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WHEN SHOULD COURTS PIERCE THE VEIL PROTECTING AIRCRAFT FINANCIERS?

BALANCING SOCIETY'S INTERESTS IN PROMOTING AIR SAFETY AND THE FINANCING OF AIRCRAFT UNDER THE LANGUAGE OF 49 U.S.C. 44112

INTRODUCTION

Defendant financiers in two recent aircraft accident cases argued that they were shielded from liability by section 44112 of the Federal Aviation Act. In *Ellis v. Flying Boat, Inc.*¹, a 58 year old seaplane, with corrosion in its wings, took off from Miami and crashed into the ocean after one of its wings broke off, killing all aboard. One man owned over a dozen related companies whose purpose was to provide air service between south Florida and several island destinations. The accident aircraft was owned by one company, maintained by another company, fueled and

¹ *Ellis v. Flying Boat, Inc.*, Case No. 06-20066-CIV-SEITZ/MCALILEY (S.D. FL 2006)

serviced by another company, and leased to another company which marketed it under the name of yet another company. This one man wholly owned all of the companies.² One can imagine this man possessing some amount of wealth, sitting on his yacht, driving his Mercedes, and living in a grand house on the ocean.³ The plaintiff, who lost his daughter in the crash, filed suit against the company that owned the aircraft. The plaintiff alleged that the company that owned the aircraft had failed to properly inspect the aircraft's wings for corrosion, and if it had done so, it would have discovered the corrosion and prevented the accident which killed the plaintiff's daughter. The defendant owner/lessor company filed a motion to dismiss, arguing that "49 U.S.C. 44112⁴ shields a lessor of aircraft from tort liability ...if the lessor was not in actual possession or control of the aircraft..."⁵

In *Layug v. AAR Parts Trading, Inc.*⁶, an aircraft finance company leased, long term, a Boeing 737 to an airline operator in the Philippines. The airline/lessee maintained and operated the aircraft and trained the pilots. The airline's own pilots, who were well qualified and properly certified, negligently flew the aircraft into the side of a hill and killed everyone on board.⁷ The finance leasing company had delivered an aircraft certificated as airworthy to the lessee and had no contacts or relations with the lessee other than the lease agreement. Plaintiffs, on behalf of the

² As alleged by plaintiff's attorneys, Motley Rice LLC, Atlanta.

³ LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 90 (1996)

⁴ 49 U.S.C. 44112(a) defines lessor, owner, and secured party; (b) addresses liability, "A lessor, owner, or secured party is liable for personal injury, death, or property loss or damage on land or water *only when* a civil aircraft, aircraft engine, or propeller is in the *actual possession or control* of the lessor, owner, or secured party, and the personal injury, death, or property loss or damage occurs because of (1) the aircraft, engine, or propeller; or (2) the flight of, or an object falling from, the aircraft, engine, or propeller." (*Italics added.*)

⁵ *Ellis v. Flying Boat.*

⁶ *Layug v. AAR Parts Trading, Inc. et al*, Case No. 00 L 9599 (Cir. Ct. Cook Cty. 2006)

⁷ Commission Report on Air Philippines crash.

estates of the decedents, filed suit in the circuit court of Cook County against the aircraft finance leasing company. The leasing company filed a motion to dismiss arguing that “all state law claims are preempted by 49 U.S.C. 44112” because the leasing company was not in actual possession or control of the aircraft at the time of the crash.⁸

In the flying boat case the court granted the defendant’s motion to dismiss, finding that 49 U.S.C. 44112 protected this owner from liability, even though he effectively had control of the defective, rusty-winged aircraft at the time of the crash. In the leased B737 case the court denied the defendant’s motion to dismiss, finding that 49 U.S.C. 44112 did not protect the owner from liability, and noted that “with regard to the issue of control...that was a distinction that had no bearing on the issue of preemption in the applicable case law.”⁹

These outcomes prompted the author to conduct a review of cases dating back several decades with an eye for similarly strange results, and to develop a new framework that courts could use to parse the aircraft financier liability cases with respect to the protection afforded the financiers by the language of 49 U.S.C. 44112.

This Article will briefly examine the development of 49 U.S.C. 44112 in the context of the history of aviation in the United States and as a response to the common law doctrines governing owner, bailor and lessor liability. Then, in Part II, this Article reviews decisions in which state and federal courts examined the question of whether financiers¹⁰ of aircraft should be held liable

⁸ Memorandum Opinion and Order on Defendants’ Joint Motion to Dismiss Amended Complaint, Layug v. AAR Parts Trading, Inc

⁹ *Id.*

¹⁰ This Article will use the broad term “aircraft financier” to include aircraft owners, aircraft long-term lessors (more than 30 days), and other parties holding a secured interest in an aircraft. See Margo, *Aspects of Aircraft Insurance in Aviation Finance* 62 J. AIR. L. & COM. 423, for a discussion of the various types of aircraft financing.

for the harm caused by the negligence of the lessee or operator. This Article argues that courts have been inconsistent in their interpretation of the law due to the confusing language of the statute and to courts' general lack of understanding of the nuances of aircraft financing transactions and aircraft operations. The Article further argues that courts have focused on several aspects of "financed aircraft" accident litigation, but that they have largely overlooked the key aspect, which is whether the aircraft financier was in "actual possession or control" of the aircraft.

In Part III, this Article proposes a new framework that courts should use in evaluating whether aircraft financiers should be protected from liability in tort, or whether the courts should "pierce the veil" of protection and allow plaintiffs to have their day in court.¹¹ The Article will argue that the language "actual possession or control" is not helpful to a court unfamiliar with aircraft financing and aircraft operations. Aircraft financiers have neither zero control nor absolute control of the aircraft financed; all fall somewhere along a continuum. Courts, in deciding whether section 44112 applies, must decide where the defendant aircraft financier falls on the continuum and where to draw the line of liability.

This Article proposes factors, none of which are dispositive, that when analyzed together can be used to determine where an aircraft financier falls on the continuum between minimal control and effective control. Mere financiers, with minimal control, should be protected by the language written into law by Congress. Influential financiers, with effective control, (that is, with some influence over, or relationship with, the operator), should not be exempted from state law liability to victims and their representatives.

¹¹ BAINBRIDGE, CORPORATE LAW AND ECONOMICS 151 (2002).

Stated simply, the Article's basic argument is that if a defendant had possession or effective control of an aircraft, as described *infra*, at the time of an accident, then section 44112 will not, by itself, protect that defendant. However, if a defendant merely financed an aircraft and can show a lack of effective control of that aircraft, and the aircraft is in an accident through no fault of the financier, then section 44112 is an appropriate special defense and should preempt state law causes of action.

Part IV applies the proposed framework to several of the cases reviewed *infra* and argues that the proposed framework yields results more consistent with the policy goals of Congress than the courts' current unwieldy reasoning. Part V provides an explanation as to why this subject should be interesting to anyone other than aviation lawyers or global aviation insurers. The Article argues that affordable, reliable air transport is essential to economic development and growth, especially in the less developed regions of the world.¹² Many regions in most need of air service are unable to acquire aircraft outright, and thus rely on the availability of affordable aircraft financing. The trend has been toward aircraft operators leasing, rather than purchasing, the aircraft that they operate.¹³ Courts should balance the benefits of allowing plaintiffs to recover after aircraft accidents with those of allowing people to travel and ship their goods economically and reliably.

¹² See "Airline Traffic and Urban Development", Brueckner, Dept. of Econ., Univ. of Ill.; see also "Technical Assistance for Strengthening Cooperation in the Transport Sector of the East Asian Growth Area", Asian Dev. Bank, Dec. 2001.

¹³ Margo, 62 J. AIR. L. & COM. 423.

Developing regions need reliable and safe air transport, but they do not need U.S.-sized jury awards against aircraft financiers when their local aircraft operators are negligent and crash.¹⁴ In the U.S. and abroad, the role of aircraft financiers should be to finance aircraft, and the role of governments and insurers should be to monitor operators in actual possession or control of aircraft for compliance with safety standards.¹⁵ The doctrine is well known in tort law – assign the liability to the party or parties most capable of ensuring compliance, preventing negligence, and buying affordable insurance. When courts err and let negligent parties escape liability, they do not enhance aviation safety. When courts err and hold innocent financiers liable for others’ negligent acts, they do not promote aircraft financing or general economic growth. In order to promote both aviation safety and economic growth, the courts should attempt to properly parse the cases.

I. DEVELOPMENT OF 49 U.S.C. 44112 (“FEDERAL AVIATION ACT”)

During the first several years after the Wright Brothers flew at Kitty Hawk there was little regulation of flying machines.¹⁶ As more machines took to the air, and more harm to property and persons occurred, the state and federal governments began to regulate the flying machines, their owners, and operators.¹⁷

¹⁴ This comment makes reference to *Layug v. AAR Parts Trading, Inc.*, *infra*.

¹⁵ 106 Yale L. J. at 83 (notwithstanding the idea here that the primary role of insurance companies is to spread risk, not to monitor the insured.)

¹⁶ “Should Juries Decide Aircraft Design?” 29 U.S.F.L. L. Rev. 741

¹⁷ *Id.*

A. Liability of Owners, Lessors, and Bailors under Common Law

To better understand the development of the law with respect to the liability of aircraft financiers for torts involving aircraft, it is helpful to look to the common law doctrine of the liability of owners, bailors, and lessors of property other than aircraft. Initially, the common law of owners, bailors, and lessors of property was simply adopted to handle aviation tort cases.

In *Arling v. Zeitz*,¹⁸ the plaintiff had leased from the defendant the first floor of a two-story building. One cold winter night, a water pipe supplying sinks froze and burst. Water damaged the plaintiff's goods and he brought an action in tort against the lessor. The court held that the defendant lessor was not liable for damages resulting from the bursting pipe because "the means of shutting off the sink pipe was under the control and in the possession of the plaintiff."

A year later, in *Wilsonian Investment Co. v. Swope*,¹⁹ the court held that a landlord/lessor was liable to the tenant/lessee for damages caused by an exploding refrigerating plant because the lease explicitly stipulated that the lessor would remain in control of the plant and its operation, even though it was physically possessed by the lessee.

In *Cintrone v. Hertz Truck Leasing & Rental Service*,²⁰ an injured employee of the lessee of the truck brought suit against the lessor, a commercial leasing enterprise, for injuries suffered because of an alleged brake failure. The plaintiff's employer had leased several trucks from the lessor on a long term basis. The trucks were kept at the lessee's premises, but the lessor agreed to maintain them. Furthermore, every 14 days one of the lessor's mechanics was sent to the

¹⁸ 269 Ill.App.562 (1933)

¹⁹ 38 P.2d 399 (1934)

²⁰ 45 NJ 434, 212 A.2d 769 (1965)

lessee's premises to inspect the trucks. The court held the lessor strictly liable in tort. The court held that the leasing agreement gave rise to a continuing implied promissory warranty that the leased truck would be fit for the lessee's use for the duration of the lease.²¹

B. Government Response to the Flying Machines' Safety Record

“The end of World War I brought with it a flood of surplus airplanes and trained pilots ready to adapt to commercial use, but the federal government was reluctant to support or regulate the fledgling industry.”²² “After several years of unsuccessful attempts to win passage of an aviation act in Congress, the foundation of modern aviation regulation was finally signed into law in 1926.”²³ “The Air Commerce Act of 1926 issued a dual mandate that the Secretary of Commerce not only promulgate federal standards for the licensing and safe certification of pilots and airplanes...but also that the Secretary foster air commerce.”²⁴ The next few years saw confusion over whether the states or the federal government regulated the flying machines.²⁵ The Senate investigated fraud and collusion in the airmail contract arena, and as they did so, “cutthroat bidding ensued and the transport industry began losing money. The financial losses, in turn, contributed to an even poorer safety record. The declining safety record of the airlines in

²¹ 52 A.L.R. 3d 121 (1973)

²² 29 U.S.F.L. L. Rev. 741, 745

²³ Id. at 747.

²⁴ Id.

²⁵ Id.

the mid-1930s, including a crash which took the life of a New Mexico Senator, required that existing regulations be carefully scrutinized.”²⁶

Congress passed the Civil Aeronautics Act of 1938 in response to the dismal safety record of the flying machines. The Act enlarged federal authority over aviation and created the Civil Aeronautics Authority.²⁷ However, there remained some question over whether the federal government could take authority over all of aviation from the states.²⁸

The Uniform Aviation Act of 1929 was adopted by several states in an effort to increase air safety.²⁹ Other states adopted variations of the Act. The federal version was codified as section 1301 (26)³⁰ of the “Federal Aviation Act.”³¹ Section 1301 and several of the state statutes, combined with section 1430,³² seem to have imputed to owners of aircraft the responsibility to ensure that the operator of their aircraft did so safely and lawfully.³³

Courts, or more accurately, plaintiffs’ attorneys, began to use these laws to impugn aircraft owners and lessors with liability for damages when an operator crashed their aircraft.³⁴ It is not clear that the original state and federal statutes were intended to create causes of action in

²⁶ Id. at 750.

²⁷ Id.

²⁸ See *Broadway v. Webb Aviation*, 462 F.Supp. 429 (1977) for a detailed discussion of many cases that examined whether federal law or state law controlled in questions of aircraft financier liability.

²⁹ See *Brown v. Astron Enterprises, Inc.*, 989 F.Supp. 1399 (1997) for a history of the Uniform Aviation Act and state acts throughout the country.

³⁰ 49 U.S.C. 1301 (26) “Any person who causes or authorizes the operation of aircraft with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of this statute.”

³¹ 49 U.S.C. 1301 (26) was originally enacted in the Civil Aeronautics Act of 1938, and was retained in the Federal Aviation Act of 1958, which replaced the 1938 Act.

³² 49 U.S.C. 1430(a) “It shall be unlawful for any person to operate aircraft in air commerce in violation of any other rule, regulation, or certificate of the Administrator under this subchapter.”

³³ See *Rogers*, at 1394.

³⁴ See *Broadway*, 462 F.Supp. 429

tort.³⁵ It is more likely that the statutes were intended to hold owners responsible to ensure that the person actually operating the aircraft was in compliance with all the new safety regulations.³⁶

Section 504 of the Civil Aeronautics Act was added to remove any doubt that owners “for security purposes only” have no liability for damages caused by the operation of aircraft.³⁷

Following World War II, civil aviation expanded again, thanks to the huge advances made during the war.³⁸ “As the skies grew more crowded and planes flew faster, it became apparent that the air traffic control system had become inadequate.”³⁹ A mid-air collision of two airliners over the Grand Canyon in 1956 played a role in Congress’ enactment of the Federal Aviation Act of 1958.⁴⁰ This Act created the FAA, which was again given the dual mandate to foster air commerce and promote air safety.⁴¹

In response to the litigation targeted at owners and other financiers of aircraft after aircraft accidents, Congress added section 1404 to the “Federal Aviation Act” to clarify that owners and other financiers were not liable if they were not in “actual possession or control.”⁴² Congress did this to encourage and facilitate investment in civil aircraft.⁴³ Presumably there

³⁵ Id.

³⁶ Id.

³⁷ House Report No. 2091, 80th Congress, 2d Session. “This bill proposes to insert after section 503 of the Civil Aeronautics Act of 1938 a new section 504. Provisions of present Federal and State law might be construed to impose upon persons who are owners of aircraft for security purposes only, or who are lessors of aircraft, liability for damages caused by the operation of such aircraft even though they have no control over the operation of the aircraft. This bill would remove this doubt by providing clearly that such persons have no liability under such circumstances. The relief thus provided from potential unjust and discriminatory liability is necessary to encourage such persons to participate in the financing of aircraft purchases.”

³⁸ 29 U.S.F.L. L. Rev. 741, 752.

³⁹ Id.

⁴⁰ Id.

⁴¹ Id.

⁴² *Rogers v. Ray Gardner Flying Service, Inc.*, 435 F.2d 1389 (1970).

⁴³ Id.

were lobbyists, hired by financiers of aircraft, working the backrooms of Congress in the day.⁴⁴

The House report spelled out the reasons for the addition of section 1404:

Provisions of present Federal and State law might be construed to impose upon persons who are owners of aircraft for security purposes only, or who are lessors of aircraft, liability for damages caused by the operation of such aircraft even though they have no control over the operation of the aircraft. This bill would remove this doubt by providing clearly that such persons have no liability under such circumstances.

The relief thus provided from potential unjust and discriminatory liability is necessary to encourage such persons to participate in the financing of aircraft purchases.

An owner in possession or control of aircraft, either personally or through an agent, should be liable for damages caused. A security owner not in possession or control of the aircraft, however, should not be liable for such damages. This bill would make it clear that this generally accepted rule applies and assures the security owner or lessee, that he would not be liable when he is not in possession or control of the aircraft.

The limitation with respect to leases of 30 days or more, in case of lessors of aircraft, was included for the purpose of confining the section to

⁴⁴ KLEIN, FEDERAL INCOME TAX 589.

leases executed as a part of some arrangement for financing purchasing of aircraft.

It is the conviction of this committee that the bill should be passed to remove one of the obstacles to the financing of purchases of aircraft.⁴⁵

C. Courts' Interpretation of Legislation

How have the courts interpreted the various sections of federal legislation governing aviation? In *Rosdail v. Western Aviation, Inc.*,⁴⁶ the plaintiffs amended their allegation to impute the negligence and carelessness of the pilot to the plane's owner and to an aviation leasing company as a matter of law pursuant to 49 U.S.C. 1301(26). The court granted the defendant's motion to strike the plaintiff's amended allegation.

The plaintiff was a passenger in a small Cessna aircraft that crashed during a flight from Colorado to Iowa. The aircraft's owner had leased the aircraft to an aviation business, which had, in turn, leased the aircraft to the pilot, whose negligence caused the crash. The issue before the court was whether the pilot's negligence was to be imputed to the owner and the aviation company pursuant to section 1301(26) and contrary to common law.

The court held that section 1301(26) did not create a separate cause of action in tort. Instead, it had merely required that aircraft owners be held responsible in the context of

⁴⁵ H.R. Rpt. 802091, at 1-2 (Jun. 1, 1948).

⁴⁶ 297 F.Supp. 681 (1969)

violations of the Federal Aviation Program, and that this responsibility of owners was in the nature of express penalties as provided in the Program.⁴⁷

In *Haskin v. Northeast Airways, Inc.*⁴⁸ the court addressed the question of “whether a passenger in an airplane who sustains injury as a result of a crash caused by the negligence of the aeronaut has by reason of that fact alone a cause of action for the damages sustained against the owner who consented to and authorized the use of the plane.”⁴⁹ The plaintiff, injured in the owner/bailor’s plane when the pilot/bailee negligently crashed it, argued that the Minnesota Aeronautics Act of 1943, which was based on the Uniform Aeronautics Act of 1929, made the owner vicariously liable for the negligence of the bailee in all cases. The Supreme Court of Minnesota affirmed the district court’s granting of summary judgment for the defendant. The court reasoned that under the Minnesota Act, “The liability of the owner of aircraft to passengers for damages caused by a collision on land or in the air shall be determined by the rules of law applicable to torts occurring on land.”⁵⁰ The court further reasoned that “according to the applicable rules of law governing torts occurring on land, the bailor of a chattel is not liable for damages caused by the negligence of his bailee in the absence of particular circumstances, such as, a defect in the chattel proximately causing the accident of which the owner had actual or constructive knowledge at the inception of the bailment...”⁵¹

⁴⁷ Id.

⁴⁸ 123 N.W. 2d 81 (1963)

⁴⁹ Id. at 82.

⁵⁰ Id. at 83.

⁵¹ Id. at 83.

In 1994, 49 U.S.C. 1404 was re-codified as 49 U.S.C. 44112.⁵² Congress made changes to the language of the statute.⁵³ Notably, the statute was changed to first define and then list three distinct types of defendant who should not be held liable assuming the other requirements of section 44112 are met: (1) lessors, (2) owners, and (3) other secured parties.⁵⁴ These changes have created some of the confusion over Congress's intent and the proper interpretation of the statute.⁵⁵

For decades, courts with jurisdiction over aircraft accident litigation have attempted to interpret the language of the original and subsequent versions of the federal statute, and results have been inconsistent. The language of the statute itself is unclear.⁵⁶ Courts have looked to distinguish cases based on whether the harm was done "in the aircraft" or "on the ground."⁵⁷ Other courts have ignored this distinction.⁵⁸ As one airline captain once said, "No one is killed while airborne... it's only when you hit the ground."⁵⁹ Courts have attempted to look for the "original intent" of Congress. Other courts have followed the plain language of the current statute. Courts have attempted to rule on whether the federal statute preempts state aviation laws concerning an aircraft owner's statutory liability, as well as state common law on bailor liability to the bailee or third parties. Courts have tried to parse the cases on whether the financier was an

⁵² Id.

⁵³ Compare 49 U.S.C. 44112 with 1404.

⁵⁴ 989 F.Supp. 1399

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ *Matei v. Cessna Aircraft Co.*, 35 F.3d 1142 (7th Cir. 1994)

⁵⁹ The author's father, an airline pilot for 39 years.

owner or lessor. However, courts have overlooked the key phrase in the language of both the original and current statutes: “actual possession or control.”

Defendant aircraft financiers, as owners, lessors, or other secured parties, never have *zero* control of the aircraft. For example, they always retain the contractual right to re-possess the aircraft in the event of default or other conditions.⁶⁰ They usually have other express contractual rights which allow them to monitor and ensure the value of their investment.⁶¹ On the other end of the scale, defendant aircraft financiers never have *complete* control of the aircraft, even if they are literally sitting in the pilot’s seat with their hands on the stick and throttles. Nature and Air Traffic Control always have some control over the aircraft. As Justice Jackson put it, “Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission...under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower... it may be diverted from its intended landing, and it obeys signals and orders.”⁶²

In virtually all cases, the defendant financier of the aircraft has some degree of control, varying from very little control to almost complete control. (This Article will refer to these as “minimal control” and “effective control,” respectively.) One might say that the financier’s control varies along a scale from 1 percent to 99 percent. Courts seem to not understand or recognize this reality. This is due to the unclear language of the statute⁶³ and the lack of

⁶⁰ See Margo, 62 J. AIR. L. & COM. 423.

⁶¹ Id.

⁶² Northwest Airlines v. Minnesota, 322 U.S. 292, 303 (1944)

⁶³ See Northwest Airlines, Inc. 322 U.S. 292 (1944).

knowledge of the nuances of aircraft financing and operations on the part of the courts. This Article proposes a framework that courts can use to determine where the aircraft financier is on the continuum from “minimal control” to “effective control.”

II. POORLY DECIDED AIRCRAFT FINANCIER LIABILITY CASES

It will be informative and instructive to review several cases where courts have addressed the issue of whether an aircraft financier should be protected from liability and generated some poorly reasoned decisions. Often courts appear to focus on only one issue while ignoring others. Sometimes it appears that courts do not really understand the current law with respect to aircraft financier liability or the continuum of “possession or control” of an aircraft. Thus, they merely do what they think is right for either the injured plaintiffs or the “innocent” financiers. Having ruled by their equitable instincts, the courts then try to cite to authority that supports their holding. This section will review the facts and holdings of cases which were improperly decided according to the proposed framework of this Article.

In an oft-cited Illinois case, *Retzler v. AMR Leasing Corp.*⁶⁴, a flight attendant was injured when American Eagle Flight 4048 made an emergency descent and landing due to an engine problem. She sued AMR Leasing Corporation (AMR) as the lessor who should have detected and corrected the engine problem. The trial court granted summary judgment to AMR on the grounds that section 44112 preempted state claims for personal injury against lessors of

⁶⁴ 723 N.E. 2d 345 (Ill. 1999)

aircraft. The Appellate Court of Illinois reversed, holding that the state claim was not preempted by the federal statute. The appellate court arrived at the correct outcome, but for the wrong reasons.

The appellate court reasoned that section 44112 did not preempt state claims against aircraft lessors, and that the plaintiff had “clearly established three of the four requirements for bailor-lessor liability in this case. First... AMR supplied the aircraft...Second, the aircraft was defective at the time it was leased to Simmons [the operator]. Third, there is no question that the defective engine led to plaintiff’s injuries. The final factor... is whether the defect in the engine could have been discovered by a reasonable inspection.”⁶⁵

The court noted that the defendant had relied on *Matei*⁶⁶, reviewed *infra*, in asserting that section 44112 preempted state law claims against aircraft financiers. The court reasoned that the *Matei* court had not held that 44112 preempted state law claims, but had merely held that the plaintiff in *Matei* had simply failed to establish a case under Illinois common law.⁶⁷ (In fact, the *Matei* court had held that section 44112 preempted state law. This point is made in later cases, one of which is reviewed *infra*.⁶⁸)

The facts of *Retzler* showed that a month before the accident, AMR had purchased the aircraft and sold it back to a French company, which then leased it back to AMR. AMR then subleased the aircraft to Simmons Airlines. Simmons owned and operated American Eagle,

⁶⁵ Id. at 17.

⁶⁶ *Matei v. Cessna Aircraft Co.*, 35 F.3d 1142 (7th Cir.1994) (Defendant aircraft owner leased his aircraft to an air cargo operator whose pilot was killed in a crash caused by defective instrument lights. Aircraft owner found not liable, under the protection of 49 U.S.C. 44112, because he did not have possession or control of the aircraft at the time of the crash.)

⁶⁷ Id. at 18

⁶⁸ See *In re Lawrence W. Inlow*, 2001 U.S. Dist. LEXIS 2747.

which did business as the regional airline of AMR and American Airlines. These companies were all one enterprise.⁶⁹ There is little doubt that AMR, as the parent of American Airlines and American Eagle, was able to effectively control the aircraft involved in this accident with respect to flight schedules and maintenance. Further, it seems implausible that American Eagle or Simmons could have independently decided to move the aircraft to another market, altered the flight schedules, or painted the aircraft with the color schemes or logo of another brand name. These regional operators were de facto alter-egos of AMR.⁷⁰ Thus, this flight was effectively under the control of AMR. Further, AMR breached a duty owed to the flight attendant to ensure that the aircraft was not defective.⁷¹ The circuit court, failing to understand this, held that section 44112 provided protection for AMR, even though the requirement that there be no “actual possession or control” was not met. The circuit court may have believed that AMR, a corporation and fictional person, should have been sitting in the pilot’s seat of the American Eagle flight that day in order for section 44112 to be invalidated. Industry specialists understand that “control” of the aircraft does not require the financier to be sitting in the cockpit.

The appellate court, failing to understand the distinction between the facts of *Matei* and those before them, and failing to understand why Congress bothered to add sections 504, 1404, and 44112, held that 44112 did not preempt state law. The appellate court should have noted that in *Matei* the defendant aircraft financier was a mere financier and not an influential or

⁶⁹ BAINBRIDGE, CORPORATE LAW AND ECONOMICS 168 (2002). See also *Pan Pacific Sash & Door Co. v. Greendale Park, Inc.*, 333 P.2d 802 (Cal.App.1958), where the basic standard for invoking enterprise liability requires a two-prong showing: (1) such a high degree of unity of interest between the entities that their separate existence had de facto ceased and (2) that treating the two entities as separate would promote injustice.

⁷⁰ See generally, BAINBRIDGE, CORPORATE LAW AND ECONOMICS 151 (2002). Ch 4 for a discussion of alter-egos.

⁷¹ Invoking so-called instrumentality rule. See *Zaist v. Olson*, 227 A.2d 552,558 (Conn. 1967); *Collet v. American Nat’l Stores, inc.*, 708 S.W. 2d 273, 284 (Mo. Ct. App. 1986).

related party financier, as AMR was in their case. The court then could have recognized that section 1404 (44112's predecessor) did apply in *Matei* but did not apply in *Retzler*.

It may well be that defendant AMR could have invoked other defenses aimed at shielding a parent from liability for the negligence of its subsidiaries,⁷² but the defense that under section 44112 an aircraft financier is not liable if not in "actual possession or control" does not apply because AMR exercised too much control to be able to claim that it was a "mere financier."

In the wrongly-decided Southern District of Indiana case, *In re Lawrence W. Inlow Accident Investigation*,⁷³ the General Counsel for a well-capitalized financial services company was killed when he disembarked from the corporate helicopter and was struck in the head by the rotor blade. His widow sued the sublessor of the aircraft, amongst others. The court found that section 44112 preempted her claims against the sublessor as a matter of law. The court got it wrong. If Congress meant to protect this aircraft lessor, then Congress meant to protect all aircraft lessors without regard to any other requirements.

The opinion in *Inlow* has a section under "Undisputed Facts" labeled "The Conseco Entities."⁷⁴ The label almost says it all. Conseco, Inc. was a parent corporation with many wholly-owned subsidiaries, including Capital American Life Insurance, Conseco Investment Holding Company (renamed CIHC), Conseco Services, and Conseco Flight Operations. The general counsel of Conseco, Inc. was going on a business trip related to Capital American Life Insurance, was riding on an aircraft leased by CIHC to Conseco and operated by Conseco Flight

⁷² See generally, LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 90 (1996)

⁷³ 2001 U.S. Dist. LEXIS 2747 (2001)

⁷⁴ 2001 U.S. Dist. LEXIS 2747 at 19.

Operations, whose staff were paid by Conseco Services. The alleged negligence was the failure to warn the general counsel to wait until the rotor stopped before disembarking the aircraft.

Without even going into the reasoning of the court, it is readily apparent to even untrained observers that the aircraft was under some form of control of Conseco and CIHC. It is not plausible to believe that Conseco Flight Operations could have done anything with that aircraft that day other than to transport the general counsel of Conseco and CIHC to his meeting. It is instructive to look at the ironic declaration of Judge David Hamilton. “The Conseco Group has moved for summary judgment against CIHC. On behalf of CIHC, the Conseco Group argues that plaintiff’s claims are barred as a matter of law...by [section 44112 of] the Federal Aviation Act. The court concludes that [44112] preempts the Inlow Plaintiffs’ claims against CIHC as a matter of law.”⁷⁵

It is worth noting two ideas here: (1) section 44112 states that “a lessor...is liable..only when [the] civil aircraft...is in the actual possession *or control* of the lessor...”, and (2) the court explicitly refers to “the Conseco Group,” and states that Conseco was acting on behalf of CIHC. If CIHC were a mere financier, why would the Conseco Group act on their behalf?

The fact is that CIHC was not a mere financier; rather, it was an integral part of a larger enterprise of companies. It was Conseco’s asset-owning company which subleased a highly technical asset, unforgiving of any negligence, to Conseco’s operating company. There is little doubt that each of the “companies” within the Conseco Group did exactly what they were told to

⁷⁵ Id. at 33.

do by officers and directors of Conseco. Thus, CIHC had effective control over the aircraft at the time of the accident, and therefore 44112 did not apply.

The court analyzed the Conseco Group's argument that summary judgment was appropriate because section 44112 shields CIHC from liability in its role as the lessor of the aircraft. On this defense, the court agreed with the Conseco Group.

The court recited the language of the statute, noting the word "only"⁷⁶ could have effect only if the statute preempts claims against lessors arising under state law.⁷⁷ The court went on to mention the legislative history of section 44112: "The House Report shows that the bill was a direct response to the Uniform Aeronautics Act, which was in force in ten states in 1948. Those state laws declared the 'owner' of every aircraft 'absolutely liable' for injuries caused by the flight of the aircraft, regardless of the owner's degree of control over lessee. The statutory provision (1404) was plainly intended, and plainly written, to preempt such state statutes and parallel common law claims."⁷⁸

Note that the court briefly mentioned the key phrase upon which this Article is based, but then failed to use it in its analysis. The phrase was "regardless of the owner's *degree of control over lessee*." This language was what bothered Congress, and this is why they added the provision protecting "mere financiers" of aircraft. This is why the statute applies only when the financier is not in actual possession or effective control of the aircraft.

The *Inlow* court went on to examine and refute the two plaintiff's arguments as to why section 44112 should not control the case. The first is focused on whether the financing

⁷⁶ "A lessor...is liable...only when a civil aircraft...is in the actual possession or control of the lessor..", *Inlow*, at 44.

⁷⁷ *Id.* at 45.

⁷⁸ *Id.*

arrangement between Conseco and CIHC was necessary or not, and the second focuses on whether section 44112 preempts state law. Neither are the correct focus for the case, but the second argument is worth a look.

The court looked to *Matei*, *Rogers*, and *Retzler* in analyzing whether 44112 preempts state law. The court addressed the apparent inconsistency between the district and circuit courts' holdings in *Matei* as to whether 44112 preempts state law claims.⁷⁹ The Inlow plaintiffs contend that the Seventh Circuit in *Matei* implicitly rejected the possibility of preemption. The district court in *Inlow* wrote that the plaintiffs read too much into the Seventh Circuit's silence on the matter.⁸⁰ The court went on to write that *Retzler* erred because its interpretation strayed from the statutory language and ultimately gives 44112 no effect. Note how the court failed to catch the similarity between *Retzler* and *Inlow*: in both cases the defendant aircraft financier did have effective control of the aircraft at the time of the accident. Thus, in both cases, the court did not need to address preemption because the facts on their own merit disqualified the defendants from using the special defense of the 44112 exemption.

This Article's proposed framework leaves open the possibility that Conseco and CIHC could defeat liability through standard judgment-proofing legal arrangements.⁸¹ But for the court to rule for the defendants on the basis of the section 44112 exemption when it does not apply weakens the language of the statute and confuses future courts considering these cases. In the

⁷⁹ Id. at 49.

⁸⁰ Id. at 50.

⁸¹ See generally, LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 90 (1996) Also see BAINBRIDGE, CORPORATE LAW AND ECONOMICS 151 (2002). Ch 4 Limited Liability.

poorly decided case *Coleman v. Windham Aviation, Inc.*,⁸² the Superior Court of Rhode Island found that “section 44112 does not provide an exemption for Defendant [aircraft lessor] as they outright owned the Piper involved in the fatal collision. Consequently, the Court must decide whether Defendant [lessor] will be liable under applicable state law.”⁸³

The court got a couple things right, but with improper reasoning. The court correctly found that section 44112 did not provide an exemption for the defendant aircraft lessor, and in so finding, the court realized that it needed to decide whether the defendant could be held liable under state law. Just because section 44112 does not save a defendant aircraft financier does not mean the defendant is liable; it just means that the plaintiff can proceed with her case.

Why did section 44112 not exempt the defendant lessor from liability in *Coleman*? The defendant, Windham Aviation, was an FBO⁸⁴ that rented a four-seat Piper aircraft on a very short term to a renter pilot. The pilot lessee then crashed into a small Cessna aircraft, while both were using the same runway at the same time. The two occupants of the Cessna aircraft suffered fatal injuries. The plaintiff sued for their wrongful deaths.

The plaintiff asked the court to find that—in the event that a jury finds that the renter pilot of the Piper was negligent and caused the crash—defendant Windham is vicariously liable for the negligence by virtue of its ownership of the leased Piper. The defendant Windham argued that the language of 49 U.S.C. 44112 clearly exempts aircraft owners from the imposition

⁸² 2005 R.I. Super. LEXIS 119 (2005)

⁸³ *Id.* at 16.

⁸⁴ “Fixed Base Operator,” basically a full service general aviation provider of rental aircraft, fuels, instruction, etc.

of vicarious liability, and thus, preempts any state law which purports to impose vicarious liability on the basis of aircraft ownership.⁸⁵

The court began its opinion by noting that “although a cursory review of 44112 seems to...support the Defendant’s argument..., a deeper examination of the statute reveals a contrary result.”⁸⁶ The reader of this opinion is left hoping that this court got it right. But alas, no, the court got both its cursory review and its deeper examination wrong.

Even a cursory review of section 44112 would show that it does not apply to the hourly or daily rental of an aircraft to a renter pilot, as were the facts of this case. The language of 44112 requires leases of 30 days or more, or owners who lack control over the aircraft.⁸⁷ Here, the lease was for much less than 30 days, and the owner had exactly the kind of control that Congress envisioned when it coined the language “possession or control.” The defendant owner/lessor had the authority to either rent to the pilot or not. The owner/lessor had the authority to stipulate conditions of the rental, such as weather conditions required, destinations approved or disapproved, or day versus night flying. Thus, the owner/lessor had effective control of the aircraft, even though the renter pilot had the yoke and throttle in his hands. The court did not seem to understand the nuanced continuum of control over the flight of an aircraft.

More disturbing in the court’s opinion was a discussion about whether section 44112 means what it says or not. The court wrote that 44112, a re-codification of the predecessor 1404,

⁸⁵ Id. at 6-7.

⁸⁶ Id. at 8.

⁸⁷ 49 U.S.C. 44112 (b)

“substantively alters 1404 by extending the exemption accorded to owners and lessors for security purposes only to include *all* owners and lessors.”⁸⁸

The court rejected the new meaning after going through an analysis of “the often cited Sutherland treatise on statutory construction.”⁸⁹

First, the change in the language of the statute (from that of 1404 to that of 44112) did not “extend the exemption to include all owners and lessors,” even if it did extend it to owners. The exemption is only available to owners, lessors, and other secured parties *not in actual possession or control*. This clearly does not include *all* owners and lessors.

Second, and more importantly, it is not even clear that the language of the current section 44112, which mentions owners, along with lessors and secured parties, extended the original exemption. It is possible to read the original language of sections 504 and 1404 to apply to owners as well. This was well explained in the opinion in *Mangini*, reviewed *infra*, which dismissed the *Coleman* holding as a “conclusion that defies common sense and renders the explicit words of Congress nugatory.”⁹⁰ The courts’ struggle to interpret section 44112 shows a need for a better framework to use in approaching these aircraft financier liability cases.

⁸⁸ Id. at 14,

⁸⁹ Id. at 8.

⁹⁰ *Mangini v. Cessna Aircraft Co*, LEXIS 3387 (Conn. Super. 2005).

III. A PROPOSED FRAMEWORK TO EVALUATE WHETHER 49 U.S.C. 44112 PROTECTS

FINANCIERS OF AIRCRAFT

The courts for eighty years have tried to decide whether the old aviation acts (Uniform Aviation Act, Federal Aviation Act, and state versions of those acts) impugned aircraft financiers with liability in tort or, conversely, shielded them from liability.

This Article proposes a new framework that should be employed in analyzing the cases. The proposed framework closely follows *Matei* and *Mangini*, which both capture the intent of the drafters of the original and current versions of section 44112, and then borrows from the corporate law world several concepts of limited liability, including veil piercing, alter egos, enterprise liability, and parent-subsidary control. First, though, this Part will review cases that nicely capture the gist of the exemption of section 44112.

A. *Matei*: The Aircraft Financier is Not Liable

In the 7th Circuit model case *Matei v. Cessna Aircraft Co.*,⁹¹ the district court granted summary judgment for the defendant aircraft owner/lessor, finding that he was not liable under Illinois' common law of bailment and 49 U.S.C. 1404 because he (1) had leased the aircraft to Prompt Air (the operator), (2) did not have possession or control of the aircraft at the time of the crash, and (3) had no knowledge of the alleged defects at the time he transferred possession. The 7th Circuit affirmed. This is the rule the courts should follow.

⁹¹ 35 F.3d 1142 (1994)

Dennis Matei, a commercial pilot, died in a plane crash on January 29, 1987.⁹² The alleged proximate cause of the crash was a failure of the control panel instrument lights. Mrs. Matei brought suit against the manufacturer, Cessna, and the aircraft's owner.

The district court analyzed whether the defendant owner/lessor had a duty to Matei, a third party, under both Illinois common law of bailment and under the preemption of 49 U.S.C. 1404 (the predecessor to section 44112.) The court held that “the leasing of an aircraft is subject to the general rules regarding the bailment or lease of personal property. A bailor may be held liable to an injured third person if he supplied defective chattel to the bailee, knew or should have known of the defect, and if the defect proximately caused the injury.”⁹³ The court cited *Ferrari*⁹⁴ and *Huckabee*.⁹⁵

The court further held that “the Federal Aviation Act (49 U.S.C. 1404) specifically exempts a lessor who retains no possession or control of an aircraft from any liability arising from its use where there is a lease of more than thirty days.”⁹⁶ While the owner of the aircraft was responsible for the costs of the maintenance and repairs, and was to be invoiced and notified of such activities, the lease between Prompt Air (operator/lessee) and the defendant (owner/lessor) clearly stipulated that Prompt Air would have responsibility for the maintenance and repair, and would have complete possession and control of the aircraft. The facts further

⁹² The author also flew for Prompt Air during this time frame, and had flown the aircraft involved in this case.

⁹³ *Matei v. Cessna Aircraft Co.*, 35 F.3d 1142 (1994)

⁹⁴ *Ferrari v. Byerly Aviation, Inc.*, 268 N.E. 2d 558 (1971) (holding that neither common bailment law nor the Illinois Aeronautics Act created vicarious civil liability in the owner of an aircraft for the negligent operation by another by virtue of having rented the aircraft to that negligent other.)

⁹⁵ *Huckabee v. Bell & Howell, Inc.*, 265 N.E. 2d 134 (Ill. 1970)

⁹⁶ 35 F.3d 1142

showed that the aircraft was airworthy and without defect when the owner transferred it to the operator. Therefore, the court held that the owner was not liable.

The appellate court affirmed the district court's findings with respect to the general rules of bailment, and did not make a specific holding as to whether section 44112 preempts state law generally. Note that the defendant did not need to use the special defense of section 44112 when the state claim of the plaintiff was not legally sufficient.

B. *Mangini*: The Aircraft Financier is Liable

In the well-reasoned case *Mangini v. Cessna Aircraft Co.*,⁹⁷ the Superior Court of Connecticut seems to really get the purpose of the added section (to the Federal Aviation Act) written by Congress decades ago. In the final paragraph of the court's opinion, the court wrote, "Also missing is any allegation regarding the absence of actual possession or control of the aircraft which is necessary to take advantage of 49 U.S.C. 44112. Therefore, the special defense, as presently stated, is legally insufficient, and the plaintiff's motions to strike are granted on this basis."⁹⁸

First, note that the exemption provided by section 44112 is a special defense, presumably plead ahead of the regular defenses to common liability law. Second, the burden is on the defendant to make the allegation regarding the absence of actual possession or control. Third, without an allegation of an absence of actual possession or control, the special defense available

⁹⁷ 2005 Conn. Super. LEXIS 3387 (2005)

⁹⁸ *Id.* at 18-19.

under section 44112 is legally insufficient. The court emphasized that an allegation of an absence of actual possession or control is necessary to take advantage of section 44112. This is the basic thrust of this Article.

This Article adds to the opinion, however, in two ways. First, it shows how courts for decades have misunderstood the purpose of the exemption created by Congress. Second, it proposes a framework for future courts to follow in evaluating where a defendant aircraft financier falls on the “possession or control” continuum. The *Mangini* court simply pointed out that the defendant had failed to address “possession or control,” without offering any useful guidance on what a defendant would need to show, or what a court should look to in making its decision.⁹⁹

C. The Proposed Test

Courts should follow a simple checklist to determine whether 49 U.S.C. 44112 applies, as a special defense, and protects the financier of aircraft from liability in tort:

Is the defendant an owner, lessor, or other secured party?

If not, §44112 does not apply.

If a lessor, was the lease for more than 30 days?

If not, then § 44112 does not apply.

⁹⁹ Id. at 18.

Was there a defect which was known, or should have been known, to the aircraft financier at the time the aircraft was transferred to the operator, debtor, or lessee, and was that defect a cause in fact of the damage or harm?

If yes, then § 44112 does not apply. This test captures the idea that an aircraft financier who supplies, or puts into the stream of commerce, a defective aircraft cannot escape liability merely by asserting the exemption offered by § 44112. The current language of the statute could be construed to allow an unscrupulous aircraft financier to supply a defective aircraft to an operator, then hide behind the language of the statute after the defect causes harm. Courts should look to the common law idea that the bailor needs to initially supply a non-defective chattel to the bailee.

Was the defendant financier (owner, lessor, or other secured party) in “actual possession or effective control” at the time of the accident?

If yes, then § 44112 does not apply. Courts should read this as asking whether the defendant aircraft financier was a “mere financier” with minimal control (as in *Matei*), or an “influential financier” with effective control (as in *Retzler*). If the defendant financier makes factual allegations as part of a special defense that it was not in possession or control at the time of the crash, then the burden shifts to the plaintiff to make factual allegations to the contrary. The court will then rule on the motion in question based on the factual allegations made. But how should the court

determine whether the defendant financier was a “mere financier” or whether the defendant financier had enough influence to be considered in “actual possession or effective control?”

D. The Proposed Factors

Courts should look to the totality of the circumstances in deciding whether the defendant had moved from a “mere financier” with “minimal control” to an “influential financier” with “actual possession or effective control.” The factors to be considered include:

1. The contract between the financier and operator
2. The relation between the financier and operator
3. The general consumer impression of both of the above factors

When examining the contract between the aircraft financier and the operator, the courts can look to see whether the only agreement between the two parties was the lease agreement, or if there were other agreements covering other services or cooperating efforts. Was there also a marketing agreement or an alliance? Were the contract terms at fair market value? Were the terms of the agreement available to other parties?

When examining the relationship between the aircraft financier and the operator, the courts can look to whether the financier was a “detached, disinterested party.”¹⁰⁰ Were the two

¹⁰⁰ Borrowing a phrase from tax law on gifts as taxable income. See KLEIN, FEDERAL INCOME TAX

parties negotiating at arms-length and for market prices? Or did one side get a sweetheart deal? Were the two parties part of the same “enterprise of companies?” Were the businesses of the financier and the operator of the “same economic substance?”¹⁰¹ Did the financier have some degree of influence over the operator other than the standard influence an arms-length lessor would have with a lessee? Could the financier affect the amount of business, or revenue, or routes, or passengers, allocated to the operator? Did the financier, or its related companies, share logos, paint schemes, marketing concepts with the operator? Did the two parties commingle funds? Share offices? Use the same employees? Share gates, landing slots, fuel farms, maintenance facilities, simulator training facilities?

Third, the court can look to see what impression the financier conveyed to third party customers about the nature of the relationship between the financier and the operator. Did the financier cause third parties to believe that the financier and the operator were the same company or part of the same corporate structure? Did the customers, or passengers, believe that they were dealing with the financier, when they were in fact only dealing with the operator? Did customers purchase a ticket believing they were traveling on one company, when in fact they were traveling on another? Did the financier cause there to be branding overlap? This factor gets at the idea that a truly “mere financier” would not have any outwardly perceptible signs that it was involved with the operator, much as a large bank does not put its name on the doors of franchise restaurants that it lends to. However, an “influential financier” with either “actual possession” or

¹⁰¹ Again borrowing a phrase from tax law.

“effective control” of the operator and the aircraft, would be more likely to display outwardly perceptible signs to third parties.

The proposed framework does not attempt to decide whether a defendant financier is negligent, or liable, or when a “corporate veil” should be “pierced,” or whether a plaintiff has a cause of action under either common or state law. The framework simply attempts to assist courts in analyzing whether 49 U.S.C. 44112 applies. In other words, when can a defendant aircraft financier argue that section 44112 protects that financier from liability by preempting state tort law?

In cases where the defendant, as an owner, lessor, or other secured party, argues that section 44112 preempts and protects, even though every first year law student can see that the defendant was negligent and that such negligence caused the harm, the framework will show that the defendant had pushed far enough away from “minimal control” towards “effective control” to lose the preemptive protection of section 44112.

In cases where the defendant financier was not in actual possession or effective control at the time of the accident, and yet the facts show that the harm resulted because of a defect that was known, or should have been known, at the time of the transfer of the aircraft to the operator, this framework will still hold the defendant liable, whereas the current language seems to give the negligent aircraft financier a pass.

This proposal balances the rights of plaintiffs to recover damages in tort from defendant financiers of aircraft who could have prevented the harm against the benefits to society of

protecting financiers of aircraft who fulfill their duty by delivering aircraft, free of defect, to an operator/lessee and then stand out of the way and let the operator operate the aircraft.

IV. THE CASES ANALYZED UNDER THE PROPOSED FRAMEWORK

In this section, the proposed framework will be applied to the facts of several of the cases presented *infra*, including the two cases first described in the introduction and the two hypothetical cases describe below.

A. Hypothetical Scenarios with “Very Light Jet” Financiers

Imagine that you buy one of the new Very Light Jets (VLJ) coming to market as an investment and that you “dry lease”¹⁰² it to a qualified operator who is properly certified by the F.A.A. The jet is delivered directly from the manufacturer to the operator, and the only relationship between you and the operator is a long-term lease contract. Suppose that the operator negligently crashes the jet and kills a high net worth passenger.

The special administrator of the decedent’s estate sues several defendants, including you as owner and lessor, on counts of strict liability and negligence under the applicable state law. Eventually, you move for summary judgment asserting that you are not liable based on the

¹⁰² For a discussion of the various types of aircraft leases, see Margo, 62 J. Air L. & Com. 423 (1996).

language of 49 U.S.C. 44112, which seems to protect owners, lessors, and other secured parties from liability.

Now imagine that you buy a VLJ to use for business travel and entertaining clients. You own the jet, but you lease it to a second company, wholly owned by you, to operate it. This second company leases it back to your firm for your firm's use. The jet crashes due to negligent operation and kills one of your clients. You are sued as the owner and lessor along with other defendants. You move for summary judgment asserting that you were an owner/lessor protected from liability by the language of 49 U.S.C. 44112.

Should the results be the same in the two cases? Should courts treat the two fact patterns differently when deciding whether the owner/lessor is liable, under state law, or protected from liability by the preemption of 49 U.S.C. 44112? The proposed framework will now be applied to the two fact patterns to determine how courts might rule.

In the first part of the hypothetical, you would move for summary judgment on your special defense that you cannot be liable under section 44112 because your only contract with the operator of the jet is a long-term lease, your only relation with the operator is the arms-length lease agreement, and no reasonable customer flying the operator's service would believe that they were dealing with you.

In the second part of the hypothetical, you move for summary judgment, but you know that there are multiple unwritten contracts between you, your firm, and your company which owns the jet. You also know that the relationship between the company that owns the jet and your firm is such that you have effective control of the jet as to when it flies, where it flies, who

can ride on it, and when maintenance is performed. Finally, you know that when your client boarded the jet that day, the client believed she was boarding either your jet or the firm's jet. All three factors weigh in favor of finding that you are not exempted from common law or statutory law on the liability of aircraft owners for damage done to third parties.

B. Framework Applied to Poorly Decided Cases

*Ellis v Flying Boat*¹⁰³

If the framework were applied to the case of the man in Florida who owned all the companies that made up his seaplane airline, a court would find that the contracts between all of the various companies indicated that the company that owned the flying boat was more than merely a financier of the aircraft. It would also find that the relationship between the flying boat's owner and the flying boat's operator was more than just an arms-length, market-based arrangement. The man who owned all the companies had full influence over each company, and thus the owning company was an influential financier. It is doubtful that the operating company on the day of the crash could have told all the other companies that it was going to use the aircraft somewhere else that day. Finally, the impression the passengers were given when they bought their tickets and went to board the flight was that they were on one airline. They were lead to believe that they were not just boarding the flight of a shell company with no assets. All three factors weigh in favor of a finding that the defendant in *Ellis* was more than a mere

¹⁰³ *Ellis v. Flying Boat, Inc.*

financier of the aircraft in the accident, and thus would not be able to claim exemption under section 44112.

*Layug v. AAR Parts Leasing*¹⁰⁴

In this case, the only contract between the financier and the airline was a standard long-term lease agreement. The airline got the use of the jet, and the financier got monthly lease payments. The relationship between the two parties can only be described as that of a financial lessor and a lessee. They did not share branding, offices, or employees. The lessor did not have the ability to tell the airline how or when to fly the jet. The lessor did not have a role to play in the maintenance of the jet. Finally, the passengers on the flight would have reasonably believed they were dealing with the airline, not with some leasing company thousands of miles away in another country. All the factors weigh in favor of finding that the financier was merely a financier, lacking both possession and effective control, and thus would be exactly the type of aircraft financier Congress had in mind when it drafted the exemption provisions to the code.

*Retzler v. AMR Leasing Corp.*¹⁰⁵

In this case, there were numerous contracts between the aircraft's lessor (AMR) and its lessee (American Eagle.) The relation between the two was not detached and disinterested. AMR held influence over American Eagle. The two companies were part of the same enterprise of companies and part of the same economic substance. The parent could affect the business of

¹⁰⁴ Layug v. AAR Parts Leasing, Inc.

¹⁰⁵ Retzler v. AMR Leasing Corp.

the subsidiary. Finally, reasonable passengers on American Eagle likely to believed that they were on American Airlines, or at least that AMR had some degree of control over the safety of the flight. This is exactly the type of control that Congress had in mind when it set up the rules regarding the exemption under section 44112. Congress never intended to protect this type of owner from liability.

V. POLICY: BALANCING THE BENEFITS TO SOCIETY

A. Aircraft and Economic Growth

When courts fail to follow Congress' intention to exempt aircraft financiers lacking possession or control of the aircraft from liability, they also fail to promote aviation service and infrastructure. Congress created the exemption in order to promote aviation through encouraging aircraft finance. "The evidence confirms the common view that good airline service is an important factor in urban development."¹⁰⁶ "Higher travel costs may limit the volume of face-to-face contacts that the firm undertakes. This limitation may in turn impair the viability of the enterprise, especially in high-tech industries where exchange of information is critical."¹⁰⁷ "Good airline service also fosters intercity agglomeration economies."¹⁰⁸ "Empirical results

¹⁰⁶ "Airline Traffic and Urban Development," Brueckner, Dept. of Econ., Univ. of Ill. (2002).

¹⁰⁷ Id.

¹⁰⁸ Id.

show that a 10 percent increase in passenger enplanements in a metro area leads approximately to a 1 percent increase in employment...”¹⁰⁹

The Director of the MIT Center for Air Transportation testified before a House subcommittee that “for most of the past century, the U.S. has led the world in pushing the edge of the aeronautics envelope based, in part, on a strong national aeronautics research strategy. This has resulted in ..an unsurpassed air transportation system which has contributed materially to the Nation’s economic development, geographic structure, and quality of life.”¹¹⁰

Finally, the Asian Development Bank published a study¹¹¹ which pointed out that “road transport alone cannot always appropriately serve a region’s transportation and development needs. Geographic difficulty creates barriers to physical communications, which contribute to the emergence and perpetuation of disparities between regions. In this context, civil aviation can complement the other forms of transport. Regional and rural air services allow for improved access to basic social services and contribute to some extent to improved market access.”¹¹²

B. Unintended Consequences

If courts protect all aircraft financiers from liability under section 44112, any aircraft operator, including airlines and charter companies, will be able to set up alter-ego companies to

¹⁰⁹ Id.

¹¹⁰ Statement of R. John Hansman, Director, MIT Center for Air Transportation, before House Committee on Science, Mar. 6, 2003.

¹¹¹ “Technical Assistance for Strengthening Cooperation in the Transport Sector of the East Asian Growth Area and the Growth Triangle”, Asian Development Bank, Dec. 2001.

¹¹² Id. at 2-3.

judgment-proof themselves from paying damages resulting from their negligence. For example, they could set up one company to hold the assets and one to operate the assets. Because of free market economics, the operators will be in a race to the bottom to compete on low costs, and will be able to externalize the costs of occasional aircraft losses to the unlucky few who are onboard when an aircraft crashes.

If courts don't protect those mere financiers who truly do not have "actual possession or effective control" of the financed aircraft, then the aircraft finance industry will develop solutions to judgment-proof themselves. Aircraft financiers may move overseas where judgments are not so large; they may move into the financed sale business instead of the leasing business; they may set up alter-ego companies to lease to their clients. Any of these strategies would result in judgment-proofing the financiers of all types, leaving all future plaintiffs looking only to insolvent operators when an accident happens.

To preserve the liability system in aviation, courts need to assign liability where it belongs—to those in actual possession or effective control of the aircraft—and not try to where it doesn't belong—to financiers of aircraft lacking any actual possession or effective control.

Finally, it is worth noting that if U.S. courts hold U.S. aircraft financiers liable in tort for the negligence of foreign lessee/operators, air safety will not be enhanced.¹¹³ On the contrary, off-shore and foreign aircraft finance and leasing companies will have a competitive advantage over U.S.-based companies and will supply a larger share of the world's demand for aircraft.¹¹⁴ This would not be a net gain for air safety or the U.S. based aircraft finance industry.

¹¹³ Reference to *Layug v. AAR Parts Trading, Inc.*

¹¹⁴ BAINBRIDGE, CORPORATE LAW AND ECONOMICS 141 (2002).

CONCLUSION

Congress has several times throughout history passed legislation, affecting aircraft and aviation generally, designed with dual purposes in mind: to promote air safety, yet foster growth in aviation. One such provision was the exemption specifically added as sections 504, 1404, and most recently 44112, which were all constructed to promote the financing of civil aircraft by exempting mere financiers, lacking “actual possession or control” of the financed aircraft, from liability for the negligent acts of the operators.

Due to the confusing language of the early provisions and the complexity of the relationship between aircraft financiers and aircraft operators, courts have had a difficult time properly parsing the liability cases involving financed aircraft accidents. This Article proposes that courts first look to see whether the basic requirements of the exemption of section 44112 are met. Then, courts should look to three factors to determine whether an aircraft financier is a mere financier (protected by the statute) or an influential financier (not protected by the statute.) The factors are (1) the actual contract, (2) the relationship between the financier and the operator, and (3) the consumer’s impression of the first two factors.

When courts err and let negligent parties escape liability, they do not enhance aviation safety. When courts err and hold mere financiers liable for others’ negligent acts, they promote neither aircraft financing nor economic growth. In order to promote both aviation safety and economic growth, the courts should attempt to properly analyze and parse the cases.

TABLE OF CASES

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