The Primary Jurisdiction Doctrine Looms over Litigation Concerning FAA Aircraft Certifications

By Marc L. Antonecchia

During cross-examination, an expert witness attempted to proffer his unsubstantiated opinion that certain auxiliary center tanks (ACTs) were approved by the Federal Aviation Administration (FAA) for use on a particular aircraft. The judge stopped the testimony with the following rebuke: "I don't ever want to get on an airplane because some party-hired expert offers his opinion based on reading of tea leaves that the FAA approved it. . . . In the absence of a certificate from the FAA, I'm not persuaded these ACTs were ever approved."[1]

In this instance, the court's inquiry was relatively simple because it was readily apparent that the FAA had not approved the ACTs. However, this true story highlights an issue that confronts other litigants and courts addressing airworthiness and other aircraft certification issues: Is the issue properly determined by the court, as influenced by lay and expert testimony, or is it better left to be determined by the administrative agency tasked with issuing such approvals in the first place?

The primary jurisdiction doctrine is a somewhat rare and arguably underutilized device in litigation concerning airworthiness and other aircraft certifications that are usually under the purview of the FAA. It is a judicially created doctrine that was first invoked by the U.S. Supreme Court at the beginning of the twentieth century.[2] Under the primary jurisdiction doctrine, a court may stay or dismiss an action pending resolution of a factual issue that falls within the special competence of an administrative agency. If a particular administrative agency has jurisdiction over the issue, the court usually considers four factors to determine whether to apply the doctrine: (1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory scheme that (4) requires expertise or uniformity in administration.[3]

The primary jurisdiction doctrine may justify staying or dismissing an action that raises issues of fact not within the conventional experience of judges or requires the exercise of administrative discretion. In the context of FAA certification issues, a handful of courts have invoked the primary jurisdiction doctrine sparingly by referring a plaintiff to seek administrative relief before the FAA. Other courts have declined to invoke the doctrine on the basis that the fact finder, with the aid of expert witnesses, is capable of determining airworthiness and other certification issues. In short, the doctrine applies where a claim can originally be addressed in a court but would be better addressed first by an administrative body.[4]

On its face, determining whether an aircraft is "airworthy" appears to be ripe for primary jurisdiction treatment because it is usually a factual issue that is within the FAA's competence. FAA Order No. 8130.2G, dated August 31, 2010, sets forth the procedures for accomplishing original and recurrent airworthiness certification of aircraft and related products and articles.[5] The order provides: "Although the term 'airworthy' is defined in 14 CFR § 3.5(a), a clear understanding of its meaning is essential for use in the FAA's airworthiness certification program."[6] It continues, "the following two conditions [are] necessary for issuance of an airworthiness certificate": the aircraft must (1) conform to its type design and (2) be in a condition for safe operation.[7] The order also recognizes that pursuant to 14 C.F.R. part 183, the FAA is authorized to designate private persons or organizations to act as representatives to issue airworthiness certificates and related approvals.[8]

In addition to airworthiness, other certifications are within the FAA's purview. For instance, the FAA is responsible for issuing a technical standard order (TSO), which is a minimum performance standard for specified materials, parts, and appliances used on civil aircraft. The TSO authorization approves the manufacture of an article only after showing that the article meets the specific airworthiness requirements of a particular aircraft model. An applicant for a TSO authorization must apply to the appropriate aircraft certificate office in the form and manner prescribed by the FAA, and must include a statement of conformance certifying that the article meets the applicable TSO and a copy of the technical data required in the applicable TSO.[9]

Courts Have Invoked the FAA's Primary Jurisdiction with Mixed Results

In the past few decades, airworthiness or other aircraft certifications have been at issue in several federal court cases.[10] Nevertheless, it appears that only a handful of courts have invoked the primary

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jurisdiction doctrine. In this regard, it is important to differentiate between the concepts of "exhaustion of administrative remedies" and "primary jurisdiction." The distinction is significant because the former is a *mandatory* doctrine providing that where a remedy before an administrative agency is available, the litigant must exhaust its administrative remedies before pursuing remedies in court.[11] The latter, which is *permissive*, is entirely a matter of discretion for the court.

A 1991 Eastern District of Pennsylvania decision, *Macario v. Pratt & Whitney Canada, Inc.*,[12] is one example of a court invoking the primary jurisdiction doctrine. The defendant engine manufacturer faced claims for breach of contract based on its failure to comply with a settlement agreement that required the manufacturer to issue a service bulletin informing owners of the availability of "P3" filters that would prevent or reduce the likelihood of certain contamination of the automatic fuel control (which resulted in the potential for engine rollback). The court determined that the litigation, which arose from the crash of a Beechcraft King Air aircraft, should be stayed pending the FAA's determination as to whether the filter was safe to be installed into the aircraft at issue.[13]

The manufacturer's affirmative defenses to the breach of contract claim, which included impracticality, illegality, and mutual mistake of fact, hinged on the premise that the filter was actually unsafe if installed according to the service bulletin. If successful, any of these defenses would likely have excused the defendant's purported breach of the contract. The court determined that "the FAA decision regarding the safety of the P3 filter would help determine the legitimacy of the defendants' affirmative defenses," and "the issue of the safety of the P3 filter is undoubtedly more properly before the FAA than the lay fact-finders who would comprise the jury in this case."[14]

Similarly, in *Commander Properties Corp. v. Beech Aircraft Corp.*,[15] a Kansas federal district court determined that the FAA had primary jurisdiction over a purchaser's warranty and misrepresentation claims that the wing design used on the King Air aircraft was defective. In the complaint, the purchaser alleged that the wing structure was not airworthy, did not conform to federal aviation regulations, and was in need of a substantial design modification. One of the manufacturer's affirmative defenses to the plaintiff's allegations that the aircraft was not "airworthy" was that such allegations were contrary to the lawful certification made by the FAA. The court determined that primary jurisdiction applied because at the heart of the purchaser's claims were the two "highly technical" questions of whether the wing design was defective and whether a proposed wing modification would make the aircraft airworthy. The court stated that if the FAA determined that the wing was defective, the FAA could take whatever actions it believed necessary to promote the safety of all King Air owners; further, if it determined the proposed modification was appropriate, it could issue an airworthiness directive encompassing the modification.[16]

Shortly thereafter, a court in the same federal district declined to find that the FAA had primary jurisdiction over fraud and other claims filed on behalf of all owners of Beech aircraft with the same engine involved in the *Macario* litigation. In *Sunbird Air Services, Inc. v. Beech Aircraft Corp.*,[17] the court found it unnecessary to refer to the FAA the issue of whether or not a pneumatic fuel control unit was defective. The court rejected the defendants' argument that the FAA already had asserted primary jurisdiction over the issues by publishing a notice of proposed rulemaking (NPRM) concerning the issuance of an airworthiness directive requiring the removal of P3 filters from certain models of Beech aircraft. The court found that even though the NPRM stated that the installation of the filter could result in the aircraft's inability to safely perform the required balked landing maneuver due to insufficient engine acceleration, the NPRM did not discuss the plaintiffs' alleged problem of pneumatic contamination or the alleged power fluctuations caused by such contamination. The court's comments highlighted the highly discretionary nature of its determination:

> The court finds that this court, with or without a jury, with the aid of expert witnesses, is capable of determining whether or not the fuel control unit design on the aircraft in question was defective. While the FAA's decision to certify the aircraft and the applicable governmental regulations will certainly be relevant to this determination, they are not dispositive of the issue. Moreover, juries routinely consider whether an aircraft design is defective in product liability cases.[18]

Other than the court's complete discretionary right, it is difficult to discern why the *Commander* court found primary jurisdiction but the *Sunbird* court did not. The *Sunbird* court attempted to distinguish the holding in *Commander* on the basis that the *Sunbird* plaintiff "dropped its request for court-ordered modifications of the pneumatic fuel control unit and is seeking only compensatory damages."[19] But in so stating, the *Sunbird* court appeared to ignore that the *Commander* plaintiffs primarily sought compensatory damages to cover the costs of implementing a proposed modification to the wing design. It also appeared to discount that the potential import of the FAA's participation was its ability to exercise expertise in determining a highly technical issue over which it had regulatory oversight. Indeed, the court appeared to place incorrect emphasis on its conclusions that "the *FAA* has not exercised jurisdiction over the question of pneumatic contamination,"[20] whereas in actuality it is the *court's* determination to assign agency responsibility.

Despite the *Sunbird* court's view that primary jurisdiction was appropriate in *Commander*, the procedural history of the *Commander* litigation demonstrated that the

FAA's input did not resolve the dispute. The FAA ultimately issued an opinion that the "wing design is not defective in terms of its structural strength so long as the airworthiness directives (ADs) are complied with and the aircraft is flown within its approved flight envelope."[21] The FAA's opinion also noted that over the life of the aircraft, the manufacturer corrected problems that might have had an effect on the integrity of the wing structure of each type of King Air.

The purchaser sought review of the FAA's opinions in the U.S. Court of Appeals for the District of Columbia Circuit, arguing that in determining that the aircraft were not "defective," the FAA exceeded its authority by rendering a judgment on the common-law claims. The D.C. Circuit denied review on the basis that the FAA merely found that the aircraft was "airworthy" because the past problems had been corrected.[22] In a footnote, the court noted that the FAA referred to the aircraft's current status, not to problems arising after initial certification.[23] Following the FAA's and D.C. Circuit's actions, the district court denied the manufacturer's motion to dismiss because the FAA opinion only referenced the current status of the aircraft but did not speak to the status of the aircraft postmanufacture and premodification.[24]

The *Skybolt* Decision Revisits FAA Primary Jurisdiction

A recent decision of the Middle District of Florida, *Skybolt Aeromotive Corp. v. MilSpec Products, Inc.*,[25] further highlights the primary jurisdiction doctrine's somewhat complicated inquiry. There, the court referred to the FAA a commercial dispute between aerospace industry competitors who sold various fasteners installed on general aviation airframes, corporate jet aircraft, and commercial airplanes.

To be sold and installed, the fasteners were required to meet the performance standards set forth in FAA TSO-C148. The plaintiff alleged that the defendants falsely advertised approval for certain fasteners and implemented a complex scheme using forged or fraudulent documents that purported to evidence FAA approval.[26] The plaintiff sought a preliminary injunction to enjoin the defendants from selling, as FAA approved, the fasteners and other products used on airplanes. The defendants opposed the motion, in part, on the basis that the court was not the proper forum to resolve the issue of whether the fasteners lacked TSO approval. The court invited the parties to brief on whether the primary jurisdiction doctrine would be applicable and appropriate to help answer the question of whether the defendants had the claimed approvals from the FAA.[27]

Although generally recognizing that the primary jurisdiction doctrine is applicable to factual issues not within the conventional expertise of judges, the plaintiff argued that the dispute should remain before the court because it encompassed nothing more than the issue of whether the defendants falsified documents to support FAA "approval" of the advertised products. The defendants contended that the issues were "technical questions of whether they properly obtained the TSO-C148 approvals they say they have, and, assuming they did properly obtain the approvals, when did they obtain them."[28]

The court determined that the factual issues were within the FAA's jurisdiction and regulatory authority, required the FAA's expertise, and necessitated regulatory uniformity. The court found that Congress had given the FAA expansive authority to "promote safe flight of civil aircraft" by prescribing "minimum standards required in the interest of safety for appliances and for the design, material, construction, quality of work, and performance of aircraft."[29] With this congressionally conferred power, the FAA has issued regulations that allow it to set minimum performance standards for specified articles used on civil aircraft. If a specific article meets a TSO, the FAA will issue a "TSO authorization," which "is an FAA design and production approval issued to the manufacturer of an article that has been found to meet a specific TSO."[30]

In finding primary jurisdiction, the court elaborated on the specific process to obtain a letter of TSO design approval. After the issuance of TSO authorization, the holder of the TSO also continues to undergo FAA oversight, including having to immediately notify the FAA in writing of any change that may affect the inspection, conformity, or airworthiness of the article, and allowing the FAA to inspect its quality system, facilities, technical data, and any manufactured articles.[31] In sum, the court determined that the role of the FAA in issuing TSO authorizations involves a "myriad of factors," including analyzing the inspection and test procedures used to ensure that each article conforms to the type design and is in a condition for safe operation—i.e., is airworthy.[32]

The court found that in addition to issuing approvals, the FAA has broad enforcement power for TSOs, including suspending or revoking any approval based on a fraudulent, intentionally false, or misleading statement in any application or in any record or report kept, made, or used to show compliance. The FAA may impose civil penalties, cease and desist orders, and injunctions, and seek criminal fines and imprisonment. Where, as here, a private citizen suspects violations of FAA regulations, the FAA investigates suspected unapproved parts reported through the FAA's Suspected Unapproved Parts Program.[33]

The court disagreed with the plaintiff's view that the issues were limited to the "historical questions" of whether the defendants advertised approvals that they did not receive. The court agreed with the defendants that the issues included whether they should have approval for their fasteners, and if so, when the FAA granted such approvals. For instance, the court noted that even if it found that all of the documents alleged by the plaintiff to be fraudulent actually were, the court could not say whether the FAA, in its discretion, properly granted or would have granted approval. Whether the defendants

should have approval "is surely a technical question for the FAA to decide in its judgment and discretion."[34] In referring the issue to the FAA, the court directed the plaintiff to file a formal complaint with the FAA[35] and ordered the delivery of relevant court filings to the FAA.

Although not new concepts, the *Skybolt* court's consideration of "historical fact finding" by a court or "uniform regulatory enforcement" by an administrative agency is the first time that such terms have been used in the context of assessing the FAA's primary jurisdiction. But, this nomenclature does not resolve the applicability of primary jurisdiction because the court itself noted that the inquiry may shift during the pendency of an action:

> To be sure, the issues before the Court were—at one point in time—simply the historical questions of whether [Defendants] falsely advertised TSO-C148 approval . . . . But now, as this case has progressed, there is certainly a question here as to whether Defendants have forged purported FAA documents, submitted those documents to the FAA, and in doing so conned the FAA into granting TSO-C148 approvals.[36]

Court Recognition of FAA Primary Jurisdiction Remains Murky

Skybolt, and the cases that preceded it, confirms the inevitable, but unpredictable, overlap between the adjudicatory authority of the FAA and the jurisdiction of the courts. As a concept, the primary jurisdiction doctrine appears rather simple: the FAA has the expertise and specialized knowledge to make determinations of airworthiness and other certifications. But, several factors result in a more difficult practical reality, the first and foremost of which is that the term "primary" jurisdiction does not mean that the FAA has priority of jurisdiction over the courts. Instead, jurisdiction is "shared," and ultimately the court determines whether referral to the agency is appropriate.

The cases that have addressed FAA primary jurisdiction in litigation involving certification issues demonstrate the unpredictability of courts' primary jurisdiction inquiry. Among the factors that may result in the sparing use of the doctrine are that the FAA may not render a determination that is dispositive of the issue, the potential delay in resolving the litigation due to agency review, and the sliding scale between "historical fact finding" and "uniform regulatory enforcement." Nonetheless, as referenced in this article's opening quote, important aircraft certification issues that directly implicate safety should be the preserve of the FAA, not outside "experts." In that regard, FAA primary jurisdiction remains an alternative worthy of consideration.

Endnotes

1. Austrian Airlines Oesterreichische Luftverkehrs AG v. UT Fin. Corp., No. 04 Civ. 3854 (S.D.N.Y. Nov. 3, 2008).

2. *See* Stevens v. Bos. Sci. Corp., 152 F. Supp. 3d 527, 533–34 (S.D. W. Va. 2016) (discussing the evolution of the primary jurisdiction doctrine).

3. *See, e.g.*, Skybolt Aeromotive Corp. v. MilSpec Prods., Inc., No. 5:16-cv-616, 2017 WL 2540817, at *5 (M.D. Fla. June 9, 2017).

4. *See Stevens*, 152 F. Supp. 3d at 533.

5. Airworthiness Certification of Aircraft and Related Products, FAA Order No. 8130.2G, ¶ 100 (Aug. 31, 2010).

6. *Id.* ¶ 200.

7. *Id.*

8. *Id.* ¶ 201.

9. 14 C.F.R. § 21.603.

10. *See, e.g.*, Prichard Enters., Inc. v. Adkins, 858 F. Supp. 2d 576 (E.D.N.C. 2012) (finding FAA regulations instructive to determine meaning of "airworthy condition" in contract); Austrian Airlines Oesterreichische Luftverkehrs AG v. UT Fin. Corp., 567 F. Supp. 2d 579, 592 (S.D.N.Y. 2008) (recognizing that the aircraft was not airworthy because the ACTs were not on the aircraft model type certificate), *aff'd*, 336 F. App'x 39 (2d Cir. 2009).

11. *See, e.g.*, United States v. W. Pac. R.R. Co., 352 U.S. 59, 63 (1956) (comparing rule requiring exhaustion of administrative remedies with doctrine of primary jurisdiction).

12. No. 90-3906, 1991 WL 102980 (E.D. Pa. June 11, 1991).

13. *Id.* at *3.

14. *Id.* at *2.

15. 745 F. Supp. 650 (D. Kan. 1990).

16. *Id.* at 652.

17. 789 F. Supp. 360 (D. Kan. 1992).

18. *Id.* at 363 (citations omitted).

19. *Id.* at 364.

20. *Id.* (emphasis added).

21. *See* Commander Props. Corp. v. Beech Aircraft Corp., 164 F.R.D. 529, 531 (D. Kan. 1995).

22. *See* Commander Props., Inc. v. FAA, 11 F.3d 204, 206 (D.C. Cir. 1993).

23. *Id.* at 206 n.3.

24. *See Commander*, 164 F.R.D. at 532.

25. No. 5:16-cv-616, 2017 WL 2540817 (M.D. Fla. June 9, 2017).

26. *Id.* at *2.

27. *Id.* at *1.

28. *Id.* at *9–10.

29. *Id.* at *6 (citing 49 U.S.C. § 44701(a)(1)).

30. *Id.* (citing 14 C.F.R. § 21.601(b)(2)).

31. *Id.* at *7 (citing 14 C.F.R. § 21.610).

32. *Id.* at *7–8 (citing Takacs v. Jump Shack, Inc., 546 F. Supp. 76, 78, 79 (N.D. Ohio 1982)).

33. *Id.* at *8 (citing Suspected Unapproved Parts Program, FAA Order No. 8120.16A (June 3, 2016)).

34. *Id.* at *11.

35. *See* 14 C.F.R. § 13.5 ("Any person may file a complaint with the Administrator with respect to anything done or omitted to be done by any person in contravention of any provision of any Act or of any regulation or order issued under it, as to matters within the jurisdiction of the Administrator.").

36. *Skybolt*, 2017 WL 2540817, at *10.