discuss briefly the single basis on which Sikkelee may proceed to trial.

(a) The "law of the case" doctrine should not bar the Court from considering Lycoming's Motion for Summary Judgment.

Denying (in part) Lycoming's previous motion for summary judgment, Judge Jones held that Sikkelee "has created a genuine issue of material fact for the

jury with respect to whether Lycoming breached the applicable federal standards of care by negligently designing a defective product that proximately caused” David’s crash. Sikkelee II, 876 F. Supp. 2d at 495. Based on this ruling, Sikkelee now asserts that “[t]he law of the case mandates that material questions of fact abound as to Lycoming’s breach of the cited federal regulations.” (Pl. Opp’n Br. at 8).

The Court disagrees. Courts tend not to revisit issues already decided, a tendency named the “law of the case” doctrine. See Williams v. Runyon, 130 F.3d 568, 573 (3d Cir. 1997). The doctrine “does not limit the power of trial judges to reconsider their prior decisions,” but the Third Circuit “has identified two prudential considerations that limit a court’s authority to do so. First, the court must explain on the record the reasoning behind its decision to reconsider the prior ruling. Second, the court must take appropriate steps so that the parties are not prejudiced by reliance on the prior ruling.” Id.

The law of the case doctrine should not bar the Court from considering Lycoming’s pending Motion for Summary Judgment. For one thing, the law of the case doctrine does not apply to Judge Jones’s denial of Lycoming’s previous summary judgment motion:

A denial of a motion for summary judgment cannot determine the law of a case because it is an interlocutory order subject to reconsideration at

any time before final judgment in the case. It does not conclusively resolve any legal issue or find any fact . . . and has no claim- or issue-preclusive effect. Therefore, the law of the case doctrine does not apply to a denial of a summary judgment motion.

11 Moore's Federal Practice, § 56.121(1)(c) (Matthew Bender 3d ed.).

Moreover, assuming arguendo that the doctrine does apply, there is good reason to reconsider Judge Jones's holding. As Judge Jones noted at the time of his decision in 2012, "the parties' briefs focus primarily on the issue of whether or not Lycoming is a manufacturer" for purposes of Pennsylvania law, not on the issue of whether Lycoming breached federal standards, and Judge Jones reached his holding on the latter issue "after briefly engag[ing] in a largely independent analysis." Sikkelee II, 876 F. Supp. 2d at 493-94. This is not the foundation upon which highly reliable holdings are built. In addition, Sikkelee has presented no evidence showing prejudice to her resulting from reliance on Judge Jones's prior ruling and the Court perceives none. Thus, "prudential considerations" do not counsel against reconsideration of Judge Jones's holding.

(b) Lycoming's previous statements should not bar it from asserting that it is not liable for violating various CARs and FARs.

Without using the phrase (or citing any relevant caselaw), Sikkelee opposes Lycoming's summary judgment motion on the ground that the doctrine of judicial estoppel applies. Because "Lycoming . . . [previously] admitted in this case that

federal regulations apply” (Pl. Opp’n Br. at 7), Lycoming should now be barred from asserting that it cannot be found liable under various FARs and CARs, Sikkelee argues.

The Court disagrees. “Under the doctrine of judicial estoppel, a court can defend the integrity of the judicial process by barring a party from taking contradictory positions during the course of litigation.” G-I Holdings, Inc. v. Reliance Ins. Co., 586 F.3d 247, 261 (3d Cir. 2009). “Though there is no rigid test for judicial estoppel, three factors inform a federal court’s decision whether to apply it: there must be (1) irreconcilably inconsistent positions; (2) adopted in bad faith; and (3) a showing that estoppel addresses the harm and no lesser sanction [is] sufficient.” Id. at 262 (internal quotation marks and alterations omitted).

Either ignoring or not recognizing the existence of these factors, Sikkelee does not argue all of them, focusing all but exclusively on the first. But her argument fails even here. Most of the statements Sikkelee attributes to Lycoming were actually mouthed by other defendants (since dismissed from this case) in support of a motion joined by Lycoming. (See Pl. Opp’n Br. at 28-29). But by joining other defendants in the motion (see Def. Supp. Br., Apr. 6, 2009, ECF No. 111 at 2), Lycoming did not adopt the statements made in the other parties’s briefs – indeed it could not. See L.R. 7.8(a) (“No brief may incorporate by reference all

or any portion of any other brief”). Thus, the statements that Sikkelee pulls from other parties’s briefs are not Lycoming’s admissions. Moreover, the statements that Sikkelee attributes to Lycoming are not irreconcilably inconsistent with Lycoming’s current position that it is not liable for violating various FARs and CARs. For these reasons, judicial estoppel doctrine should not bar Lycoming from summary judgment.

(c) Federal preemption of the field of aviation safety does not necessarily imply that there must be a regulation “at hand” for Lycoming to have violated, and neither principles of field preemption nor Abdullah require this Court to fill in the gaps of the FARs and CARs with an “overall concept” of due care for engine designers; accordingly, Sikkelee’s arguments (4) and (5) are rejected.

Although she does not stress the point at this stage of the game, it is worth remembering that Sikkelee’s original position in this litigation – a position she no doubt maintains today – was that Abdullah does not control design defect claims against aircraft engine manufacturers. Judge Jones conceded that he perceived the “wisdom” of this position – as does this Court¹² – but thought his hands were tied

¹²See also Pease v. Lycoming Engines, 2011 WL 6339833, at *22 (M.D. Pa. Dec. 19, 2011) (Conner, C.J.) (“The undersigned concludes that Abdullah fails in its application to aviation products liability cases, and for the followings reasons, it would be far more facile to employ the applicable state standards of care in

by “the state of the law as articulated by the Third Circuit,” and held that federal law must supply the standard of care in this case because state standards are preempted. Sikkelee I, 731 F. Supp. 2d at 438. Since Judge Jones’s decision was issued in 2010, Judge Harvey Bartle III has reasoned that the pronouncements of the Third Circuit that Judge Jones viewed as “controlling” in Sikkelee I, id., were actually “dicta, not the holding of Abdullah,” Lewis v. Lycoming, 957 F. Supp. 2d 552, 558 (E.D. Pa. 2013), a view this Court also finds compelling.¹³

Nevertheless, the Court will not revisit Judge Jones’s determination to apply Abdullah, a determination reached after a careful effort to be faithful to the Third Circuit’s precedents in this jumbled area of the law.¹⁴ (Cf. section V.(a) supra (deciding to revisit issue previously addressed by Judge Jones where briefs

aviation products liability cases.”).

¹³ Judge Bartle would subject defendants like Lycoming to the standards of “state products liability, negligence, or breach of warranty law.” Id. at 599.

¹⁴Examining the relevant precedents, Judge Jones noted that the Third Circuit in Elassaad v. Independence Air, Inc., 613 F.3d 119 (3d Cir. 2010), “reaffirmed that ‘Abdullah’s primary holding was that federal law preempted the entire field of aviation safety,” and “strongly, and perhaps explicitly, suggest[ed] that the manufacture of aircraft parts is . . . contained in this field and, thus, subject solely to federal standards of care.” Sikkelee I, 731 F. Supp. 2d at 437-38 (quoting Elassaad, 613 F.3d at 126). See also Pease v. Lycoming Engines, 2011 WL 6339833, at *21-*22 (M.D. Pa. Dec. 19, 2011) (Conner, C.J.) (collecting evidence for the proposition that “the Third Circuit’s definition of ‘air safety’ litigation encapsulates aviation product liability cases”).

submitted to Judge Jones at that time focused primarily on a different issue and Judge Jones reached his holding based on largely independent analysis)).

Therefore, Abdullah applies.

Her prime position defeated, Sikkelee now offers second-best arguments purporting to show that the impact of Abdullah on her claims is limited. In particular, she argues that if her claim is subject to field preemption, then there must be a federal regulation “at hand” for Lycoming to have violated because “[t]here can be no pervasive regulation [of the field of aviation safety, thus preempting the field from state regulation,] if there are no regulations applicable to [Lycoming’s] aircraft engine design.” (Pl. Opp’n Br. at 43). Relatedly, Sikkelee argues that Abdullah implies the general principle that aircraft engine designers should not act carelessly or recklessly, even where no specific federal regulation governs their conduct, and that if the Court finds that “no general or specific regulation” reaches Lycoming’s allegedly tortious conduct, then “Lycoming is not immune . . . [-] there would simply be no preemption.” (Id. at 46).

The Court rejects both arguments. First, Abdullah does not compel the conclusion that the CARs and FARs imply a general standard of care for aircraft engine designers. At issue in Abdullah was plaintiffs’s suit for damages sustained while passengers on the severely turbulent American Airlines Flight 1473. 181

F.3d at 365. The plaintiffs brought suit “against defendant American Airlines, Inc., alleging negligence on the part of the pilot and flight crew in failing to take reasonable precautions to avoid the turbulent conditions known to them and in failing to give warnings reasonably calculated to permit plaintiffs to take steps to protect themselves.” Id. Judge Roth held that the plaintiffs could recover only if the conduct of the airline’s personnel fell below federal aviation safety standards.

In reaching this conclusion, Judge Roth analyzed the 1958 Federal Aviation Act (hereinafter, the “Aviation Act”) and federal regulations concerning aviation and “f[ound] implied federal preemption of the entire field of aviation safety.” 181 F.3d at 365. “[T]he [Aviation Act] and relevant federal regulations establish complete and thorough safety standards for interstate and international air transportation and . . . these standards are not subject to supplementation by, or variation among, jurisdictions.” Id. “[F]ederal law establishes the applicable standards of care in the field of air safety.” Id. at 367.

Examining federal law in order to identify the relevant standard of care, Judge Roth held that, in addition to any specific applicable regulations, “there is an overarching general standard of care under the [Aviation Act] and its regulations[,] . . . [arising] in particular from 14 C.F.R. § 91.13(a).” Abdullah, 181 F.3d at 365. Section 91.13(a) of the FARs provides with respect to “aircraft operations for the

purpose of air navigation” that “[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.” 14 C.F.R. § 91.13(a) (2004). Judge Roth instructed that § 91.13(a) should form an aspect of the standard of care applicable to the aircraft operations at issue in Abdullah on remand. Abdullah, 181 F.3d at 365.

The case at bar, however, is not an aircraft “operations” case. See 14 C.F.R. § 1.1 (2004) (“Aircraft means a device that is used or intended to be used for flight in the air.” “Operate, with respect to aircraft, means use, cause to use or authorize to use aircraft, for the purpose . . . of air navigation including the piloting of aircraft, with or without the right of legal control (as owner, lessee, or otherwise).”) (emphasis in original). No party argues that this is an “operations” case, and the Court sees no reasonable argument to be made, see Ellassaad v. Independence Air, Inc., 613 F.3d 119, 129-30 (3d Cir. 2010) (analyzing application of § 91.13 at length); therefore, § 91.13(a) does not readily supply a general standard of care to fill gaps left by the relevant FARs and CARs. Accordingly, Abdullah does not compel the conclusion that aircraft designers are governed by a general standard of care.

That much is clear, but how the Court should adapt Abdullah to apply in the context of the case at bar is anything but. See Pease v. Lycoming Engines, 2011

WL 6339833, at *23 (M.D. Pa. Dec. 19, 2011) (Conner, C.J.) (“[C]onstruing and applying FAA safety regulations as federal standards of care in [aircraft product liability cases] will be arduous and impractical”).¹⁵ A major source of the difficulty is that Judge Roth’s identification of § 91.13(a) (which bears a definite resemblance to a common law negligence standard) as an aspect of the standard of care applicable to the aircraft operations at issue in Abdullah seems to have provided critical support for her decision to find the field of aviation safety preempted.¹⁶ Abdullah, 81 F.3d at 365, 376. It is tempting, if for no reason other

¹⁵Deciding how federal regulations should translate into a standard of care has proven a bedeviling task in other contexts as well. See, e.g., In re TMI, 67 F.3d 1103, 1107 (3d Cir. 1995) (“Although it is clear that federal law governs the standard of care for tort claims arising from nuclear accidents, it is more difficult to discern the precise contours of that federal duty”).

¹⁶The existence of a “general standard” backstopping the “specific standards” set forth in the relevant federal regulations seems to have been an important aspect of Abdullah. Faulting the trial judge for the “narrow nature of the federal standard” applied below, Abdullah, 181 F.3d at 365, Judge Roth reasoned that, “[i]n a case . . . where there is no specific provision or regulation governing air safety, § 91.13(a) provides a general description of the standard required for the safe operation of aircraft,” id. at 371:

Thus, in determining the standards of care in an aviation negligence action, a court must refer not only to specific regulations but also to the overall concept that aircraft may not be operated in a careless or reckless manner. The applicable standard of care is not limited to a particular regulation of a specific area; it expands to encompass the issue of whether the overall operation or conduct in question was careless or reckless.

than an appreciation of symmetry, to conclude that because Judge Roth found the field of aviation safety federally preempted at least partly because she derived a general standard of care from the federal regulations applicable in Abdullah, that placing the facts of this case within the preempted field (as Judge Jones did) implies the existence of a general standard of care.

The Court is faced with an uncomfortable choice: (1) read an “overall concept” of careful conduct into the federal regulations, dissociated from any anchor in the text, or (2) apply only the standards specifically enunciated in the relevant federal regulations, leaving gaps unfilled by any overall concept of care, thus taking a sledgehammer to one of the pillars (load-bearing or ornamental?) that underlaid Judge Roth’s finding of preemption in Abdullah.¹⁷

Id. And faulting the Tenth Circuit’s decision in Cleveland v. Piper Aircraft Corp., 985 F.2d 1438 (10th Cir. 1993), abrogated by U.S. Airways, Inc. v. O’Donnell, 627 F.3d 1318 (10th Cir. 2010), for concluding that, because state common law duties do not conflict with duties imposed by the federal aviation safety regulations, federal law therefore does not preempt the common law, Judge Roth wrote that “there is no gap in the federal standards to fill with a state common law standard [because] [t]he § 91.13(a) prohibition of ‘careless or reckless’ operation of an aircraft occupies the apparent void.” Abdullah, 181 F.3d at 374. “[B]ecause the Administrator [of the FAA] has provided both general and specific standards, there is no need to look to state or territorial law to provide standards beyond those established by the Administrator.” Id.

¹⁷A third option that would normally be available – to fill the gaps with state common law not inconsistent with any specific federal regulation – is unavailable as a consequence of Judge Jones’s decision that this case is within the field of

aviation safety governed by Abdullah: “If Congress has preempted a field – whether it be expressly or by implication – state laws attempting to regulate within that field will be invalidated no matter how well they comport with substantive federal policies.” Abdullah, 181 F.3d at 374 (internal quotation marks omitted). See also Arizona v. United States, 132 S. Ct. 2492, 2502 (2012) (“Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.”).

A fourth option is Judge Bartle’s approach – to hold that aircraft design defect cases are not within the field governed by Abdullah – but Judge Jones’s previous ruling likewise precludes taking this option. See also Martin v. Midwest Express Holdings, Inc., 555 F.3d 806, 811 (9th Cir. 2009) (“[W]hen the agency issues ‘pervasive regulations’ in an area, like passenger warnings, the FAA preempts all state law claims in that area. In areas without pervasive regulations or other grounds for preemption, the state standard of care remains applicable.”).

There may be yet a fifth option, though it seems to have been eliminated by the Third Circuit’s decision in In re TMI, 67 F.3d 1103 (3d Cir. 1995), a case that set the groundwork for the Circuit Court’s approach in Abdullah, 181 F.3d at 367. Four years prior to the 1995 TMI decision, Judge Scirica concurred in an earlier Judge Mansmann opinion in the same case, 940 F.2d 832 (3d Cir. 1991), but doubted Judge Mansmann’s holding that, because the federal government occupied the field of nuclear safety, “plaintiffs’ rights [in nuclear safety torts actions] will necessarily be determined, in part, by reference to federal law, namely the federal statutes and regulations governing the safety and operation of nuclear facilities.” TMI, 940 F.2d at 860. Judge Scirica wrote,

[I]t is not clear to me that Congress has precluded state law tort suits predicated on standards of care that do not conform to federal regulation. As the majority notes, in Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983), the Court held that the Atomic Energy Act pre-empts all state regulation of nuclear safety. But in Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984), the Court considered the holding of Pacific Gas in the context of private tort law. In Silkwood, the Court held that Congress did not intend to pre-empt punitive damages awards under state tort law.

Sikkelee would have the Court pick option (1), but the Court thinks option

The Court relied on the legislative history of the Price–Anderson Act, which indicated that Congress intended to retain all state tort law remedies. The Court noted that “Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted,” and that the defendant has the burden of demonstrating pre-emption. *Id.* at 255, 104 S.Ct. at 625. It also indicated that a state may impose strict liability for nuclear accidents. *Id.* at 254, 256, 104 S.Ct. at 625. See also *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 186, 108 S.Ct. 1704, 1712–13, 100 L.Ed.2d 158 (1988) (Characterizing *Silkwood* as finding that “Congress was willing to accept regulatory consequences of application of state tort law to radiation hazards even though direct state regulation of safety aspects of nuclear energy was pre-empted.”).

If state tort law may hold a nuclear plant operator strictly liable, or establish some other standard of care that does not conform to federal regulation, the federal law quotient in public liability actions would be decreased. As noted in the majority opinion, notwithstanding *Silkwood*, at least two district courts have found that the Price–Anderson Act pre-empts state tort suits that do not adopt federal regulations as the standard of care. See *Hennessy v. Commonwealth Edison Co.*, 764 F.Supp. 495 (N.D.Ill.1991); *O’Conner v. Commonwealth Edison Co.*, 748 F.Supp. 672 (C.D.Ill.1990). In *Hennessy*, however, the court left open the issue of whether state law may impose strict liability for nuclear incidents.

Unlike the majority, I would not decide these issues here.

TMI, 940 F.2d at 870 (Scirica, J., concurring). Four years later, however, Judge Scirica held that Judge Mansmann’s ruling “controls, and federal law determines the standard of care and preempts state tort law” in the field of nuclear safety. *TMI*, 67 F.3d at 1107.

(2) is the better choice. By what principle could the Court choose option (1)? To do so would undermine an unambiguously crafted – and therefore, the Court presumes, deliberate – regulatory scheme. The relevant regulations prohibit careless or reckless aircraft operation generally. Makers of aircraft engines and components, in contrast, are subject only to specific regulations devised to ensure engine safety; Sikkelee points to no regulation imposing a generally applicable standard of care functioning as a catchall; once the engine or component-maker has complied with the specific regulations, he has met any standard of care the federal regulations can be said to constitute. Moreover, since this is an area in which this Court has no “authority to formulate federal common law . . . absent some congressional authorization to formulate substantive rules of decision,” Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 640-41 (1981), and “neither . . . Abdullah, nor any language in the FAA contemplates such [rules],” Martin v. Midwest Express Airlines, Inc., 555 F.3d 806, 811 (9th Cir. 2009) (“The [Aviation Act] itself makes no mention of federal courts developing a federal common law standard of care for airplane personal injury actions”), the Court does not view the creation of federal common law as an option. Ultimately, Sikkelee’s argument for a general standard of care represents a mere policy disagreement with the regulations as written, and for the Court to follow Sikkelee’s approach would

be the functional equivalent of filling in the gaps left by the FARs and CARs with state common law, which is anathema to the very notion that the field is preempted. The Court will not travel this road.

Of course, option (2) is not without its drawbacks, which have been foreshadowed supra. Not recognizing a general prohibition on careless or reckless conduct leaves gaps in the regulatory scheme governing makers of aircraft engines and components. These gaps are problematic in the sense that they give one pause before concluding that the case at bar is within the field of preemption identified in Abdullah. See Abdullah, 181 F.3d at 367 (“[I]mplied federal preemption may be found where federal regulation of a field is pervasive . . . or where state regulation of the field would interfere with Congressional objectives.”) (internal citations omitted).

Gaps are, however, not terribly problematic once it has been determined – and it has been, by Judge Jones – that this case is within a preempted field, and this is so even if Sikkelee is left remediless because she cannot identify any relevant federal regulation that Lycoming has violated.

In other words, Sikkelee is incorrect when she suggests that “[t]here can be no pervasive regulation [of the field of aviation safety, thus preempting the field from state regulation,] if there are no regulations applicable to [Lycoming’s]

aircraft engine design.” (Pl. Opp’n Br. at 43). So long as its intent is clearly expressed, Congress’s decision to leave an area unregulated by both the federal and state governments preempts the field as effectively as its decision to have federal law regulate so comprehensively that state law supplementation is undesirable. See Puerto Rico Dept. Of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 503 (1988). Moreover, where Congress determines that common law tort claims should play no role in a regulatory scheme, preemption may leave an injured person remediless. See, e.g., Kurns v. R.R. Friction Prods. Corp., 132 S. Ct. 1261 (2012) (Locomotive Inspection Act preempted defective design/warning claims of railroad locomotive repairman exposed to asbestos, leaving repairman remediless).¹⁸ Stated conversely, the absence of federal regulation that reaches Lycoming’s allegedly tortious conduct does not necessarily imply that “there [is] simply . . . no preemption.”¹⁹

¹⁸This result obtained even though relevant federal regulations did not address hazards arising from locomotive repair. Indeed, the agency to which Congress delegated regulatory authority had never regulated locomotive repair and disclaimed the power to do so. Kurns, 132 S. Ct. at 1274 (Sotomayor, J., concurring in part and dissenting in part). Despite the consequent regulatory gap, the Supreme Court’s field preemption holding “[left] petitioners without a remedy for what they allege was fatal exposure to asbestos in repair facilities.” Id. at 1275.

¹⁹Of course, Abdullah held neither that Congress desired to leave the field of aviation safety unregulated, nor that Congress envisioned no regulatory role for state common law remedies to play. As the Third Circuit has clarified,

Thus, in accordance with Judge Jones determination that Abduallah controls and Sikkelee's failure to provide persuasive reasons for undergirding the relevant specific federal regulations with a general standard of care, the Court will choose option (2) supra. The Court will measure Lycoming's allegedly tortious conduct against the specific federal regulations that Sikkelee asserts are applicable; if there is no genuine issue as to whether Lycoming violated the specific regulations, then summary judgment in Lycoming's favor is warranted.

(d) Type certification of the O-320-D2C entitles Lycoming to summary judgment on the design-related regulatory grounds asserted by Sikkelee.

Lycoming argues that type certification of the O-320-D2C renders a number of Sikkelee's claims – namely those alleging failure to comply with regulations

We did not conclude in Abdullah that the passengers' common law negligence claims themselves were preempted; instead, we determined only that the standard of care used in adjudicating those claims was preempted. Local law still governed the other negligence elements (breach, causation, and damages), as well as the choice and availability of remedies.

Elassaad, 613 F.3d at 125. The Court mentions the extreme case of Congress leaving an area totally unregulated simply to illustrate that, contrary to Sikkelee's contention, the federal government's pervasive regulation of the field of aviation safety does not imply that there must there be a federal regulation "at hand" for Lycoming to have violated.

governing the design of aircraft engines – a dead letter:

The FAA alone establishes the regulations governing the design requirements for aircraft engines, and the FAA alone, through the type certification process, decides whether the standards of care it has created by those regulations have been met. . . . [T]he question of whether any standards in those regulations were met cannot exist separately from the issuance of the type certificate. Under field preemption, the standards can only be what the FAA defines them to be, and the FAA alone decides if they have been met.

(Def. Supp. Br. at 34).

Sikkelee disagrees, arguing that Lycoming’s position is contrary to the United States Supreme Court’s decision in United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797 (1984), and contrary to Chief Judge Conner’s decision in Pease, 2011 WL 6339833, at *13-*14 (M.D. Pa. Dec. 19, 2011).

To evaluate the significance of the O-320-D2C’s type certificate for Sikkelee’s claims, the Court must examine the regulatory basis for Sikkelee’s assertion that Lycoming breached “federal standards related to design and continued airworthiness.” (Pl. Opp’n Br. at 30). Sikkelee cites to four regulations that she supposes comprise a federal standard of care for aircraft engine design: CAR § 13.100, CAR § 13.101, CAR § 13.104, and CAR § 13.110(a) (1964). Each of these provisions is taken from the CARs’s Part 13, which says of the

“[a]pplicability of this part” that it “establishes standards with which compliance shall be demonstrated for the issuance of and changes to type certificates for engines used on aircraft.” CAR § 13.0 (1964)). Part 13 further provides that

[a]n engine shall be eligible for type certification under the provisions of this part if it complies with the airworthiness provisions hereinafter established or if the Administrator²⁰ finds that the provision or provisions not complied with are compensated for by factors which provide an equivalent level of safety: Provided, That the Administrator finds no feature or characteristic of the engine which renders it unsafe for use on aircraft.

CAR § 13.10. At CAR § 13.13(a), it is further provided, in relevant part, that “[a]n applicant shall be issued a type certificate when he demonstrates the eligibility of the engine by complying with the requirements of this part.”

An applicant for type certification “demonstrates the eligibility” of his engine by “submit[ting] to the Administrator . . . descriptive data, test reports, and computations.” CAR § 13.14(a). The descriptive data is

known as the type design and shall consist of such drawings and specifications as are necessary to disclose the configuration of the engine and all the design features covered in the requirements of this part, such information on dimensions, materials, and processes as is necessary to define the structural strength of the engine, and such other data as are necessary to permit by comparison the determination of the airworthiness of subsequent engines of the same type.

CAR § 13.14(b).

²⁰Defined as the then-existing Administrator of Civil Aeronautics.

Finally, under the heading of “[d]esign and [c]onstruction,” there are the provisions that Sikkelee asserts Lycoming violated. Part 13 provides that reciprocating engines (like the O-320-D2C) should, as a general matter, “not incorporate design features or details which experience has shown to be hazardous or unreliable.” CAR § 13.100(a). The sections that follow, CARS §§ 13.101-13.115 (hereinafter, along with CAR § 13.100(a), the “design and construction regulations”), set forth specific standards for design devised by regulators to ensure safety when an engine is “installed, operated, . . . maintained in accordance with the instruction manual . . . and . . . fitted with an appropriate propeller.” CAR § 13.100(b). Sikkelee asserts that there is a genuine issue of material fact concerning whether Lycoming violated three of these:

CAR § 13.101 – The suitability and durability of all materials used in the engine shall be established on a basis of experience or tests. All materials used in the engine shall conform to approved specifications which will insure their having the strength and other properties assumed in the design data.

CAR § 13.104 – All parts of the engine shall be designed and constructed to minimize the development of an unsafe condition of the engine between overhaul periods.

CAR § 13.110(a) – The fuel system of the engine shall be designed and constructed to supply an appropriate mixture of fuel to the cylinders throughout the complete operating range of the engine under all flight and atmospheric conditions.

In tension with Sikkelee's assertion that Lycoming has violated these provisions, the FAA's issuance of a type certificate for the O-320-D2C in 1966 denotes the Administrator's finding that the engine met all applicable requirements. See CAR § 13.13(a) ("An applicant shall be issued a type certificate when he demonstrates the eligibility of the engine by complying with the requirements of this part.").

Lycoming argues that the FAA's determination is conclusive.

The Court holds that Lycoming is entitled to summary judgment on Sikkelee's claims asserting violations of CAR §§ 13.100(a), 13.101, 13.104, and 13.110. As set forth supra, each of the cited regulations establishes a requirement that applicants must satisfy in order to obtain a type certificate, and it is the Administrator alone who decides whether a certificate should be issued. To hold as Sikkelee proposes, the Court would be required to take two questionable steps away from the apparent regulatory scheme. First, the design and construction regulations would have to be read as freestanding mandates possessing a meaning independent of that given them by the Administrator's application, not as mere prerequisites for type certification, an interpretation without apparent basis in the regulation. Cf. Martin, 555 F.3d at 814 (Bea, J., concurring) ("[I]n the field of aircraft design regulation, the FAA directs only the conditions under which the government may grant an aircraft design a 'certificate' that permits production; the

FAA does not prescribe general standards the manufacturer must follow to exercise reasonable care in designing a safe aircraft.”). Second, the Administrator would be dethroned as the arbiter of whether the requirements set forth in the design and construction regulations have been met. How else – after the Administrator’s decision to type certify the O-320-D2C in 1966 – could the Court allow a jury to reconsider Lycoming’s compliance with the design and construction regulations? The Court concludes that the natural interpretation of the regulatory scheme commands that, under the circumstances, Sikkelee is precluded from proving that Lycoming violated CAR §§ 13.100(a), 13.101, 13.104, and 13.110 as a matter of law.²¹

²¹In Pease, Chief Judge Conner concluded that “[t]here is simply no textual support in either the Abdullah decision or the Aviation Act that Congress intended the FAA to act as the sole arbiter of whether manufacturers have complied with its own regulations.” This Court disagrees, at least with respect to the design and construction regulations.

The issue is complicated. In the Aviation Act, Congress gave the Administrator the “duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time . . . [s]uch minimum standards governing the design, materials, workmanship, construction, and performance of . . . aircraft engines . . . as may be required in the interest of safety.” 49 U.S.C. § 1421 (1964). Here, the language suggests that the minimum standards are to be prescribed by the Administrator, but that (at least theoretically) anyone might evaluate compliance with them. At 49 U.S.C. § 1423(a) (1964), however, the “Administrator is empowered to issue type certificates for . . . aircraft engines,” and it is commanded that “he shall issue a type certificate” once he finds – after “investigation[s],” “hearings,” and “tests” for his consideration – “that such . . . aircraft engine . . . is of proper design, material, specification, construction, and

Varig Airlines is not to the contrary. Even Sikkelee does not argue that the holding of the case – *i.e.*, that tort claims against the FAA for alleged negligence in certificating aircraft for use in commercial aviation are barred by the discretionary function exception of the Federal Tort Claims Act – controls here. Rather, Sikkelee posits that Chief Justice Burger’s description of the FAA’s role in type certification mandates that a jury should be permitted to revisit Lycoming’s compliance with the design and construction regulations. (See Pl. Opp’n Br. at 44).

In Varig Airlines, Chief Justice Burger explained that the FAA had “implement[ed] [a] ‘spot-check’ system of compliance review” for determining

performance for safe operation, and meets the minimum standards, rules, and regulations prescribed by the Administrator.” Congress’s creation of this apparatus suggests an intention to give the Administrator sole responsibility for not only prescribing minimum standards, but also for interpreting and applying them in the process of deciding whether an engine is sufficiently safe for the use of pilots and passengers.

As discussed *supra*, the regulations promulgated by the Administrator in accordance with Congress’s mandates show that he viewed “minimum standards governing design” merely as a framework for determining an applicant’s entitlement to a type certificate, *see* CAR § 13.0 (“This part establishes standards with which compliance shall be demonstrated for the issuance of and changes to type certificates for engines used on aircraft.”), and viewed himself as the arbiter of compliance with the standards. The Court should defer to the Administrator’s interpretation. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-45 (1984). Moreover, as discussed *infra*, the design and construction regulations are sufficiently vague that, unless the Administrator is given sole responsibility for their interpretation and application, it is difficult to see how Congress’s intention that “the Administrator . . . exercise sole discretion in regulating air safety,” *Abdullah*, 181 F.3d at 369, can be accomplished.

whether an applicant meets the type certification prerequisites:

The FAA certification process is founded upon a relatively simple notion: the duty to ensure that an aircraft conforms to FAA safety regulations lies with the manufacturer and operator, while the FAA retains the responsibility for policing compliance. Thus, the manufacturer is required to develop the plans and specifications and perform the inspections and tests necessary to establish that an aircraft design comports with the applicable regulations; the FAA then reviews the data for conformity purposes by conducting a “spot check” of the manufacturer’s work.

467 U.S. at 816-17, 819. In Sikkelee’s view, the FAA’s approach to determining compliance with the design and construction regulations is too hands-off and would benefit from a jury’s assistance. Therefore, argues Sikkelee, a jury’s reconsideration of Lycoming’s compliance with the regulations must be permitted.

Sikkelee’s argument is lent some credence by Chief Judge Conner’s acceptance of its essentials in Pease, where the Chief Judge wrote that jury reconsideration of a manufacturer’s compliance with the design and construction regulations “pragmatically recognizes the limitations of FAA certification.” 2011 WL 6339833, at *14. “Moreover,” in the Chief Judge’s view,

there is a salutary effect of opening the courthouse door: “An inquiry ... into whether the manufacturer in fact complied with the regulations ... would assist the FAA in policing a manufacturer’s compliance rather than hampering the agency in this regard.” [Elsworth v. Beech Aircraft Corp., 691 P.2d 630, 636 (Cal. 1984)]. In the case sub judice, the [plaintiffs’s] products liability claims regarding the airworthiness of [an] engine serve the public interest of ensuring that [the defendant-

manufacturer] complied with all applicable FAA regulations. The [plaintiffs's] claims will not disrupt the "uniform system of regulation" desired by Congress because the FAA still has sole authority to promulgate regulations. See Abdullah, 181 F.3d at 368.

Pease, 2011 WL 6339833, at *14.

To this Court, the Chief Judge's reasoning is incomplete. A jury trial will have the "salutary effect" of "ensuring . . . compli[ance] with all applicable FAA regulations" only if one makes the assumption that a jury will interpret and apply the FAA regulations as would the Administrator himself. But there is no reason to think this assumption will hold in reality. The jury might also interpret and apply the regulations in a more demanding fashion than the Administrator, in which case a trial will have the unsalutary effect of invading the federally preempted field of aviation safety.

In this Court's view, that the jury's interpretation and application of the CARs will vary from the Administrator's is more than likely. As Chief Judge Conner himself wrote in Pease, "The applicable FAA regulations are acutely technical and often incurably vague." 2011 WL 6339833, at *23. Indeed, when the regulations provide that an "engine shall not incorporate design features or details which experience has shown to be hazardous or unreliable," CAR § 13.100(a), how much experience is contemplated? What are the relevant hazards? If the "suitability

and durability of all materials used in the engine shall be established on the basis of experience or tests,” CAR § 13.101, how much experience or testing is required? If “[a]ll parts of the engine shall be designed and constructed to minimize the development of an unsafe condition of the engine between overhaul periods,” CAR § 13.104, how small should the probability of the development of an unsafe condition be? If the “fuel system of the engine shall be designed and constructed to supply an appropriate mixture of fuel to the cylinders throughout the complete operating range of the engine under all flight and atmospheric conditions,” CAR § 13.110(a), does this contemplate a negligence or strict standard of liability or, more likely, is it merely a way of expressing that the system should prove its fitness through the “[i]nspections and tests . . . found necessary by the Administrator,” CAR § 13.15? What should be made of CAR 13.10, which provides that, even if the engine does not satisfy the design and construction regulations, the engine may still be considered safe when the “provisions not complied with are compensated for by factors which provide an equivalent level of safety”?

Faced with these imponderables, the parties, the Court and the jury will likely resort to more familiar negligence standards, a problematic outcome in this federally preempted field. In this regard, Judge Scirica’s decision in In re TMI is instructive. 67 F.3d 1103 (3d Cir. 1995). In TMI, plaintiffs sought to recover in tort

for injuries allegedly caused by the Three Mile Island nuclear meltdown. As in Abdullah, the Third Circuit held that, in light of federal preemption of the field of nuclear safety, “federal law determines the standard of care.” Id. at 1107. The Third Circuit then endeavored to “discern the precise contours of that federal duty” and rejected plaintiffs’s attempt to fashion a standard of care out of a regulation requiring applicants for “a permit to construct a nuclear power reactor[] [to] identify the design objectives, and the means to be employed, for keeping levels of radioactive material in effluents to unrestricted areas as low as is reasonably achievable.”²² Id. at 1107, 1109 (quoting 10 C.F.R § 50.34a(a)). Agreeing with the trial judge that the “as low as is reasonably achievable” requirement – deemed the “ALARA” standard – resulted “essentially, in a negligence standard,” Judge Scirica reasoned that “[a]dopting ALARA as part of the standard of care would put juries in charge of deciding the permissible levels of radiation exposure and, more generally, the adequacy of safety procedures at nuclear plants – issues that have explicitly been reserved to the federal government in general and the [Nuclear

²²The regulations defined “as low as reasonably achievable” to mean “as low as is reasonably achievable taking into account the state of technology, and the economics of improvements in relation to benefits to the public health and safety and other societal and socioeconomic considerations, and in relation to the utilization of atomic energy in the public interest.” TMI, 67 F.3d at 1109 (quoting 10 C.F.R § 50.34a(a)).

Regulatory Commission] specifically.” TMI, 67 F.3d at 1115. He continued,

Adoption of a standard as vague as ALARA would give no real guidance to operators and would allow juries to fix the standard case by case and plant by plant. An operator acting in the utmost good faith and diligence could still find itself liable for failing to meet such an elusive and undeterminable standard. Our holding protects the public and provides owners and operators of nuclear power plants with a definitive standard by which their conduct will be measured.

Id.

Jury interpretation and application of the design and construction standards in the case at bar will poke at the same hornets’s nest identified by Judge Scirica. No less than if jurors were permitted to subject manufacturers to state common law duties, jury interpretation and application of the design and construction regulations would put jurors in charge of deciding permissible safety levels and engine designs – issues left to the Administrator. Jurors would fix the standard case by case and engine by engine, resulting in an elusive and undeterminable standard, as opposed to the “one, consistent means of regulating aviation safety” that Congress intended. Abdullah, 181 F.3d at 372.

Therefore, the Court cannot conclude that the supposed inadequacies²³ in the

²³That it relies heavily on manufacturers is not an unambiguously flawed aspect of the type certification process. Granted, agents of the manufacturers are burdened by a conflict of interest that could make them prone to cut corners in the manufacturer’s favor. On the other hand, they likely “possess detailed knowledge of an aircraft[] [or engine’s] design based upon their day-to-day involvement in its

type certification process imply that the jury should be employed to “ensur[e] that Lycoming complied with all applicable FAA regulations.” Pease, 2011 WL 6339833, at *14. Rather than ensure such compliance, jury reconsideration of the design and construction requirements (in this case and others) promises to “disrupt the ‘uniform system of regulation’ desired by Congress” and achieved by putting responsibility for type certification with the Administrator. Id.

Accordingly, this Court holds that the Administrator’s issuance of a type certificate for the O-320-D2C is conclusive of the engine’s compliance with the design and construction regulations. Lycoming’s motion for summary judgment on Sikkelee’s claims predicated on the violation of these regulations should be granted.

(e) Sikkelee’s claims may move forward on the theory that Lycoming violated its duty to report engine defects to the FAA.

The Court holds that Lycoming is entitled to summary judgment in relation to additional FARs,²⁴ primarily because these FARs are meant to ensure that

development,” Varig Airlines, 467 U.S. at 807, knowledge that could make their work more accurate and efficient than that of FAA officials.

²⁴Sikkelee has asserted in previous filings that Lycoming violated additional FARs, but the Court assumes that, by not addressing these regulations in her brief, she has abandoned any claims based on them.

products conform to a type design found safe by the Administrator.²⁵ Sikkelee does not claim or proffer evidence showing that the replacement carburetor did not conform to its type design (see Pl. Opp'n Br. at 30 (“There is no claim here of defective manufacture.”)); she claims, rather, that the replacement carburetor conformed to a defective type design. Fundamentally, Sikkelee’s claims and her evidence in support of them are mismatched with these regulations.

Sikkelee asserts that Lycoming, as holder of a production certificate for the O-320-D2C, violated its responsibility to “[d]etermine that each part and completed product . . . submitted for airworthiness certification or approval conforms to the approved design and is in a condition for safe operation.” (Pl. Opp'n Br. at 32 (citing 14 C.F.R. § 21.165(b) (2004))).

The Court disagrees. Sikkelee proffers no evidence showing that the allegedly defective replacement carburetor did not conform to its “approved design”; she states the opposite multiple times. (Pl. Facts ¶¶ 10, 12, 13). She also does not proffer evidence showing that David’s crash was caused by Lycoming’s alleged failure to determine that the carburetor was in a “condition for safe

²⁵Sikkelee’s briefs are as exacting as a shock and awe bombing campaign; as a result, the Court sometimes strains to understand how, in her view, a given regulation is relevant. The discussion infra represents the Court’s best effort to make sense of Sikkelee’s arguments.

operation.” For one thing, Lycoming’s § 21.165 duty applied (if at all) in 1978 – i.e., when the replacement carburetor was hot off the assembly line and initially submitted for airworthiness certification – not in 2004 when Kelly overhauled the replacement carburetor. Sikkelee directs the Court to no evidence showing that Lycoming breached its § 21.165 duty in 1978 or that such breach contributed to the 2005 accident. And there is another hurdle: assuming arguendo that Lycoming’s § 21.165 duties extended to Kelly’s submission of the replacement carburetor for airworthiness certification in 2004, Sikkelee directs the Court to no evidence showing that Kelly’s submission was not in a “condition for safe operation.”

According to the FAA, an “engine is in a condition for safe operation when the condition of the engine considering such factors such as wear, damage, and deterioration does not prevent the engine from demonstrating compliance with those requirements of [the airworthiness standards for type certificate issuance] that relate to the safe operation of the engine, and does not result in an unsafe condition to the aircraft.” (Pl. Opp’n Br. at 37 (citing FAA AC 33.4-1, Instructions for Continued Airworthiness (Aug. 27, 1999)). Sikkelee blames David’s crash on the O-320-D2C’s carburetor, specifically the MA-4SPA’s “throttle body to float bowl screws [coming] loose due to the faulty design of the lock tab washers as well

as gasket set.” (Pl. Facts ¶ 16).²⁶ But during its 2004 overhaul, Kelly installed “new throttle body to bowl screws and lock tab washers as an attachment system,” and the engine was adorned with an airworthiness approval tag. (Pl. Facts ¶¶ 12, 14).²⁷ Sikkelee proffers no evidence that “the condition of the engine considering factors such as wear, damage, and deterioration” was a factor in the crash; the “condition” of the engine allowed it to function with the same potential for failure as a new engine that conformed to Lycoming’s (allegedly defective) type design.²⁸ Since there is neither evidence showing that the replacement carburetor did not conform to the approved design, nor evidence showing that the replacement carburetor was not in a condition for safe operation, Lycoming is entitled to summary judgment to

²⁶(See also Pl. Opp’n Br. at 15 (“Plaintiff’s expert found that loose throttle body to bowl screws caused a loss of engine power, which was a causal factor in the crash at issue.”)).

²⁷(See also Pl. Facts ¶ 13 (“Lycoming instructed carburetor overhaulers to follow Precision’s manual, which Kelly did, requiring new throttle body to bowl screws and lock tab washers as an attachment system. This defective method of throttle body to bowl attachment for the O-320 series engines was part of the O-320 engine type design, and approved by Lycoming.”))

²⁸Presumably, then, the subject engine was also no less likely than a new engine to “demonstrat[e] compliance with those requirements of [the airworthiness standards for type certificate issuance] that relate to the safe operation of the engine . . . [and to not] result in an unsafe condition to the aircraft.” To the extent the subject engine would not have demonstrated such compliance or did compromise safety, the design – not the “condition” – of the engine was the problem.

the extent Sikkelee's claims are based on the violation of 14 C.F.R. § 21.165.

For much the same reason, Sikkelee fails in her assertion that Lycoming violated regulations requiring it to provide "Instructions for Continued Airworthiness." (Pl. Opp'n Br. at 40-43). First, the relevant CAR – CAR § 13.21 (1964) – actually calls for the type certificate applicant to prepare "an approved manual containing instructions for the installation, operation, servicing, maintenance, repair, and overhaul of the engine"; the requirement of "Instructions for Continued Airworthiness" came later, as did most of the supposed "standards" to which Sikkelee cites. CAR § 13.21 does not supply a "standard." In any case, the concept of "airworthiness" simply denotes that an engine "conforms to its type certificate" and "is in a condition for safe operation." (Pl. Opp'n Br. at 36 (citing FAA AC 33.4-1, Instructions for Continued Airworthiness (Aug. 27, 1999)). As discussed supra, Sikkelee does not claim that the supposedly defective carburetor failed to conform to Lycoming's type design, and the part of the carburetor that allegedly caused David's crash was in a condition for safe operation as defined by the FAA.

Moreover, Sikkelee does not really allege or proffer evidence in support of the claim that Lycoming did not comply with the applicable regulations requiring Instructions for Continued Airworthiness. Her position, rather, is that "Lycoming

was required to use reasonable care in the design of its continued airworthiness instructions” and failed to do so. (Pl. Opp’n Br. at 41). But there is nothing in the regulations themselves that imposes a reasonable care standard on Lycoming in this regard; Sikkelee has overlaid that common law standard on top of Lycoming’s duty to comply with the federal regulations. Contrary to Sikkelee’s view that “[t]his is a negligence case where Lycoming is held to the standard of reasonable care in complying with the minimum federal regulations” (Pl. Opp’n Br. at 27), it is the minimum regulations themselves that constitute the standard of care. Accordingly, Lycoming is entitled to summary judgment to the extent Sikkelee’s claims are based on a violation of CAR § 13.21.

That leaves Sikkelee’s claims based on Lycoming’s alleged violation of 14 C.F.R. §§ 21.3 and 21.99 (2004). With respect to § 21.99(b), which provides that “the holder of [a] type certificate [who] finds through service experience that changes in type design will contribute to the safety of the product . . . may submit appropriate design changes for approval [of the Administrator],” Lycoming should be granted summary judgment. Section 21.99(b) is permissive; it does not create a duty. Sikkelee’s argument to the contrary – that “[i]t is for a jury to determine whether Lycoming should have issued a design change pursuant to § 21.99(b) [because] [t]his is a negligence case where Lycoming is held to the standard of

reasonable care in complying with the minimum federal regulations” (Pl. Opp’n Br. at 27) – has already been rejected by this Court. It is the minimum regulations themselves that constitute the standard of care, and since § 21.99(b) does not impose a standard of care on Lycoming, it cannot serve as the basis for Sikkelee’s claims.

So Sikkelee is left with 14 C.F.R. § 21.3, the regulation to which she devotes by far the most attention in her brief (Pl. Opp’n Br. at 8-26), and (relatedly) § 21.99(a). Under § 21.3(a), holders of type certificates are required to “report any failure, malfunction, or defect in any product, part, process, or article” that they manufactured, if the holder determines that the item “has resulted in any of [various] occurrences,” including “engine failure.” 14 C.F.R. § 21.3(a). If the item left the holder’s quality control system, then under § 21.3(b) the holder must report any defect “that it determines could result in any of [various] occurrences,” again including “engine failure.” Sikkelee proffers a variety of evidence tending to show that Lycoming knew of a defect in the O-320-D2C (namely the MA-4SPA carburetor), but hid the defect from the FAA, arguably preventing the Administrator from ordering “design changes . . . to correct the unsafe condition” under § 21.99(a). (Pl. Opp’n Br. at 15-27; Pl. Facts ¶¶ 16-34).

Lycoming raises four defenses: (1) §21.3 “does not apply to Lycoming

because [Lycoming] did not manufacture the [replacement] carburetor, and the carburetor did not pass through Lycoming's quality control system; (2) "[n]o evidence exists that Lycoming ever determined that a failure, defect, or malfunction in the subject carburetor could or did result in any of the enumerated safety risks"; (3) Lycoming's reporting obligation was lifted by the previous reports of others (citing 14 C.F.R. § 21.3(d) (reporting is not necessary when the type certificate holder "knows" that the failure, malfunction, or defect was already reported to the FAA by another person)); and (4) "[n]o evidence exists in this case that [a report from Lycoming to the FAA] would have caused the FAA to issue an Airworthiness Directive²⁹ or otherwise mandate a design change." (Def. Supp. Br. at 24-27).

The Court rejects Lycoming's first argument because it mischaracterizes Sikkelee's theory of liability. In the Court's understanding, Sikkelee posits that had Lycoming complied with its § 21.3 reporting responsibilities in relation to the O-320-D2C engines (incorporating MA-4SPA carburetors) that were manufactured by Lycoming or did go through its quality control system, then a type design

²⁹Airworthiness Directives are issued by the FAA when the agency "finds that . . . [a]n unsafe condition exists in [a] product." 14 C.F.R. § 39.5 (2004). The Directive "specif[ies] inspections you [*i.e.*, the operator of a given aviation product] must carry out, conditions and limitations you must comply with, and any actions you must take to resolve an unsafe condition." 14 C.F.R. § 39.11 (2004)

change would have been mandated by the Administrator, which would have changed the design of even those carburetors that were not manufactured by Lycoming. Since the identity of the manufacturer of the replacement carburetor is irrelevant under Sikkelee's theory of liability, Lycoming's defense on the basis that it did not manufacture the carburetor fails.

The Court rejects Lycoming's second arguments because Sikkelee adduces enough evidence to create a genuine issue of material fact as to whether Lycoming determined that a defect in the MA-4SPA created safety risks. It is possible that Lycoming never made such a determination, in which case its reporting responsibility was never triggered. But viewing the facts in Sikkelee's favor, it is also possible that Lycoming made the determination, but hid the relevant information from the FAA.

The Court rejects Lycoming's third argument for similar reasons. Sikkelee has adduced enough evidence to allow the jury to compare the "failure, malfunction, or defect" reports of others to the reports that Lycoming allegedly should have made and decide whether Lycoming's reporting duty was rendered unnecessary under § 21.3(d).

Finally, Lycoming is correct that Sikkelee's claim based on § 21.3 is a difficult one because Sikkelee must prove not only that the allegedly defective

replacement carburetor caused David's crash, but also that the FAA would have responded to Lycoming's § 21.3 reports – had Lycoming not breached its duty to make them – by ordering changes to the carburetor's design or otherwise taking action that would have prevented David's accident. In other words, Sikkelee must prove that the carburetor's defective design caused the crash and that the carburetor's design was defective on the date of David's accident because Lycoming failed to make § 21.3 reports to the FAA. Proving the second element requires establishing that the FAA would have responded meaningfully to the reports.

The circumstances are similar to those in Stanton v. Astra Pharm. Prod., Inc., 718 F.2d 553 (3d Cir. 1983), which involved a claim against the manufacturer of an anesthetic for negligence that caused the plaintiff severe injury. The alleged negligence was the manufacturer's failure to submit certain adverse-reaction reports to the Food and Drug Administration. On proving causation, Judge Becker wrote that the manufacturer's negligence "in failing to file the reports is not in itself sufficient to sustain the finding that [the manufacturer] was liable. The negligence must also have been a proximate cause of the [plaintiff's] injury." Stanton, 718 F.2d at 565. The plaintiff relied on four experts "to establish causation by introducing evidence tending to show that the information withheld

from the FDA was of great importance and that the agency could not properly perform its regulatory and supervisory roles without access to the unreported data, and that the FDA would have taken action had it been aware of [the anesthetic's] propensity to cause adverse reactions despite low dosage." *Id.* at 568. Calling the issue "an extremely close one," Judge Becker held that the such evidence was sufficient to support the jury's verdict in the plaintiff's favor. *Id.* at 568-69.

In the case at bar, Sikkelee's evidence is similar to that of the plaintiff in Stanton. For example, one of Sikkelee's experts opines that, "As a former FAA certification engineer, this reportable failure, malfunction, or defect information associated with the Lycoming O-320 series engines and the Model MA-4SPA carburetor, is something that I would want to have and use to determine if an Airworthiness Directive should be issued to correct the un-airworthy carburetor" (Pl. Ex., ECF No. 234-5 at 24). Since Sikkelee may be able to make a case for causation on par with the plaintiff in Stanton, summary judgment should be denied as to her claims based on Lycoming's violation of 14 C.F.R. § 21.3.

VI. Conclusion

The watchword in Abdullah was Congressional intent. Yet having endeavored to reconcile Abdullah with the federal regulatory scheme that governs aviation design and manufacturing, this Court – either by way of its own error or

that of the precedents it has followed – has reached holdings that it imagines have little to do with Congressional intent. Fortunately, whether this Court has been pushed to pier’s end by precedent or has stumbled to the edge itself, the Circuit Court has the authority to pull it back to safety. See 28 U.S.C. § 1291.

For the foregoing reasons, Lycoming’s motion for summary judgment is granted in part and denied in part.

BY THE COURT:

s/Matthew W. Brann
Matthew W. Brann
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JILL SIKKELEE, individually and : Case No. 4:07-cv-00886
as personal representative of the :
estate of DAVID SIKKELEE, :
deceased, :

Plaintiff : (Judge Brann)

v. :

PRECISION AIRMOTIVE :
CORPORATION, PRECISION :
AIRMOTIVE LLC, PRECISION :
AEROSPACE CORPORATION, :
PRECISION AEROSPACE :
SERVICES LLC, PRECISION :
AVIATION PRODUCTS :
CORPORATION, PRECISION :
PRODUCTS LLC, ZENITH FUEL :
SYSTEMS LLC, BURNS :
INTERNATIONAL SERVICES :
CORPORATION, FORMER FUEL :
SYSTEMS, INC., MARK IV :
INDUSTRIES, INC., TEXTRON :
LYCOMING RECIPROCATING :
ENGINE DIVISION, TEXTRON, :
INC., AVCO CORPORATION, :
KELLY AEROSPACE, INC., :
KELLY AEROSPACE POWER :
SYSTEMS, INC., :
ELECTROSYSTEMS, INC., :
CONSOLIDATED FUEL :
SYSTEMS, INC., :

Defendants. :

ORDER

AND NOW, this 10th day of September, 2014, it is hereby ORDERED:

1. The motion for summary judgment of AVCO Corporation, on behalf of its Lycoming Engines Division (March 19, 2014, ECF No. 482), IS GRANTED IN PART AND DENIED IN PART in accordance with the Memorandum of this same date.
2. All other pending motions (ECF Nos. 374, 376, 377, 379, 381, 382, 383, 385, 386, 387, 388, 389, 390, 418, 444) are DENIED AS MOOT in light of the Court's ruling on Lycoming's summary judgment motion, but the parties are given leave to re-file these motions as amended to reflect the changed circumstances of the case. The schedule for filing such motions will be set in a future Order.

FURTHER, it is stated that the Court is of the opinion that this Order involves a controlling question of law as to which there is substantial ground for difference of opinion – to wit, whether this Court has properly reconciled Abdullah v. Am. Airlines, 181 F.3d 363 (3d Cir. 1999), with the facts and aviation regulations at issue in this case – and that an immediate appeal from this Order

may materially advance the ultimate termination of the litigation. See 28 U.S.C. § 1292(b).

BY THE COURT:

s/ Matthew W. Brann
Matthew W. Brann
United States District Judge