

Congress Grants Federal Jurisdiction and Imposes SFP Cross-Waivers. Now What? A Legislative Update.

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Question

In light of Congress’s 2016 enactment of the “Competitiveness Act”: (1) mandating cross-waivers between SFPs and Commercial Human Spaceflight Operators (“CHSF Operators”) and (2) granting federal courts exclusive subject matter jurisdiction over disputes arising out of launches and re-entries, what does the legal landscape regarding limiting liability exposure actually look like?

Background

Commercial space, in the United States, is regulated by Chapter 51 of the United States Code. Chapter 51’s predecessor was initially passed as the Commercial Space Launch Act in 1984 (the “Launch Act”) and has since been amended multiple times. Most recently, in 2016, Chapter 51 was amended by the US Commercial Space Launch Competitiveness Act (the “Competitiveness Act”). The FAA implements Chapter 51 through regulations in the Code of Federal Regulations (the “Regulations”).

The Competitiveness Act amended federal law to require a cross-waiver between SFPs and CHSF Operators. The language is as follows:

(b) RECIPROCAL WAIVER OF CLAIMS.—

(1) (A) A launch or reentry license issued or transferred under this chapter shall contain a provision requiring the licensee or transferee to make a reciprocal waiver of claims with applicable parties involved in launch services or reentry services under which each party to the waiver agrees to be responsible for personal injury to, death of, or property damage or loss sustained by it or its own employees resulting from an activity carried out under the applicable license.

(B) In this paragraph, the term “applicable parties” means—

- (i) contractors, subcontractors, and customers of the licensee or transferee;
- (ii) contractors and subcontractors of the customers; and
- (iii) space flight participants.

In addition, the Competitiveness Act gives federal courts exclusive jurisdiction over launch & reentry disputes:

Federal jurisdiction.—Any claim by a third party or space flight participant for death, bodily injury, or property damage or loss resulting from an activity carried out under the license shall be the exclusive jurisdiction of the Federal courts.

Analysis

The effect of this language is to grant federal courts exclusive subject matter jurisdiction over disputes arising from commercial launch or reentry licenses issued under the Code of Federal Regulations. In other words, if an individual wishes to sue a CHSF Operator, they will have to do so in federal rather than state court. This is federal question jurisdiction. This does not mean, however, that the laws applied by these federal courts will be “federal laws.” In fact, it will be the job of federal courts to decide which state law they need to apply. Further, SFPs and CHSF Operators now must enter into cross-waivers releasing each other of liability. These two requirements, both alone and apart, have dramatically changed the legal landscape for commercial space flight.

Most critically, states that had previously addressed the issue of space activity liability by requiring the execution of acknowledgments of risk are now authors of preempted laws with regard to launch and reentry. Given that the federal government now requires a waiver, the question, naturally, is whether the federal requirements preempt the statutes and if so, what should CHSF Operators do to maximize their chances of immunity?