IS LESSOR MORE?

I. INTRODUCTION - - WHAT EXPOSURE DO AIRCRAFT LESSORS HAVE TO PASSENGER WRONGFUL DEATH AND PERSONAL INJURY SUITS IN A POST- AIR PHILIPPINES WORLD?

On April 19, 2000, a Boeing 737, Air Philippines Flight 541 crashed into a hill while attempting to land on Samal Island in the Philippines. All of the persons on board were Philippine citizens, and sadly, all of them perished in the accident.[1] In August of 2000, an Illinois resident, Jovy Layug, whose mother was on board Flight 541 filed a wrongful death state court lawsuit in Cook County, Illinois, naming the original aircraft lessor, AAR Parts Trading Inc.[2] The initial complaint was based on a theory of products liability, but was twice amended to ultimately include ten additional theories. The amended complaint also named the successor lessor, Fleet Business Credit, as an additional defendant as well.[3] The new theories of liability against AAR Parts Trading and Fleet Credit included negligence and negligent entrustment.[4]

The aircraft lessors moved to dismiss, arguing that 49 U.S.C. Section 44112(b) precluded the state law claims against them ("Section 44112").[5] The federal statute appears, at least at first glance, to insulate commercial aircraft lessors from legal liability for death or injury to passengers of air carriers operating aircraft under lease from those

[1] Ellis v. AAR Parts Trading Inc., 828 N.E.2d. 726, 730 (Ill. App. Ct. 2005).
[2] Id.
[3] Id. at 730-31.
[4] Id.
[5] Layug v. AAR Parts Trading, Inc., 2003 WL 25744436 (Ill. Cir. 2003).

lessors. Section 44112 is a part of the Federal Aviation Administration Act of 1958 ("FAA Act of 1958") and is titled "Limitation of Liability."[6] The text of Section 44112 reads as follows:

> "44112. Limitation of liability
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> (a) Definitions --In this section--
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> (1) "lessor" means a person leasing for at least 30 days a civil aircraft, aircraft engine, or propeller.
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> (2) "owner" means a person that owns a civil aircraft, aircraft engine, or propeller.
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> (3) "secured party" means a person having a security interest in, or security title to, a civil aircraft, aircraft engine, or propeller under a conditional sales contract, equipment trust contract, chattel or corporate mortgage, or similar instrument.
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> (b) 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—
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> (1) the aircraft, engine, or propeller; or
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> (2) the flight of, or an object falling from, the aircraft, engine, or propeller."[7]

[6] 49 U.S.C. Section 44112 (2008).
[7] *Id.*

The state court shocked the defendants but caused the plaintiffs to jump with joy with its answer to the motion. The court, relying on an earlier state court decision, denied the motion and held that the statute does not preempt Illinois law which makes commercial aircraft lessors answerable for damages caused by their alleged acts of negligent entrustment and products liability.[8]

The lessors later asked the state court to dismiss the claims, arguing Cook County was an inconvenient forum. The court denied that motion as well.[9] Numerous other heirs of the Air Philippines disaster joined Layug as plaintiffs. Now stuck in Cook County, a venue perceived as heavily biased in favor of plaintiffs, the defendants finally paid approximately $165,000,000.00 to settle the suits.

Naming American aircraft lessors as defendants has thus come to be seen by the plaintiffs' aviation bar in the post-Air Philippines world as the magic bullet that slays the specter of a forum non conveniens dismissal, particularly in wrongful death lawsuits arising from foreign air disasters which have no American decedents. But, on the other hand, the Cook County handling of *Air Philippines* has frightened the American commercial aircraft lessor community into recalling the John Donne poem: "Therefore, send not to know for whom the bell tolls, it tolls for thee."

Which side of the argument is correct? Is there really a new and viable strategy where the domestic aircraft lessor provides a jurisdictional hook for foreign aviation accidents? The issue begs the question: *Is Lessor More?*

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[8] Id.
[9] *See* Ellis, 828 N.E.2d. 726.

The issue is not academic. As much as fifty-three percent of the aircraft operated by the world's airlines are under some form of leasing arrangement.[10] Many of these aircraft are owned and leased by American aircraft lessors. The problem is bound to resurface time and time again.

It is important to point out there are two basic leasing arrangements: finance or capital leases, and operating leases.[11] The legal liability could differ depending upon whether a finance lease or an operating lease is at issue. Under a finance lease, the lessor essentially provides the financing or capital for the airline to acquire new aircraft or equipment. In this arrangement, the lessor only retains a security interest in the aircraft, while the lessee "has absolute dominion over the aircraft 'to do with as he will even as against the [lessor] so long as payments are made . . .'" The lessor is the owner only for aircraft registration purposes.[12] Accordingly, a finance or capital lease is typically made for the life of the aircraft.[13]

An operating lease is typically for a shorter term, several years as opposed to the life of the aircraft.[14] The airline has physical possession of the aircraft. It provides the fuel, maintenance and crews. But the lessor typically retains a right to inspect the aircraft and to audit the maintenance and flight history.

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[10] Financial Characteristics of Airlines, Leasing to the Rescue, http://www.airlinemonitor.com/tutorial2.html#Financial (last visited Dec. 5, 2008).
[11] Rod D. Margo, *Aspects of Insurance in Aviation Finance*, 62 J. AIR. L. & COM. 423, 425 (1996).
[12] Legal Opinion as to Whether the Lessee of an Aircraft Conveyed Under a Finance Lease is the Owner of the Aircraft for Purposes of United States Aircraft Registration, FAA, 46 Fed Reg. 18877 (March 26, 1981).
[13] *See* Margo, *supra* note 11, at 425.
[14] *Id.* at 426.

In 2006, of the major[15] United States air carriers, thirty-six percent of the aircraft they operated were under some form of leasing arrangement.[16] Of the leased aircraft, fifteen percent are on capital leases, and eighty-five percent on operating leases.[17] Continental, the airline that advertises having the newest jet fleet, is leasing seventy-five percent of its 641 aircraft.[18] U.S. Airways was a close second with seventy-four percent of its 279 aircraft under a leasing arrangement.[19]

From these statistics it is easy to appreciate the large role that aircraft lessors play in supporting the operations of airlines. Some of these airlines, although properly certificated by their home nation, might be listed on the "European Union's Blacklist" ("E.U. Blacklist"). And some of the nations from which the airlines operate might be designated as "Class 2" by the Federal Aviation Administration pursuant to international programs implemented by the International Civil Aviation Organization ("FAA Class 2").[20] Should a lessor, irrespective of Section 44112, hesitate to lease to an airline

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[15] For this article's purpose- major air carriers are: American Airlines, Continental, Delta, FedEx, Northwest, United, UPS, and U.S. Airways. The statistics in this section are from 2006, so not all mergers may be accounted for.

[16] Bureau of Transportation Statistics, U.S. Dept. of Transportation, Schedule B-43 Aircraft Inventory (2006), http://www.bts.gov/programs/airline_information/schedule_b43/pdf/entire.pdf.

[17] *Id.*

[18] *See* http://www.continental.com/web/en-US/content/company/advertising/proud_parents.asx (last visited Dec. 5, 2008). Bureau of Transportation Statistics, U.S. Dept. of Transportation, Schedule B-43 Aircraft Inventory (2006), http://www.bts.gov/programs/airline_information/schedule_b43/pdf/entire.pdf.

[19] Bureau of Transportation Statistics, U.S. Dept. of Transportation, Schedule B-43 Aircraft Inventory (2006), http://www.bts.gov/programs/airline_information/schedule_b43/pdf/entire.pdf

[20] The Federal Aviation Administration will be referred to simply as the "FAA." The "International Aviation Safety Assessments" program ("IASA") is a technical agency of the United Nations responsible for monitoring safety standards established by the International Civil Aviation Organization ("ICAO"). Nations currently classified as Class 2 and unable to satisfy ICAO standards include: (1) Bangladesh; (2) Indonesia; (3)

properly certificated but nevertheless on the E.U. Blacklist or listed as FAA Class 2 because of a fear of potential legal liability for negligent entrustment?

Because of their large role in commercial aviation, aircraft lessors are naturally an alternative potential deep pocket in America if non-American claimants from foreign domestic air disasters are unable to reach the manufacturer or airline in an American court. The lessors must naturally act to protect their investments and own financial well being by insuring their aircraft and including "detailed and sometimes complex insurance specifications" in their leasing arrangements.[21]

In addition to acquiring their own insurance and mandating that the lessee obtain insurance, lessors will include lease terms that restrict where the aircraft can be operated,[22] specify how it is to be maintained,[23] make the lessee bear the risk of loss,[24] and contain broad default provisions.[25] These provisions could themselves become central to a fight over whether the aircraft lessor has been guilty of negligent entrustment.[26]

Uruguay; (4) Zimbabwe; (5) Belize; (6) Cote D'Ivoire; (7) Croatia; (8) Democratic Republic of Congo; (9) Gambia; (10) Ghana; (11) Guyana; (12) Haiti; (13) Honduras; (14) Kiribati; (15) Nauru; (16) Nicaragua; (17) Serbia and Montenegro; (18) Swaziland; (19) Paraguay; and (20) Ukraine. The airlines on the E.U. Blacklist correspond roughly in origination but not completely to the nations listed as Class 2. There are currently approximately 143 airlines on the E.U. Blacklist.

[21] Margo, *supra* note 11, at 427.

[22] *See* Aircraft Lease Agreement between General Electric Capital Corp. and TRC Realty Co., http://contracts.onecle.com/restaurant/gecc.lease.1999.11.09.shtml (last visited, Oct. 2, 2008) (Section 6(d) restricting the aircraft to North America and the Caribbean).

[23] *Id*. (Section 7 Maintenance).

[24] *Id.* (Section 9).

[25] *Id.* (Section 12).

[26] By "aircraft lessor," the author is focusing on the commercial or financial aircraft lessor that leases commercial aircraft to commercial air carriers. While it will be discussed in passing, general aviation lessors like fixed base operators are not the primary focus of this article, although we discuss at least one negligent entrustment case arising

There have been important changes since *Air Philippines*, making a repeat of the Cook County disaster for the aircraft lessors less likely. For example, the *Multiparty, Multiforum Trial Jurisdiction Act* ("MMTJA") became applicable to accidents on February 1, 2003. Under the MMTJA the Air Philippines air disaster would have been removable from Cook County to federal court. Presumably, a federal court would take a more sympathetic view of preemption under 49 U.S.C. Section 44112(b). But the MMTJA applies only to accidents with seventy-five or more deaths.

Is Lessor More?

The answer to that question depends in part upon a resolution of the inherent tension between federal and state law in the regulation of commercial and recreational aviation. There is little doubt that Congress could completely occupy the field of aviation if it chose to do so, but through the present our politicians in Washington have been careful to reserve to the states a large role in aviation. [27] The result has been uncertainty at times over where federal management of aviation ends and where state management begins.

There are only two instances where Congress has expressly preempted state regulation. The first is the Airline Deregulation Act of 1978 ("ADA") which prohibits the states from enforcing any law pertaining to the "rates, routes and services" of commercial air carriers. The second is the General Aviation Revitalization Act of 1994 ("GARA")

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from a fixed base operation. In essence, this article is focusing on the Ford Motor Credit or GMAC's of the aviation world, not Hertz or Avis.

[27] "Aviation is unique among transportation industries in its relation to the federal government - - it is the only one whose operations are conducted almost wholly within federal jurisdiction, and are subject to little or no regulation by States or local authorities. Thus, the federal government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest." Senate Report 1811, 85th Congress, Second Session 5 (1958)

which prohibits states from enforcing laws relating to product claims against general aviation manufacturers where the claims concern general aviation aircraft or components older than eighteen years.[28]

GARA should have no impact upon the exposure of commercial aircraft lessors. The ADA arguably could if a claim against the lessor related to "rates, routes and services." But so far there has been no decision that holds a suit for wrongful death or personal injury might impact the "rates, routes or services" of an air carrier.

What remains after GARA and the ADA is a vast black hole of aviation regulation where the forces of implied preemption reign supreme. Section 44112 has been sucked into this black hole where the state and federal courts have debated for years whether Section 44112, either through a field or conflict preemption analysis, precludes any attempt by the states at regulating the liability of commercial aircraft lessors for air disasters.

Section 44112 purportedly limits a commercial aircraft lessor's liability to those instances when the aircraft was "in the actual possession or control of" the lessor, owner or secured party.[29] But meanwhile at the state level, state legislatures have passed laws regarding aircraft lessor liability, and state courts have interpreted aviation statutes that address the "operation of aircraft" as a way to impute a pilot's negligence to the lessor.[30]

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[28] 49 U.S.C. Section 40101

[29] 49 U.S.C. Section 44112 (2008).

[30] While not an exhaustive list, here are two examples of state laws that address lessor liability: N.Y. GEN. BUS. Section 251 (2008) (New York statute defining the liability of aircraft owners and exempts those with just a security interest in an aircraft from liability); MICH. COMP. LAWS SERV. Section 259.180a (2008) (Michigan statute addressing civil liability for the negligent operation of an aircraft). As will be explained later in this article, the majority of state court opinions that address aircraft lessor liability base their reasoning on state laws that focus on the operation of aircraft or who was

Some state courts have even been bold enough to argue that state law is not preempted by federal aviation law, despite similar language in the respective statutes and a detail history of legislative intent.[31] The end result of these different statues and judicial interpretations is confusion about the meaning of how Section 44112 relates to state law, and what this means for the commercial aircraft lessor.

The fight over whether federal or state law controls the potential liability of an aircraft lessor does not necessarily end at the shores of the United States. A foreign aviation disaster necessarily means that an American court will need to conduct the appropriate choice of law analysis which could result in the law of the foreign nation applying to the lawsuit, including its law, if any, on the liability of the aircraft lessor for the deaths or injuries arising from the crash. The foreign law could specify the lessor has vicarious liability for the negligence of the airline, or that it could be liable for negligently entrusting the aircraft to the airline, or that it is strictly liable for defect of design or manufacture. If these laws conflict with Section 44112 the American court will have to determine if Section 44112 reflects a strong public policy of the United States, thus precluding the application of the law of the foreign nation.

Even if it reflects the public policy of the United States, Section 44112 could itself be preempted if there is a conflicting provision in an applicable bi-lateral or multi-lateral treaty between the United States and the nation where the foreign air disaster occurred. A prudent practitioner would be well-advised to determine if there is an

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operating the aircraft. *See, e.g.,* Storie v. Southfield Leasing Inc., 282 N.W.2d 417 (Mich. Ct. App. 1979). *See also* 620 ILL. COMP. STAT. ANN. 5/11 (LexisNexis 2008); Connecticut Section 15-34(20).

[31] *Southie, Hoebee, Retzler*

applicable treaty and then analyze it to verify there is no provision that might preempt either the law of the United States or the law of the situs of the foreign air disaster.

So, the answer to *Is Lessor More?* depends upon a number of issues. Does naming the aircraft lessor invariably result in the denial of a motion to dismiss that otherwise would have been granted under the forum non conveniens doctrine? Does Section 44112 preempt state law that would otherwise allow a damage recovery from an aircraft lessor? [32] Does Section 44112 provide absolute immunity to commercial aircraft lessors, or is the scope of Section 44112 limited? Is negligent entrustment within the preemption scope of Section 44112? Could Section 44112 itself be preempted by the law of a foreign nation or treaty? Is the lawsuit removable from state court to federal court? Are there other deep-pocket American defendants available in the forum? These and other factors will have an impact upon the exposure of an aircraft lessor.

Before we reach the rather complex issue of whether Section 44112 preempts state or foreign laws addressing aircraft lessor liability exposure, it would be helpful to review the legislative history of Section 44112. We then will discuss the theories of liability that might be pursued against lessors. Some theories, depending upon the scope of the federal statute, could arguably be preempted by Section 44112 but other theories could potentially survive a preemption attack.

[32] *See* N.J.Stat.Ann. Section 6:2-7 (West 2008); N.Y. Gen. Bus. Law Section 251 (McKinney 2008). These state statutes appear to create absolute liability for the owner of an aircraft, irrespective of whether the lessor has control or possession.

II. THE LEGISLATIVE HISTORY OF SECTION 44112 PROVIDES SOME GUIDANCE AS TO THE INTENDED SCOPE OF THE FEDERALLY MANDATED IMMUNITY AGAINST LESSOR LIABILITY

The language of Section 44112 is limited. The statute clearly identifies instances where an aircraft lessor, owner or secured party should not be liable. But was it the intent of Congress to completely exonerate lessors from liability? State and federal courts have interpreted the scope of Section 44112 differently, leaving a series of confusing and somewhat contradictory holdings in their wake.

By looking at the plain language of Section 44112 and its legislative history it is obvious that an argument exists that Congress intended to preempt state law imposing liability upon owners and lessors of aircraft, at least when certain conditions are met. As set forth above, Section 44112 states in part: "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."[33]

In Section 44112, Congress defined those parties whose civil liability could be limited by this section.[34] One qualifies as a lessor when he leases an aircraft for at least thirty days. Otherwise, one is considered either an owner or a secured party.[35] For example, "Smith Aircraft Leasing Corp." is an owner if it purchases a Boeing 737. If

[33] *Id.*
[34] Section 44112(a).
[35] As we will discuss later, the distinction between lessor and owner has been blurred by the courts and is important in determining whether or not a party is liable in a civil action.

Smith Aircraft Leasing Corp. leases that same 737 to Fictional-Airline for three years, Smith Aircraft Corp. is both an owner and a lessor. In a situation where Fictional-Airline purchases a 737 but arranges the financing for that purchase via Smith Aircraft Leasing Corp., Fictional-Airline is the owner and Smith Aircraft Leasing Corp. is the "secured party."[36]

A lessor/owner/secured party is only liable when (1) the aircraft is in the *actual possession or control* of the lessor; (2) the injury was caused by the aircraft, or the flight of the aircraft; and (3) the personal injury, death, or property loss or damage occurred "on land or water."[37] With this statutory language, Congress has expressed its intent as to when and how a lessor can or cannot be liable for personal injury, death, or property damage. As the district court said in 2001 in the *In re Lawrence W. Inlow Accident*

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[36] Section 44112(a)(3).

> "To illustrate the classic finance lease transaction, assume that an airline selects a 747 and negotiates over its particular configuration with Boeing. Instead of purchasing the 747, the airline then arranges for a bank to purchase it and for the bank to lease the aircraft to the airline. Although the document between the bank and the airline would be a true lease and not a security agreement, this transaction between the airline and the bank is first and last a financing transaction. White & Summers, supra., at 20."

Dudley v. Business Express, Inc., Civil No. 93-581-SD, 1994 U.S. Dist. LEXIS 18426, at *8-11 (D.N.H. 1994) (citing Dominguez Mojica v. Citibank, N.A. 853. F.Supp. 51, 54 n.5 (D.P.R. 1994)).

[37] Section 44112(b) (emphasis added). Section 44112(b) states that the lessor is liable for injury/damage "on land or water only". *Id.* However, this should not be interpreted as restricting Section 44112 to just injury/damage "on land or water only." When courts have interpreted the difference between Section 44112 and its predecessor statutes, they have said that Section 44112 is not a substantive revision to its predecessor and should follow the intent of the original statute. Coleman v. Windham Aviation, Inc., No. Civ.A. K.C.2004-0985, 2005 WL 1793907, *7 (R.I.Super. 2005).

Litigation, "[t]he plain language of Section 44112 establishe[s] that it preempts state common law claims against covered lessors."[38]

Section 44112 was passed in July of 1994 when Congress recodified the Transportation Code in Public Law No. 103-272. The statute is deemed part of the FAA Act of 1958. The purpose of Public Law No. 103-272 was "to revise, codify, and enact without substantive change certain general and permanent laws, related to transportation, as subtitles II, III, and V-X of Title 49, United States Code, "Transportation," and to make other technical improvements in the Code."[39] Prior to the recodification, Section 44112 was codified as 49 U.S.C. Section 1404.[40] 49 U.S.C Section 1404 stated:

> Section 1404: Limitation of security owner's liability
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> No person having a security interest in, or security title to, any civil aircraft, aircraft engine, or propeller under a contract of conditional sale, equipment trust, chattel or corporate mortgage, or other instrument of similar nature, and no lessor of any such aircraft, aircraft engine, or propeller under a bona fide lease of thirty days or more, shall be liable by reason of such interest or title, or by reason of his interest as lessor or owner of the aircraft, aircraft engine, or propeller so leased, for any injury to or death of persons, or damage to or loss of property, on the surface of the earth (whether on land or water) caused by such aircraft, aircraft engine, or propeller, or by the ascent, descent, or flight of such aircraft,

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[38] In re Lawrence W. Inlow Accident Litigation, No. IP 99-0830-C H/G, 2001 WL 331625, *14 (S.D.Ind. 2001).
[39] Revision of Title 49, United States Code Annotated, "Transportation", Pub. L. No. 103-272, 108 Stat. 1167.
[40] *See* Inlow, 2001 WL 331625 at *15.

> aircraft engine, or propeller or by the dropping or falling of an object therefrom, unless such aircraft, aircraft engine, or propeller is in the actual possession or control of such person at the time of such injury, death, damage, or loss.[41]

Clearly, there is a difference between Section 44112 and its predecessor, 49 U.S.C. Section 1404, as evidenced by their differing lengths alone. Interestingly, the language in the original Section 1404 seems in certain aspects to be broader than its younger brother. For example, Section 1404 says a lessor is not liable for any injury to or death of persons, occurring because of the "ascent, descent, or flight of" aircraft in addition to injury or death occurring "on the surface of the earth (whether on land or water)." Section 44112 does not refer to "ascent, descent or flight of" an aircraft.

Because Congress' stated purpose in recodifying the Transportation Code with Public Law No. 103-272 was to revise and "enact without substantive change" the preexisting law, the courts interpreting the alleged preemptive effect of Section 44112 have looked to 49 U.S.C. Section 1404 to determine the proper scope of Section 44112.[42] Because Section 1404 preempts lessors and secured parties from liability for injury and death, some courts have held that there is no real substantive difference between the two,

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[41] 49 U.S.C. Section 1404

[42] *See* Coleman v. Windham Aviation, Inc., No. Civ.A. K.C.2004-0985, 2005 WL 1793907, *2, *7 (R.I.Super. 2005); In re Lawrence W. Inlow Accident Litigation, No. IP 99-0830-C H/G, 2001 WL 331625, *14 (S.D.Ind. 2001); Mangini v. Cessna Aircraft Co., Nos. X07CV044001467S, X07CV044003418S, 2005 WL 3624483, *2 (Conn. Super. Ct. 2005).

and if there is a difference, the courts should be bound by the legislative intent behind the original enactment of Section 1404.[43]

Some of the dispute over the differences between Section 44112 and 49 U.S.C. Section 1404 revolves around the inclusion of "owner" in the later enactment.[44] As one can see by looking at Section 1404, the statutory language seems to apply only to persons having a security interest in an aircraft or lessors of aircraft under a lease of thirty days or more.[45] Absent from Section 1404 is the term "owner" whereas the term clearly shows up in Section 44112. For our purposes, this dispute is not entirely relevant because we are focusing on the liability of commercial aircraft lessors. However, the dispute over the inclusion of "owner" in Section 44112 is helpful for our analysis since those cases that address the dispute find that either statute can preempt state law for a secured party and lessor.[46]

By looking at the House Report that accompanies Section 1404 we learn that the purpose behind its passing was "to encourage such persons to participate in the financing

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[43] *See* Coleman, 2005 WL 1793907 at *6; Mangini, 2005 WL 3624883; In re Inlow, 2001 WL 331625.

[44] *See* Coleman v. Windham Aviation, Inc., No. Civ.A. K.C.2004-0985, 2005 WL 1793907 (R.I.Super. 2005) (Court trying to decide if Section 44112 was meant to exempt aircraft owners from the imposition of vicarious liability under state law); Mangini v. Cessna Aircraft Co., Nos. X07CV044001467S, X07CV044003418S, 2005 WL 3624483 (Conn. Super. Ct. 2005) (Court trying to determine if Section 44112 extends to all owners of aircraft or just to lessors and secured parties under Section 1404).

[45] 49 U.S.C. Section 1404

[46] *See* Coleman v. Windham Aviation, Inc., No. Civ.A. K.C.2004-0985, 2005 WL 1793907, *6 (R.I.Super. 2005) (While this case does hold that an aircraft owner could be liable, the court said it "has no difficulty concluding that Congress passed Section 1404 to facilitate the financing of private airplanes by exempting owner or lessors holding only a security interest in an aircraft from liability for negligent operation of that aircraft").

of aircraft purchases."[47] This history has been relied on in support of arguments that both Section 1404 and Section 44112 preempt state law liability of lessors and secured parties.[48] The reasoning is that by eliminating the risk of civil liability, persons would be more willing to finance aircraft purchases.[49]

House Report 2091 provides additional support for the argument that Section 1404 and Section 44112 are meant to preempt state law.

> "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."[50]

The language "[t]his bill would remove this doubt by providing clearly that such persons have *no liability under such circumstances*" naturally makes a statement that Section 1404 is meant to preempt state law liability "under such circumstances."[51] The argument in favor of preemption finds additional support in House Report 2091 when Congress addresses the effect of the Uniform Aeronautics Act upon aircraft financing.[52]

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[47] H.R. Rep. No. 80-2091, (1948) *as reprinted in* 1948 U.S.C.C.A.N. 1836-1837. *See Mangini*, 2005 WL 3624883, at *3 (Reasoning that " '[s]uch persons' refers to both those retaining a security interest and lessors, i.e./both the financier and financed").
[48] *See generally Mangini*, 2005 WL 3624883; *In re Inlow*, 2001 WL 331625.
[49] *Id.*
[50] H.R. Rep. No. 2091, at 1836.
[51] *Id.*
[52] The Uniform Aeronautics Act was in force in ten states when Section 1404 was passed in 1948. The effect of those acts was to hold aircraft owners "absolutely liable" for damage caused by their aircraft. *See* H.R. Rep. No. 2091, at 1836-37.

In response to the absolute liability effect that Section 4 of Uniform Aeronautics Act had, the report states:

> "[Section 4] is susceptible of a construction which would impose liability upon any person registered as owner, even though he holds title only as security under a mortgage or similar security instrument or as lessor under an equipment trust. If such interpretation were adopted, the security title holder could become liable for extensive damages on the surface caused by the operation of the aircraft. 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*."[53]

As the above portion states, Section 1404 was intended to provide that a security owner will not be liable when not in possession or control of the aircraft. The combination of that quotation with the other portions of Section 1404 evidences a clear Congressional intent for Section 1404 and its recodified version Section 44112, to preempt at least certain attempts to hold a lessor or secured party liable for damage caused by an aircraft, so long as the lessor or secured party is not in control or actual possession of the aircraft.

[53] *Id.* at 1837 (emphasis added).

But was it the Congressional intent to preempt liability of lessors arising from their own independent negligence in entrusting an aircraft to someone or something not qualified to operate the aircraft as an air carrier? And was it the Congressional intent to preempt liability for injury or death to passengers of air carriers? House Report 2091 did not, after all, refer to death or injury to passengers. The language in House Report 2091 stated that Congress wanted to encourage financing of aircraft acquisition by limiting the legal liability of lessors "for extensive damages on the surface caused by the operation of the aircraft."

James B. Busey, Administrator of the Department of Transportation, Federal Aviation Administration, did not believe Section 1404 insulated aircraft lessors from "potential tort liability." On May 2, 1991, Busey responded to an inquiry asking whether under the statute an aircraft owner would be responsible for the "negligent maintenance of an aircraft that had been leased to an airline." Busey stated that the "potential tort liability of an aircraft owner/lessor is a matter of state law and does not directly involve the Federal Aviation Administration." Busey pointed out that the FARs state that "no person may operate a civil aircraft unless it is in an airworthy condition. The FAR defines the word 'operate' to include 'use, cause to use or authorize to use aircraft . . . with or without the right of legal control (as owner, lessee, or otherwise).'"[54]

It is important to note that maintenance is not equivalent to the operational negligence of the flight crew. And if the legal interpretation of Busey were correct in its broadest possible scope then Section 44112 would be essentially written out of the statute books.

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[54] Department of Transportation, Federal Aviation Administration, Legal Interpretation, Interpretation 1991 -27, May 2, 1991, 1991 WL 11663094 (D.O.T.)

III. COULD THE POTENTIAL LEGAL LIABILITY OF A COMMERCIAL AIRCRAFT LESSOR UNDER SECTION 44112 DEPEND UPON THE PARTICULAR THEORY ALLEGED AGAINST THE LESSOR?

Every aviation practitioner knows there are several different theories of liability that plaintiffs rely on in attempting to hold an aircraft lessor liable for injuries caused by operation of the leased aircraft.[55] There are, for example: (1) the common law theory of bailment which potentially makes the bailor liable if the "chattel" was defective at the time it was supplied to the bailee; under some formulations of the bailment doctrine the operational negligence of the bailee is imputed to the bailor; (2) the common law theory of negligent entrustment which potentially makes the lessor liable if he unreasonably entrusts the aircraft to someone or something not competent or qualified to operate the aircraft; (3) a variation of negligent entrustment known as "negligent supervision" which could make the lessor liable when, although at the time of the lease the lessee was

[55] For the purpose of this article, please recall that we are focusing on the commercial aircraft lessor that provides financing for aircraft purchases or engages in long-term leases of aircraft to air carriers. While some of the cases that will be discussed involve an aircraft "lessor," in some of these instances the lessor is a fixed base operator or is an individual who has leased his/her aircraft to a corporation but still uses the aircraft for his/her own benefit. In some of these instances the aircraft lessor has been held liable because he is still in possession or control of the aircraft. As we review case law in this area, it will be helpful to remember that not every judge is familiar with the aviation industry. Keeping this in mind, in the opinions discussed below, courts tend to use "owner" and "lessor" interchangeably. This can be confusing from the commercial aircraft lessor perspective since there is obviously a distinct difference between the commercial lessor and a fixed base operator, namely the commercial aircraft lessors very likely do not have actual possession or control of the aircraft. As a legal practitioner, when faced with a case involving a commercial aircraft lessor, it is important to explain and distinguish for the court the difference between a commercial aircraft lessor and a fixed based operator or small time lessor. Section 44112 liability limitation is only effective, if it is effective at all, when the lessor does not have actual possession or control of the aircraft. What can constitute actual possession or control of the aircraft may be different for a fixed base operator that rents or leases single-engine aircraft than it is for a commercial aircraft lessor that arranges financing for the purchase of aircraft or engages in long-term equipment leases.

initially competent and qualified, the lessor unreasonably allowed the lessee to retain possession of the aircraft during the term of the aircraft lease when the qualifications or competence of the lessee were deteriorating; (4) statutory schemes that make the aircraft lessor vicariously liable for the negligence of the lessee; and (5) various products liability theories such as strict liability and breach of warranty that make the aircraft lessor liable without fault for a defect that existed in the aircraft at the time of the lease.

The treatment of each theory may not necessarily be the same under Section 44112.[56] The cases addressing preemption under Section 44112 have not specifically settled whether the potential legal liability of an aircraft lessor may differ according to the theory being pursued.

The theory of liability implicating commercial aircraft lessors that has received the most attention is negligent entrustment. But negligent entrustment is distinct from vicarious negligence as the former focuses on the alleged independent negligence of the lessor while the latter focuses on the negligence of the operator. [57] And both negligent entrustment and vicarious negligence are distinct from the traditional product claims of strict liability and breach of warranty which, of course, focus on a design or

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[56] 14 C.F.R. Section 91.13. *See* Montalvo v. Spirit Airlines, 508 F.3d 464, 472 (9th Cir. 2007) (noting that 14 C.F.R. Section 91.13 acts as a "general federal standard of care…").

[57] *See* Dameris, Wagner, Weiner, *supra* note 4, at 94; *Dudley*, 1994 U.S. Dist. LEXIS 18426, at *13-14 (addressing the plaintiff's negligence claims, the court relied on Section 408 of the Restatement (Second) of Torts to determine that a chattel lessor is subject to liability "if the lessor fails to exercise reasonable care to make it safe for such use or to disclose its actual condition to those who may be expected to use it." After looking at the relationship between the defendant finance lessor and the aircraft, the court held that the defendant finance lessor could not be liable for negligence because there was no proof that the lessor breached a duty of care owed to the plaintiffs. "At no time did either [defendant] have possession of the aircraft, nor did they participate to any degree in the design, maintenance, manufacture, operation, or inspection of same.")

manufacturing defect of an aircraft. A different public policy underlies each of these theories of liability. Some of these public policies could be consistent with the public policy underlying Section 44112, thus allowing those theories to avoid preemption.

Recall that under Section 44112 the lessor or secured party is liable when the aircraft is in the lessor's actual possession or control.[58] Is the scope of "possession or control" broad enough to preclude liability for negligent entrustment and negligent supervision as well as vicarious negligence? We should note that by definition the lessor did have either possession or control at the time he entrusted the aircraft to the operator.

On the other hand the lessor would not have possession or control after entrusting the aircraft to the lessee. But a negligent supervision claim might still be viable under the "control or possession" standard of Section 44112 if a court were to construe the termination and default provisions in the lease as providing the lessor with the "control" to recover possession if the lessee had become incompetent to operate the aircraft safely.

Under *Abdullah* it is federal law that sets the standard of care for air safety.[59] If there is no standard established under federal law for negligent entrustment should such a claim be preempted under a field preemption theory even though negligent entrustment might otherwise be outside the preemption scope of Section 44112? Should a recovery for negligent entrustment be considered a remedy and hence not preempted under the FAA Act of 1958?

[58] 49 U.S.C. Section 44112.
[59] *See Abdullah*, 181 F.3d at 371.

Does Section 44112 reach product claims? The language "possession or control" suggests the statute was intended to reach only vicarious negligence claims, not product claims arising out of the chain of distribution. The defective product, in this case an aircraft, would have been in the possession or control of the lessor at the time the lease was made.

A. VICARIOUS LIABILITY

More than sixty years ago the *Uniform Aeronautics Act* was in force in at least ten states. Section 4 of the Act made aircraft owners absolutely liable for losses arising from use of the aircraft. There are still states that statutorily or by common law impose vicarious liability upon the owners and lessors of aircraft.[60] Some courts have imposed a variation of vicarious liability when the lessor entrusted an aircraft to a lessee when at the

[60] *See* Rogers v. Ray Gardner Flying Service, Inc., 435 F.2d 1389, 1394 (5th Cir. 1970). Three of the most cited cases from this period are *Hoebee v. Howe*, 97 A.2d 223 (N.H. 1953), *Hays v. Morgan*, 221 F.2d 481 (5th Cir. 1955), and *Lamasters v. Snodgrass*, 85 N.W.2d 622 (Iowa 1957). All three cases determined that the lessor could be liable for the pilot's negligence. *Hoebee* and *Hays* each dealt with the vicarious liability of the owner, whereas *Lamasters* was looking at negligent entrustment. *Hoebee*, at 225; *Hays*, at 482-3; *Lamasters*, at 626. What is interesting about *Hays* and *Lamasters* is that both determined that a previous incarnation of Section 44112 would preempt liability if its requirements were fulfilled. *Hays*, at 482; *Lamasters*, at 625. *Hoebee, Hays*, and *Lamasters* have received disparate treatment; one example being the Fifth Circuit's rejection of the reasoning of those cases in *Rogers v. Ray Gardner Flying Service*. Rogers v. Ray Gardner Flying Service, Inc., 435 F.2d 1389, 1394 (5th Cir. 1970) (*Rogers* is particularly helpful since it is rejecting its prior holding in *Hays*). However, the Mississippi Supreme Court in *Malone v. Capital Correctional Resources, Inc.*, recently affirmed *Hays* and allowed an aircraft owner to be vicariously liable. Malone v. Capital Correctional Resources, Inc., 808 So.2d 963, 966 (Miss. 2002). The validity of the *Malone* holding is questionable since the majority opinion based its reasoning by distinguishing itself from the federal district court opinion in *Astron* (a 1997 N.D.Ala. decision that refused to impute liability to the owner of an aircraft for the pilot's negligence) but made no direct reference to the Fifth Circuit decision in *Rogers*. *See Malone*, 808 So.2d 963. *But see id.* at 970-71 (Smith, J., concurring in part and dissenting in part).

time of entrustment the aircraft either had a defect or maintenance shortcoming.[61] In some of these cases the underlying legal theory has either been based on the common law of bailment or the violation of a state or federal statute for operational negligence.[62] Arguably, the current trend is to not find the aircraft owner vicariously liable for the independent acts of a third party.[63]

We should recall that when enacting Section 1404 in 1948 the House of Representatives in House Report 2091 noted that a reason for passing the legislation was to reverse the adverse impact the *Uniform Aeronautics Act* was having on aircraft financing. Does this mean that Section 1404 was intended to completely preempt all state law vicarious liability exposure to long term aircraft lessors?

Some cases have reasoned the foundation for a vicarious liability claim against the aircraft lessor comes from those provisions of the FAA Act of 1958 dealing with the operation of an aircraft.[64] The theory is that the aircraft owner or lessor could be vicariously liable under a common-law bailment theory because the lessor (bailor) caused or authorized the negligent operation of an aircraft by the bailee.[65]

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[61] *See* Mangini v. Cessna Aircraft Co., Nos. X07CV044001467S, X07CV044003418S, 2005 WL 3624483 (Conn. Super. Ct. 2005); Hays v. Morgan, 221 F.2d 481 (5th Cir. 1955).

[62] *See* Brown v. Astron Enterprises, 989 F.Supp. 1399 (N.D.Ala. 1997).

[63] Brown v. Astron Enterprises, 989 F.Supp. 1399, 1408 (N.D.Ala. 1997); Rosdail v. Western Aviation, Inc., 297 F.Supp. 681, 684-85 (D.Colo. 1967). *Contra* Malone v. Capital Correctional Resources, Inc., 808 So.2d 963, 966 (Miss. 2002); Coleman v. Windham Aviation Inc., No. Civ.A. K.C.2004-0985, 2005 WL 1793907 (R.I.Super. 2005).

[64] *See* McCord v. Dixie Aviation, 450 F.2d 1129, 1129-30 (10th Cir. 1971); *Hays v. Morgan*, 221 F.2d 481 (5th Cir. 1955).

[65] *See* 8A AM. JUR. 2D Aviation Section 128 (2008)

But through the present date the federal courts that have looked at the potential vicarious liability of an aircraft lessor have not read federal law to impute liability absent negligence by the lessor.[66] But is this a correct interpretation of the FAA Act of 1958?

Under *Abdullah*, federal law sets the standard of care for "aircraft operations."[67] The general standard of care required in the operation of an aircraft can be found in 14 C.F.R. Section 91.13:

> 91.13 Careless or reckless operation.
>
> (a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.
>
> (b) Aircraft operations other than for the purpose of air navigation. No person may operate an aircraft, other than for the purpose of air navigation, on any part of the surface of an airport used by aircraft for air commerce (including areas used by those aircraft for receiving or discharging persons or cargo), in a careless or reckless manner so as to endanger the life or property of another.[68]

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[66] *See McCord*, 450 F.Supp. at 1129-30 (declining to imply a civil remedy under the FAA Act of 1958 absent an actual violation of the FAA Act of 1958 or any proof that the airplane was rented in an unsafe condition or other circumstance); Sanz v. Renton Aviation, Inc., 511 F.2d 1027, 1029 (9th Cir. 1975); *Rosdail*, 297 F.Supp. at 684-85; Broadway v. Webb, 462 F.Supp. 429, 433-34 (W.D.N.C. 1977); 8A AM. JUR. 2D Aviation Section 128 (2008) (stating that "…a program of the Federal Aviation Act, under which one who causes or authorizes the operation of an aircraft, with or without the right of legal control, is regarded as operating such aircraft, does not afford a basis under federal law for vicarious liability of for imputing a pilot's negligence to the owner of an aircraft").

[67] *Abdullah*, 181 F.3d 363, 367.

[68] 14 C.F.R. Section 91.13. *See Abdullah*, 181 F.3d at 371 (stating "in determining the standards of care in an aviation negligence action, a court must refer not only to specific

Thus, according to 14 C.F.R. 91.13 no person may operate an aircraft in a "careless or reckless manner so as to endanger the life or property of another." It is important to recall, however, that the FARs, as already noted in the Legal Intepretation of Administrator James B. Busey, defines the term "operate" to include "use, cause to use or authorize to use aircraft . . . with or without the right of legal control (as owner, lessee, or otherwise)."

Does this mean that federal law has already established a standard of care applicable to aircraft lessors that imposes vicarious liability? Are the elements of this claim only the following: (1) the careless or reckless operation of an aircraft by an air carrier; and (2) whether the lessor "authorized" the air carrier to fly the aircraft?

Naturally, if such a federal standard of care does exist, although not previously recognized, it would have to be harmonized with Section 44112. In other words, does federal law impose vicarious liability upon a lessor subject only to the exceptions, if any, set out in Section 44112?

But should such a potential federal standard of vicarious liability, if it exists, be applicable to finance lessors?[69] It should be difficult to hold the "finance lessor" vicariously liable because a finance lessor likely never had actual possession or control of the aircraft.[70]

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regulations but also to the overall concept that aircraft may not be operated in a careless or reckless manner. The applicable standard of care is not limited to a particular regulation of a specific area; it expands to encompass the issue of whether the overall operation or conduct in question was careless or reckless").

[69] *McCord*, 450 F.2d at 1130. See *Rosdail*, 297 F.Supp. at 684-85; *Astron*, 989 F.Supp. at 1408; In re Lawrenace W. Inlow Accident Litigation, No. IP 99-0830-C H/G, 2001 WL 331625.

[70] *See Dudley*, 1994 U.S. Dist. LEXIS 18426, at *13-14.

The commercial lessor that leases an aircraft for less than thirty days faces the greatest exposure to vicarious liability since it is accorded no protection under Section 44112. A recent example of when a commercial lessor was liable despite Section 44112 was seen in *Coleman v. Windham Aviation, Inc*. The reasoning for permitting vicarious liability was that the lessor was the actual owner of the aircraft involved in the accident, so Section 44112 did not preempt.[71]

B. NEGLIGENT ENTRUSTMENT

An allegation of negligent entrustment by a plaintiff against the lessor is based on common law of bailment and is essentially an allegation the lessor knew or should have known that the lessee aircraft operator was not competent to safely operate the aircraft.[72] A negligent entrustment claim is different from a vicarious liability claim because the plaintiff is trying to prove that the lessor itself was negligent as opposed to being automatically liable for another's negligent conduct. While federal courts have been hesitant to hold that the FAA Act of 1958 imposes vicarious liability on an aircraft owner for the negligence of the operator, they have allowed negligent entrustment claims to go forward.[73]

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[71] *Coleman*, 2005 WL 1793907, at *6 (R.I.Super. 2005). One problem with the *Coleman* case is that the court applied a Rhode Island law that imposed vicarious liability on aircraft owners for the negligent operation of authorized operators. *Id.* There is no discussion at this point in the opinion on whether such laws would be preempted under *Abdullah* and earlier decisions that suggest no vicarious liability.

[72] *See* Joy v. Bell Helicopter Textron, Inc., Nos. 88-2165, 88-2351, 88-2352, 88-3012, 1990 U.S. Dist. LEXIS 17185, at *5 (D.D.C. 1990) (stating "[t]he tort of negligent entrustment provides a remedy against those who negligently entrust a chattel to another whose foreseeable negligent use of the chattel causes injury.")

[73] Sanz v. Renton Aviation, Inc., 511 F.2d 1027, 1029 (9th Cir. 1975) (holding that while the Federal Aviation Act was not meant to make non-negligent aircraft owners "civilly

Attempting to hold a lessor liable for negligent entrustment is an interesting theory of liability because of the different elements the plaintiff must prove in order for a lessor to be liable.[74] The standard for negligent entrustment is based on Section 390 of the Restatement (Second) of Torts:

> Section 390. Chattel For Use By Person Known To Be Incompetent:
>
> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.[75]

While Section 390 provides the basic standard, some states, like California, have their own standard for negligent entrustment and determining the actual standard of one's own state is worth investigating.[76]

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responsible for pilot-lessee negligence. … If the owner negligently entrusts the aircraft, that is another matter").

[74] "A bailor or lessor that entrusts a small airplane, etc., to a bailee pilot that the bailor either knows or should have known was incompetent to operate the aircraft, or reckless, may be held liable for injury, death or property damage caused by operational negligence of the bailee pilot." Charles Krause & Kent Krause, Annotation, *Bailor's or Lessor's Liability for Negligence with Respect to Condition, Maintenance, etc, .of Aircraft – Negligent Entrustment*, 2 AVIATION TORT AND REG. LAW Section 14:8 (2007).

[75] Restatement (Second) of Torts Section 390 (1965). *See Joy*, 1990 U.S. Dist LEXIS 17185, *5 (District Court for D.C. applying Section 390 because "it is widely known and applied in other jurisdictions"); Zetter v. Griffith Aviation, Inc., Civil Action No. 6:03-218-DCR, 2006 U.S. Dist. LEXIS 23192, at *42-43 (choosing to apply Section 390).

[76] *See* White v. Inbound Aviation, 82 Cal. Rptr. 2d 71, 77 (Cal. Ct. App. 1999) (applying California standard for negligent entrustment, but indicates that Section 390 is similar); *Zetter*, U.S. Dist. LEXIS 23191, at *42 (refusing to apply a specific "negligent entrustment of aircraft" standard from Anderson Aviation v. Perez, 508 P.2d 87 (Ariz.

The basic test for negligent entrustment is whether the owner or lessor knew or should have known that the bailee was incompetent, inexperienced, reckless or had dangerous propensities.[77] This is based on an "ordinary prudent person" in like circumstances or if the lessor exercised ordinary care in making this determination. In some instances, there must be a determination if the harm was foreseeable.[78]

> "If a supplier of a chattel is aware of facts which establish that an individual lacks the ability to safely use the chattel for a particular purpose, and the supplier nevertheless entrusts the chattel to that individual to use *for that purpose*, the supplier has acted imprudently and should be held accountable if harm arises from the individual's inadequacy."[79]

A lessor is in a quandry when it leases to an airline that is fully certificated but nevertheless is on the E.U. Blacklist or is from a nation that has been downgraded to Class 2. The certification, as impliedly suggested in *White* below, is probably not a full shield to negligent entrustment claims. A certification may be only a minimum standard. An adverse safety history of the lessee may still create a triable issue of negligent

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App. 1973); Pincura v. Forbes, No. 56854, 1990 Ohio App. LEXIS 1375, *6-7 (Ohio Ct. App. 1990) (applying Ohio standard for negligent entrustment).

[77] *See White*, 82 Cal. Rptr. 2d at 77 (Stating that "'[i]n its simplest form the question is whether the owner [or other supplier] when he permits an incompetent or reckless person, whom he knows to be incompetent or reckless, to take and operate his car [or any other instrumentality], acts as an ordinary prudent person would be expected to act under the circumstances.' California courts have long held that inexperience alone does not necessarily establish incompetency"); *Joy*, 1990 U.S. Dist LEXIS 17185, *7 (two main features of negligent entrustment are "'the knowledge of the supplied concerning the dangerous propensities of the entrustee and in the forseeability of harm'"); *Pincura*,1990 Ohio App. LEXIS 1375, *6-7.

[78] *Joy*, 1990 U.S. Dist LEXIS 17185, *7.

[79] *White*, 82 Cal. Rptr.2d at 77 (emphasis in the original).

entrustment notwithstanding the fact the air carrier holds a current operating certificate. The lessor should have ready access to information regarding the airline's safety records. Sources include but would not be limited to the Aviation Safety Network, the Airclaims' Database, and the lessor's presumed ability, although arguably impracticable, to inspect and audit an air carrier before entering into a lease.

Both large and small aircraft lessors have been found liable for negligent entrustment. In *White v. Inbound Aviation, Inc.*, the fixed base operator, Inbound Aviation, was sued for negligent entrustment by the parents of a pilot who had rented a Piper Archer from the operator. The Piper was owned by Jeffrey Marconet ("Marconet") who leased it to Inbound. Besides being the owner and lessor, Marconet was also a manger and employee of Inbound. The young pilot had about seventy-five hours of flight time, twenty-three of which were solo. The pilot had rented from Inbound before and had previously completed a non high altitude check ride with an Inbound check pilot. Inbound Aviation was charged with knowledge of the pilot's skill and experience in piloting an airplane.[80]

The fixed base operator in *White* required pilots to pass a high altitude check ride before they could rent an aircraft to fly to a "high altitude" airport.[81] The pilot knew about the check out requirement, but had never completed a high altitude check ride with Inbound. The lack of a high altitude check ride was noted in the pilot's file at Inbound Aviation.[82] The pilot's log did indicate that he had flown into high altitude airports before, just never with one of Inbound's aircraft.

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[80] *See id.* at 73-76.
[81] *Id.* at 73.
[82] *Id.* at 75.

On the day of the accident, the pilot rented the Piper from Inbound Aviation and Inbound knew the pilot intended to fly to a high altitude airport, even though he had not been checked out to fly to such locations. The pilot later crashed while on take off from a high altitude airport.

At issue in the case was whether Inbound negligently entrusted the aircraft to the pilot when it knew or should have known the pilot was arguably not competent to operate the aircraft in and out of high altitude airports.[83] Significantly, there was no dispute the pilot was properly certificated by the FAA to operate the Piper as pilot-in-command. There were no applicable limitations upon the pilot's airman's certificate. Not unreasonably, Inbound Aviation argued it could not be liable for negligent entrustment as a matter of law because the FAA certificated the pilot as competent to fly the aircraft without limitation.[84]

The court found that being properly certificated by the FAA is not an absolute defense to a claim for negligent entrustment. The court explained that Inbound Aviation could nevertheless be liable for negligent entrustment because a reasonable jury could have concluded the pilot was incompetent to fly into high altitude airports because he had never taken the high altitude check ride and that Inbound knowingly permitted a pilot with questionable skills and no high altitude experience to rent one of its airplanes and fly to a high altitude airport.[85]

In other words, it appears the California court determined that being properly certificated by the FAA is simply a minimum standard. Circumstances known to the

[83] *Id.* at 76.
[84] *Id.* at 78.
[85] *Id.*

owner or lessor of the aircraft could and do create triable issues of fact over whether the lessor acted reasonably in allowing a pilot to take possession and control of an aircraft.

There was no argument in *White* that Section 44112 should have been applicable. The case therefore is not helpful to our preemption analysis. The reasoning in *White* is instructive, however, for other reasons.

The holding in *White,* although that case dealt with a rental by a fixed base operator, suggests that a commercial aircraft lessor may not find immunity against negligent entrustment by arguing the air carrier is properly certificated under the regulations of the controlling jurisdiction. Thus, under the reasoning in *White* the status of an air carrier on the E.U. Blacklist or the FAA's Class 2 could be particularly relevant in a negligent entrustment claim.

A commercial aircraft lessor, not a fixed base operator, was a defendant in *Joy v. Bell Helicopter Textron, Inc.* In *Joy* the commercial aircraft lessor was found liable for negligent entrustment.[86] Once again, however, there is no analysis of Section 44112 and the case should not be considered precedent on the potential preemptive effect of the federal statute.

The lessor in *Joy* was a company called Advest which had purchased a helicopter which it then leased to the operator for sixty months. Advest was essentially acting as a "finance lessor." Advest retained the right to repossess the helicopter under certain conditions, like late lease payments or lapse in insurance. As part of the lease the operator had to abide by all Federal Aviation Regulations ("FARs") and was responsible

[86] Joy v. Bell Helicopter Textron, Inc., Nos. 88-2165, 88-2351, 88-2352, 88-3012, 1990 U.S. Dist. LEXIS 17185 (D.D.C. 1990).

for obtaining hull and liability insurance. In event of a lapse in insurance, the operator was to notify the lessor.

Shortly after taking possession of the helicopter, the operator missed several lease payments and its insurance policies were canceled for non-payment. In response, Advest acted to repossess the helicopter. An Advest representative personally informed the operator that the lease was terminated and removed the maintenance logs from the helicopter. The lessee gave Advest verbal confirmation that it knew it was against FARs to fly without the maintenance logs and promised not to use the helicopter. At the time of repossession, the lessee told the lessor that the helicopter needed a new oil filter. However, the lessee broke its promise to the lessor and used the aircraft. It crashed, killing the passengers on board.[87] The plaintiffs brought suit against the lessor, one of the claims being negligent entrustment.

In evaluating the negligent entrustment claim, the court looked to see if the lessor knew that the lessee had dangerous propensities.[88] The court determined the plaintiff could show that the lessor had knowledge that the lessee had a "propensity to operate the aircraft in an irresponsible manner"[89] because the lessor knew the lessee had been behind in lease payments thus "evincing a reckless disregard of its financial obligations."[90] Since the lessee told the lessor at the time of repossession that the helicopter needed a new oil filter, the lessor had actual knowledge that the lessee was not properly maintaining the helicopter.[91] Lastly, the lessor knew that the lessee's insurance policies

[87] *Id.* at *1-4.
[88] *Id.* at *7.
[89] *Id.*
[90] *Id.*
[91] *Id.*

for the helicopter had lapsed.[92] By looking at the "cumulative effect" of this evidence, the court determined that the plaintiff had sufficiently shown that the lessee "had a propensity to use the helicopter in a dangerous manner, and that Advest [the lessor] knew or should have known of this likelihood."[93]

The lessor argued that there was not an entrustment because it had repossessed the aircraft. Yet, the aircraft remained in the lessee's physical possession because the lessor left it on the lessee's property and the lessee had the keys. Besides taking the maintenance log and eliciting a promise that the aircraft would not be flown, the lessor never made any additional efforts to ensure that the aircraft would not be flown.[94] The court determined that an entrustment occurred, because the aircraft remained in the lessee's possession and that the lessor "failed to effectively exercise" its right to prohibit the lessee's use of the helicopter.[95]*Joy* is interesting because the Court allowed the negligent entrustment claim to stand, yet dismissed a vicarious liability claim against the lessor.[96]

The *Joy* case presents a dilemma for the commercial aircraft lessor. Although the court did not address Section 44112 preemption, it is difficult to determine if Section 44112 would preempt here. Under Section 44112, there is arguably no liability should the lessor not be in actual possession or control of the aircraft. Here, the Court found an entrustment occurred once the lessor acted to repossess the aircraft but the lessee still retained possession of the helicopter. Because the lessee still retained possession, then

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[92] *Id.*
[93] *Id.* at *7-8.
[94] *Id.*
[95] *Id.* at *8-9.
[96] *Id.* at 13 (citing Sanz v Renton Aviation, Inc. 511 F.2d 1027 (9th Cir. 1975)).

under Section 44112, the lessor did not have actual possession. However, Section 44112 also looks at control of the aircraft. Whether or not the lessor had control of the aircraft is difficult to determine. Because the lessor took the maintenance logs, it arguably was in control of the aircraft since flying without the logs would violate federal regulations.[97]

From *Joy* and *Inbound*, we have learned that a court could hold the lessor liable under a negligent entrustment theory when the lessor knows that the lessee is not competent to safely operate the aircraft or has a propensity to use the aircraft in a dangerous manner even though the operator may otherwise be properly certificated.[98] For the large scale commercial lessor, the reasoning in *Joy* could act to broaden its liability exposure as it seems an aircraft lessor could potentially become liable for negligent entrustment should the lessee fall behind in lease payments, fail to acquire insurance, in addition to failing to maintain the aircraft properly.[99]

As phrased in *White* "[t]he information available to the supplier about the individual and his or her purpose in obtaining the chattel determines whether the supplier acts imprudently in supplying the chattel."[100] In analyzing the negligent entrustment issue *Joy* sought "'significantly probative' evidence" that the lessor knew the lessee had the "propensity to operate the helicopter in an irresponsible manner."[101] The court in *Joy* implies, if it does not state outright, that there is a somewhat remarkably low threshold

[97] *Id.* at 3.
[98] *Id.*
[99] *Id*. at 7-8.
[100] *Id.* at 77.
[101] *Joy*, 1990 U.S. Dist. LEXIS 17185, at *7

for "knowledge" that creates a jury issue on whether the lessor had been negligent in entrusting the aircraft to the operator.[102]

From *Joy* we see that "knowledge" can be satisfied by financial violations of the lease agreement.[103] It might surprise some that financial difficulties of a lessee could place a lessor on notice that the air carrier might be incompetent to operate or maintain an aircraft. But, upon reflection, we should remember that the Department of Transportation links financial stability with suitability to maintain scheduled air carrier operations. Unless an air carrier makes a sufficient demonstration that it has adequate financial resources the Department of Transportation will not issue a certificate of public convenience and necessity.

Does the potential liability of a lessor extend to negligent supervision? A lessor is charged with information which it actually possesses but is also charged with information it "should have known." Is the lessor thus charged with knowledge of facts that a reasonable investigation would have disclosed? Do provisions in the lease allowing the lessor to audit and investigate the operations of the air carrier and terminate the lease constructively impute knowledge of the air carrier's operations? Do such lease provisions create liability for "negligent supervision" under circumstances where the operator was "competent and qualified" at the time of initial entrustment of the aircraft but then over the life of the aircraft lease the financial condition of the operator deteriorated?

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[102] *White*, 82 Cal. Rptr.2d at 78. *See id.* at 77 (stating "[i]t is necessarily a question for the jury whether a prudent person, aware of the facts known to the supplier of the instrumentality, would have permitted the individual to operate the instrumentality.")

[103] Examples from *Joy* of how the lease agreement was used to fulfill the knowledge element are: lessee being late in lease payments, requirement to obtain insurance and notice when there is a lapse in insurance coverage. *Id*.

C. PRODUCTS LIABILITY

The theory of products liability creates an interesting conundrum for the commercial aircraft lessor and for the plaintiff. Whether or not an aircraft lessor can be liable under a theory of strict products liability for an injury caused by a leased aircraft depends on the relationship between the aircraft lessor and the aircraft itself. If the lessor only provided the financing, i.e. is a "finance lessor," and never had possession of the aircraft, then it is likely there is no strict products liability exposure for the aircraft lessor.[104] However, if the lessor did have possession of the aircraft, a strict products liability claim might be successful depending on the facts of the situation.[105] The distinction as to when a lessor can or cannot be strictly liable depends on whether the lessor is considered a "finance lessor" or "commercial lessor" under the Uniform Commercial Code and applicable laws for the aircraft at issue.

Before delving into a discussion about the aircraft lessor and a strict products liability claim, it will be helpful to provide a little background information about strict product liability claims. As experienced practitioners well know, unlike a negligence claim, a strict products liability does not require proof of fault, only defect. [106] Under

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[104] *See* Dudley v. Business Express, Civil No. 93-581-SD, 1994 U.S. Dist. LEXIS 18426 (D.N.H., 1994) (holding that a finance lessor cannot be liable to third party for injury that occurred on lessee's aircraft because the lessor was never in possession of the aircraft).
[105] *C.f. id.*
[106] Thad T. Dameris, T. Craig Wagner, David J. Weiner, *Apportioning Liability Between the Commercial Aircraft Used and the Commercial Aircraft Manufacturer, in* LITIGATING THE AVIATION CASE; FROM PRE-TRIAL TO CLOSING ARGUMENT, 96 (Andrew J. Harkas ed., 3rd ed., 2008).

strict products liability, the plaintiff will be alleging that the lessor placed a defective aircraft into the stream of commerce.[107]

Most strict liability claims are governed by Section 402A of the Restatement (Second) of Torts.[108] Such claims can be based upon a failure to warn or to provide adequate instructions.[109] One could argue that an aircraft lessor failed to warn or adequately instruct the lessee on nuances regarding a particular aircraft.[110] Compliance with federal regulations is not an adequate defense against a strict liability claim.[111] Liability under a strict products liability theory is not just limited to the purchaser, but can extend to third parties like passengers on the aircraft.[112] Because third parties can utilize a strict products liability theory, it can be attractive to the plaintiff passenger.

A commercial lessor can be subject to strict products liability because, by "renting" or leasing a product, they are akin to the seller of a product who puts a defective good into the stream of commerce.[113] The commercial lessor "is someone who rents a product to its customer for a relatively short period, with the expectation that the product will be returned at the completion of the term of the lease and, perhaps, then

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[107] *See Id.* The elements of a strict products liability claim between the "aircraft user" and the manufacturer are:

> "In order to prevail on a strict liability claim, the aircraft user must establish that the manufacturer placed a defective aircraft into the stream of commerce, that the aircraft was in a defective condition that was unreasonably dangerous to consumers, and that the seller was in the business of selling the product."

Id.

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.* at 97. (citing Silkwood v. Kerr-McGee Corp., 485 F.Supp. 566, 578 (W.D. Okla. 1979).

[112] *Id.* (citing King v. Douglas Aircraft Co., 159 So. 2d 108 (Fla. Dist. Ct. 3d dist. 1964).

[113] *See* Abco Metals Corp. v. J.W. Imports Co., Inc., 560 F.Supp. 125, 130 (D.C.Ill. 1982).

leased to other, future customers."[114] Lessors, who take on the commercial lessor role, may be held strictly liable for the defective products they rent.[115]

On the other hand, a finance lessor is more of a middle man in the transaction, existing between the supplier and purchaser. The finance lessor "does not actually provide the equipment to the lessee, but rather provides the money which allows the user of already selected equipment to purchase it."[116] The finance lessor doesn't help in the selection, production or marketing of the product, it just provides the financial wherewithal behind the transaction.[117]

> "To illustrate the classic finance lease transaction, assume that an airline selects a 747 and negotiates over its particular configuration with Boeing. Instead of purchasing the 747, the airline then arranges for a bank to purchase it and for the bank to lease the aircraft to the airline. Although the document between the bank and the airline would be a true lease and not a security agreement, this transaction between the airline and the bank is first and last a financing transaction."[118]

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[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] Abco Metals Corp. v. Equico Lessors, Inc., 721 F.2d 583, 585 (7th Cir. 1983) (describing the role of the financial lessor in the transaction. "[Defendant] had no input into the production or marketing of this machine. It was not, therefore, in the original chain of distribution and was not a party capable of preventing a defective product from entering the stream of commerce. Any profit it reaped derived from having placed its money, and not the defective product, into the stream of commerce").
[118] Dominguez Mojica v. Citibank, N.A., 853 F.Supp. 51, 54 n.5 (D.P.R. 1994)

The finance lessor, because it does not actually design/manufacture/distribute the product, is not introducing the aircraft into the stream of commerce and, thus, should be exempt from strict products liability.[119]

The premise of not holding strictly liable an aircraft lessor acting as a finance lessor was seen in *Dudley v. Business Express, Inc*., where a district court in New Hampshire granted summary judgment for a finance lessor of an airplane being sued for negligence, strict liability and breach of warranty.[120] The underlying claim related to a plaintiff who was injured after striking her head on the aircraft door or fuselage. The aircraft was a Beechcraft 1900D, operated by Business Express.[121] In addition to Business Express, the plaintiff named Concord Commercial Corporation ("CCC") as a defendant.[122] CCC's sole connection to the aircraft was as a "finance lessor," having provided third party financing to Business Express and its corporate parent.[123]

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[119] Joy v. Bell Helicopter Textron, Inc., Nos. 88-2165, 88-2351, 88-2352, 88-3012, 1990 U.S. Dist. LEXIS 17185, at *11 (D.D.C. 1990) (finding "persuasive those cases which hold that providers of financial leases are not held strictly liable for defective products"). *See* Cole v. Elliott Equipment Corporation, 653 F.2d 1031, 1032 (5th Cir. 1981); Abco Metals Corp. v. Equico Lessors, Inc., 721 F.2d 583, 584-86 (7th Cir. 1983); Dominguez Mojica v. Citibank, N.A., 830 F.Supp. 668, 671-73(D.P.R. 1993); Nath v. National Equipment Leasing Corp., 439 A.2d 663 (Pa. 1981).

[120] Dudley v. Business Express, Civil No. 93-581-SD, 1994 U.S. Dist. LEXIS 18426 (D.N.H., 1994). *See* Joy v. Bell Helicopter Textron, Inc., Nos. 88-2165, 88-2351, 88-2352, 88-3012, 1990 U.S. Dist. LEXIS 17185, at *11 (D.D.C. 1990). *But see* In Re Aicrash Disaster Near Roselawn, Indiana on October 31, 1994, No. 95 C 4593, 1997 U.S. Dist. LEXIS 13696 (E.D.Ill. 1997) (finding that AMR Leasing was a commercial lessor and could be subject to strict liability. The Court does not go into detail behind this conclusion. This determination is interesting because this case related to the same accident that was at issue in *Retzler v. Pratt and Whitney*. While not discussed in *Retzler* maybe the fact that the lessor was a "commercial lessor" as opposed to a "finance lessor" contributed to the court's determination that Section 44112 would not preempt in that case).

[121] *Dudley*, 1994 U.S. Dist. LEXIS 18426, at *2-3.

[122] *Id.* at *1.

[123] *Id.* at 3-4.

Central to the court's reasoning was that CCC was "not involved in the design, selection, or manufacture of the defective items and thus are not in a position to detect a possibly defective condition."[124] That, and ". . . the imposition of strict liability on financial lessors would adversely impact the leasing market as a whole, forcing the lessors to charge enhanced fees so as to protect themselves from liability claims for defective products whose condition they are unable to detect and powerless to correct."[125]

Looking at the facts of the case, the court noted that by being a finance lessor, CCC "lacked 'dominion and control' over the aircraft" and that the plaintiffs were "unable to prove that CCC and [other named defendant] were part of the original chain of production, marketing or distribution of the aircraft."[126] By not being part of the original chain of production, marketing or distribution of the aircraft, the finance lessor could not be involved in the development of the product that would lead to a defect.

What is interesting about *Dudley*, is that the case makes no mention of the role Section 44112 would play in a strict liability context. Looking back to the discussion on whether Section 44112 can preempt state law, Section 44112 should preempt state laws that impose strict products liability on the aircraft lessor in those situations when the lessor does not have actual possession or control of the aircraft.[127]

As seen from the above discussion, whether or not the large commercial aircraft lessor can be strictly liable may depend on whether it can be classified as a "finance lessor" or a "commercial lessor." The distinction between the two depends on the role

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[124] *Id.* at 17-18.
[125] *Id.* This last argument could be used to support the contention that letting a finance lessor be strictly liable would be expressly preempted by the Airline Deregulation Act of 1978.
[126] *Id.* at 18.
[127] *See* 49 U.S.C. Section 44112

the lessor played in relation to the aircraft and the lessee. Should the aircraft lessor be acting only as a financial middle-man, and not participating in the selection, production or manufacture of the aircraft, or never exercising "dominion and control" over the aircraft, it is more likely that the aircraft lessor is a finance lessor and is exempt from liability.[128] However, should the role of the lessor be more like that of a "renter," then it is likely that the aircraft lessor would be defined as a "commercial lessor" and will be exposed to strict products liability.

Like the aircraft lessor facing a third party strict liability claim, the liability exposure of an aircraft lessor facing a breach of warranty claim is based on their role as either a commercial or finance lessor. Under the Uniform Commercial Code, there are no implied warranties of merchantability or fitness for finance leases, so a financial lessor who only provided a finance lease cannot be liable for breach of an implied warranty.[129] Central to an attempt to bring a breach of implied warranty claim depends on the classification of the lease and the role of the lessor.

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[128] *See* Dudley v. Business Express, Civil No. 93-581-SD, 1994 U.S. Dist. LEXIS 18426 (D.N.H., 1994); Joy v. Bell Helicopter Textron, Inc., Nos. 88-2165, 88-2351, 88-2352, 88-3012, 1990 U.S. Dist. LEXIS 17185, at *11 (D.D.C. 1990).

[129] Uniform Commercial Code Section 2A-212, 213, 103(1)(g). *See Dudley*, 1994 U.S. Dist. LEXIS 18426, at *19; Joy v. Bell Helicopter Textron, Inc., Nos. 88-2165, 88-2351, 88-2352, 88-3012, 1990 U.S. Dist. LEXIS 17185, at *11 (D.D.C. 1990).

IV. THE EXPOSURE OF THE COMMERCIAL AIRCRAFT LESSOR TO PASSENGER PERSONAL INJURY AND WRONGFUL DEATH CLAIMS MAY DEPEND NOT ONLY UPON THE THEORY OF LIABILITY ALLEGED AGAINST THE LESSOR BUT ALSO UPON THE INTENDED SCOPE OF SECTION 44112 AND WHETHER STATE, FEDERAL OR FOREIGN LAW WILL APPLY TO THE CLAIMS

A. DOES SECTION 44112 "RELATE TO A RATE, ROUTE, OR SERVICE"?

Putting aside whether the liability of a commercial aircraft lessor might be preempted by Section 44112, could an attempt by a state to legislate the liability of a commercial aircraft lessor instead be preempted as an impermissible attempt to regulate "rates, routes or services" of an air carrier?

The ADA was passed by Congress as "economic deregulation" under the theory that "competitive market forces" as opposed to federal or state regulation could best set rates, routes and services and "further 'efficiency, innovation, and low prices' as well as 'variety [and] quality . . . of air transportation serivces'."[130] Prior to the ADA airlines were forced to operate under a patchwork of federal and state economic regulation.[131]

Unlike the FAA Act of 1958, the ADA (and the Federal Aviation Administration Authorization Act of 1994) contains express preemption clauses stating that a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air

[130] Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 (1992). *See* Rowe v. New Hampshire Motor Transport Association, 128 S.Ct. 989, 991 (2008); Harakas, p.106.
[131] Morales, 504 U.S. at 378.

transportation."[132] The purpose of this express preemption clause is to "ensure that the states would not undo federal deregulation with regulation of their own" [133] resulting in a "state regulatory patchwork [that] is inconsistent with Congress' major legislative effort to leave [price, route, or service] decisions, where federally unregulated, to the competitive marketplace."[134] In short, the ADA seeks to preempt state laws that will affect the economic regulation of the airline industry.

How and when is state law preempted as improperly regulating a price, route, or service? The answer depends on whether the state law "relates" to an air carrier's price, route or service and, if so, does the law have a "significant impact" or "effect" on Congress' economic deregulatory and preemption goals.[135] The challenged law need only relate indirectly to Congress' goals, and preemption can occur even if the challenged state law is consistent with Congress' goals.[136] However, the impact of some state laws upon rates, routes and services might be "too tenuous, remote or peripheral" to warrant preemption.[137]

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[132] 49 U.S.C. Section 41713(b); 49 U.S.C. Section 14501(c)(1). Note, the original act expressly preempted "rates, routes, or services." "Price" was substituted for "rates" when Congress recodified the ADA and the Federal Aviation Act in 1994.
[133] Morales v. Trans World Airlines, 504 U.S. 374, 378 (1992).
[134] Rowe v. New Hampshire Motor Transport Ass'n, 128 S.Ct. 989, 996 (2008).
[135] *See* Morales, 504 U.S. at 384, 388; Rowe, 128 S.Ct. at 995; Witty v. Delta Air Lines, 366 F.3d 380, 383 (2004). *See also* Data Manufacturing, Inc. v. United Parcel Service, Inc., 2008 WL 648483 (E.D.Mo. 2008) (setting forth a two-part preemption test. "(1) Plaintiff's claim must derive from the enactment or enforcement of state law; and (2) plaintiff's claim must relate to defendant's prices, routes or services. If plaintiff's claims satisfy both of these conditions, then they are preempted and must be dismissed").
[136] *See* Morales, 504 U.S. at 386-87; Rowe, 128 S.Ct. at 995.
[137] Morales, 504 U.S. at 390; Rowe, 128 S.Ct. at 995.

In *Morales v. Trans World Airlines* the Supreme Court defined "relating to" as "having a connection with or reference to" price, routes or services.[138] Applying this definition, the court found that state consumer protection guidelines governing the content and format of airline advertisements had a reference to price and rates because the guidelines required disclosure of the purchasing requirements and whether the advertised fares were available in quantities sufficient to meet consumer demand.[139] Because the guidelines related to "rates" they were potentially subject to the preemption of the ADA.[140]

Having determined the challenged state law could be preempted, the court sought to determine if the advertising guidelines had a significant impact on Congress' deregulatory and preemption objectives. To do so, the court analyzed the role of marketing in the airline industry and the processes by which airlines determined what price to assign to which seat. Finding that the state mandated guidelines "severely burdened" the ability of airlines to market and price seats, the court held that the guidelines had a significant impact upon Congress' deregulatory and preemptive goals and were therefore preempted by the ADA.[141]

Recently, the Supreme Court examined an identical express preemption clause that appears in the Federal Aviation Authorization Act of 1994 ("FAAA") in the case of *Rowe v. New Hampshire Motor Transport Ass'n.*[142] In *Rowe*, the court was presented

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[138] Morales, 504 U.S. at 383.
[139] *Id.* at 389-90.
[140] *Id.* at 388.
[141] *Id.* at 390.
[142] Rowe, 128 S.Ct. at 993. *See id.* at 994 (court noting that Congress copied the express preemption language from the Airline Deregulation Act of 1978 when writing the Federal Aviation Authorization Act of 1994)

with a challenge to a Maine law regulating how tobacco products were to be delivered within the state.[143] Finding that the Maine law had a connection to carrier services, and would have a significant and adverse impact on the Congress' preemptive goals, the court held that the law "produce[d] the very effect that the federal law sought to avoid, namely, a state's direct substitution of its own governmental commands for 'competitive market forces' in determining the services that motor carriers will provide" and thus were preempted by federal law.[144]

By looking at *Rowe* it appears that a state law which has an "effect" and thus "forbidden" under federal law are those with a "*significant* impact" on rates, routes, or services.[145] Assuming the Supreme Court would apply a similar analysis to the same language appearing in the ADA, any state law having a significant impact upon rates, routes or services of an air carrier should be expressly preempted by the ADA.

A "price" or "route" might be easier to define under the ADA. But neither the ADA nor the FAAA define "service." The lack of a definition has led to some disparity amongst the different circuits.[146] The Third and Ninth Circuits have taken a narrow view on what "service" means, saying that it applies to "the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo or mail," and does

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[143] *Id.*
[144] *Id.* at 995.
[145] *Id*i at 997 (citing Morales, 504 U.S. at 390) (emphasis in the original).
[146] In *Air Transport Ass'n of America, Inc. v. Cuomo*, the Second Circuit noted that a majority of the circuits define "service" broadly to include "the provision or anticipated provision of labor from the airline to its passengers, baggage handling, and food and drink-matters incidental to and distinct from the actual transportation of passengers." Air Transport Ass'n of America, Inc. v. Cuomo, 520 F.3d 218, 223 (2d Cir. 2008).

not include "an airline's provision of in-flight beverages, personal assistance to passengers, the handling of luggage and similar amenities."[147]

In justifying this narrow definition, the Ninth Circuit in *Charas v. Trans World Airlines, Inc.* reasoned that a broader definition would result "in the preemption of virtually everything an airline does."[148] On the contrary, the court argued that the ADA was intended to preempt just those state laws that "adversely affect the economic deregulation of the airline industry and the forces of competition within the industry" and not tort claims.[149]

However, the narrow definition of "service" advocated by *Charas* may no longer be applicable. The Second Circuit in *Air Transport Ass'n v. Cuomo*, has read *Rowe* as creating a broader definition of "service" than *Charas* that includes onboard amenities.[150] At issue in *Cuomo* was a New York State law creating a passenger bill of rights.[151] The bill of rights required airlines to provide on-board electricity, food, water, and bathrooms to passengers stuck on board aircraft during a lengthy ground delay.[152] In order to find that the New York law was preempted by the ADA, the court relied on *Rowe* to hold that

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[147] Charas v. Trans World Airlines, Inc. 160 F.3d 1259, 1261 (1998). *See* Taj Mahal Travel, Inc. v. Delta Airlines, Inc., 164 F.ed 186 (3d Cir. 1998). What is missing from the *Charas* court's analysis is why it would include the price of transportation in its definition of service when the ADA had already included "rates" in its express preemption clause.

[148] Charas, 160 F.3d at 1266.

[149] *Id.* at 1261.

> We conclude that when Congress enacted *federal* economic deregulation of the airlines, it intended to insulate the industry from possible *state* economic regulation as well. It intended to encourage the forces of competition. It did not intend to immunize the airlines from liability for personal injuries caused by their tortious conduct.

Id. at 1266.

[150] Air Transport Ass'n of America, Inc. v. Cuomo, 520 F.3d 218, 223 (2d Cir. 2008).

[151] *Id.* at 220

[152] *Id.*

if the New York law was not preempted it could lead to a "patchwork of state service-determining laws, rules and regulations."[153]

As seen by the Supreme Court decisions in *Morales* and *Rowe,* the ADA expressly and broadly preempts state laws that relate to and have a significant impact on the economic goals of deregulation.[154] Under *Cuomo* and *Rowe* a state law should qualify as a regulation of a price, route or service and thus be preempted by the ADA if the state law threatens to lead to a patchwork of state laws, rules and regulations that would undermine Congress' intent in passing the ADA, namely to let competitive market services guide the airline industry.

Under *Morales* and *Rowe* any state law that indirectly relates to, and would have a significant impact upon an air carrier's rates, routes or services is preempted by the ADA. Could state imposition of liability upon lessors be preempted under the ADA, irrespective of any potential preemption under Section 44112? Would the threat of tort liability upon a lessor potentially have a significant impact upon the rates, routes or services of an air carrier? What if the potential tort liability of the lessor might increase lease rates thus driving up the price of passenger tickets? What if the the potential tort liability of the lessor might cause the lessor not to lease certain types of aircraft to certain carriers thus preventing the air carrier from servicing certain routes?

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[153] *Id.* (citing Rowe v. New Hampshire Motor Transport Ass'n, 128 S.Ct. 989, 996). Support for the worry that the New York law could lead to a patchwork of state regulations was that nine other states had proposed similar legislation. *Id.* at 224.

[154] Morales, 504 U.S. at 383 (In trying to define "relating to" from the ADA, the Court stated that "the words thus express a broad preemptive purpose"). *See* Rowe v. New Hampshire Motor Transport Ass'n, 128 S.Ct. 989, 994-95 (2008) (Court referring to a House Conference report acknowledging that the Court in *Morales* adopted a "broad preemption interpretation").

B. DOES SECTION 44112 RELATE TO THE SAFETY OF AIR CARRIER OPERATIONS?

In passing the FAA Act of 1958, Congress sought to create safety standards for domestic and international transportation in order to "promote safety in aviation and to protect the lives of persons who travel on board aircraft."[155] The FAA Act of 1958 delegated to the Federal Aviation Administration the authority to regulate air safety by implementing rules and regulations in order to best promote air safety. These regulations cover a broad range of subjects, from establishing pilot certification rules and in-flight procedures, to how and where aircraft are to be registered.[156]

There is no express preemption provision in the FAA Act of 1958. To the contrary, the FAA Act of 1958 contains a "savings clause" which reserves to the states the right to create remedies for those injured or killed in aviation accidents. The FAA Act of 1958 states: "Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."[157]

States are still actively trying to promote safety and the needs of their citizens in commercial aviation through legislation.[158] Because both Congress and the states are active in aviation legislation, litigation involving commercial air carriers frequently requires a discussion of how and to what extent the FAA Act of 1958 might preempt state law.

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[155] Abdullah v. American Airlines, 181 F.3d 363, 365 (3d Cir. 1999); *Id.* at 368 (citing In re Mexico Aircrash of October 31, 1979, 708 F.2d 400).
[156] *Id.* at 369.
[157] 49 U.S.C. App. 1506
[158] *See* Air Transport Ass'n v. Cuomo, 520 F.3d 218;

For many years it appeared there was confusion if not disagreement over whether the FAA Act of 1958 and the regulations created under it impliedly preempt state or territorial laws regarding the standard of care for aviation safety.[159] Although there still is not unanimity, the trend now appears to be that federal law occupies the entire field of commercial aviation safety, and there is no room for the states to establish standards of care. But state law provides the remedy for harm resulting from a violation of the federally imposed standard of care.[160]

i. Does "Field Preemption" Preclude the States from Imposing Tort Liability Upon Aircraft Lessors?

Implied federal preemption of state law relies on Congressional intent and can take on two forms: field preemption and conflict preemption.[161] Field preemption of state law is found when the "Congressional intent to preempt is inferred from the existence of a pervasive regulatory scheme" or a "comprehensive scheme of federal regulation."[162]

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[159] *See* City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973); Witty v. Delta Airlines, Inc., 366 F.3d 380 (5th Cir. 2004); Abdullah v. American Airlines, 181 F.3d 363 (3d Cir. 1999); French v. Pan Am Express, Inc., 869 F.2d 1 (1st Cir. 1989) Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974); Miezin v. Midwest Express Airlines, Inc., 701 N.W.2d 626 (Wis. Ct. App. 2005). *See also* Harakas, Litigating the Aviation Case, p.111. *But see* Cleveland v. Piper v. Aircraft Corp., 985 F.2d 1438 (10th Cir. 1993); In re Air Crash Disaster at John F. Kennedy Int'l Airport, 635 F.2d 67 (2d Cir. 1980).

[160] Abdullah v. American Airlines, 181 F.3d 363.

[161] Abdullah, 181 F.3d at 367. *See* Witty v. Delta Air Lines, 366 F.3d 380, 384 (2d Cir. 2004); Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

[162] Witty, 366 F.3d at 384 (citing Hodges v. Delta Airlines, Inc., 44 F.3d 334, 335 (5th Cir. 1995)).

Basically, field preemption of state law occurs "if federal law 'thoroughly occupies' the 'legislative field' in question."[163]

The Third Circuit in *Abdullah v. American Airlines* laid out a compelling argument that the FAA Act of 1958 and the Federal Aviation Regulations ("FARs") promulgated under it constitute implied field preemption of state law air safety regulations.[164] By looking at the legislative history and how courts have interpreted it, the *Abdullah* court found that the Act and "relevant federal regulations establish complete and thorough safety standards . . . that are not subject to supplementation by, or variation among jurisdictions."[165]

This finding was supported because the Congressional purpose behind the act was "to promote safety in aviation and thereby protect the lives of persons who travel on board aircraft" by creating a uniform system of air safety regulation under federal control.[166] The court reasoned that it was "the evident intent of Congress that there be federal supervision of air safety" and "that federal law preempts the general field of aviation safety."[167]

Having determined that the FAA Act of 1958 can preempt state air safety regulations, the *Abdullah* court held that when faced with an aviation tort case, a court should look at the applicable FARs and if no regulation speaks to the situation, to

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[163] Abdullah, 181 F.3d at 367. *See* Schneidewind v. ANR Pipeline Co., 484 U.S. 293, 200 (1988)
[164] Abudllah, 181 F.3d at 367.
[165] *Id.*
[166] *Id*. at 368 (citing In re Mexico Aircrash of October 31, 1979, 708 F.2d 400). *See Id.* at 369-70.
[167] *Id.* at 371

consider "whether the overall operation or conduct in question was careless or reckless" as set forth in the general standard of care described in FAR 91.13.[168]

While federal law sets the standard of care for aviation operations, "traditional state and territorial law remedies exist for violations of those standards."[169] The extent of this implied preemption of state law is quite broad, with federal law preempting "*any* state or territorial standards of care relating to aviation safety . . ."[170]

Abdullah's finding of a broad implied preemption has found support beyond the Third Circuit.[171] In *Witty v. Delta Air Lines*, the Fifth Circuit determined that by passing the FAA Act of 1958 "Congress enacted a pervasive regulatory scheme covering air safety concerns . . ." thus preempting an airline passenger's failure to warn claim against an airline.[172] Because of the implied preemptive effect of the Act, and since there was no federal regulation requiring such a warning, the plaintiff's claim failed.[173] The Fifth Circuit noted that because of the comprehensive scheme of federal aviation regulation, there was both field and conflict preemption of state laws and standards that conflict and interfere with federal law and objectives.[174] In finding field preemption, the court stated that "federal regulatory requirements for passenger safety warnings and instructions are

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[168] *Id.* "Thus, in determining the standards of care in an aviation negligence action, a court must refer not only to specific regulations but also to the overall concept that aircraft may not be operated in a careless or reckless manner." *Id.*
[169] *Id.* at 375.
[170] *Id.* (emphasis in the original).
[171] *See* Witty, 366 F.3d 380; Montalvo v. Spirit Airlines, 508 F.3d 464, 468 (9th Cir. 2007) (adopting "the Third Circuit's broad, historical approach to hold that federal law generally establishes the applicable standards of care in the field of aviation safety").
[172] *Id.* at 385.
[173] *Id.*
[174] *Id.* at 384.

exclusive and preempt all state standards and requirements.[175] To support conflict preemption of state law, the court reasoned that "[a]llowing courts and juries to decide under state law that warnings should be given in addition those required by the Federal Aviation Administration would necessarily conflict with the federal regulations."[176] Having preempted the state law based failure to warn claim, the court noted "at a minimum, any such claim must be based on a violation of federally mandated warnings."[177]

The Ninth Circuit in *Montalvo v. Spirit Airlines*, relying on *Abdullah* and *Witty,* affirmed a district court determination that the FAA Act of 1958 and relevant federal regulations preempted a failure to warn claim because the FAA Act of 1958 and the regulations constitute field preemption of the entire field of aviation safety.[178] In support of this decision, the court relied on the purpose and legislative history, the delegation of regulatory authority to the FAA and its subsequent regulations, to find that Congress intended for the Act to impliedly preempt state law.[179] Additional support was found by reasoning that if there was no preemption, individual state legislation could lead to confusion and would be contrary to the unique relationship that exists between the federal government and air transportation.[180]

Although the court did find that Congress intended for federal law to be the "sole regulator of air safety" the court did indicate that "Congress may not have acted to

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[175] *Id.* at 385.
[176] *Id.*
[177] *Id.*
[178] Montalvo v. Spirit Airlines, 508 F.3d 464, 468 (9th Cir. 2007).
[179] *Id.* at 470-74.
[180] *Id.* at 473.

occupy exclusively all of air commerce . . ."[181] The effect of this sentence is difficult to determine, but it could be used to limit the broad preemptive effect of the FAA Act of 1958 by allowing state regulation of air commerce but not air safety.

The Sixth Circuit concurred with *Abdullah*, holding in *Greene v. B.F. Goodrich Avionics Systems, Inc.* that "federal law established the standards of care in the field of aviation safety and thus preempts the field from state regulation."[182] The *Greene* holding is interesting because the Sixth Circuit found that implied preemption under the FAA Act of 1958 was broad enough to preempt the plaintiff's strict products liability claim against a manufacturer for failing to warn about a defective product.[183]

Although it declined to make a formal determination, the Second Circuit in *Air Transport Ass'n v. Cuomo* noted that a New York Passenger Bill of Rights law might be impliedly preempted since it could open the door to other states enacting laws specifying what food an airline must serve on an outbound flight.[184] Allowing states to enact such laws would lead to the "unraveling [of] the centralized federal framework for air travel."[185] This commentary by the Second Circuit is especially interesting since the Second Circuit does not agree with *Abdullah* that the FAA Act of 1958 preempts all state law tort actions.[186] While it did not alter course, the Second Circuit's dicta in *Cuomo* suggests a broader acceptance of the premise that the FAA Act of 1958 impliedly

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[181] *Id.* at 474.
[182] Greene v. B.F. Goodrich Avionics Sys. Inc., 409 F.3d 784, 795 (2006).
[183] *See id*. at 794-95.
[184] Air Transport Ass'n of America, Inc. v. Cuomo, 520 F.3d 218, 224-25 (2d Cir. 2008).
[185] *Id.*
[186] *Id.*

preempts state law when such laws will affect the federal regulatory scheme and framework of air travel.[187]

The effect of *Abdullah* and its brethren is relatively simple: federal aviation law sets the standard of care for aviation safety and preempts state law that attempts to regulate aviation safety or to establish a different standard of care.[188] Yet, the states retain the right to specify what remedies apply.

Should states have a right to provide a cause of action against a commercial aircraft lessor if no federal law provides a cause of action? Is a cause of action against an aircraft lessor in reality only a remedy which is expressly reserved to the states under the FAA Act of 1958?[189]

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[187] *Id.* (stating "[i]nsofar as the [Passengers Bill of Rights] is intended to prescribe standards of airline safety, we note, finally, that it may also be impliedly preempted by the FAA and regulations promulgated thereunder").

[188] *See* Witty, 366 F.3d at 385 (State law is "preempted to the extent that a federal standard must be used but that state remedies are available").

[189] These comments are based in part on how broadly the *Abdullah* implied preemption has been read. As was seen in *Greene v. B.F. Goodrich Avionics Systems,* the plaintiff's failure to claim failed because there was no requirement to warn about the manufacturing defect found in the federal regulations. Green, 409 F.3d at 795. Considering the broad nature of *Adbullah* and how the *Greene* court applied *Abdullah* to a products liability claim, the conclusion that if the Act and the FARs do not provide the cause of action, then state law being preempted from providing a cause of action falls in line with the Abdullah court's determination that Congress intended the Act to occupy the field of air safety regulation. This is supported by the Seventh Circuit decision in *Bieneman v. City of Chicago*, where the court held that "the state may employ damages remedies only to enforce federal requirements… ." Bieneman v. City of Chicago, 864 F.2d 463, 473 (7th Cir. 1988). "[A] state may not use common law procedures to question federal decisions", referring to the FARs. *Id.*

ii. Does Section 44112 Preempt State Laws Under A Conflict Analysis?

Conflict preemption exists when state law conflicts with federal law. In other words, conflict preemptions exists ". . . when it is impossible to comply with both state and federal law."[190] As seen in *Witty*, there is implied conflict preemption where "the imposition of state standards would conflict with federal law and interfere with federal objectives."[191]

Should Section 44112 preempt state laws holding aircraft lessors liable for injury, death, or property damage under a conflict implied preemption theory under the FAA Act of 1958? The federal objective behind Section 44112 is to encourage aircraft financing by eliminating the risk of civil liability for those engaged in aircraft financing.[192] Any state law that would increase the risk of civil liability beyond Section 44112 arguably conflicts with Section 44112 and would be preempted.

There may be confusion over the scope of Section 44112. But no court can ignore that the statute is on the books. Any state court opinion that performs a thorough preemption analysis and fails to acknowledge at least a potential of a conflict between Section 44112 and state law imposing liability upon an aircraft lessor should be analytically suspect. Logic dictates that once the true scope of Section 44112 has been ascertained there should be conflict preemption of contradictory state laws within the scope of the statute.

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[190] Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984). *See* Abdullah, 181 F.3d at 367; Witty, 366 F.3d at 384 (finding conflict preemption when "state law conflicts with federal law or interferes with the achievement of federal objectives").

[191] *Witty*, 366 F.3d at 384. *See* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).

[192] *See generally Mangini*, 2005 WL 3624883; *In re Inlow*, 2001 WL 331625.

C. CASES HOLDING THAT SECTION 44112 PREEMPTS STATE LAW

One of the earlier cases addressing the preemptive effect of Section 1404 was *Rosdail v. Western Aviation*.[193] In that case, a Colorado federal district court interpreted Section 1404 to read "in essence that no persons who merely have a security interest in aircraft or who are lessors of thirty days or more shall be liable for property or personal damages caused by an aircraft unless those persons be in actual possession or control at the time of such injury."[194] At issue in *Rosdail* was the liability of a plane owner who leased his plane to a corporation. The corporation then leased the plane to a pilot who in turn crashed it.[195]

Rosdail's reading of Section 1404 found support in the Fifth Circuit where it was relied on in *Rogers v. Ray Gardner Flying Service, Inc.* to support a holding that Section 1404 "appears clearly and forthrightly to preempt any contrary state law which might subject holders of security interests to liability for injuries . . ."[196] *Rogers* was also a fixed base operator case. The owner of a private airplane leased the plane to a fixed based operator that in turn rented the plane to the pilot that crashed it.[197] *Rogers* lends support to the argument that Section 1404 and Section 44112 would preempt commercial aircraft

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[193] We will discuss Sections 1404 and 44112 interchangeably except where noted. Rosdail v. Western Aviation, Inc., 297 F.Supp. 681, 685 (D.Colo. 1969). There were some earlier cases that looked at Section 1404 shortly after it had passed and found no preemptive effect for vicarious liability for an aircraft owner or lessor. *See* Hoebee v. Howe, 98 N.H. 168 (N.H. 1953); Hays v. Morgan, 221 F.2d 481 (5th Cir. 1955). These cases later received negative treatment or were overturned. *See* Rogers v. Ray Gardner Flying Service, Inc., 435 F.2d 1389, 1394 (5th Cir. 1970); McCord v. Dixie Aviation Corp., 450 F.2d 1129, 1130 (10th Cir. 1971) (Stating "[w]e reject the *Hoebee* rationale")
.[194] Rosdail, 297 F.Supp. at 685.
[195] *Id*. at 682.
[196] Rogers v. Ray Gardner Flying Service, Inc., 435 F.2d 1389, 1394 (5th Cir. 1970).
[197] *Id.* at 1391.

lessor liability, at least in part, because the court determined that the purpose of Section 1404 was to "facilitate financing of the purchase of aircraft by providing that those holding security interest would not be liable for injuries caused by falling planes or the parts thereof."[198]

A year after *Rogers*, the Tenth Circuit had an opportunity to interpret Section 1404 in *McCord v. Dixie Aviation Corp*.[199] Here, the Tenth Circuit explicitly agreed with the Fifth Circuit's interpretation from *Rogers*. Having quoted *Rogers* the court stated that "[w]e agree with this interpretation. The specific purpose having been determined, we find no merit in appellant's argument that Congress, failing to specifically exempt owners and lessors, intended that they be absolutely liable for injuries sustained by passengers of leased aircraft."[200]

The Seventh Circuit briefly addressed the issue of preemption in *Matei v. Cessna Aircraft Co.*[201] Here, the court affirmed the district court's granting of summary judgment for the defendant aircraft owner, Robert Hansel, because he had leased the aircraft to a corporation, thus not having possession or control of the aircraft when it crashed.[202] The district court held that the defendant wasn't liable under Section 1404 and Illinois' common law of bailment.[203]

On appeal, the court briefly acknowledged that Section 1404 can preempt state law, by explaining when a lessor or owner can and cannot be liable under Section

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[198] *Id*. at 1394
[199] McCord v. Dixie Aviation Corp., 450 F.2d 1129 (10th Cir. 1971).
[200] *Id.* at 1130. The specific purpose referred to in the quote is that Section 1404 was passed to facilitate aircraft financing. *Id.* (citing Rogers, 435 F.2d at 1389).
[201] Matei v. Cessna Aircraft Co., 35 F.3d 1142 (7th Cir. 1994).
[202] *Id.* at. 1143.
[203] *Id.*

1404.[204] Having discussed Section 1404, the court then went on to explain what the plaintiff would need to show to make the defendant liable under the Illinois common law of bailment; concluding that the plaintiff's claim would not succeed under that theory either.[205] Because the court discussed the plaintiff's common law bailment claim in addition to affirming that Section 1404 would preempt, the Illinois appellate court in *Retzler* reasoned that *Matei* determined that Section 1404 actually does not preempt state law.[206]

A more recent interpretation of Section 44112 that arguably supports the preemption of a state law claim against a commercial aircraft lessor is found in *Coleman v. Windham Aviation, Inc*.[207] While the court read Section 44112 to not preempt the liability of the aircraft owner, the court indicates that it would support preemption for a commercial aircraft lessor. The underlying issue in *Coleman* is whether the owner/lessor of an aircraft can be vicariously liable under Rhode Island or Connecticut law for the negligence of the pilot to whom it leased the aircraft.[208]

The defendant, Windham Aviation, argued that Section 44112 would preempt "any provision of state law which purports to impose vicarious liability on the basis of

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[204] *Id* at 1145. This determination is subject to some dispute because *Retzler v. Pratt and Whitney Co.* read *Matei* as not preempting state law. Retzler v. Pratt and Whitney Co., 723 N.E. 2d 345, 352 (Ill. App. Ct. 1999). The *Retzler* case and those rebuffing it will be discussed later.

[205] *Id.*

[206] *See* Retzler v. Pratt and Whitney Co., 723 N.E. 2d 345, 352 (Ill. App. Ct. 1999).

[207] Coleman v. Windham Aviation, Inc., No. Civ.A. K.C.2004-0985, 2005 WL 1793907 (R.I.Super. 2005).

[208] *Id.* at 1. It cannot go without mentioning that there is a surprising lack of reference by the *Coleman* court to any decisions that interprets Section 1404 and Section 44112. The Court cites to case law that discusses statutory interpretation yet there is no mention of any decision that discusses the actual interpretation of Section 1404 or Section 44112. This case was decided in 2005, so there was plenty of reference material available on the subject, even cases like *Retzler* which argue for no preemptive effect by Section 44112.

aircraft ownership."[209] In trying to determine whether or not Section 44112 preempted state law, the court conducted a thorough analysis of Section 44112 and its history, including the history behind Section 1404. Having looked at Section 44112, Section 1404, and the House Report, the court found that it had "no difficulty concluding that Congress passed Section 1404 to facilitate the financing of private airplanes by exempting owners or lessors holding only a security interest in an aircraft from liability for negligent operation of that aircraft. In addition, according to the court, the House Report also explicitly stated the intent of Congress to hold owners in possession of an aircraft, either personally or through an agent, liable for damages caused by negligent operation."[210]

While the court then went on to hold the defendant aircraft owner liable, the court did so because it determined that Section 1404 and Section 44112 do "not provide an exemption for [the defendant] as [the defendant] outright owned the Piper involved in the fatal collision."[211] Based on this reasoning and how the court interpreted Section 1404 and Section 44112, under *Coleman* there is arguably support for the premise that Section 44112 would preempt the imposition of liability upon a commercial aircraft lessor who was not in possession of the aircraft at the time of the accident.

The distinction on whether Section 44112 preempts is driven by the status and relationship between the lessor/owner and the aircraft itself. Under *Coleman*, if the

[209] *Id.* at 2.
[210] *Id.* at 6.
[211] *Id.*

commercial aircraft lessor is not in actual possession of the aircraft, then Section 44112 preemption should exempt the commercial aircraft lessor from liability.[212]

Coleman is not without its detractors, as was seen in a Connecticut case, *Mangini v. Cessna Aircraft Co.*, decided several months after *Coleman*.[213] In *Mangini*, that court found *Coleman*'s analysis of Section 1404 and Section 44112 was "unpersuasive."[214] *Mangini*'s core dispute with *Coleman* is its disagreement that *Coleman* ignored the addition of a definition of "owner" when Section 1404 was recodified into Section 44112.[215]

While *Mangini* disputes the "owner"aspect of *Coleman*, in *Mangini* the central holding is that "Congress announce[d] that it intended 49 U.S.C. Section 1404 and its present version, 49 U.S.C. Section 44112, to preempt state law and to exempt from liability those persons who met the other criteria of those statutes."[216] What does the *Mangini* court likely mean by "other criteria?" Is the court referring to actual possession or control under Section 44112? Is it referring to the requirement that an applicable lease be for a period greater than thirty days? Is the court referring to a requirement the injury, death or loss be "on land or water?" [217] In reaching its conclusion that Section 44112

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[212] *Id.* at 6-7. *C.f.* Charles P. Sheehan, *No Federal Bar to Vicarious Liability of Aircraft Owners*, 55-Jun R.I. B.J. 19, 19-23 (2007) (discussing the holding of Coleman v. Windham Aviation Inc.).
[213] Mangini v. Cessna Aircraft Co., Nos. X07CV044001467S, X07CV044003418S, 2005 WL 3624483, at 5 (Conn. Super. Ct. 2005).
[214] Mangini, 2005 WL 3624483, at 5.
[215] *Id.*
[216] *Id.* at 6.
[217] *See id.*

preempts state law, the court in *Mangini* cited several federal court decisions previously discussed in this article.[218]

Last year, there were two additional examples of courts finding that Section 44112 preempts state law, at least under some circumstances.[219] In *Esheva v. Siberia Airlines*, the Southern District of New York addressed in a footnote the liability of a commercial aircraft lessor, Airbus Leasing II, while deciding to conditionally grant a forum non conveniens motion.

> "There is a compelling argument that Airbus was added to this litigation solely to provide some American nexus to the litigation, albeit not a New York nexus. To the extent that it is facing a claim of derivative liability, Airbus *is absolutely immune from such liability* in the United States. American law provides that a 'lessor . . . is liable for personal injury, death or property loss or damage . . . only when a civil aircraft is in the actual possession of control of the lessor . . .' 49 U.S.C. Section 44112(b)."[220]

Although this comment is hidden in a footnote, this case is helpful in crafting an argument that Section 44112 preempts commercial aircraft liability since the facts are

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[218] *See id.* Specifically, the court relied on the following cases: *In re Inlow Accident Litigation*, 2001 WL 33162514 at 15; *Matei v. Cessna Aircraft Co.*, 35 F.3d at 1445; *Abdullah v. American Airlines, Inc.*, 181 F.3d at 365; *Rogers v Ray Gardiner Flying Services*, 435 F.2d at 1394; and *Rosdail v. Western Aviation*, 297 F.Supp. at 685.

[219] Besides the two cases to be discussed below, there is a third case which discusses preemption as well. This third case, *Ellis v. Flying Boat Inc.*, was an federal district court case in Florida. It will not be discussed because the author was unable to locate a copy of the opinion. The only citation we've uncovered is: Ellis v. Flying Boat, Inc., Case No. 06-20066-CIV-Seitz.Mcaliley (S.D.Fl 2006).

[220] Esheva v. Siberia Airlines, 499 F.Supp. 2d. 493, 499 n.5 (S.D.N.Y. 2007).

analogous to the *Air Philippines* case.[221] In *Esheva*, the defendant, Airbus Leasing II, was a commercial aircraft lessor and the aircraft involved was being operated by a foreign airline on a domestic route in Russia.[222]

In the *Air Philippines* case, we saw a similar situation, the only difference being the aircraft had been manufactured in the United States. Because of the similarity between *Esheva* and *Air Philippines*, the Southern District of New York looks to be an attractive forum for the defendant aircraft lessor. However, as was discussed earlier in the implied preemption section, the Second Circuit has not yet determined if the FAA Act of 1958 impliedly preempts state law.[223] Yet, in *Cuomo,* we saw that the Second Circuit might be leaning towards an implied preemption.[224]

The other recent instance where a court found Section 44112 to preempt state law was the Florida state case, *Vreeland v. Ferrer*.[225] Here, the defendant aircraft lessor, "Aerolease," sought summary judgment on the lessee plaintiff's negligence claim by arguing that Section 44112 preempts Florida's Dangerous Instrumentality Doctrine.[226] In a short, two-page opinion, the court agreed with the lessor, stating that "under a plain reading of 49 U.S.C.A. Section 44112, AEROLEASE, described as the lessor and owner of the aircraft in the AIRCRAFT LEASE, was a lessor/owner *who was not in the actual*

[221] *Id.* at 496. *See* Ellis v. AAR Parts Trading Inc., 828 N.E.2d. 726, 730 (Ill. App. Ct. 2005).
[222] *Esheva*, 499 F.Supp. 2d. at 496
[223] In re Air Crash Disaster at John F. Kennedy Int'l Airport, 635 F.2d 67 (2d Cir. 1980).
[224] *See* Air Transport Ass'n v. Cuomo, 520 F.3d 218, 224-5 (2d Cir. 2008).
[225] Vreeland v. Ferrer, No. 2005-CA-003534, 2007 WL 5552091 (Fla. Cir. Ct. 2007).
[226] Vreeland, 2007 WL 5552091, at 1-2.

possession or control of the airplane. Therefore, 49 U.S.C.CA. [sic] 44112 is applicable, preempting Florida law as to AEROLEASE only."[227]

As can be seen from the above cases, a range of courts from state trial courts to federal circuit courts have read Section 44112 and its predecessor Section 1404 to preempt state law for commercial lessors.[228] But is the scope of preemption absolute? Does it extend to wrongful death and personal injury claims of passengers? Or is it limited to death, injury and loss that occurs "on land or water?" Does preemption extend to the independent acts of alleged negligence on the part of the lessor, acts that might be characterized as negligent entrustment or negligent supervision? Or is the preemption limited to the vicarious liability of the lessor?

D. CASES HOLDING THAT SECTION 44112 DOES NOT PREEMPT STATE LAW

There are several cases that stand for the proposition that Section 44112 does not preempt state law.[229] Both cases were at the state level and have received some negative treatment by cases that support the argument that Section 44112 preempts state law. Both cases will be discussed along with those presenting a counterargument.

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[227] *Id.* at 2007 WL 5552091, at 2.

[228] *See* Mangini v. Cessna Aircraft Co., Nos. X07CV044001467S, X07CV044003418S, 2005 WL 3624483 (Conn. Super. Ct. 2005); McCord v. Dixie Aviation Corp., 450 F.2d 1129 (10th Cir. 1971).

[229] *See* Retzler v. Pratt and Whitney Co., 723 N.E.2d 345, 325 (Ill. App. Ct. 1999); Storie v. Southfield Leasing, Inc., 282 N.W.2d 417, 419-21 (Mich. Ct. App. 1979). There is a third decision that finds Section 44112 does not preempt state law. In *Layung v. AAR Parts Trading, Inc.*, the circuit court relied solely on the *Retzler* and *Matei* decisions to find that Section 44112 did not preempt the state law claim against the defendant lessors. *See* Layung v. AAR Parts Trading, Inc., 2003 WL 25744436 (Ill. Cir. 2003). Because this section of the article discusses how *Retzler* is a poorly decided decision and that *Matei* has been mis-read by *Retzler* to support preemption, lengthy analysis on why the *Layung* circuit court holding is poorly reasoned is not warranted.

In *Storie v. Southfield Leasing* the Michigan Court of Appeals addressed the appeal of a representative of a deceased passenger who died when a small plane, owned and leased by the defendant to the passengers' employer crashed. The circuit court dismissed the claim on a summary judgment motion, finding that Section 1404 preempted a Michigan aircraft ownership liability statute.[230] In reviewing the appeal, the appellate court held that Section 1404 does not expressly or impliedly preempt a Michigan law unless the injury occurred "on the surface of the earth"[231] The reasoning behind this holding comes from the following language in Section 1404: "No person . . . shall be liable . . . for any injury to or death of persons, or damage to or loss of property, on the surface of the earth (whether on land or water) caused by such aircraft . . ."[232] The court reasoned that the plaintiff's injury did not occur on the surface of the earth.[233]

This is a questionable conclusion based upon the strict language of the statute because the court quoted Section 1404 in full, but chose to apply the "surface of the earth" element as being the only aspect that could lead to preemption. A reasonable person looking at this reasoning may disagree, especially when reading the rest of the sentence from which the court took "surface of the earth" which states ". . . [O]n the surface of the earth (whether on land or water) caused by such aircraft, aircraft engine, or propeller, *or by the ascent, descent, or flight of such aircraft . . .*"[234]

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[230] *Storie*, 282 N.W.2d at 617.
[231] *Id.* at 422.
[232] *Id.* at 420.
[233] *Id.*at 422. This logic potentially confounding because no matter where in flight or at what altitude the accident occurs, the accident is not concluded until the aircraft returns to earth.
[234] *Id.* at 420 (emphasis added).

Why did the court choose to rely on the first half of the quote and not acknowledge that an injury could be caused by "the flight of such aircraft?" Is this a flaw in the court's analysis or is the conclusion the result of a well-reasoned consideration of the legislative history which notes that Section 1404 was intended to protect the "security title holder" from becoming liable for "extensive damages on the surface caused by the operation of aircraft?"[235]

We should recall that "ascent, descent . . ." was omitted from Section 44112. The House Report accompanying Section 44112 indicated that "ascent, descent . . ." were omitted as surplus.[236] "[O]n the surface of the earth" was stricken and replaced with "on land or water" so as to eliminate unnecessary words.[237]

Storie was subsequently affirmed by the Michigan Supreme Court, but as the court in *In re Inlow* argues, it is difficult to determine if the Michigan Supreme Court was affirming that Section 1404 can preempt in certain instances or whether it does not preempt at all.[238]

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[235] *Id.*
[236] H.R. rep. no. 103-180.
[237] *Id.*
[238] *See* Sexton v. Ryder Truck Rental, Inc., 320 N.W.2d 843, 847 (Mich. 1982); In re Lawrence W. Inlow Accident Litigation, No. IP 99-0830-C H/G, 2001 WL 331625, at *16 (S.D.Ind. 2001). Besides *Inlow*, additional support for an argument against *Storie* could be made by relying on *Montalvo* and *Abdullah*. From the *Abdullah* line of cases, we've seen that federal law sets the standard of care and preempts any different state law standard. In *Storie*, the Court based part of its reasoning on a Michigan law for aircraft operator negligence intended to increase the safety of aircraft flown within the state by imposing liability upon the aircraft owner. *Storie*, 282 N.W.2d at 419. It was thought that the imposition of such liability upon the owner would encourage increased supervision of aircraft maintenance. *Id.* at 419-20. Should the Michigan law be creating a stricter standard than federal law, such law would be impliedly preempted under *Abdullah*. Because *Abdullah* should preempt the law that the *Storie* plaintiff claim was based upon, the *Storie* court may have come to a different conclusion.

The second case holding that Section 44112 does not preempt is the Illinois Appellate Court decision, *Retzler v. Pratt and Whitney Company*.[239] Here, the court relied on *Matei* and *Storie* to find that Section 44112 did not preempt a flight attendant's common law bailment claim against the aircraft owner/lessor. The factual background of *Retzler* is helpful for our analysis as it deals with a commercial airline and a leased aircraft.

The aircraft involved, an ATR 42-300, had been purchased by AMR Leasing Corporation (AMR) and then sold to a French company, Mathilde Bail G.I.E.[240] Mathilde Bail then leased the aircraft back to AMR Leasing Corp., who in turn leased the aircraft under an oral agreement to Simmons Airlines, Inc.[241] Simmons Airlines was the owner of American Eagle, the plaintiff's employer.[242] So, Mathilde Bail is the owner and lessor of the aircraft; AMR Leasing is the lessee/sublessor and Simmons Airlines is the sublessee.

Less than a month from when these transactions occurred, the ATR experienced an engine failure shortly after take off. In response to the emergency, the pilot began an emergency descent to land, resulting in the plaintiff being injured in the plane's galley.[243] The plaintiff sued the manufacturer of the plane's engine and alleged that AMR was the owner of the aircraft and that AMR had been negligent in the maintaining, testing and

[239] *Retzler*, 723 N.E.2d 345.
[240] *Id.* at 349.
[241] *Id.*
[242] *Id.*
[243] *Id.*

inspection of the plane.[244] Plaintiff claimed that the defect in the engine and AMR's negligence resulted in the engine failure and emergency descent that caused her injury.[245]

AMR filed a motion for summary judgment, one of the grounds being that the plaintiff's claims were impliedly preempted by Section 44112.[246] The circuit court found that Section 44112 preempted the plaintiff's claims and dismissed the matter. The plaintiff's appeal led to the appellate court analysis discussed below.

The court held that "Section 44112 does not preempt a personal injury action under state law against AMR, the aircraft lessors in the instant case."[247] Looking at *Matei*, the Court determined that *Matei* found:

> "not that the state law claim was preempted by Section 1404, but that the plaintiff simply had not established a case under Illinois common law. If the federal statute preempted state law claims, there would have been no need for the court to reach a decision at all on the state law claims. Thus, *Matei* implicitly rejected the idea that state claims against lessors were preempted by Section 1404."[248]

Moving on from *Matei*, the court attempted to bolster its no-preemption argument by relying on *Abdullah*.[249] By arguing that common law bailment is a state law remedy, the court reasoned that under *Abdullah*, a state remedy would not be impliedly preempted

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[244] *Id.*
[245] *Id.*
[246] *Id.* at 350. The other ground was that the plaintiff failed to establish that AMR Leasing owed her a duty to base her negligence claim on. *Id.*
[247] *Id.* at 353.
[248] *Id.* at 352 (citations omitted).
[249] *Id.*

by the FAA Act of 1958 since the Act only preempts state standards of care.[250] This reasoning earned a lengthy rebuttal by a federal district court in *In re Inlow*, which will be discussed later.[251]

Continuing to rely on *Abdullah*, the court noted that federal aviation law preempts state remedies "where there is an irreconcilable conflict between federal and state standards or where the imposition of a state standard in a damages action would frustrate the objectives of the federal law."[252] Having just discussed how federal law preempts state law when there is a conflict, one would expect the court to have analyzed whether or not there was an "irreconcilable conflict" between Section 44112 and Illinois law, or if the imposition of liability would frustrate the objectives behind Section 44112. But the court did not take this approach. Instead, the court seemed to ignore what it had just written and moved on to a discussion of the savings clause and insurance provisions of the FAA Act of 1958.[253]

Once it was through discussing *Abdullah*, the court made its last argument by stating that "[o]ther states have also rejected the idea that state personal injury claims are preempted by Section 1404 (now 49 U.S.C. Section 44112 (1994)."[254] Of the "other states" the only state the court mentions is Michigan, and the Illinois court claimed that Michigan in the *Sexton* decision "outright" rejects Section 1404 preempting state law.[255]

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[250] *Id.* at 352-3.
[251] *See In re Inlow*, 2001 WL 331625, at *16.
[252] *Id.* at 352 (citing Abdullah, 181 F.3d at 375).
[253] *Id.*
[254] *Id.*
[255] *Id.* (citing Sexton v. Ryder Truck Rental, Inc., 320 N.W.2d 843 (Mich. 1982) where the Michigan Supreme Court affirmed the *Storie v. Southfield Leasing* finding that Section 1404 does not preempt state law). *See In re Inlow*, 2001 WL 331625, at *16 (Rebutting the *Retzler* conclusion that *Sexton* "outright" rejected Section 1404).

Having determined that Section 44112 does not preempt the personal injury action against the aircraft lessor, the court went on to determine that the lessor could be liable under a state law bailment theory.[256]

The Southern District of Indiana, in *In re Inlow*, addresses and provides an interesting explanation and rebuttal of the arguments made by the *Storie* and *Retzler* courts and concludes that Section 44112 does preempt state law. The plaintiff in *In re Inlow* died after being hit in the head by a helicopter rotor blade after disembarking from a helicopter.[257] The helicopter was made by Eurocopter and purchased by CIHC, Inc.[258] The purchase was financed by GE Capital, who leased the helicopter to CIHC.[259] CIHC in turn subleased the helicopter to its corporate parent, and the plaintiff's employer, Conseco, Inc.[260] The helicopter was then operated by Conseco Flight Operations.[261]

The plaintiff's survivors sued CIHC and Conseco for negligent operation and failure to warn of defective product.[262] CIHC moved for summary judgment, claiming that the plaintiff's claims were preempted by Section 44112 because CIHC was the lessor of the aircraft.[263] The court agreed, stating "[t]he plain language of Section 44112 establishes that it preempts state common law claims against covered lessors."[264]

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[256] *Id.*
[257] *In re Inlow*, 2001 WL 331625, at *1.
[258] *Id.* at *8
[259] *Id.* From the description of the litigation provided by the court, it does not seem that GE Capital was named as a defendant in this litigation.
[260] *Id.*
[261] *Id.* at *7.
[262] *Id.* at *1.
[263] *Id.* at 14.
[264] *Id.*

The court drew support for its holding by looking at the legislative history, in particular House Report 2091, noting that Section 1404 was passed in response to the Uniform Aeronautics Act that was in force in ten states.[265] The Uniform Aeronautics Act that was in force in the states "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 a lessee."[266] From House Report 2091, the court concluded that "[Section 1404] was plainly intended, and plainly written, to preempt such state statutes and parallel common law claims."[267]

Having analyzed the history behind Section 44112, the court held that "CIHC falls squarely within the purview of Section 44112."[268] However, the court did not end its analysis there. Instead, the court set forth a test for when Section 44112 should apply and discussed the *Matei, Retzler* and *Storie* decisions.

According to the *In re Inlow* court the test is as follows: Section 44112 does not require "any inquiry into whether the lessor's role in financing was necessary, convenient, or anything else."[269] There is only a need to answer two questions: (1) is there a lease for more than thirty days: and (2) did the lessor have actual possession or control of the aircraft.[270] If the answer is "yes" to Number One and "no" to Number Two then Section 44112 applies.[271]

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[265] *Id.*
[266] *Id.*
[267] *Id.* (citations omitted).
[268] *Id.*
[269] *Id.*
[270] *Id.*
[271] *See id.* at *18 (Stating "[t]hrough its requirement that a lessor must be in 'actual possession or control' of the aircraft at the time of accident, Section 44112 prevents the

Looking at facts of the case, the court sought to determine whether or not there was control of the aircraft. The plaintiffs pointed towards the lease between GE Capital and CIHC as evidence of control.[272] The court responded that the lease imposed legal obligations but did not prove that CIHC had actual possession or control of the helicopter to warrant liability because the helicopter was subleased to Conseco Inc. and operated by Conseco Flight Operations.[273]

In discussing *Matei*, the court notes that the Seventh Circuit did not address whether or not Section 1404 preempted a state law claim. Instead, the court noted that the Seventh Circuit affirmed a district court opinion that found Section 1404 preempted state law, and noted that the district court's decision was persuasive.[274] Addressing *Retzler*, the court held that *Retzler's* reliance on *Abdullah* was misplaced because *Abdullah* did not discuss Section 44112.[275]

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imposition of liability on lessors that are not engaged in some concrete fashion in the operation of the aircraft).

[272] *Id.*

[273] *Id.* From a commercial aircraft lessor perspective, this determination on possession and control is very helpful for structuring leases. The court seems to find that one corporate entity leasing to another is enough to warrant a finding that the lessor did not have possession or control of the aircraft sufficient for Section 44112 liability protection. A flaw in this reasoning is that the court seems to neglect that CIHC, Conseco Flight Operations were both subsidiaries of Conseco, Inc. Under this reasoning, if one corporate sub purchases and then leases an aircraft to another corporate sub, that leasing relationship would warrant liability protection under Section 44112.

[274] *Id.* at *15; *id.* at *15 n.12.

[275] *In re Inlow*, 2001 WL 331625, at *16.

The court continued its rebuttal of *Retzler* by noting that the *Retzler* court's argument that the FAA Act of 1958 savings and insurance clauses supports the use of state law remedies to overcome Section 44112, "ultimately gives Section 44112 no effect . . ."[276] The court continued, "If Section 44112 did not apply to limit liability arising under state law for personal injuries, Section 44112 would have no apparent effect."[277]

Lastly, the court rebutted Michigan's finding of no preemption in *Storie* as affirmed by the Michigan Supreme Court.[278] Calling for a closer examination of the Michigan Supreme Court's analysis, the court noted that "it is unclear whether the Michigan Supreme Court in *Sexton* meant to adopt *Storie*'s determination that there was no preemption because of the facts of the case or whether it meant to reject the Court of Appeal's legal conclusion that these would be preemption if Section 1404 applied."[279] Having just questioned the *Sexton* and *Storie* conclusions, the court noted that under the *Storie* reasoning, Section 1404 should preempt since the plaintiff's injury occurred on the surface of the earth.

The *In re Inlow* decision presents an interesting dilemma for Section 44112 cases in the Seventh Circuit. As noted in the discussion of *Storie*, Congress elected to remove "on the surface of the earth" as unnecessary when it recodified Section 1404 into Section 44112. There is little authority besides *Storie* that addresses the "on land or water" provision in Section 44112(b) and how that relates to preemption. Does "on land or water" mean that the injury must occur there? Do the terms play a role as an element of

[276] *Id.*
[277] *Id.*
[278] *Id.*
[279] *Id.*

causation? Without further analysis by a court, it is difficult to understand what effect "on land or water" will have on the preemption argument.

E. THE STORY OF PREEMPTION DOES NOT NECESSARILY END WITH SECTION 44112

There is almost always a potential that lawsuits in American courts arising out of foreign aviation disasters will present a choice of law issue. The choice of law issue may be raised by an independent motion. It could be raised indirectly through a motion to dismiss under the forum non conveniens doctrine.

The presence of an American aircraft lessor as a defendant may be a "jurisdictional hook" for the foreign plaintiff that avoids a forum non conveniens dismissal.[280] However, the court may nevertheless apply the law of the foreign nation. What if the foreign law conflicts with Section 44112? What if it conflicts with the local state law?

The foreign law could, for example, impose absolute or strict liability upon a commercial aircraft lessor for damages arising from accidents involving aircraft leased by the lessor. The foreign law may not have any "possession or control" limitation upon the liability of the lessor. The foreign law may not have a limitation that the damage occur "on land or water." In short, a lessor could find itself in a situation where it is in an American court but foreign law applies, and the foreign law is far more hostile to the interests of the lessor than would be the case under Section 44112.

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[280] *Id.* at 328 (referring to U.S. plaintiffs' lawyers seeking foreign plaintiffs from foreign accidents and using the U.S. based defendants like a manufacturer as a "jurisdictional hook"). *See Esheva*, 499 F.Supp. 2d at 499 n.4 (Court finding "a compelling argument that Airbus was added to this litigation solely to provide some American nexus to the litigation…").

What happens to the preemptive effect, if any, of Section 44112 if the American court determines that foreign law applies?[281] In short, the foreign law applies and the preemptive effect of Section 44112 is basically lost, *unless* a public policy argument can be made to counter the application of foreign law[282] or if the application of foreign law would somehow be contrary to a treaty to which the United States is a party, or if application of foreign law would interfere with American foreign policy.[283] What this means for the defendant aircraft lessor facing trial in the United States with foreign law being applied, is that it must put forth a strong public policy argument that American law

[281] Note that under the forum non conveniens doctrine if the court determines that foreign law should apply this is a factor that points towards but does not compel dismissal. *Reyno*, 454 U.S. at 260 (stating that "the need to apply foreign law pointed towards dismissal" in discussing the choice of law determination as part of the public factor analysis).

[282] Sunbeam Corporation v. Masters of Miami, Inc., 225 F.2d 191, 198 (5th Cir. 1955) (stating "[i]t is settled law that no foreign tort action contrary to a strong public policy of the forum state can be maintained"); RESTATEMENT (SECOND) OF CONFLICT OF LAWS Section 90 (1971). *See also* 16 AM. JUR. 2D *Conflict of Laws* Section 24 (2008) (commenting that "[i]t is a well-established general principle that courts are slow to overrule the positive law of the forum, and that effect will not be given to a foreign law if to do so would contravene the positive policy of the law of the forum, whether or not that policy is reflected in statutory enactment. Thus, subject to constitutional limitations, a court may: (1) refuse to entertain a transitory action, on the ground that it offends the public policy of the forum; or (2) entertain the action but refuse to apply the foreign law, on the ground that such law violated the local public policy"); 16 AM. JUR. 2D *Conflict of Laws* Section 25 (2008) (noting that "[i]nvocation of the public policy of the forum as a bar to the enforcement of foreign rights of action should be very narrowly limited…"); 15A C.J.S. *Conflict of Laws* Section 23 (2008)

[283] *See* American Insurance Association v. Garamendi, 539 U.S. 396, 417 (2003) (stating that "valid executive agreements are fit to preempt state law, just as treaties are…"); Zschernig v. Miller, 389 U.S. 429, 440 (1968) (holding that state laws "must give way if they impair the effective exercise of the Nation's foreign policy"); U.S. v. Belmont, 301 U.S. 324, 328 (1937). The effect of *Garamendi* in the aviation context can be seen to preempt an application of state law that would conflict with any international aviation treaty as well. *See Id.* Thus, under *Garamendi*, there is merit for the defendant aircraft lessor to determine whether any treaty to which the United States is a party contains any provision that would require application of United States aviation law.

or Section 44112 should not be preempted,[284] or that the application of foreign law in this instance would affect American foreign policy.

It is a central element of American law that a forum does not need to apply foreign law if the application of foreign law would threaten the public policy of the forum.[285] This "exception" to choice of law principles exists to permit a forum to refuse "to apply a portion of foreign law because it is contrary or repugnant to [the forum's] own public policy."[286] The public policy exception has a narrow application, however, and should only be applied when the application of foreign law "would violate some fundamental principle of justice, some prevalent conception of morals, some deep-seated

[284] *See* 16 AM. JUR. 2D *Conflict of Laws* Section 144 (2008) (stating that "the forum court may refuse to give effect to the foreign statute imposing vicarious liability on the ground that the statute is repugnant to its public policy); 15A C.J.S. *Conflict of Laws* Section 23 (2008) (noting that state may only refuse to give effect to foreign law because of public policy reasons in "extremely limited' circumstances").

[285] Nevada v. Hall, 440 U.S. 410, 422 (1979) (holding that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy"); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §90 (1971) (stating "[n]o action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum"). *See* Sunbeam Corporation v. Masters of Miami, Inc., 225 F.2d 191, 198 (5th Cir. 1955) ("[i]t is settled law that no foreign tort action contrary to a strong public policy of the forum state can be maintained").

[286] Schultz v. Boy Scouts of America, Inc., 480 N.E.2d 679, 687 (N.Y. 1985).

tradition of the commonwealth" [287] or is "prejudicial to the best interests of the citizens of the forum state."[288]

In *Schultz v. Boy Scouts of America, Inc.* the Court of Appeals of New York put forward a "test" for when public policy can be used to overcome the application of another forum's substantive law.[289] First, it must be established that the substantive law to be applied under the forum's choice of law is not the actual law of the forum.[290] From here, there must be evidence of an actual and fundamental public policy of the forum. A forum's public policy can "be ascertained by reference to the laws and legal precedents" of the forum. [291]

Once both of these two elements has been established, the party arguing for a public policy exception "has the burden of proving that the foreign law is contrary to" the forum's public policy.[292] The burden of proof "is a heavy burden because public policy is not measured by individual notions of expediency and fairness or by a showing that the foreign law is unreasonable or unwise."

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[287] RESTATEMENT (SECOND) OF CONFLICT OF LAWS §90 cmt. (1971); Loucks v. Standard Oil Co. of New York, 224 N.Y. 99, 111 (1918). *See* Cooney v. Osgood Machinery, 612 N.E.2d 277, 285 (N.Y. 1993) (holding that "[i]n view of modern choice of law doctrine, resort to the public policy exception should be reserved for those foreign laws that are truly obnoxious"); American Interstate Ins. Co., G & H Service Ctr. Inc., 861 N.E.2d 524, 528 (Ohio 2007) (noting that "[t]he public policy exception…is narrow and should be applied only in rare circumstances").

[288] American Interstate Ins. Co., G & H Service Ctr. Inc., 861 N.E.2d 524, 528 (Ohio 2007) (citing Jeffrey v. Whitworth College, 128 F.Supp. 219, 222 (D.Wash 1955)).

[289] *Schultz*, 480 N.E.2d at 687-88. *See also American Interstate Ins. Co.*, 861 N.E.2d at 528 (relying on *Schultz* and *Cooney* to determine if the law to be applied would be contrary to Ohio public policy).

[290] *Schultz*, 480 N.E.2d at 687.

[291] Muschany v. United States, 324 U.S. 49, 67 (1945); *id.* at 68 (stating that "it is Congressional enactments which determine public policy…"). *See* Schultz v. Boy Scouts of America, Inc., 480 N.E.2d 679, 688(N.Y. 1985) (noting that a forum's public policy can be found "in the State's Constitution, statutes and judicial decisions…").

[292] *Schultz*, 480 N.E.2d at 688.

This burden is satisfied by showing that the contacts between the parties, the underlying tort and the forum implicate the forum's public policy and are "substantial enough to threaten" the forum's public policy.[293] The mere fact that the substantive law to be applied differs from, or is less favorable than the forum's law is not enough, on its own, to warrant use of the public policy exception.[294] The more marginal the contact the forum has with the parties and the effects of the foreign law, the less reason to find an exception under the guise of public policy.[295] In essence, the greater the relationship that the parties and the underlying claim have to the forum and with the forum's public policy, the greater reason for the exception to apply.[296]

The underlying issue in *Schwartz* stemmed from a tort claim brought by a New Jersey plaintiff against a New Jersey charity in New York because the underlying tort occurred in New York. The defendant charity argued that it was immune from suit because of New Jersey's charitable immunity law. The court, having found that New York's choice of law rules pointed to the application of New Jersey law, agreed.

The plaintiff tried to overcome the application of the charity immunity law by arguing that the application of such a law in New York was counter to New York's public policy because New York did not have a charitable immunity provision.[297] While it found that applying the charitable immunity statue might be contrary to New York public policy, because both parties were residents of New Jersey, the court declined to apply the

[293] *Id.*; *Cooney*, 612 N.E.2d at 284-85.
[294] Nadler v. Liberty Mutual Fire Ins. Co., 424 S.E.2d 256, 263 (W. Va. 1992)
[295] *Nadler*, 424 S.E.2d at 264.
[296] *Id.*
[297] *Schultz* at 681; *id.* at 687.

public policy exception because there were insufficient contacts between New York, the parties, and the underlying tort.[298]

Because Section 44112 is an act of Congress it can be argued the statute represents the public policy of the United States. Under Section 44112 and its predecessor statutes, Congress has arguably stated that it is American public policy to not hold aircraft lessors liable when the conditions of Section 44112 have been fulfilled.[299] The purpose behind this public policy is arguably two-fold: (1) encourage aircraft financing, and (2) limit the financial exposure of aircraft lessors to encourage the growth of the aircraft leasing industry and hence the growth and stability of airline services.[300]

Moreover, to be successful, an argument favoring a public policy exception based on Section 44112 would need to show that the parties involved have significant contacts with the United States; [301]that Section 44112 would protect the lessor if American law was applied, and that allowing the foreign law to apply would undercut the purposes behind the passage of Section 44112.[302]

F. THE SCOPE OF PREEMPTION UNDER SECTION 44112 REMAINS UNDETERMINED

The relative scarcity of cases discussing Section 44112, and the clear disagreement amongst the courts over the preemptive effects of the statute, makes it

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[298] *Id.*at 688-89.
[299] 49 U.S.C. §44112.
[300] H.R. Rep. No. 80-2091, (1948) *as reprinted in* 1948 U.S.C.C.A.N. 1836-1837
[301] *See Nevada*, 440 U.S. at 422.
[302] *See Schultz*, 480 N.E.2d at 688; *Cooney*, 612 N.E.2d at 284-85. *C.f.* Tramontana v. S.A. Empresa De Viacao Aerea Rio Grandense, 350 F.2d 468, 472 (D.C. Cir. 1965) (finding that Brazil's interest in the financial integrity of its airlines was a national public policy).

apparent that the scope of preemption under Section 44112, if any, remains underdetermined. Presumably, at the very least, there is some limited conflict preemption under Section 44112. But how far should the preemptive effect of the statute reach?

Is there a federal standard of care applicable to the liability of commercial aircraft lessors for damages arising from the use of their aircraft that must be reconciled with Section 44112? In other words, is a lessor liable for "careless or reckless" operations of air carriers to which it leases simply because the lessor "has authorized [a lessee] to use aircraft . . . with or without the right of legal control (as owner, lessee, or otherwise)"? And how should Section 44112 be reconciled with the federal standard of lessor liability?

If there is no federal standard of care should any state remedy against lessors nevertheless be completely preempted because the federal government has completely occupied the field of aviation safety under the FAA Act of 1958, including standards of care, and federal law under the FAA Act of 1958 does not recognize a right to recover damages from an aircraft lessor?

If there is no field preemption what is the scope of conflict preemption under Section 44112? Should any state law allowing recovery from an aircraft lessor be preempted whenever the lessor has leased the aircraft for at least thirty days and the lessor does not have actual possession or control of the aircraft?

Or should the phrase "actual possession or control" be limited in its interpretation? Should the phrase be limited to possession or control at the time of the accident? Or should the phrase be construed to apply to the moment when the alleged wrongful conduct of the commercial lessor is deemed to have occurred? If it is the latter then arguably the lessor is not immune from suit for negligent entrustment or products

liability because the alleged wrongful conduct of the lessor occurred when the aircraft was in the possession or control of the lessor, although the accident did not occur until later.

Should the phrase "possession or control" be interpreted to allow potential suits for negligent supervision. In other words, should the phrase allow for potential claims against the lessor after the aircraft has been leased but the lessor has the right to declare a default and recover possession of the aircraft when the lessee has failed to maintain financial stability, or when the lessee has failed to properly maintain the aircraft, or when the airline has subsequently been listed on the E.U. Blacklist, or the airline is from a nation that has been designated a Class 2 country?

And irrespective of whether the lessor had "actual possession or control" of the aircraft, should the courts limit the reach of Section 44112 by placing teeth in the phrase "on land or water?" Was it the intent of Congress when it originally passed Section 1404 to restrict the liability of lessors to damage which occurred on the ground or water? An argument clearly exists that it was difficult to anticipate the liability exposure sustained from damage and death which occurs because of a ground impact, and hence it was difficult for a lessor to secure the necessary liability insurance at reasonable rates.

On the other hand, the liability exposure to passenger suits could be quantified since the lessor would know the number of passenger seats on any given aircraft. Should the lessor be subject to passenger suits when death or injury occurs from mid-air collisions or explosions because the "damage" did not occur on "land or water?" Or should the lessor only be liable for passenger death and injury even when the "damage" occurs because of ground impact?

Finally, irrespective of the potential preemption of Section 44112, should there be a preemption of state suits against lessors under the ADA? Would the unlimited liability of aircraft lessors significantly impact the "rates, routes or services" of air carriers, thus making the liability of lessors expressly preempted under the rationale of *Rowe?* After all, more than half of the aircraft operated by the world's airlines are under a lease agreement. An airline obviously is unable to provide "services" or fly "routes" or "rate" fares unless it has aircraft to fly.

V. CONCLUSION: THE ANSWER TO "IS LESSOR MORE" REMAINS SHROUDED IN THE MISTS OF A LEGISLATIVE AND JUDICIAL FOG

We began our discussion with the *Air Philippines* case and we now return to that case. The potential remains that foreign air disaster victims and their heirs, as in *Air Philippines,* will sue American aircraft lessors in American courts to avoid dismissal under the forum non conveniens doctrine or simply to have a deep-pocket defendant to answer for the serious monetary claims that mass disaster litigation invariably triggers. The weather forecast remains "a possibility of *Air Philippines* 'perfect storm' tomorrow."

But the MMTJA[303] now makes it less likely that an *Air Philippines* state court "perfect storm" will be the result. [304] If the foreign air disaster involves at least seventy-five deaths at a "discrete location" the lawsuits will probably be removable to federal

[303] 28 U.S.C. Section 1369.

[304] *See* Jonathan M. Stern and Gordon S. Woodward, *Cleared Direct to Federal Court: Why Aviation Cases Are More Likely Than Other Types to Take Flight From State Courts, in* LITIGATING THE AVIATION CASE; FROM PRE-TRIAL TO CLOSING ARGUMENT, 231 (Andrew J. Harkas ed., 3rd ed., 2008).

court where presumably the preemptive effect of Section 44112 will receive a more sympathetic consideration.

Congress' intent in passing MMTJA was to promote judicial efficiency by simplifying the process for consolidating litigation stemming from one major accident into one court.[305] The minimal diversity requirement for MMTJA is met so long as one defendant and one plaintiff are citizens of different states.[306] But a district court should abstain from exercising MMTJA jurisdiction when (1) a "substantial majority of all plaintiffs are citizens of a single state of which the primary defendants are also citizens;" and, (2) the claims will be primarily governed by the laws of that single state.[307]

The "substantial majority of all plaintiffs" provision of the MMTJA depends upon "whether the number of potential plaintiffs from a single state makes up a substantial majority of *all* potential plaintiffs with claims arising from the same disaster."[308] "Substantial majority" should equal a number between two-thirds and three-quarters of all the plaintiffs.[309] "Primary defendants" means all defendants facing direct liability, not those joined for secondary purposes like vicarious liability, indemnification or contribution.[310]

A claim can originate in federal court under the MMTJA or it can be removed to federal court via the removal provisions found in Section 1441(e). Once removed the

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[305] Passa v. Derderian, 308 F.Supp.2d 43, 53-54 (D.R.I. 2004). *See* Joseph M. Creed, Comment and Note, *Choice of Law Under the Multiparty, Multiforum Trial Jurisdiction Act of 2002*, 17 REGENT U. L. REV. 157, 167-73 (2004).
[306] 28 U.S.C. Section 1369(c)(2). *See* Flint v. Louisiana Farm Bureau Mut. Ins. Co., 2006 WL 2375593 (E.D.La. 2006).
[307] 28 U.S.C. Section 1369(b)
[308] *Passa*, 308 F.Supp.2d at 60 (emphasis in the original).
[309] *Id.* at 61.
[310] *Id.* at 62.

federal court would retain the ability to dismiss the case because of forum non conveniens.

The MMTJA does not contain a choice of law provision. Thus, if the case is filed initially in federal court pursuant to the grant of original jurisdiction of the MMTJA the choice of law issue should be resolved in accordance with traditional federal choice of law rules.[311] But should the case be removed from state court there could be confusion over the choice of law analysis.

The general rule, of course, is that the federal court will apply the law of the state from which the case was removed.[312] If the case was originally filed in state court but was removed under Section 1441 to the consolidated MMTJA federal court the federal court would probably apply the state's choice of law provisions.[313] If the case originated in a different federal court, either under diversity or federal question, but is transferred to the MMTJA consolidated court then the choice of law rules of the transferor court should apply. In the end, the MMTJA court could be faced with differing substantive law to multiple litigants.[314]

The enactment of the MMTJA is not the only important federal jurisdictional development to have taken place since *Air Philippines.* The federal courts appear to have moved closer toward acknowledging the existence of a complete federal field preemption

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[311] Creed, *supra* note X, at 172. *See* Nemsick, *supra* note X at 191- 217.
[312] *See* Erie Railroad v. Tompkins, 304 U.S. 64, 78 (1938).
[313] *See* Creed, *supra* note X at 172-73; Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496 (1941). *See generally* Judith R. Nemsick, *Navigating Through the Chaos of a Choice of Law Analysis in Aviation Accident Litigation, in* LITIGATING THE AVIATION CASE; FROM PRE-TRIAL TO CLOSING ARGUMENT, 191- 217 (Andrew J. Harkas ed., 3rd ed., 2008) (this article is very helpful in describing the various choice of law rules applied in the United States).
[314] Creed, *supra* note X, at 185.

of aviation safety.[315] Non-diverse state court actions against aircraft lessors might therefore be removable even if the MMTJA is not applicable.

The federal courts might even be prepared to recognize that state law actions against lessors involving aircraft leased to air carriers are pre-empted by the ADA if those actions could have a "significant impact on rates, routes or services."[316] A liability theory often pled is that the lessor should have taken steps to ground a leased aircraft when the lessor knew or should have known the air carrier was behaving irresponsibly. A grounding of an aircraft presumably would have an impact upon "routes" since it is difficult to fly a route without an aircraft. And imposing upon a lessor a responsibility to ground aircraft would appear to create a secondary private regulatory regime in the already heavily governmental regulated commercial air carrier market.

These comments suggest the federal courts may be moving toward recognizing that a single federal standard of care should be applied to aircraft lessors. The federal standard, as arguably already established by the FARs but previously unrecognized by the courts, would inquire whether: (1) the air carrier has been guilty of careless or reckless operation of the aircraft; and (2) whether the lessor "authorized" the air carrier to fly the aircraft?[317] The federal standard of care would necessarily be subject to the limitations, exceptions and immunities granted by Section 44112.

Regardless of whether the forum is federal or state, a defendant lessor will invariably be tempted to seek a dismissal of American lawsuits arising from foreign air

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[315] *See* Abdullah, 181 F.3d at 367 and Montalvo v. Spirit Airlines, 508 F.3d 464, 468 (9th Cir. 2007).
[316] *See* Rowe v. New Hampshire Motor Transport Ass'n, 128 S.Ct. 989, 996 (2008); and Morales v. Trans World Airlines, 504 U.S. 374, 378 (1992).
[317] 14 C.F.R. Section 91.13; 14 C.F.R. Section 1.1

disasters under the forum non conveniens doctrine. [318] The defendant[319] has the burden of proving a more convenient forum.[320] And the plaintiff's forum choice is accorded deference,[321] however, a foreign plaintiff is accorded less deference than a domestic plaintiff.[322] Once an adequate alternative forum has been proven the defendant must show why certain public and private interest factors favor disturbing the plaintiff's choice of forum.[323]

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[318] Deborah Elsasser, *The Doctrine of* Forum Non Conveniens *in the Context of Litigation Arising out of Aviation Accidents, in* LITIGATING THE AVIATION CASE; FROM PRE-TRIAL TO CLOSING ARGUMENT, 289-325 (Andrew J. Harkas ed., 3rd ed., 2008).

[319] Lacey v. Cessna Aircraft Co., 862 F.2d 38, 43-44 (3d Cir. 1988).

[320] *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-07 (1957); *See* Gambra v. International Lease Finance Corp., 377 F.Supp. 2d 810, 814 (C.D.CA 2005) (stating that for an alternative forum to be adequate, a court "must find that (1) defendants are amenable to process in the alternative forum, and (2) the subject matter of the lawsuit is cognizable in the alternative forum so as to provide plaintiff[s] appropriate redress" (quoting Bodner v. Banque Paribas, 114 F.Supp. 2d 117, 132 (E.D.N.Y. 2000)).

[321] *Gulf Oil* v. 330 U.S. at 506-07.

[322] *Reyno*, 454 U.S. at 256; Pollux Holding Ltd., v. Chase Manhattan Bank, 329 F.3d 64, 71 (2d Cir. 2002).

[323] Private interest factors include:

> Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy.

Gulf Oil, 330 U.S. at 508. Public Interest factors to be considered are:

> Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by

Rightly or wrongly, naming the American aircraft lessor as a defendant in foreign aircraft disaster litigation has come to be seen as an effective device to avoid dismissal under the forum non conveniens doctrine, particularly if the litigation remains in state court. We have already seen how the Illinois state court refused to dismiss under the doctrine.[324] But other American lessors in other courts have fared better when pursuing dismissal.[325]

An aircraft lessor should carefully consider the implications before seeking a dismissal pursuant to the forum non conveniens doctrine. Such a motion necessarily asks the court to rule that foreign law will apply to the litigation.[326] The court may hold that foreign law does in fact apply but nevertheless deny the motion under the public and private components of the doctrine. The lessor might have effectively "shot itself in the foot" if the foreign law provides that the lessor shall have vicarious liability for the operational negligence of the foreign air carrier, or that the lessor could be liable under a

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> report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself. *Id.* at 508-09.

[324] Ellis v. AAR Parts Trading Inc., 828 N.E. 2d 726 (Ill. App. 1st Dist. 2005), at 743 (quoting the trial court as saying "'it is incredulous for two Illinois resident corporations to argue that their home state is inconvenient to them to litigate this matter. It is also incredulous to observe that the defendants thoroughly ignore the fact that the theories of liability pled against them concern the alleged defective condition of the aircraft prior to its transfer to Air Philippines, and there has been no assertion by the defendants that the sources of proof, records, and witness on these issues are not located in Illinois.'"

[325] Esheva v. Siberia Airlines, 499 F.Supp. 2d 493 (S.D.N.Y. 2007); Gambra v. International Lease Finance Corp., 377 F.Supp. 2d 810 (C.D.CA 2005); Siddi v. Ozark Aircraft Systems LLC., Nos. 05-5170, 05-5206, 2006 U.S. Dist. LEXIS 84882 (W.D.Ark. 2006).

[326] Gschwind v. Cessna Aircraft Co., 161 F.3d 602 (10th Cir. 1998)

negligent entrustment theory, or that the lessor could be strictly liable for any defects in design or manufacture of the aircraft. [327]

The lessor would then long for the seemingly pro-lessor protection of Section 44112. But once foreign law becomes the applicable law the lessor is relegated to arguing that foreign law cannot apply because foreign law is in conflict with Section 44112, and hence unenforceable in an American court because Section 44112 represents the fundamental public policy of the United States.

But American law is not necessarily a warm and fuzzy blanket insulating the commercial aircraft lessor from the massive litigation that flows from a major air disaster. American law remains confused, undecided and uncertain.

Even if Section 44112 is applicable to a foreign air disaster the scope of the statute remains unclear. The statute by its terms limits its application to instances where the lessor does not have "actual possession or control" of the aircraft. Should the phrase refer to possession at the time of the alleged wrongful conduct which, in a negligent entrustment case, would be at the time of entrustment? Or should the phrase refer to possession at the time of the accident?

Section 44112 says it applies to damages occurring "on land or water." Does this mean that passenger deaths and injuries that occur during flight do not come within the scope of the law?

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[327] *See* Lory Barsdate Easton and Shelia A. Sundvall, *Getting Out of Dodge: Defense Pointers on Jurisdictional Issues in Transnational Aviation Torts Litigation, in* LITIGATING THE AVIATION CASE; FROM PRE-TRIAL TO CLOSING ARGUMENT, 329 (Andrew J. Harkas ed., 3rd ed., 2008) (Noting that "the maxim 'Be careful what you ask for… because you might get it' applies with respect to a foreign forum." Defense counsel should ensure that they are "informed by the realities of the potential foreign forum.")

Is there an argument, irrespective of whether there is immunity for the lessor under Section 44112, that any state or foreign effort to regulate the tort liability of the aircraft lessor runs afoul of the ADA? Would tort liability imposed by state or foreign law have a significant impact upon rates, routes or services? And are all of these arguments misplaced because Congress has already created a federal standard of care applicable to commercial aircraft lessors, leaving the appropriate remedy to be fashioned by either state or foreign law?

These and other questions remain shrouded in the mists of judicial and legislative fog. Unless the United States Supreme Court speaks to these issues with a clear and unequivocal voice it is probable that aviation practitioners will be raising these same questions for decades to come.