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AIRCRAFT CRASHES: SHOULD AIRCRAFT LESSORS BE HELD LIABLE?

GEOFF KASS*

VIOLET O'BRIEN**

INTRODUCTION

IN APRIL 2000, an Air Philippines flight from Manila to Davao International Airport crashed into a hillside while trying to land, killing all on board. Although a commission appointed by the President of the Philippines determined that pilot error caused the crash, plaintiffs representing the passengers' families filed suit in August 2000 in an Illinois state court against AAR Parts Trading, Inc. (formerly known as AAR Aircraft & Engine Group, Inc.), the lessor that leased the aircraft to Air Philippines prior to the crash, and Fleet Business Credit, LLC, the lessor at the time of the crash. The case, *Layug v. AAR*, moved slowly through the Illinois state court system until 2008. In 2008, following various motions, amendments, and plaintiff-favorable rulings, Air Philippines' insurers, who were handling the case under various insurance and indemnity provisions in the lease documentation, settled the case for \$165 million.

While the *Layug* court made a number of plaintiff-favorable rulings, one of the more important decisions that apparently motivated the insurers to settle was a rejection of the defendants' motion to dismiss based on 49 U.S.C. § 44112.¹ The de-

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¹ 49 U.S.C. § 44112 is set out *infra*, Part III.A.

fendants based their motion on the plain language of § 44112, which states, in pertinent part, that “a lessor . . . is liable for personal injury . . . only when a civil aircraft . . . is in the actual possession or control of the lessor”² Despite the plain language of § 44112, the *Layug* court ruled that § 44112 did not preempt the plaintiffs’ state-law tort claims, allowing the case to proceed.³

Section 44112 and its predecessor statutes have been effective law since 1948 and aircraft lessors have long relied on the protection provided thereby. Not surprisingly, the ruling by the *Layug* court and subsequent settlement by the insurers caused the aviation finance community to question the continuing efficacy of § 44112. A number of courts have issued well-reasoned decisions holding that § 44112 preempts state-law claims and such decisions remain effective law in many jurisdictions, but unfortunately, the *Layug* court is not the only court that has held that § 44112 does not preempt state-law claims. In fact, *Layug* is only one of the most recent in a series of cases and decisions that evidence that the language of § 44112, while seemingly clear, actually is sufficiently unclear as to create a variety of divergent court holdings that, when collectively evaluated, threaten to undermine § 44112 and the protections it purports to provide.

Given the key role that aviation plays in the global economy and that aviation finance plays in providing operators with effective access to aircraft, it is worthwhile to evaluate the issues presented by the current state of case law interpreting § 44112.⁴ Moreover, given the uncertainty created by the divergent case law and the need, as stated by Congress in 1948, “to encourage [owners and lessors] to participate in the financing of aircraft purchases,” it is worthwhile to evaluate how to amend § 44112 to rectify the potential problems caused by the divergent case law and allow § 44112 to provide the protections originally intended by Congress.

Part I of this article will examine the procedural history of the *Layug* case to determine why the defendants’ insurers may have chosen to settle the case before trial, as well as the *Layug* court’s reasoning in finding that § 44112 did not exculpate the lessor

² 49 U.S.C. § 44112(b) (2006).

³ See case discussion *infra* Part I.A.

⁴ In 2006, 53% of the global fleet was operated under some form of leasing arrangement. *Financial Characteristics of the Airlines*, THE AIRLINE MONITOR, May 2006, <http://www.airlinemonitor.com/tutorial2.html#Financial>.

defendants. Part II will dissect the case law beyond *Layug* on this subject, noting and evaluating the courts' struggles with the two separate issues of (1) whether § 44112 preempts state law, the issue in the *Layug* case, and (2) whether § 44112 covers lessors, which has been at issue in other cases. Part III of this article will analyze § 44112 and Congress's intent behind enacting it by examining the legislative history of § 44112 and its predecessor statutes. This analysis will demonstrate Congress's intention both to preempt state-law claims and to include lessors within the coverage of the statute. Part IV gives an overview of the current finance market in commercial aviation, including the development of operating leases, to demonstrate that, given Congress's intent in enacting § 44112 and its predecessor statutes, today's operating lessors should be covered by the statute.⁵ Finally, Part V explores the possibility of amending § 44112 to correct the current discrepancies in its application and to eliminate the risk of continued divergent holdings and the resulting uncertainty in the aviation finance marketplace.

I. THE AIR PHILIPPINES CASE AND ITS AFTERMATH

This Part will analyze the procedural history of *Layug*. This analysis will highlight a number of issues with the *Layug* court's holdings, in particular with respect to preemption under § 44112. This Part will also evaluate some of the repercussions of *Layug*, including inaccurate public statements and subsequent litigation.

A. *LAYUG v. AAR*

On April 19, 2000, Air Philippines Flight 541 crashed into a coconut grove on the hills of Samal Island in the Republic of the Philippines.⁶ Just before the crash, the pilot contacted the con-

⁵ As will also be discussed in Part IV, an "operating lease" is one of many ways to categorize different types of leasing structures. At the time the relevant statute was enacted, most leases were used as part of a long-term financing arrangement, much like a loan (sometimes no different from a loan). Today, the leasing industry has evolved to provide for the operating lease, which allows for the shorter-term use of an aircraft. Unlike the leases used for long-term financing, the equipment has enough useful life at the end of the lease term to be re-leased to another lessee. See discussion *infra* Part III.B.

⁶ Kathy Marks & Konrad Muller, *Philippines' Worst Air Crash Kills All 131 on Board*, THE INDEPENDENT, Apr. 20, 2000, at 17, available at <http://www.independent.co.uk/news/world/asia/philippines-worst-air-crash-kills-all-on-board-719405.html>.

trol tower to report visibility problems.⁷ At the time of the crash, the pilot was making a second attempt to land.⁸ Everyone on the flight, including 7 crew members and 124 passengers, died in the crash.⁹ The President of the Philippines appointed an independent investigation commission to investigate the crash.¹⁰ The commission concluded that the crash was caused by pilot error, noting the pilot's loss of situational awareness and specifically finding no evidence of structural or mechanical failure.¹¹

The aircraft, a Boeing 737, was manufactured in 1978 and operated by Southwest Airlines for twenty years.¹² AAR Parts Trading, Inc. (AAR) purchased the plane in 1998.¹³ After the Federal Aviation Administration determined that the plane was sound enough to export by issuing an export certificate of airworthiness and the Philippines aviation authority found that the aircraft was airworthy under all applicable airworthiness regulations, AAR leased the plane to Air Philippines.¹⁴ Later, AAR sold the aircraft and assigned its rights, title, and interests in the lease to Fleet Business Credit, LLC (Fleet) (AAR and Fleet are collectively referred to as the "Layug Defendants").¹⁵ Because AAR had transferred the aircraft to Fleet, AAR had no interest in the aircraft at the time of the crash.

In August 2000, Jovy Layug, the daughter of a Philippines resident who died in the crash, filed a complaint against AAR in Cook County, Illinois, where AAR is headquartered.¹⁶ The plaintiff later amended the complaint to include Fleet as a de-

⁷ *Air Philippines Flight Data and Voice Data Recorders Found*, AIRLINE INDUSTRY INFORMATION, Apr. 20, 2000, <http://www.allbusiness.com/operations/shipping-air-freight/508301-1.html>.

⁸ Marks & Muller, *supra* note 6.

⁹ *Id.*

¹⁰ *AAR Responds to Inquiries Concerning Settlement of Air Philippines Accident Lawsuit*, REUTERS, Mar. 13, 2008, <http://www.reuters.com/article/pressRelease/idUS253669+13-Mar-2008+PRN20080313>.

¹¹ *Id.*

¹² David Koenig, *Insurers Settle Lawsuits over Philippines Crash for \$165M*, INSURANCE JOURNAL, Mar. 19, 2008, <http://www.insurancejournal.com/news/national/2008/03/19/88380.htm>.

¹³ *AAR Responds to Inquiries Concerning Settlement of Air Philippines Accident Lawsuit*, *supra* note 10.

¹⁴ *Id.*

¹⁵ *Ellis v. AAR Parts Trading, Inc.*, 828 N.E.2d 726, 729–30 (Ill. App. Ct. 2005).

¹⁶ *Op. Modified on Denial of Reh'g*, *Layug v. AAR Parts Trading, Inc.*, No. 00 L 9599 (Fla. Cir. Ct. May 6, 2005).

fendant.¹⁷ The initial complaint was based in product liability and alleged, among other things, that the plane (i) lacked current operation and maintenance manuals; (ii) was older than its safe-life expectancy; (iii) was comprised of fatigued, cracked, and corroded structures that would likely lead to the aircraft's failure; and (iv) contained a fatigued flap control system that was likely to fail.¹⁸ The plaintiff alleged that these defective and unreasonably dangerous conditions were the direct and proximate cause of the crash.¹⁹ The plaintiff also amended the complaint several times over the years to add counts based on negligence, breach of warranty, strict product liability, and common law bailment.²⁰ The fourth amended complaint filed in August 2002 joined thirty-two plaintiffs, representing fifty-three decedents.²¹

In September 2002, the Layug Defendants filed a joint motion to dismiss, alleging that the plaintiffs' claims were preempted under 49 U.S.C. § 44112.²² The motion noted that Congress enacted § 44112 to "protect from liability those who leased aircraft without asserting control over or maintaining possession of a leased aircraft."²³ As part of their motion, the Layug Defendants attempted to distinguish their circumstances from a previous Illinois decision (*Retzler v. Pratt & Whitney*) that held a lessor liable for injuries arising from a plane crash notwithstanding § 44112.²⁴

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ The original complaint was filed on August 2, 2000, containing the product liability cause of action above. A month later, it was amended to add Count II based upon negligence and Count III for breach of warranty. In February 2001, plaintiff filed a second amended complaint, adding an allegation that she had been appointed administrator of the decedent's estate. In March 2002, plaintiff filed a third amended complaint including eight new counts: negligent entrustment, Count I (wrongful death) and Count II (survival action); strict product liability, Count III (wrongful death) and Count IV (survival action); Illinois common law of bailment, Count V (wrongful death) and Count VI (survival action); breach of warranty, Count IX (wrongful death) and Count X (survival action); and spoliation of evidence, Count XI (damages). One month later, Layug filed a fourth amended complaint joining thirty-two new plaintiffs. Finally, on August 15, 2002, plaintiff filed a fifth amended complaint adding allegations to Counts III and IV, Count V, and Count XI.

²¹ Op. Modified on Denial of Reh'g, *Layug*, No. 00 L 9599.

²² *Id.*

²³ *Id.*

²⁴ *Retzler v. Pratt & Whitney Co.*, 723 N.E.2d 345, 352-53 (Ill. App. Ct. 1999).

In *Retzler*, the defendant lessor, AMR Leasing Corporation, was leasing the aircraft to Simmons Airlines, a sister corporation.²⁵ This sister corporation was the parent of the operator, American Eagle.²⁶ Thus, because the operator and the defendant lessor were corporate subsidiaries, the lessor arguably had control over the operator and consequently the aircraft. The Layug Defendants argued that the lease between AAR and Air Philippines had no such characteristics.²⁷ In other words, there was no common ownership or other corporate link between AAR and Air Philippines that could cause the Layug Defendants to be in possession or control of the aircraft. Thus, according to § 44112, which requires "actual possession or control" to impose liability on a lessor,²⁸ the Layug Defendants should not have been held liable.

The *Layug* court did not consider these distinctions under § 44112, instead finding *Retzler* to be appropriate and applicable precedent.²⁹ In fact, the court held that the element of control over the aircraft was irrelevant, stating that the "Defendants' argument with regard to the issue of control of the aircraft is without merit as that was a distinction that had no bearing on the issue of preemption in the applicable case law."³⁰ Obviously, this holding is in direct opposition to the plain language of § 44112. As addressed in detail in Part II, the holding also misinterprets *Retzler*, which itself is flawed in numerous respects.³¹

²⁵ *Id.* at 349. A 1998 Seventh Circuit case explains that both Simmons Airlines, Inc. and American Airlines, Inc. were owned at the time by AMR Corporation. *Frederick v. Simmons Airlines*, 144 F.3d 500, 501 (7th Cir. 1998).

²⁶ *Retzler*, 723 N.E.2d at 349.

²⁷ Op. Modified on Denial of Reh'g, *Layug*, No. 00 L 9599.

²⁸ 49 U.S.C. § 44112(b) (2006).

²⁹ Op. Modified on Denial of Reh'g, *Layug*, No. 00 L 9599.

³⁰ *Id.*

³¹ In addition to a questionable interpretation of § 44112, a subsequent *Layug* court order demonstrates the court's lack of understanding of aircraft transactions and leasing structures. In an order on the plaintiffs' motion to compel discovery, the court held that a power of attorney provision in the lease demonstrated that the Layug Defendants had control over Air Philippines. The provision read as follows:

(a) [Lessee] IRREVOCABLY APPOINTS LESSOR its true and lawful attorney to execute and to do and perform upon its behalf and in its name or otherwise to deliver any documents, instruments or certificates with such amendments thereto (if any), which Lessor determines may be required and to take such steps as may be necessary to process or prosecute any insurance claims under Section 12 of the Lease.

Faced with a pending trial in front of a judge who determined that (1) § 44112 does not preempt state law, (2) the amount of control the Layug Defendants did or did not have over the aircraft was irrelevant to § 44112's application, and (3) the Layug Defendants controlled Air Philippines by way of an insurance power of attorney, the insurers settled the case.³² Thus, in March 2008, prior to conclusion of discovery and well before a trial on the merits of the case and plaintiffs' claims, Air Philippines' insurers negotiated and agreed on a settlement with the plaintiffs' attorneys.³³ However, this is not the way the case has been presented by the plaintiffs' attorneys.

B. LAYUG'S AFTERMATH

Throughout the *Layug* case proceedings, and particularly after the settlement, the plaintiffs' attorneys issued a series of press releases and comments that one might conclude misrepresent the status of the case, the validity of the plaintiffs' claims, and the reasons for the settlement. The plaintiffs' attorneys made the case about leasing a "decrepit airplane" and lessor responsibility for ensuring that airlines have "the latest equipment" and "best maintenance."³⁴ For example, following the *Layug* court's rejection of the Layug Defendants' motion to dismiss on the grounds that the case should have been heard in the Philippines, the plaintiffs' attorneys issued a statement saying:

(c) agrees that this Power of Attorney shall be effective immediately (but Lessor shall not exercise any rights hereunder unless and until an Event of Default (under and as defined in the Lease) shall have occurred and be continuing

Order Granting Pl.'s Mot. to Compel Disc. from Defs., *Layug v. AAR Aircraft & Engine Group, Inc.*, No. 05 L 125509 at 1–2 (Fla. Cir. Ct. June 8, 2007). Provisions of this nature are common in the industry but do not have the meaning or importance which the *Layug* court found. Effectively, this provision gives the lessor the right to act on behalf of the lessee only in very limited circumstances. The lessor is permitted to exercise the power of attorney only to process and pursue insurance claims during periods when the lessor is in default of its obligations under the lease. As will be addressed in Part IV, lessors generally exercise very little or no control over an aircraft while the aircraft is leased to an airline. These types of provisions are not meant to give the lessor control over the aircraft or lessee, but rather to give the lessor the ability to handle insurance matters when the lessee is in default.

³² Koenig, *supra* note 12.

³³ *Id.*

³⁴ *American Leasing Companies Pay \$165 Million to Settle Philippines Crash*, REUTERS, Mar. 10, 2008, <http://www.reuters.com/article/pressrelease/idus195668+10-mar-2008+prn20080310>.

With the possibility now of a full blown trial, AAR and Fleet who leased the sub-standard planes should be made to understand that when they did business with Air Philippines what they received was good Philippine money. They should have considered their corporate responsibility informing their clients of the true state of the machines or had at least provided their client an expert examining the plane's true worth.³⁵

Another plaintiffs' attorney is quoted as saying that AAR "did some cosmetic work, didn't do a (heavy maintenance) 'D' check . . . and shipped [the plane] out to the Philippines" and that lessors "are in the business of providing cheap aircraft to lease."³⁶ These statements appear contrary to the facts. The cause of the crash was not attributed to the age or condition of the aircraft but to the pilot's unfortunate mistake in poor weather conditions and a loss of situational awareness on the pilot's second landing attempt. Furthermore, prior to delivering the aircraft to the airline, the FAA issued an export certificate of airworthiness and the Philippines aviation authority determined that the aircraft satisfied all applicable Philippine airworthiness requirements.³⁷

While the plaintiffs' attorneys' statements poorly represent the outcome of the case, the real danger created by such statements is the potential damage they can cause to the aviation finance industry as a whole. Reading these comments could lead courts, as well as others unfamiliar with the aviation finance industry, to several false conclusions. First among these is that aircraft of a certain age cannot be safely operated. It is common for aircraft to be in service for twenty to twenty-five years, and lessors typically lease aircraft of this age.³⁸ Second, these com-

³⁵ *Kin of Flight 541 Victims Win Case vs Plane Suppliers*, SUNSTAR DAVAO, Oct. 2, 2005, <http://www.sunstar.com.ph/static/dav/2005/10/02/news/kin.of.flight.541.victims.win.case.vs.plane.suppliers.html>.

³⁶ Koenig, *supra* note 12.

³⁷ *AAR Responds to Inquiries Concerning Settlement of Air Philippines Accident Lawsuit*, *supra* note 10. One of the more absurd assertions made by the plaintiffs' attorneys implies that lessors have a duty to impose airworthiness standards that are higher than the standards of the local aviation authority. It is at best difficult to consider all the policy, economic, and political implications of such a suggestion and the reasons why such a suggestion should never be given any legal effect. Such an analysis is beyond the scope of this article.

³⁸ Boeing reports that 321 of its model 737 aircraft, the same model involved in the Air Philippines crash, are in service more than twenty years. *Table 1: Boeing Airplanes in Service*, http://www.boeing.com/commercial/aeromagazine/aero_07/corrosn_sb_table01.html (last visited Oct. 2, 2009). According to Boeing, "approximately 20 percent of all commercial jet airplanes flying today are

ments may lead to the belief that lessors are hands-on maintenance providers, while the truth is quite different. As will be discussed in detail in Part IV, lessors have minimal contact with the aircraft when it is on lease, leaving the responsibilities of possessing, operating, maintaining, and insuring the aircraft to the operator.³⁹

The industry is also threatened by the fear of being subject to liability for an aircraft out of its control, which may prevent lessors from participating in aircraft leasing, thus severely hindering the availability of aircraft to airlines and other operators. As discussed in Part IV, upwards of 30% of commercial aircraft are financed through operating leases, which would be difficult to replace if the leasing market suffered a loss of participants.⁴⁰ While there has been an instrumental change since *Layug* with respect to the Multiparty Multiforum Trial Jurisdiction Act,⁴¹ this is simply not enough protection. As further evidence of the risks created by the uncertainty of the applicability of § 44112, several lawsuits have recently been filed against the lessor of an

considered to be aging airplanes.” *Structures Engineering Support for Out-of-Production Airplanes*, http://www.boeing.com/commercial/aeromagazine/aero_02/textonly/ps01txt.html (last visited Oct. 2, 2009). An aging airplane is one operating beyond the design service objective, which generally ranges between twenty and thirty years. *Id.*

³⁹ See discussion of this and other details of aircraft lease structures *infra* Part IV.

⁴⁰ This is for operating leases alone. *Lessors Riding Out the Storm*, AIRLINE FLEET & NETWORK MGMT. 44 (July-Aug. 2008). For example, Continental leases 75% of its aircraft and U.S. Airways leases 79%. See BUREAU OF TRANSP. STATS., U.S. DEP’T OF TRANSP., SCHEDULE B-43 AIRCRAFT INVENTORY 46–58, 173–78 (2006), available at http://www.bts.gov/programs/airline_information/schedule_b43/2006/pdf/entire.pdf.

⁴¹ The Multiparty Multiforum Trial Jurisdiction Act (MMTJA), 28 U.S.C. § 1369, took effect on November 2, 2002, with the purpose of opening federal courts to class actions that previously did not qualify for federal jurisdiction to advance the efficient handling of mass disaster accident litigation. *Passa v. Derderian*, 308 F. Supp. 2d 43, 53–54 (D.R.I. 2004). The MMTJA grants jurisdiction for cases arising out of a single accident where seventy-five people have died as a result. 28 U.S.C. § 1369(a) (2006). The requirement for diversity is minimal, requiring only that one plaintiff and one defendant are from different states. 28 U.S.C. § 1369(c)(1). The MMTJA would have likely removed a case like *Layug* to federal court where, arguably, the preemption of § 44112 would have been viewed more favorably. However, the MMJTA only applies where there are seventy-five or more deaths. 28 U.S.C. § 1369(a). Additionally, removing a case to a federal forum may increase the likelihood that federal preemption would prevail, but it does not guarantee it.

aircraft that crashed in Brazil.⁴² This is deeply troublesome to those in the industry, as the suit seems to follow in *Layug's* footsteps. Similar to the *Layug* case, the TAM Airlines lawsuits were filed in the United States after a crash that occurred outside the United States.⁴³ As reports thus far indicate, an amalgamation of a few circumstances caused the aircraft to outrun the runway, cross a highway, and collide into a building, igniting the aircraft.⁴⁴ These circumstances include a deactivated thrust reverser on one of the two engines, the possibility that the thrust-reverser lever was improperly engaged, and a historically dangerous and slick runway that did not have proper channeling grooves to avoid hydroplaning.⁴⁵ The claims, brought in the District Court of the Southern District of Florida, name the manufacturers of the aircraft and thrust reversers, TAM's training provider, and the leasing company as defendants. As of May 2009, approximately seventy suits were pending against the defendants.⁴⁶ Substantive rulings have not yet been made; however, the leasing company did assert the affirmative defense that they are not liable as the lessor of an aircraft under § 44112.⁴⁷

⁴² See, e.g., *Tazoe v. Airbus S.A.S.*, No. 0:2008cv61391 (S.D. Fl. filed Aug. 29, 2008).

⁴³ *Id.*

⁴⁴ Stan Lehman, *Brazilian Airline Cancels Flights at Airport Where Crash Occurred*, OAKLAND TRIB., Jul. 25, 2007, http://findarticles.com/p/articles/mi_qn4176/is_20070725/ai_n19390474.

⁴⁵ Some reports focus on the short runway and rainy conditions on the day of the crash, noting that the Sao Paulo Congonhas Airport has had problems with the runway. See, e.g., Lehman, *supra* note 44; George Hatcher, *TAM Update*, GEORGE HATCHER'S AIR FLIGHT DISASTER, Nov. 19, 2008, <http://airflightdisaster.com/?p=1369> ("Sao Paulo Institute of Criminology 16-month investigation places blame on government agencies for failing to ensure runway safety. Government failure to set rainy-day landing rules for the short runway whose new surface had not yet been grooved to drain rainwater."). Other reports note the pilot's failure to retard the thrust reversers for the right-hand engine in the moments before touchdown. See, e.g., Bobbie Sullivan, *Update on TAM Crash in Sao Paulo*, AIRCREW BUZZ, Aug. 4, 2007, <http://aircrewbuzz.com/2007/08/update-on-tam-crash-in-sao-paulo.html>; David Kaminski-Morrow, *TAM A320 Crew Did Not Retard Right Hand Thrust Lever*, Feb. 8, 2007, <http://www.flightglobal.com/articles/2007/08/02/215897/tam-a320-crew-did-not-retard-right-hand-thrust-lever.html> ("Flight-data recorder information indicates that the pilots repeatedly pressed on the brakes in a bid to stop the jet but did not retard the right-hand thrust lever.").

⁴⁶ This was determined by a federal-docket search for related suits against the defendants.

⁴⁷ Def.'s Answer to Pl.'s 3d Am. Compl., Nov. 6, 2008.

II. A SURVEY OF THE RELEVANT CASES

The *Layug* case is one example of a court that struggled with the appropriate level of protections under § 44112. While the better-reasoned court decisions have held that § 44112 preempts state-law claims and that lessors are entitled to the protections of § 44112, there are a number of cases in which courts have ruled that § 44112 does not preempt state-law claims or that certain lessors are not protected or both. This part summarizes the cases that address both preemption and lessor protection to demonstrate the divergent positions courts have taken and the reasons the current drafting of § 44112 contributes to the divergent opinions.

A. PREEMPTION

Since the Federal Aviation Act itself does not impose any liability upon aircraft finance parties for damages or injuries, the logical reading of § 44112 is that it preempts any liability under state law.⁴⁸ The majority of courts have agreed. *Rogers v. Ray Gardner Flying Service, Inc.* involved a wrongful-death action arising out of a private airplane crash.⁴⁹ The court did not directly examine whether § 44112, then § 1404, preempted state law but addressed a different provision of the Federal Aviation Act.⁵⁰ The *Rogers* court noted, however, that if it had been addressing a claim under § 1404, “our task would be correspondingly simpler” since “[t]his provision appears clearly and forthrightly to preempt any contrary state law which might subject holders of security interests to liability for injuries so incurred.”⁵¹

⁴⁸ See 49 U.S.C. § 44112 (2006).

⁴⁹ *Rogers v. Ray Gardner Flying Serv., Inc.*, 435 F.2d 1389, 1390 (5th Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

⁵⁰ The *Rogers* court examined whether 49 U.S.C. § 1301(26), which defined “operation of aircraft,” preempted the Oklahoma law of bailments as it related to the liability of a lessor for negligent acts. *Id.* The plaintiffs were parents of two women killed in a private plane crash. *Id.* at 1390–91. The pilot was the husband of one of the decedents, who was renting the plane from the defendants. *Id.* The basis of the plaintiffs’ claim was that by operation of 49 U.S.C. § 1301(26), the defendants became vicariously liable for the pilot’s negligence and that such negligence afforded the basis for a wrongful-death action under Oklahoma law. *Id.* at 1391–92. The plaintiffs argued that only those exempted by § 1404 should evade liability. *Id.* at 1392. The court held that Congress did not intend “to alter common law principles with a definitional section of a regulatory scheme.” *Id.* at 1393.

⁵¹ *Id.* at 1394. While the *Rogers* court clearly found (though *dicta*) that § 1404 preempted state-law claims, its finding that the provision clearly preempted state law that “might subject holders of security interests to liability” has been perhaps the

A case in which upholding preemption plays a central role is that of *Matei v. Cessna Aircraft Co.*⁵² *Matei* involved a state-bailment claim against Cessna Aircraft Co. resulting from an airplane crash in Chicago.⁵³ The plaintiff named the private lessor, Robert W. Hansel, as a defendant.⁵⁴ Hansel had leased the aircraft to Prompt Air, an air freight service company.⁵⁵ Hansel argued that he was not liable under § 1404 because he was not in possession or control of the aircraft that was on lease to Prompt Air at the time of the crash.⁵⁶ Hansel also noted that under the lease, the operator undertook all maintenance obligations.⁵⁷

The district court in *Matei* held that “[t]he Federal Aviation Act specifically exempts a lessor who retains no possession or control of an aircraft from any liability arising from its use, where there is a bonafide lease of more than thirty days duration.”⁵⁸ The court further held that the “provision was enacted in order to remove any doubt concerning a lessor’s liability.”⁵⁹ The court, finding the element of “possession or control” common to both a state bailment claim and a § 1404 defense, evaluated both and, finding no evidence of control, granted the defendant lessor’s motion for summary judgment, holding that “[f]or the duration of the lease, Hansel relinquished all control, and Prompt Air assumed the obligation to maintain and repair the aircraft.”⁶⁰ On appeal, the appellate court affirmed, holding “[T]here is nothing in the record which would even arguably support Mrs. Matei’s assertion that Hansel retained possession or control of the aircraft at the time it crashed”⁶¹

Though *Matei* focused on control and is clearly supportive of preemption, a subsequent key decision misinterpreted the decision and read *Matei* as precedent *against* preemption. As noted

root of confusion for the second issue addressed *infra*, Part II.B. See *id.* (emphasis added).

⁵² 1990 U.S. Dist. LEXIS 3611 (N.D. Ill. 1990), *aff’d* 35 F.3d 1142 (7th Cir. 1994) (holding that an owner/lessor under an oral lease giving the operator possession and control of the aircraft was not liable for the death of the aircraft’s pilot as the result of a crash).

⁵³ *Matei*, 35 F.3d at 1143. See also *Matei*, 1990 U.S. Dist. LEXIS 3611, at *2.

⁵⁴ *Matei*, 1990 U.S. Dist. LEXIS 3611, at *1–2.

⁵⁵ *Id.* at *2.

⁵⁶ *Matei*, 35 F.3d at 1144–45.

⁵⁷ *Id.* at 1145.

⁵⁸ *Matei*, 1990 U.S. Dist. LEXIS 3611, at *11.

⁵⁹ *Id.*

⁶⁰ *Id.* at *10–12.

⁶¹ *Matei*, 35 F.3d at 1146.

in Part I, that case is *Retzler v. Pratt & Whitney*.⁶² Retzler, a flight attendant, brought suit against a series of defendants including the aircraft lessor, AMR Leasing Corporation (AMR), for injuries she sustained during an emergency landing due to an alleged defect in one of the engines.⁶³ The plaintiff claimed that the leasing company was liable for placing a defective engine into the stream of commerce.⁶⁴ AMR asserted the protection of § 44112, relying on the decision in *Matei* as properly affirming that state-law claims against lessors are preempted when the aircraft is not in their control or possession; however, the *Retzler* court disagreed.⁶⁵

The *Retzler* court noted that *Matei* simultaneously addressed the “possession or control” element under § 44112 and Illinois bailment law and held that the plaintiff’s claims failed under both.⁶⁶ The court concluded that the *Matei* court implicitly held that state-law claims were not preempted, reasoning that “[i]f 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.”⁶⁷ This simply is not a correct interpretation of *Matei*. This reasoning ignores *Matei*’s holding that § 44112 “specifically exempts” lessors and “remove[s] any doubt concerning a lessor’s liability.”⁶⁸

⁶² 723 N.E.2d 345 (Ill. App. Ct. 1999).

⁶³ *Id.* at 348–49.

⁶⁴ *Id.* at 351.

⁶⁵ *Id.* at 351–52.

⁶⁶ *Id.* at 352.

⁶⁷ *Id.*

⁶⁸ *Matei v. Cessna Aircraft Co.*, 1990 U.S. Dist. LEXIS 3611, at *11 (N.D. Ill. 1990). In addition to *Retzler*’s misinterpretation of *Matei*, the *Retzler* decision is plagued by another flaw. *Retzler* relied upon the reasoning of *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999), to find against preemption. *Retzler*, 723 N.E.2d at 352–53. The *Abdullah* case, however, did not even involve preemption under § 44112. Rather, *Abdullah* involved passengers suing American Airlines, the operator of the aircraft (not the lessor), in the District Court of the Virgin Islands for injuries sustained on a turbulent flight. *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 365 (3d Cir. 1999). The *Abdullah* jury awarded the plaintiffs damages, but the district court ordered a new trial, finding that it had “improperly relied upon territorial common law to establish the standards of care that were used by the jury” *Id.* at 364. The district court found that the Federal Aviation Act implicitly preempts territorial standards and thus supporting evidence was wrongly introduced to the jury. *Id.* After this trial, but before the resolution on American Airlines post-trial motions, American Airlines proceeded with litigation in New York. *Id.* at 364 n.1. The Southern District Court of New York ultimately held that the preemption of aviation safety was an open issue and certified it for interlocutory appeal to the Second Circuit, which declined to address the issue. *Id.* As a result, the parties agreed to be bound by the result of the

Due to its misinterpretations of *Matei* and *Abdullah*, the *Retzler* case is flawed. Moreover, as demonstrated by the *Layug* case, the *Retzler* court's flawed reasoning invites plaintiff-favoring courts, such as the *Layug* court, to continue and expand the *Retzler* court's erroneous logic. While *Layug* turned to *Retzler* as precedent, there are cases subsequent to *Retzler* that recognize and illustrate *Retzler*'s imperfections. Two of these cases are the Indiana case of *In re Lawrence W. Inlow Accident Litigation*⁶⁹ and the Connecticut case of *Mangini v. Cessna Aircraft Co.*⁷⁰

Virgin Islands litigation. *Id.* The Virgin Islands district court certified this issue: "Does federal law preempt the standards for air safety, but preserve State and Territorial damage remedies?" *Id.* at 364.

The appellate court held that "[f]ederal preemption of the standards of care [of aviation safety] can coexist with state and territorial tort remedies." *Id.* at 375. This has been the general trend when dealing with federal safety standards—federal law occupies safety standards while state law provides the remedy for the resulting harm of a breach of those standards. The *Retzler* court noted *Abdullah*'s holding and erroneously applied it to preemption of state-liability claims. See *Retzler v. Pratt & Whitney*, 723 N.E.2d 345, 352–53 (Ill. App. Ct. 1999). *Abdullah* never touched upon lessor liability because the suit was against the operator. Moreover, taking this holding, which states that federal preemption of the standards of care for aviation safety can co-exist with state claims and remedies for the subject tort, to find that *no* provision of the Federal Aviation Act preempts state law is wholly overreaching. There is no question that, if a state promulgated separate laws for safety standards, courts would rule that the Federal Aviation Act preempts the state standards. The *Retzler* court erroneously adopted a second line of reasoning from *Abdullah*. In determining the relationship between federal preemption and state remedies, the *Abdullah* court reasoned that because there is no federal remedy for injury or death and because the FAA requires air carriers to maintain liability insurance for bodily injury resulting from the operation or maintenance of an aircraft, state-law remedies must be available. *Abdullah*, 181 F.3d at 375–76. In other words, "Congress could not have intended to abolish a damage remedy for injury or death if it required airlines to maintain insurance coverage to recompense injured persons." *Id.* at 375. This argument may have made sense in *Abdullah*'s context, where the operator of the aircraft was the entity being sued and the entity required to maintain liability insurance. See *id.* at 375 (noting the insurance clause of 49 U.S.C. § 4112(a) requiring that airlines carry liability insurance). However, such reasoning is inapplicable to cases against lessors. Section 4112 exculpates lessors who are not in possession or control of the aircraft. See 49 U.S.C. § 4112(b) (2006) (establishing liability only when a lessor has "actual possession or control" of an aircraft). Naturally, then, liability would be imposed on the entity that is in possession or control of the aircraft. Thus, the operator or air carrier would be subject to liability, rendering the FAA requirement that the air carrier have insurance compatible with the statute.

⁶⁹ No. IP 99-0830-C H/G, 2001 WL 331625 (S.D. Ind. Feb. 7, 2001).

⁷⁰ Nos. X07CV044001467S & X07CV044003418S, 2005 WL 3624483 (Conn. Super. Ct. Dec. 7, 2005). Two other cases have also found in favor of preemption—*Esheva v. Siberia Airlines*, 499 F. Supp. 2d 493 (S.D.N.Y. 2007), and *Vreeland v. Ferrer*, No. 2005-CA-003535, 2007 WL 5552091 (Fla. Cir. Ct. Sept. 26, 2007). The *Esheva* court addressed liability in a footnote. *Esheva*, 499 F. Supp. 2d 493,

Inlow addressed a claim against the sublessor of a helicopter where the decedent was killed by a rotor blade that hit him in the head as he disembarked a helicopter.⁷¹ CIHC, Inc. was subleasing the helicopter to the operator, Consec, Inc., of which the decedent was general counsel.⁷² The defendant lessor asserted the protection of § 44112.⁷³ The court held that “[t]he plain language of § 44112 establishes that it preempts state common law claims against covered lessors.”⁷⁴ The *Inlow* court properly noted that § 44112 would have little meaning if it did not preempt state law, specifically stating, “Federal common law generally does not provide a remedy for those injured in aircraft accidents. The word ‘only’ could have effect only if the statute preempts claims against lessors arising under state law.”⁷⁵

The court also reviewed the legislative history of § 44112 and noted, as discussed in the next part, that:

[T]he bill was a direct response to the Uniform Aeronautics Act, which was in force in ten states . . . in 1948. Those state laws declared the “owner” of every aircraft “absolutely liable” . . . regardless of the owner’s degree of control over a lessee. The statutory provision was plainly intended, and plainly written, to preempt such state statutes and parallel common law claims.⁷⁶

499 n.4. The case involved an action brought against a Russian air carrier on behalf of victims of a crash in Russia. *Id.* at 496. The lessor, Airbus Leasing II, was named as a defendant. *Id.* In deciding whether to grant a *forum non conveniens* motion, the court noted that the defendant’s argument that the lessor was added solely to provide an American nexus to the litigation was compelling in light of the fact that “Airbus is absolutely immune for [sic] 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 or control of the lessor’” *Id.* at 499 n.4.

Vreeland involved a case against Aerolease of America, Inc., a lessor of an aircraft that crashed in Florida while it was operated by Skyblue Air, Inc. *Vreeland*, 2007 WL 5552091, at *1. The lessor argued that the Florida Dangerous Instrumentality Doctrine, which allowed for an aircraft’s owner or lessor to be held vicariously liable for the negligence of a pilot operating the aircraft, was preempted by § 44112. *Id.* In a very brief opinion, the *Vreeland* court agreed. *Id.* It held that “under the plain reading” of the statute, the lessor “was not in the actual possession or control of the airplane,” and thus § 44112 applied and preempted the Florida law claim against the lessor defendant. *Id.* (emphasis omitted).

⁷¹ *Inlow*, 2001 WL 331625, at *1.

⁷² *Id.*

⁷³ *Id.* at *11, *14.

⁷⁴ *Id.* at *14.

⁷⁵ *Id.*

⁷⁶ *Id.* (citation omitted).

The *Inlow* court also recognized the flaws in the *Retzler* holding.⁷⁷ It observed that *Retzler's* reading of *Matei* as implicitly rejecting preemption by analyzing the state-law claim was erroneous.⁷⁸ The *Inlow* court pointed out that the district court in *Matei* expressly held that the statute does preempt state-law remedies and the appellate court affirmed.⁷⁹ The *Inlow* court noted that the *Retzler* court "did not acknowledge or consider the district court's decision in *Matei*."⁸⁰ The *Inlow* court also noted that the appellate court ignored the fact that the district court "expressly held that the predecessor statute does preempt state remedies" and, thus, only considered whether the plaintiff had a state-law claim as a threshold matter.⁸¹

The *Inlow* court used a combination of common sense and a review of the legislative history to find in favor of preemption. The *Mangini* court also used this approach. Taking a cue from *Inlow*, a review of the legislative history convinced the *Mangini* court that "[t]he most compelling argument for preemption are [sic] the House and Senate Reports concerning the passage of 49 U.S.C. § 1404."⁸² Noting the concern with state-liability laws at the time of its passage, the *Mangini* court held that "Congress announced that it intended 49 U.S.C. § 1404 and its present version, 49 U.S.C. § 44112 to preempt state law and to exempt from liability those persons who met the other criteria of those statutes."⁸³

⁷⁷ *Id.* at *15.

⁷⁸ *Id.*

⁷⁹ *Id.* ("The Seventh Circuit did not address in *Matei* whether § 1404 preempted the plaintiff's state law claim, but the district court in *Matei* had held that it did.").

⁸⁰ *Id.*

⁸¹ *Id.* The *Inlow* court also took issue with *Retzler's* reliance on *Abdullah*. The *Inlow* court observed that *Abdullah* did opine that the Federal Aviation Act does not preempt state law remedies generally, but that *Retzler's* "extension of that reasoning to the protection for lessors under § 44112(b) was not justified." *Inlow*, 2001 WL 331625, at *16. *Inlow* also noted *Retzler's* use of the insurance clause argument from *Abdullah*. The *Inlow* court soundly argued that the insurance clause "pertain[s] to the availability of remedies where there is some basis for them" and has "no bearing" on § 44112. *Id.* Consequently, the *Inlow* court concluded that *Retzler's* interpretation "strayed from the statutory language and ultimately gives § 44112 no effect If § 44112 did not apply to . . . state law . . . , § 44112 would have no apparent effect." *Id.*

⁸² *Mangini v. Cessna Aircraft Co.*, Nos. X07CV044001467S & X07CV044003418S, 2005 WL 3624483, at *6 (Conn. Super. Ct. Dec. 7, 2005). Note that the facts of *Mangini* will be addressed in more detail in the next part.

⁸³ *Id.*

The case analysis above demonstrates that the better-reasoned cases find § 44112 preempts state-law claims. A combination of realizing § 44112's ineffectiveness without preemption and a review of the legislative history clearly proves Congress's intent to bar claims available at state law against specific persons covered by the statute. The second line of cases that require analysis includes cases addressing which parties are covered under § 44112. A number of courts have wrestled with whether § 44112 protects all lessors or just financiers that are owners or lessors for security purposes only.⁸⁴

B. TYPES OF LESSORS COVERED

The recent Rhode Island case of *Coleman v. Windham Aviation, Inc.* addresses the issue of whether Congress intended to cover lessors under § 44112, specifically concluding that Congress did not intend to include lessors in the limitation on liability unless they are lessors only for security purposes.⁸⁵ This holding is significant, as it would exclude a considerable number of lessors from protection.⁸⁶

Coleman involved a wrongful-death action brought as a result of a collision between two private aircraft at a small airport in Westerly, Rhode Island.⁸⁷ The incident occurred while one aircraft, a Cessna, was taking off and the other aircraft, a Piper, was attempting to land.⁸⁸ The pilot of the Piper aircraft survived.⁸⁹ That pilot had rented the Piper the day of the collision from Windham Aviation, Inc. (Windham).⁹⁰ The plaintiff alleged

⁸⁴ See *infra* Part II.B.

⁸⁵ *Coleman v. Windham Aviation, Inc.*, No. K.C. 2004-0985, 2005 R.I. Super. LEXIS 119, at *14, *16 (R.I. Super. Ct. July 18, 2005).

⁸⁶ This would exclude the 30% of global aircraft on lease under an operating lease which includes the significant portion of national air carriers' aircraft under an operating lease (approximately 85% of the 36% in leasing arrangements). See *infra* Part IV.A., BUREAU OF TRANSP. STATS., U.S. DEP'T OF TRANSP., SCHEDULE B-43 AIRCRAFT INVENTORY (2006), http://www.bts.gov/programs/airline_information/schedule_b43/2006/pdf/entire.pdf. An operating lease is an accounting term but is widely used to refer to leases where the aircraft is returned (and likely leased again) to the lessor at the end of the term. Additionally, leases can fall into more than one category as most distinctions between leases are for specific purposes (tax, accounting, etc.). See *infra* Part III.B. Since the definitions are variable, it is too difficult to exclude lessors from coverage under § 44112 based on one distinction.

⁸⁷ *Coleman*, 2005 R.I. Super. LEXIS 119, at *3-4.

⁸⁸ *Id.* at *4.

⁸⁹ *Id.*

⁹⁰ *Id.* at *3.

that Windham was vicariously liable for the Piper pilot's negligence because it owned the aircraft.⁹¹

The defendant invoked federal preemption under § 44112, contending that any provision of state law that imposes vicarious liability on the basis of aircraft ownership was preempted.⁹² The *Coleman* court began its analysis by stating that "a cursory review of § 44112 seems to not only support the Defendant's argument but also present a conflict with applicable state tort law liability, a deeper examination of the statute reveals a contrary result."⁹³ The court found that the proper starting point was to note the congressional reports stating that the purpose of the 1994 recodification was to "revise, codify, and enact without substantive change certain general and permanent laws [. . .] and to make other technical improvements in the Code."⁹⁴ The court reasoned that since the recodification was meant to be nonsubstantive, the court was obligated to examine the predecessor statute to determine whether owners/lessors were covered by its terms.⁹⁵

The *Coleman* court examined the original codification under § 1404, ultimately finding that Congress did not intend to include owners or lessors under its limitation unless such owners or lessors hold only a security interest in the aircraft.⁹⁶ The court stated that "[a]fter reviewing the committee reports, the Court has no difficulty concluding that Congress passed § 1404 to facilitate the financing of private airplanes by exempting owners or lessors holding only a security interest in an aircraft"⁹⁷ The court reached this conclusion by examining parts of the House report from the 1948 bill that read, "This bill would make it clear that this generally accepted rule applies and assures the *security owner* or lessee [sic], that he would not be liable when he is not in possession or control of the aircraft."⁹⁸ The *Coleman* court noted additional language in the House report regarding the limitation of leases to thirty days or more and Congress's stated purpose that the limitation was to "confin[e]

⁹¹ *Id.* at *4.

⁹² *Id.* at *6.

⁹³ *Id.* at *8.

⁹⁴ *Id.* at *9 (quoting Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745) (emphasis omitted).

⁹⁵ *Id.* at *13-14.

⁹⁶ *Id.* at *16.

⁹⁷ *Id.*

⁹⁸ *Id.* at *15 (quoting H.R. REP. NO. 80-2091, at 1-2 (1948) (emphasis added), reprinted in 1948 U.S.C.C.A.N. 1836, 1837).

the section to leases executed as a part of some arrangement for financing purchases of aircraft.”⁹⁹ The *Coleman* decision shows that the court seemed to draw a distinction between what the industry sometimes refers to as an “operating lessor,” or a lessor that supplies an aircraft that is owned by the lessor, and a “finance lessor,” or a lessor that supplies financing, similar to a lender, but through a lease structure.

There is no denying that the legislative history surrounding § 1404 mentions leases as a part of financing an aircraft and also often refers to security owners.¹⁰⁰ However, the *Coleman* court did not recognize two important points in this regard. First, lease structures in 1948 consisted only of leases as part of long-term financing, as other leasing structures did not yet exist.¹⁰¹ Second, leases that provide long-term financing often involve a lessor that holds title to the aircraft solely as a means of establishing a proper security interest over the aircraft.

Even if lessors that are more than secured parties were excluded from Congress’s original scope of protection, the revisions to the statute in 1994 confirm that operating lessors are, in fact, protected. The *Coleman* court ignored the legislative history surrounding the 1994 revision and focused solely on the history from 1948, when the market was dramatically different. The *Coleman* court implies that this history or any “substantive” intent behind Congress’s 1994 revisions is irrelevant because the recodification was not meant to be substantive.¹⁰² This rationale is unsound. It does not entertain the possibility that Congress, by way of the recodification, intended to clarify that all lessors are covered under the statute. This possibility is further supported by the fact that the recodification’s stated purpose was for “technical improvements.”¹⁰³ In fact, the *Coleman* court itself noted that the House report declares that “[i]n the restatement, simple language has been substituted for awkward and obsolete terms, and superseded, executed, and obsolete laws have been eliminated.”¹⁰⁴

⁹⁹ *Id.*

¹⁰⁰ *See id.*

¹⁰¹ *See infra* Part III.B.

¹⁰² *See Coleman*, 2005 R.I. Super. LEXIS 119, at *9–10 (emphasizing “Congress’s strong presumption against affecting any substantive change of the predecessor statute”).

¹⁰³ H.R. REP. NO. 103-180 (1993). In a section designated “Standard changes,” the report explains that numerous changes were made “for clarity.” *Id.*

¹⁰⁴ *Coleman*, 2005 R.I. Super. LEXIS 119, at *10, (quoting H.R. REP. NO. 103-180 (1993)).

Taking Congress's comments regarding the nonsubstantive nature of the 1994 revisions to the extent the *Coleman* court did is not logical. The revisions in the statute to categorize owners, lessors, and secured parties as distinct parties could very arguably be "for clarity" or to substitute "simple language . . . for awkward and obsolete terms" and not deemed a substantive change.¹⁰⁵ As will be discussed more thoroughly in the next part, interpreting the statute in this way is the most logical interpretation. The legislative history of the 1948 enactment uses terms like "lessor" and "secured party" interchangeably.¹⁰⁶ Notwithstanding Congress's varied employment of both terms, Congress's main focus was promoting the availability of aircraft for public travel.¹⁰⁷ Based upon Congress's interchangeable use of "owner," "lessor," and "secured party" and Congress's main focus on promoting public air travel, it is a logical conclusion that Congress's 1994 revisions simply clarify the distinctiveness of an owner, lessor, and secured party. Thus, protecting lessors does not threaten Congress's original intent, but merely clarifies and gives proper effect to such intent in the context of the current aviation finance market.

Although the *Coleman* decision is troubling, there is precedent on the issue of lessor protection under § 44112 that presents a more well-reasoned decision.¹⁰⁸ *Mangini*, which was discussed earlier with regard to its holding on preemption, also addressed

¹⁰⁵ See *id.*

¹⁰⁶ For examples, see *infra* Part III.A.

¹⁰⁷ See H.R. REP. NO. 80-2091 (1948), reprinted in 1948 U.S.C.C.A.N. 1836, 1836 ("The relief thus provided from potential unjust and discriminatory liability is necessary to encourage such persons to participate in the financing of aircraft purchases.").

¹⁰⁸ The distinction between the type of lessor covered by the statute began, possibly inadvertently, with the *Rogers* court, which has caused confusion in subsequent cases. *Rogers* stated that § 1404 "appears clearly and forthrightly to preempt any contrary state law which might subject holders of security interests to liability for injuries so incurred." *Rogers v. Ray Gardner Flying Serv., Inc.*, 435 F.2d 1389, 1394 (5th Cir. 1970) (emphasis added). An interpretation of this language to exclude owner and lessors is incorrect for three reasons. First, the defendant in *Rogers* was a secured party, and therefore the court was really only concerned with whether a secured party was protected. In fact, a plaintiff in a similar case argued that *Rogers* set a precedent that § 1404 is not available to owners. *McCord v. Dixie Aviation Corp.*, 450 F.2d 1129, 1130 (10th Cir. 1971). The court found "no merit in appellants' argument that Congress, failing to specially exempt owners and lessors, intended that they be absolutely liable for injuries sustained by passengers of leased aircraft." *Id.* Second, the *Rogers* holding regarding § 1404 was dicta. The court was using § 1404 as an example of a provision of the Federal Aviation Act that clearly preempts state law and made no

Congress's intent to cover lessors.¹⁰⁹ *Mangini* involved a lawsuit against an owner of "an aircraft that sustained a fuel leak or engine fire while in flight."¹¹⁰ The aircraft ignited upon landing, killing the passengers.¹¹¹ The plaintiffs brought suit under common-law negligence.¹¹² The defendant claimed a defense by way of § 44112.¹¹³

Mangini should serve as the most logical approach to discerning Congress's intention in enacting § 44112. The *Mangini* court rejected the plaintiffs' argument that lessors are distinguishable from secured parties and, consequently, are not entitled to protection under § 44112.¹¹⁴ The difference between the *Coleman* approach and the *Mangini* approach is simple. When the *Mangini* court reviewed the congressional reports stating that the recodification was for clarification purposes, to make "technical improvements" and to substitute "simple language . . . for awkward and obsolete terms," it found that Congress did, indeed, merely clarify the prior statute and was responding to the ambiguity of the former statute and confusion created by the conflicting *Rogers* and *McCord* cases.¹¹⁵ Accordingly, the *Mangini* court stated that "[i]n this sense, 49 U.S.C. § 44112 simply clarifies that the word 'owner' in 49 U.S.C. § 1404 was meant literally and was not confined to mean holders of security interests only."¹¹⁶

Taking the analysis a step further, the *Mangini* court reasoned that even if the inclusion and definition of "owner" in the recodified statute was a substantive change, such change is not impermissible.¹¹⁷ The *Coleman* court argued that it could not infer a substantive change if Congress did not intend a substantive

substantive decisions under § 1404. Lastly, *Rogers* was enacted before § 1404 was revised in 1994 and thus does not take any of the revisions into consideration.

¹⁰⁹ *Mangini v. Cessna Aircraft Co.*, Nos. X07CV044001467S & X07CV044003418S, 2005 WL 3624483, at *6 (Conn. Super. Ct. Dec. 7, 2005).

¹¹⁰ *Id.* at *1.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at *4–5 (holding that the inclusion of all three categories, owner, lessor, and secured party, in § 44112 "is a change too clearly apparent to disregard") (quoting *Sigal v. Wise*, 158 A. 891, 894 (Conn. 1932)).

¹¹⁵ *Id.* at *3.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at *4 ("The presumption against substantive change is overcome when there is a change too clearly apparent to disregard.") (quotation omitted).

change.¹¹⁸ The *Mangini* court pointed out, however, that the *Coleman* court failed to consider that a presumption against a substantive change is rebuttable if the alteration is clearly intended to express a change.¹¹⁹ The *Mangini* court held that while

[i]t is true that the congressional reports [that *Coleman* cites] . . . repeatedly remark that no substantive changes were intended . . . it is far more likely that Congress overstated this general purpose of recodification than Congress inadvertently inserted a precise and unequivocal definition of "owner" and specifically stated that the limitation on liability extended to such well-defined owners.¹²⁰

Thus, the *Mangini* court realized that even if Congress effected substantive changes in the 1994 recodification, such changes were appropriate due to how clearly Congress drafted and enacted them.

Following its analysis of the statutory language, legislative history, and prior case law, the *Mangini* court held that either (1) the addition of separate categories for owners and lessors was simply a clarification of the vague use of the terms in the predecessor statute and thus in accordance with taking Congress's "non substantive" purpose literally, or (2) it was a substantive addition, which is permissible if clearly stated, and thus it could be that Congress simply overstated the general purpose of the revisions.¹²¹

The analysis of case law addressing § 44112 demonstrates that courts struggle with both whether § 44112 preempts state-law tort claims and whom it protects. Conflicting precedent exists on both issues, and some courts, including the *Layug* court, continue to issue rulings based upon misinterpretations of § 44112.¹²² In order to preserve lawsuits by sympathetic plaintiffs in cases where § 44112's preemption would otherwise provide for dismissal, courts have found ambiguities in the current statute, as well as its legislative history, to argue against preemption, based on either no preemption of state-law claims or no

¹¹⁸ *Coleman v. Windham Aviation, Inc.*, No. K.C. 2004-0985, 2005 R.I. Super. LEXIS 119, at *16 (R.I. Super. Ct. July 18, 2005).

¹¹⁹ *Mangini*, 2005 WL 3624483, at *4-5 (quoting *United States v. Sischo*, 262 U.S. 165, 168-69 (1923) ("[A] codification . . . is not lightly to be read as making a change, although of course it may do so.")).

¹²⁰ *Id.* at *5.

¹²¹ *Id.*; see also text accompanying *supra* note 120.

¹²² See cases cited *supra* Part II.

protection for certain lessors. Clarification of the statute to effectively implement Congress's intent appears necessary. However, before addressing what clarifications the statute may need, it is necessary to thoroughly evaluate the language of the statute and Congress's stated intention in enacting § 44112. The next part provides a thorough and logical review of § 44112, including its predecessor statutes and legislative history, imparting compelling arguments that § 44112 both preempts state-law claims and protects lessors.

III. SECTION 44112 OF THE UNITED STATES CODE

Congress originally enacted a limitation on lessor and lender liability with respect to aviation incidents as part of the Civil Aeronautics Act.¹²³ This part examines the legislative history with respect to lessor and lender liability.

A. CONGRESS'S INTENTION TO PREEMPT STATE LAW

Congress promulgated the Civil Aeronautics Act in 1938 to transfer federal civil aviation responsibilities, which then rested with the Department of Commerce, to a newly formed Civil Aeronautics Authority in order "to centralize commercial and safety regulation of civil air travel."¹²⁴ The Civil Aeronautics Act did not address lessor liability until ten years later, in 1948, when Congress amended it to add § 504 in order to "limit[] the liability of certain persons not in possession of aircraft."¹²⁵ The provision read as follows:

No person having a security interest in, or security title to, any civil aircraft 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 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 so leased, for any injury to or death of persons, or dam-

¹²³ Civil Aeronautics Act of 1938, ch. 482, sec. 504, § 2455, 62 Stat. 470, 470 (1948).

¹²⁴ Douglas B. Harris, *Civil Aeronautics Act (1938)*, in MAJOR ACTS OF CONGRESS (2004), excerpt available at <http://www.encyclopedia.com/doc/1G2-3407400039.html>. The Civil Aeronautics Authority later became the Civil Aeronautics Administration, and in 1958, the Federal Aviation Agency (to become the Federal Aviation Administration) was created to take over its responsibilities. A Brief History of the Federal Aviation Administration, http://www.faa.gov/about/history/brief_history/ (last visited Oct. 5, 2009).

¹²⁵ Civil Aeronautics Act of 1938, ch. 482, sec. 401, § 504, 62 Stat. 470, 470 (1948).

age to or loss of property, on the surface of the earth (whether on land or water) caused by such aircraft, or by the ascent, descent, or flight of such aircraft or by the dropping or falling of an object therefrom, unless such aircraft is in the actual possession or control of such person at the time of such injury, death, damage, or loss.¹²⁶

The preemption called for in § 504 raises the question of what exactly Congress aimed to preempt. The only logical conclusion is that state-law claims are the only bodies of law that, absent preemption, would create potential liability for lessors and other financing parties. Therefore, if the preemption did not apply to state law, it would have no purpose. However, to the extent that this was in doubt, the legislative history unmistakably reveals Congress's intentions.

The House report demonstrates that Congress enacted § 504 to preempt provisions of "present Federal and State law [that] 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."¹²⁷ Particularly, the House report notes a concern regarding the Uniform Aeronautics Act, a statute that was adopted in ten states at the time that Congress enacted § 504.¹²⁸

The House report explains that the Uniform Aeronautics Act imposed absolute liability on an aircraft owner "whether such owner was negligent or not."¹²⁹ The report also notes Congress's concern that the statute was "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 as lessor under an equipment trust" and that if such an interpretation was adopted, owners not in possession or control of the aircraft "could become liable for extensive damages on the surface caused by the operation of the aircraft."¹³⁰ Thus, the purpose of the provision was to "remove this doubt by providing clearly that such persons have no liability under such circumstances."¹³¹ According to the report, "It is the conviction of

¹²⁶ *Id.*

¹²⁷ H.R. REP. NO. 80-2091 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1836, 1836.

¹²⁸ *Id.*

¹²⁹ *Id.*, *reprinted in* 1948 U.S.C.C.A.N. 1836, 1836-37.

¹³⁰ *Id.*, *reprinted in* 1948 U.S.C.C.A.N. 1836, 1837.

¹³¹ *Id.*, *reprinted in* 1948 U.S.C.C.A.N. 1836, 1836.

the committee that the bill should be passed to remove one of the obstacles to the financing of purchases of new aircraft.”¹³²

Between 1948 and 1958, the civil aviation industry underwent significant change with, among other changes, the introduction of jet airliners.¹³³ In response, Congress passed the Federal Aviation Act of 1958, creating the Federal Aviation Agency to take over the responsibilities of the Civil Aeronautics Administration.¹³⁴ Title V of the Federal Aviation Act retained the provisions of Title V of the Civil Aeronautics Act, including the limitation of liability previously existing under § 504. This section was codified at 49 U.S.C. § 1404. In 1959, Congress proposed an amendment to § 1404.¹³⁵

Concerned once again with the imposition of liability under state law and that such imposition would hinder the availability of aircraft, Congress amended the Federal Aviation Act.¹³⁶ Since the original enactment already protected aircraft financiers and lessors, Congress amended the provision so that the limitation of liability included an exemption for financiers and lessors of engines and propellers, as well as aircraft.¹³⁷ The House report again specifically points to the fear that claims may be brought under state law and unmistakably notes the intention to preempt such claims and, thus, expresses the same purpose as the original statute. The report notes that

since those interested in leasing or separately financing aircraft engines and propellers interpret the so-called absolute liability laws enacted by various states as applying to them, they are unwilling to enter into such arrangements unless the law is

¹³² *Id.*, reprinted in 1948 U.S.C.C.A.N. 1836, 1837.

¹³³ At this time, after World War II, the country became more affluent, raising the demand for travel. Additionally, “improved technology made air travel faster, safer, and cheaper.” John E. Robson, *Airline Deregulation: Twenty Years of Success and Counting*, REGULATION 18 (Spring 1998), available at <http://www.cato.org/pubs/regulation/regv21n2/airline2-98.pdf>.

¹³⁴ The Federal Aviation Act was originally codified at 49 U.S.C. app. § 1301. It was repealed in 1994 and recodified at 49 U.S.C. §§ 40101–49105. The broad authority it gives to the Federal Aviation Administration is found at 49 U.S.C. § 40101 (2000).

¹³⁵ See Federal Aviation Act of 1958, Pub. L. No. 86-81, § 504, 73 Stat. 180, 180–81 (1959) (detailing the subsequent amendment).

¹³⁶ See Federal Aviation Act of 1958, Pub. L. No. 86-81, §§ 503–04, 73 Stat. 180, 180–81 (1959) (stating that the purpose of the amendment is “to facilitate financing of certain aircraft engines and propellers”).

¹³⁷ *Id.*

amended to provide them the same protection now afforded holders of security interest in aircraft.¹³⁸

Accordingly, in response to the concern that engine financiers and lessors would no longer participate in the business, Congress included them in § 1404.¹³⁹

Congress's focus on ensuring that aircraft and engines were available by protecting their providers surely demonstrates an intent to preempt state-law claims against such providers. Congress's concern with the Uniform Aeronautics Act and other similar "absolute liability laws" was clearly its motivation for enacting the protection in the first place.¹⁴⁰ Congress wanted to make sure aircraft and engine lenders and lessors were not dissuaded from participating in the industry for fear of exposing themselves to costly liability.¹⁴¹ The only way to alleviate the fear imposed by state absolute-liability laws would be preemption. Thus, the only logical conclusion is that Congress intended § 1404 to preempt state-law claims.

B. CONGRESS'S INTENT TO INCLUDE LESSORS

Courts have struggled with Congress's intent with respect to two issues under § 44112: preemption of state law, as discussed above, and the extent of preemption for lessors, which is addressed in this Part. The *Layug* court did not address the issue of whether and to what extent lessors are covered under § 44112; however, this issue has arisen in recent case law, as discussed in Part II. As with the issue of preemption, the legislative history provides significant detail as to whether Congress intended that lessors should benefit from the protections of § 44112. In fact, the legislative history constantly discusses "lessors" as a category of financiers to be protected under § 44112. Unfortunately, the term "lessor" was, in 1948, and remains today, somewhat ambiguous, covering a wide range of roles that different financiers play in different financing structures. The terms and structure of a "lease" can vary significantly and such

¹³⁸ H.R. REP. NO. 86-445, at 2 (1959), *reprinted in* 1959 U.S.C.C.A.N. 1762, 1763. The section remained the same but for the addition of "aircraft engine or propeller" after each mention of "aircraft."

¹³⁹ Section 1404 was recodified in 1994 at 49 U.S.C. § 44112. *See infra* Part III.B (discussing this revision).

¹⁴⁰ *See supra* notes 123-25 and accompanying text (discussing limitation of liability).

¹⁴¹ *See supra* notes 123-25 and accompanying text (discussing limitation of liability).

variance can impact the ease with which one can apply preemption under § 44112. When the terms and conditions of a lease vary from those of a secured transaction, a more detailed analysis of the legislative history and the use of the term “lessor” is necessary, but the result remains that lessors should be entitled to the protection of preemption under § 44112. The courts that have tried to evaluate the preemption as applicable to lessors have failed to note the differentiations across the various transactions that can be characterized as “leases.” This part will work through the references to “lessor” in the legislative history, as well as the historical context of such references with respect to the aviation finance marketplace at the times such references were made to determine Congress’s intentions behind the use of “lessor.” This part also will address the broader intent of Congress to enhance the availability of aircraft in order to ascertain the extent to which Congress intended that the protections of § 44112 be extended to lessors to further this intent.

Prior to evaluating how Congress intended § 44112 to apply to lessors, it is important to review some of the different types of leases. First, one must distinguish a lease from a loan. In a loan, a purchaser desires to buy an aircraft but needs financing.¹⁴² Funds are advanced from a lender and repaid by the borrower with interest.¹⁴³ The borrower receives legal title to the aircraft and pledges the asset as collateral for the loan.¹⁴⁴ Therefore, the lender has a security interest in, or lien on, the aircraft. Consequently, this type of loan is a “secured transaction.”¹⁴⁵ In a lease, that same operator desires to acquire an aircraft, but it does not desire or perhaps does not have the capital to purchase the aircraft. Unlike a lender, a lessor purchases the aircraft, holds title to it, and leases it to the lessee.¹⁴⁶ The lessor is the “owner” of the aircraft. Thus, the essential difference between a lease and a secured transaction is ownership. However, this line can be easily blurred. For example, if the lease uses up the economic useful life of the goods, thus depriving the lessor of a

¹⁴² See generally Frederick E. Hines, *Legal Difficulties in Secured Airlines Equipment Financing*, 15 J. AIR L. & COM. 11 (1948).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See, e.g., U.C.C. § 9-109(a)(1) (classifying a secured transaction as any transaction “that creates a security interest in personal property or fixtures by contract”).

¹⁴⁶ See generally FIN. ACCOUNTING STANDARDS BD., STATEMENT OF FIN. ACCOUNTING STANDARDS NO. 13 (1976), available at <http://www.fasb.org/pdf/fas13.pdf>.

“meaningful economic stake” in the residual value of the aircraft at the time the lease expires, it is likely to be deemed a secured transaction and not a lease.¹⁴⁷ Though less common in aircraft transactions, leases that give the lessee a right or obligation to buy the equipment at the end of the term at a “bargain” price are often deemed loans because one could argue that the lessee undoubtedly will exercise its option and therefore should be viewed and treated as the owner.¹⁴⁸ Thus, the distinction between a secured transaction and a lease is not always clear or easy, particularly when a secured transaction is incorrectly documented by the parties as a lease.¹⁴⁹

One context where the distinction of a lease and a secured transaction is critical is the Uniform Commercial Code (UCC). If the financing is a secured transaction, it is governed by Article 9 of the UCC. If it is a “true lease” it is governed by Article 2A of the UCC.¹⁵⁰ As discussed, characterization as a secured transaction tends to revolve around ownership. For example, under a true lease, where the lessor is viewed as the owner of the aircraft, it is not necessary for the lessor to file a financing statement to preserve its ownership or priority in an aircraft.¹⁵¹ In a secured transaction, however, this filing is necessary to preserve the owner’s priority against bankruptcy trustees or other third parties.¹⁵² In fact, many lessors file precautionary financing statements to avoid becoming an unsecured creditor if the lease is recharacterized as a secured transaction.¹⁵³ Again demonstrating a focus on ownership, unlike secured transactions, a lessee in a true lease has the right, at the expiration of the lease, “to walk away from the transaction . . . without penalty, before be-

¹⁴⁷ Edward K. Gross, *Chapter 28: Middle Market Leasing and Syndication*, in 2 EQUIPMENT LEASING—LEVERAGED LEASING 28-6, 28-7 n.4 (Arnold G. Gough & Ian Shrank eds., Practising Law Institute, 4th ed. 1999).

¹⁴⁸ Michael Downey Rice, EQUIPMENT FINANCING, 1.8 Aspen Law and Business, New York (2001).

¹⁴⁹ Edward K. Gross & Robert W. Ihne, *ALI-ABA Leasing “Hot Topics”*, in The New Uniform Commercial Code 209, 221–23 (2007).

¹⁵⁰ It is important to note that characterization as secured party or lessor has many far-reaching consequences. It affects the secured party or lessor’s priority against other creditors, the remedies available upon the lessee’s default, including the ability to recover the aircraft, and the default payment provisions of the lease, to name a few. See generally *id.*

¹⁵¹ Richard F. Duncan et al., THE LAW AND PRACTICE OF SECURED TRANSACTIONS: WORKING WITH ARTICLE 9, § 1.04(5) (Law Journal Press 2004) (1987).

¹⁵² *Id.* § 1.04(2).

¹⁵³ See Gross & Ihne, *supra* note 149, at 215–16 (discussing such recharacterizations).

coming the owner, or before exhausting the economic useful life" of the aircraft.¹⁵⁴ This is because true lessors contemplate leasing their aircraft to a subsequent lessee.

As mentioned above, a transaction may be documented as a lease and later recharacterized as a secured transaction.¹⁵⁵ This occurs if the lease is terminable without compensation and has terms that include any of the following: (1) its term is equal to or greater than the economic life of the asset; (2) the lessee must renew the lease for the remaining economic life of the property or is required to take ownership of it; (3) there is an option to renew for the remaining economic life of the asset, but no additional or only nominal consideration need be paid to exercise that option; or (4) the lessee has an option to purchase the property for little or no additional consideration.¹⁵⁶ These factors reveal a structure where the lessee is taking on the role of the owner of the aircraft and is thus not a true lease.

Characterization of a transaction under the UCC is not as simple as true lease (Article 2A) and secured transaction (Article 9). Article 2A of the UCC also covers a specific subset of true leases called "finance leases."¹⁵⁷ The differences that cause a transaction to be characterized as a finance lease or a secured transaction are subtle and often confused.¹⁵⁸ Finance leases are much like secured transactions, except that they meet specific requirements that preserve the transaction as a lease. In a true lease, the lessor gives to the lessee possession and the right to use the goods for a fixed period of time in return for rent. Title to the property and a meaningful residual interest remain with the lessor. A "finance lease" is a true lease in which the lessor is not the fundamental supplier of the goods leased but leases goods to lessees as a means of financing their acquisition from the supplier. UCC Article 2A generally treats finance leases as

¹⁵⁴ Gross, *supra* note 147, at 28-13.

¹⁵⁵ See *supra* text accompanying notes 149-54.

¹⁵⁶ U.C.C. APP. D § 1-201(37) (1987).

¹⁵⁷ Further, given certain conditions, a non-true lease could also be characterized as a sale to which Article 2 of the UCC is applied. See, e.g., *Key Equip. Fin., Inc. v. Pioneer Transp., Ltd.*, 472 F. Supp. 2d 1131, 1138-39 (W.D. Wis. 2007) (discussing difference between finance leases and sales). For an analysis of the significance of this holding, see Gross & Ihne, *supra* note 149, at 215-16.

¹⁵⁸ EQUIPMENT FINANCING at 5.7. The similarity of function shared by finance leases and secured loans suggests that there will always be a certain difficulty in distinguishing the two, as elements of both types of instruments are alloyed to produce the right financial product for a particular situation.

true leases, but treats them differently from other true leases in some respects.¹⁵⁹

The distinction of a finance lease is important for other reasons, including tax and accounting purposes. Many airlines or other operators lease aircraft to keep the related assets and liabilities off their balance sheet.¹⁶⁰ In this context, a lease is distinguished as either an "operating lease" or a "capital lease."¹⁶¹ If a lease is an operating lease, the lease obligations are off the lessee's balance sheet and included in the footnotes.¹⁶² If a lease is a capital lease, it appears as a long-term debt.¹⁶³ Also, federal tax rules make distinctions between "tax leases" and "conditional sales leases."¹⁶⁴ If a lease is a tax lease, the lessee may treat the rental payment as a business expense or deduction. If the lease is a conditional sale, then only the interest component is deductible.¹⁶⁵ When the IRS made these distinctions in 1955, it caused the split between leases for security and true leases.¹⁶⁶ Originally, accounting rules for distinguishing between capital and operating leases, and tax rules for distinguishing between tax and conditional sales leases, seemed to coincide. However, tax guidelines are a culmination of "both objective and subjective characteristics, while accountants' criteria are fundamentally quantitative."¹⁶⁷

¹⁵⁹ Finance lessors are afforded certain financing party protections. For example, lessors receive the protection of absolute payment rights. *See, e.g.,* Gross & Ihne, *supra* note 149, at 219 (detailing "lessees' 'absolute and unconditional' obligation to make all payments"). Triggers causing default by the lessee are more limited for true leases. Treatment as a finance lease also permits the pass through of warranties and other rights directly to the lessee as against the supplier. Gross & Ihne, *supra* note 149, at 216. For a complete examination of other differences in treatment, *see generally* 2003 Amendments, *Uniform Commercial Code: Article 2A—Leases*, UNIFORM LAW COMMISSIONERS (Chicago, IL), available at http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-ucc2a2003.asp. (last visited Oct. 4, 2009).

¹⁶⁰ *See Airlines 101—A Primer for Dummies*, AIRLINE MONITOR, 22–23 (Nov. 1998), available at <http://libraryonline.erau.edu/online-full-text/books-online/Airlines101.pdf> (discussing leasing as a solution for airlines' capital needs).

¹⁶¹ EQUIPMENT FINANCING at 1.9. *See also* FIN. ACCOUNTING STANDARDS BD., *supra* note 146, at 7–9.

¹⁶² EQUIPMENT FINANCING at 1.9.

¹⁶³ *Id.*

¹⁶⁴ IRS Revenue Ruling 55-540 sets forth detailed guidelines for these categories to set forth who, lessor or lessee, gets the tax depreciation and various deductions. *Rev. Rul. 55-540*, 1955-2 C.B. 39.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 5.27. Further complicating the process of distinguishing a lease from a loan are certain hybrids like the synthetic lease. The synthetic lease is a popular

As is demonstrated by this brief survey, the distinctions between leases are variable. Seemingly simple nomenclature is not so simple. Consequently, when courts or Congress use terms like “lease for security” or a lease for the purposes of financing, it should not be taken too purposefully. Moreover, leasing has developed throughout the decades. In 1948, there was very little leasing of any kind, and, until the 1980s, operating leases (which today are a common finance tool and constitute a significant percentage of the aviation finance market) were almost non-existent.¹⁶⁸ Clearly, the term “lease” in 1948 had a much different meaning than it had when Congress revised the statute in 1994.

Given the variety in leasing structures, it is difficult to determine with certainty the historical context of a lease in 1948. Commentary at the time suggests that all leases were part of long-term financings.¹⁶⁹ In fact, it was around this time that commentators expressed concern that lease structures would continue to exacerbate the airlines’ credit problems because these structures derive their worth from the credit of the airline.¹⁷⁰ Despite the prevalence of secured loans, and although Congress likely was not fully aware of the many types of lessors, especially since operating leases did not yet exist, Congress was certainly cognizant of lessors as a separate category from secured lenders. For example, when expressing concern with absolute-liability laws adopted by certain states, the House report notes that “[p]rovisions 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”¹⁷¹ Later in the report, Congress expressed concern over liability laws and phrased it this way: “It is susceptible of a construction which would impose liability upon any person

“off-balance-sheet” structure. It provides a transaction that is off the balance sheet, but permits the obligor to retain the tax benefits. The methods are complicated and include carefully crafted purchase options, return provisions, and rental adjustment clauses. For a more detailed analysis, *see* EQUIPMENT FINANCING at 5.28.

¹⁶⁸ See discussion *infra* Part IV.A.

¹⁶⁹ See, e.g., Walter H. Wager, *Report on Air Transportation of Aviation Securities Committee of Investment Bankers Association of America*, 16 J. AIR L. & COM. 223, 234–35 (1949). See also Hines, *supra* note 142, at 11 (observing that “[b]etween 1936 and 1942, nine airlines entered into twelve arrangements for secured financing, nine involving chattel mortgages, one involving a lease-purchase agreement, and two involving equipment trusts”).

¹⁷⁰ See discussion *supra* Part IV.A.

¹⁷¹ H.R. REP. NO. 80-2091 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1836, 1836 (emphasis added).

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*" and "[t]his bill . . . assures the security owner *or lessee* [sic], that he would not be liable when he is not in possession or control of the aircraft."¹⁷² Congress revised the statute in 1959 to include lessors and lenders "to facilitate *the leasing* or separate financing of propellers and aircraft engines needed to modernize the Nation's civil aircraft fleet."¹⁷³ In the House report on such revision, it was noted that § 504 "recognizes the practical difficulties faced by sellers, *lessors*, or mortgagors of aircraft . . . in undertaking to avoid circumstances and events which might lead to liability suits from buyers, *lessees*, mortgagees, or third parties"¹⁷⁴

Similar to the lack of distinctions in the legislative history, courts have not specifically addressed the nuances between types of leases. A review of the case law in Part III reveals the courts' general tendency to consider a "lease" a lease, without any examination as to whether it is actually a secured transaction, let alone any analysis as to what type of lease it may be.¹⁷⁵ For example, the court in *Matei* referred to an "oral lease" that existed between the defendant lessor and a lessee and applied the preemption found in § 44112 to the defendant lessor because the lessee had agreed to maintain and repair the aircraft.¹⁷⁶ Though not specifically discussed in these terms, it appears that this was not a finance lease or secured transaction. This distinction, however, was not addressed. Rather, the court considered the transaction as a lease without any analysis as to whether the transaction was truly a lease or actually a secured transaction and focused on whether the lessor had possession or control of the aircraft.¹⁷⁷

Similarly, in the *Inlow* case, the court found a sublease between a parent company and its subsidiary sufficient to merit the protection of § 44112.¹⁷⁸ The plaintiff argued that the lease should not be considered under § 44112 because the sublease

¹⁷² *Id.*, reprinted in 1948 U.S.C.C.A.N. 1836, 1837 (emphasis added).

¹⁷³ H.R. REP. NO. 86-445, at 2 (1959), reprinted in 1959 U.S.C.C.A.N. 1762, 1763 (emphasis added).

¹⁷⁴ *Id.* at 8, reprinted in 1959 U.S.C.C.A.N. 1762, 1767 (emphasis added).

¹⁷⁵ See generally *supra* Part III.

¹⁷⁶ *Matei v. Cessna Aircraft Co.*, 35 F.3d 1142, 1145 (7th Cir. 1994).

¹⁷⁷ *Id.*

¹⁷⁸ *In re Lawrence W. Inlow Accident Litig.*, No. IP 99-0830-C H/G, 2001 WL 331625, at *14-15 (S.D. Ind. Feb. 7, 2001).

from the parent to the subsidiary was not necessary for the subsidiary to procure financing for the helicopter.¹⁷⁹ The court disregarded this point, stating,

As a lessor of civil aircraft, [the sublessor] falls squarely within the purview of § 44112. The application of the statute does not call for any inquiry into whether the lessor's role in financing a transaction was necessary, convenient, or anything else. The issues under the statute are simply whether there was a lease for more than 30 days and whether the lessor had actual possession or control of the aircraft.¹⁸⁰

As the *Mangini* and *Inlow* courts note, the best reading of § 44112 is that lessors are a separate category entitled to preemption.¹⁸¹ If one adopts this reasoning, then it is not necessary to address distinctions among leasing structures. However, the objections to lessors as a separate category raised by other courts should be addressed. In addressing such objections, the distinctions among leasing structures can be informative and help to narrow the potential objection.

The *Coleman* court asserts that Congress intended to protect only lessors acting as secured parties.¹⁸² Even granting validity to the *Coleman* court's assertion, it follows that lessors who act as secured parties should be entitled to preemption under § 44112. The *Coleman* court's analysis of the legislative history of § 44112 is based on the House report of 1948.¹⁸³ In 1948, the various leasing structures available in the current finance market did not exist. Logically, therefore, the *Coleman* court's assertion that only lessors acting as secured parties are covered must be evaluated and applied in the context of the variety of leasing

¹⁷⁹ *Id.* at *14.

¹⁸⁰ *Id.* The only court that deliberately examines the type of leasing transaction behind the facts is the *Coleman* court. See *Coleman v. Windham Aviation, Inc.*, No. K.C. 2004-0985, 2005 R.I. Super. LEXIS 119, at *14–16 (R.I. Super. Ct. July 18, 2005). *Coleman* took issue with whether the statute applied to true lessors as it did lessors acting only as secured parties (and, thus, not really lessors at all). *Id.* This question may have been more perplexing before the 1994 revisions, but as the *Mangini* court properly notes, such reasoning ignores the impact of the additional subsections Congress added in 1994 (addressed in the following paragraphs) which clearly define “three classes of exempt persons, . . . ‘lessor, owner, or secured party.’” *Mangini v. Cessna Aircraft Co.*, Nos. X07CV044001467S & X07CV044003418S, 2005 WL 3624483, at *3 (Conn. Super. Ct. Dec. 7, 2005). Therefore, such “conclusion defies common sense and renders the explicit words of Congress nugatory.” *Id.* at *5.

¹⁸¹ *Id.* at *4–5; *Inlow*, 2001 WL 331625, at *14.

¹⁸² *Coleman*, 2005 R.I. Super. LEXIS 119, at *16.

¹⁸³ See *supra* notes 80–83 and accompanying text.

structures now available. As discussed above, one of the more relevant categories of leasing structures is finance leases.¹⁸⁴ As noted, finance leases are nothing more than secured transactions.¹⁸⁵ A lessor under a finance lease is really just a secured party and consequently is, even under the restrictive reading of § 44112 espoused by the *Coleman* court, entitled to the protection of § 44112.

If it is clear that, even under *Coleman*'s restrictive interpretation of § 44112, finance lessors are entitled to preemption under § 44112, then the subsequent question is whether other lessors (in the aviation finance market, primarily "operating lessors") should also be entitled to such preemption. When one analyzes the legislative history of § 44112 and applies the logic and reasoning of Congress in 1948 to today's operating lease market, it is equally clear that operating lessors should be entitled to preemption.

There are two strong arguments for including operating lessors within the protections of § 44112. First, the legislative history of § 44112 and its predecessor statutes clearly demonstrates that protecting operating lessors is consistent with Congress's legislative intent.¹⁸⁶ Second, today's operating lessor acts as a financial party, facilitating the long-term availability of aircraft to operators (and through the operators, to the public). Operating lessors provide a significant portion of the current supply of commercial aircraft, and the typical operating lessor runs its business and manages its assets virtually identically to the way a finance lessor runs its business and manages its assets.¹⁸⁷ Given the prevalence of operating leasing in today's market and such similarities among lenders, finance lessors, and operating lessors, it is logical to conclude, whether based on the general arguments that Congress intended that lessors should be covered under § 44112 or based on the more restrictive arguments es-

¹⁸⁴ See *supra* notes 157–159 and accompanying text

¹⁸⁵ See *supra* note 159 (stating that finance leases and secured loans are difficult to distinguish). Again, note that the main structural difference within a finance lease is that the lessor is not the main supplier of the goods but rather is using the lease payments to finance its own purchase of the aircraft. In other words, the lessor is the borrower under a loan, or secured transaction, and is a lessor under a lease with the operator. For the operator, however, the arrangement is the same as if it were directly purchasing and financing the aircraft from the supplier with respect to terms and payments.

¹⁸⁶ See discussion *supra* Part III.A.

¹⁸⁷ This and other details on the organization and operation of leasing companies will be addressed in Part IV.

poused by courts such as *Coleman* that only lessors which are secured parties should be covered, that operating lessors deserve the same protections as finance lessors and therefore are protected under § 44112.

In 1994, Congress revised and restructured § 1404 as part of a reorganization of the Federal Aviation Administration.¹⁸⁸ Congress enacted the revised statute at a time when operating leases were on the rise, which makes an examination of this revision particularly helpful. The provision was recodified in 1994 as 49 U.S.C. § 44112, which provides:

(a) Definitions. In this section:

(1) “lessor” means a person leasing for at least 30 days a civil aircraft, aircraft engine, or propeller.

(2) “owner” means a person that owns a civil aircraft, aircraft engine, or propeller.

(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.

(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:

(1) the aircraft, engine, or propeller; or

(2) the flight of, or an object falling from, the aircraft, engine, or propeller.¹⁸⁹

The language of the provision is formatted differently than the original codification.¹⁹⁰ The revised format visibly breaks

¹⁸⁸ See A Brief History of the Federal Aviation Administration, http://www.faa.gov/about/history/brief_history/ (last visited Oct. 5, 2009) (detailing the restructuring).

¹⁸⁹ 49 U.S.C. § 44112 (2006).

¹⁹⁰ Compare this text with the original text of § 504 (*supra* Part III.A), as well as the text of § 1404, as follows:

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,

the provision into clearer and more manageable segments. Most noticeable is section (a), where Congress provides more concrete definitions of the parties intended to be included in the provision.¹⁹¹ It sets forth three clear, distinct roles: lessor, owner, and secured party.¹⁹² Section (b) then limits the liability of these individual parties for property damages and personal injuries to those lessors, owners, and secured parties that, like the original codification, are in “actual possession or control” of the aircraft or aircraft engine.¹⁹³

The most logical approach to these provisions is to conclude that by breaking these parties into three distinct categories and then separately defining those categories, Congress intended all three categories to be covered under the statute in their individual capacities. As discussed, some court interpretations of the original statute found that while lessors and owners were mentioned in the statute, they appeared to be covered only to the extent that they were owners or lessors for the purpose of financing.¹⁹⁴ Congress’s reorganization of the statute, however, clarifies that lessors and owners each are a distinct category, separate and apart from secured parties.

A proper analysis of the current § 44112 should conclude that lessors of all types are covered.¹⁹⁵ In enacting § 44112, Congress had the opportunity to exclude certain types of lessors and declined to do so. This may be the strongest evidence that Congress’s view of the purpose of § 44112 evolved with the aviation finance industry and that Congress decisively intended that all lessors are to be protected. Note that the definition of “lessor” remains simply any lessor in a lease with a term of at least thirty

or propeller, or by the ascent, descent, or flight of such aircraft, 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.

Federal Aviation Act of 1958, Pub. L. No. 86-81, § 504, 73 Stat. 180, 180 (1959).

¹⁹¹ 49 U.S.C. § 44112(a).

¹⁹² *Id.*

¹⁹³ 49 U.S.C. § 44112(b).

¹⁹⁴ See the discussion of *Coleman*, *supra* Part II.B.

¹⁹⁵ Recall that this was the logic in *Mangini*. See *Mangini v. Cessna Aircraft Co.*, Nos. X07CV044001467S & X07CV044003418S, 2005 WL 3624483, at *3, *5 (Conn. Super. Ct. Dec. 7, 2005) (holding that the § 44112 revision “simply clarifies that the word ‘owner’ . . . was meant literally and was not confined to mean holders of security interests only” and further that even if the change was substantive, “it is far more likely that Congress overstated this general purpose of recodification”).

days.¹⁹⁶ Additionally, Congress's revisions made "owners" a separate category, evidencing a desire for any owner (not just owners for security purposes, as that would be a "secured party") to be shielded from liability when not in control or possession of the aircraft.¹⁹⁷ Thus, it would make little sense for outright owners to be protected but owners leasing aircraft to be excluded. Congress's changes make sense only if they are read as written, addressing three distinct and entirely separate parties.

While it seems clear that Congress always intended to include lessors within the protection of § 44112, the significant presence of operating lessors in today's market and the crucial role they play in the overall availability of aircraft fit clearly within Congress's broader intent to support the availability of aircraft and provide another layer of arguments for including lessors within the protections of § 44112. Today, operating lessors provide almost one-third of the aircraft in the aviation finance market.¹⁹⁸ Since operating leases were not yet employed for aircraft when Congress amended the Civil Aeronautics Act to include § 504 to limit the liability of certain parties, Congress did not consider such leases; however, the development of operating leasing as a significant means of providing aircraft to operators dictates that Congress's broad intent in enacting § 44112 must be applied to the operating-lease market as it exists today. As will be discussed in more detail in the next part, operating lessors do not act in a manner that is materially different from how finance lessors or lenders act.¹⁹⁹ Moreover, despite the various distinctions found under tax, accounting, and UCC regimes, all leases serve the same overall purpose for the lessee—a means to obtain an aircraft it cannot afford (or otherwise does not want) to purchase. Congress's broader intent in enacting a limitation on liability was to facilitate the availability of capital for financing aircraft, and this broad intent far outweighs nuanced distinctions among various types of leases. Thus, any lease that provides for the long-term availability of an aircraft should be protected.

The next part will outline the development of leases as related to the aviation finance market. This analysis will clearly demonstrate that Congress's interchangeable use of "lessor" and "se-

¹⁹⁶ 49 U.S.C. § 44112(a).

¹⁹⁷ See 49 U.S.C. § 44112.

¹⁹⁸ Christopher Hinton, *Airline Turmoil Opens Doors to Aircraft Lessors*, MARKETWATCH, May 6, 2008, <http://www.marketwatch.com/story/aircraft-lessors-eye-opportunity-in-airline-woes>.

¹⁹⁹ See *infra* Part IV.B.

cured party" reflected the manner in which aircraft finance transactions were structured at that time—where leases were finance leases and more similar, if not identical, to secured loans. It will also explain the relatively late development of the operating lease and thus reveal that the 1994 amendment was likely a consequence of this development and subsequent change in the structure of certain transactions in order to provide protection for this emerging new finance party.

IV. AIRCRAFT LEASE TRANSACTIONS

In order to provide relevant information on the role of lessors in today's aviation finance market, it is helpful to illustrate the role of lessors and the levels of control they can hold over aircraft. This part will describe the development of the current aircraft lease market, identify the different types of leasing companies, and explain their organizational and leasing structures. As will become clear, the typical lessor functions no differently than a lender and is in no better position to exercise control over an aircraft it owns and leases than a lender who has financed an aircraft.

A. THE DEVELOPMENT OF LEASES

The commercial aviation market developed significantly following World War II.²⁰⁰ After the war, airlines were heavily regulated by the federal government.²⁰¹ Federal regulation ended when Congress passed the Airline Deregulation Act in 1978, which made it easier for new airlines to enter the market and establish diverse business approaches.²⁰² Since deregulation, the number of airlines in operation and the number of passengers has increased considerably.²⁰³ Historically, airlines have not been very profitable and, in order to run their businesses, have regularly incurred major expenses with regard to purchasing aircraft, engines, maintenance, and fuel.²⁰⁴ Because deregulation subjected the airlines to market forces, airlines had to find new ways to finance their fleets in a manner flexible

²⁰⁰ Robson, *supra* note 133, at 18. See also *Airlines 101—A Primer for Dummies*, *supra* note 160, at 1.

²⁰¹ Robson, *supra* note 133, at 17–18.

²⁰² *Id.* at 17, 19–20.

²⁰³ *Id.* at 17–18, 20.

²⁰⁴ *Airlines 101—A Primer for Dummies*, *supra* note 160, at 22. From 1963 to 1998, "the net profit margin for the world's airlines was 0.3%." *Id.*

enough to endure the financial fluctuations caused by the market's cyclical nature.²⁰⁵

Fleet flexibility can be obtained and capital commitment can be lowered through a lease. When airlines cannot generate enough cash flow to support spending, spending has to be reduced. Airlines, in fact, reduced their spending in the early 1990s.²⁰⁶ Consequently, a new financing tool emerged that minimized the emphasis on the credit of the airline: the operating lease. In terms of aircraft, the operating lease did not exist until the mid 1980s.²⁰⁷ Operating leases are attractive because they provide airlines more fleet flexibility, decrease their capital expenditures, and reduce their exposure to an aircraft's residual value risk.²⁰⁸ Operating leases also make it possible for airlines to continuously update their fleets by acquiring newer aircraft models at significantly lower costs.²⁰⁹ Accordingly, operating leases have become increasingly important to the commercial aviation market.

According to a recent article, "[t]he proportion of the global fleet under operating lease has increased from 17 per cent in 1990 to 30 per cent in 2006."²¹⁰ Today, that number remains at about one-third of all aircraft.²¹¹ Notwithstanding the current market conditions characterized by record-high oil prices, a declining housing market, and the tightening of credit, the de-

²⁰⁵ See Hinton, *supra* note 198 (discussing the benefits of leasing for airlines in such a market).

²⁰⁶ *Airlines 101—A Primer for Dummies*, *supra* note 160, at 23.

²⁰⁷ *Id.*

²⁰⁸ Aircastle Ltd., Annual Report (Form 10-K), at 5 (Feb. 28, 2008), *available at* <http://quote.morningstar.com/stock-filing/Annual-Report/2007/12/31/t.aspx?t=AYR&ft=10-K&d=1699a96098d4f527>.

²⁰⁹ Hinton, *supra* note 198.

²¹⁰ *Lessors Riding out the Storm*, *supra* note 40, at 44. See also Alasdair Whyte, *What a Difference 10 Years Makes*, AIRCRAFT ECONOMICS, No. 62 (Mar.-Apr. 2002), at 10.

²¹¹ Hinton, *supra* note 198. See also Hugh Tomlinson, *Leasing Market Takes Off*, MEED MIDDLE EAST ECONOMIC DIGEST, July 11, 2008 ("[A]s the rising cost of fuel deters airlines from buying new planes and makes older, less fuel-efficient aircraft too expensive to operate, leasing firms are enjoying a boom."). This demand will "be driven by emerging economies in China and India" and the fact that supply is limited with few aircraft available from Airbus and Boeing. *Aircraft Leasing Firm Sees Strong Demand to 2008*, REUTERS, June 8, 2007, *available at* <http://www.reuters.com/article/companyNewsAndPR/idUSN0835917720070608>.

mand for aircraft remains strong.²¹² In fact, "the number of leased aircraft is expected to rise . . . to 40% by 2013" ²¹³

While the operating lease market has greatly expanded over the past fifteen years, leasing companies have developed, grown, and changed in correspondingly significant ways. The aviation finance marketplace has responded to the massive growth and demand for lease financing by creating today's leasing company. An analysis of a typical leasing company in today's market demonstrates that the leasing company supplies a significant number of aircraft to the market but remains a small organization.²¹⁴ Thus, on an asset allocation basis, most of the leasing company's assets are dedicated to acquiring, marketing, and remarketing its aircraft, and a relatively small portion of the company's assets are dedicated to activities that would be considered elements of such company's possession or control of its aircraft, such as technical support or repair and maintenance of aircraft.²¹⁵ In short, today's lessors do not operate, maintain, or otherwise possess or control their aircraft. Indeed, lessors function as financiers providing financial support to airlines in the form of an available supply of aircraft.

B. TYPES OF LEASING COMPANIES AND LESSOR CONTROL OVER THEIR AIRCRAFT²¹⁶

Aircraft leasing has become a market in which substantial financial opportunities exist. With so much economic opportunity existing in the marketplace, many financial institutions entered the market with hopes of generating income. Consequently, aircraft lessors exist as a variety of corporate entities such as commercial banks, hedge funds, and corporations.

Essentially, there are three different categories of aircraft lessors. First, many lessors, such as GE Capital Aviation Services

²¹² See, e.g., *Dealwatch*, AIRFINANCE JOURNAL Vol. 312, July/Aug. 2008 (giving statistics that 37 aircraft were acquired in just the months of April, May, and June of 2008).

²¹³ Hinton, *supra* note 198.

²¹⁴ See *Aircastle Ltd.*, *supra* note 208, at 9 (noting that the business is "capital intensive, rather than . . . labor intensive").

²¹⁵ See *id.* at 43 (noting that "the lessee is generally responsible for maintaining the aircraft and paying operational and insurance costs").

²¹⁶ Note that certain information provided in this part, including technical data and certain policies, has been provided by interviews with various leasing company executives who have asked that such information remain confidential. To the extent such information is publicly available, it has been cited accordingly.

(GECAS), International Lease Finance Corporation (ILFC), and BOC Aviation, are the creation of strong corporate parents or sovereign wealth funds.²¹⁷ Second, aircraft lessors such as Aer-Cap, AirCastle, Genesis Lease Limited, and Babcock & Brown Limited are publicly owned and traded independent companies. Third, privately-owned lessors also exist in the market.

No matter the size of the lessor, lessors have certain common and consistent features, all of which evidence entities that function as passive financiers, not as “hands-on” lessors who exert control over their aircraft or the operations thereof. All lessors are staffed in a manner that allows them to properly manage financial assets but are without sufficient technical staffs to actively manage the maintenance and operation of their aircraft. Moreover, while all lessors have standard leases that are understandably asset-focused, containing robust provisions regarding the standards to which the operator must maintain, repair, and operate the aircraft, lessors only monitor their lessees’ performance of their obligations. A careful reading of the various lease provisions indeed indicates that such provisions give the lessors only rights of observation, not of performance.²¹⁸ Furthermore, lessors readily confirm that their technical staffs are not sufficient, in either size or training, to do more than monitor their lessees’ performance.²¹⁹

Currently, GECAS and ILFC are the two largest lessors of commercial aircraft.²²⁰ GECAS owns and manages over 1,800 commercial aircraft,²²¹ and ILFC owns nearly 1,000 commercial aircraft.²²² Mid-sized aircraft lessors follow the capital-intensive structures of GECAS and ILFC. Aircastle Limited and Genesis Lease Limited are two mid-sized aircraft lessors that exemplify the capital-intensive model. Aircastle Limited has 133 aircraft

²¹⁷ ILFC is owned by American International Group, Inc. (AIG), and Bank of China (BOC) acquired Singapore Aircraft Leasing Enterprise (SALE) in 2006. *Bank of China Acquires Singapore Aircraft Leasing Enterprise*, BANK OF CHINA, Dec. 15, 2006, http://www.bankofchina.com/en/bocinfo/bi1/200810/t20081027_8134.html?keywords=bank+of+china+acquires+singapore+aircraft.

²¹⁸ Vedder Price represents various entities in the aviation finance market place. This statement is based on our review of the leases used by our clients.

²¹⁹ See, e.g., Aircastle Ltd., *supra* note 208, at 9 (“We operate in a capital intensive, rather than a labor intensive, business.”).

²²⁰ Hinton, *supra* note 198.

²²¹ GE Capital Aviation Services, <http://www.gecas.com> (last visited Oct. 6, 2009).

²²² Introduction, International Lease Finance Corporation, <http://www.ilfc.com/introduction.htm> (last visited Oct. 6, 2009).

leased to 58 lessees in 31 countries.²²³ However, Aircastle's staff consists of only 69 employees.²²⁴ Similarly, Genesis Lease Limited has 53 aircraft leased to 34 lessees in 17 countries.²²⁵ Genesis also is slimly staffed with only 20 employees.²²⁶ Clearly if large and mid-sized leasing companies employ limited technical staffs, private leasing companies' staffs are even smaller. One private lessor reports only 20 staff members, 3 of which are considered technical personnel.²²⁷

In the case of all sizes of lessors, their technical staffs are a small portion of their overall staffs, and the lessors' full staffs are small relative to the number of aircraft they own. No matter the type or size of the lessor, staffs of such a small number undoubtedly are not intended to repair and maintain aircraft.²²⁸ Rather, the staffing levels reflect what is appropriate for leasing companies who are not aircraft operators and who practice a business model where aircraft are continuously leased and rarely sit in the lessor's actual possession.²²⁹ This not only maximizes a leasing company's profits, but also minimizes the operator's capital costs. When maintenance is needed on an aircraft that is in the lessor's possession, the maintenance work is almost always contracted out to other organizations.²³⁰ However, this is a rare occurrence and usually exists when the lessee did not satisfy the lease return provisions. Again, given the limited size of these lessors' staff versus the number of aircraft owned and volume of business generated, it is clear that they exist to manage the com-

²²³ Aircastle Ltd., *supra* note 208, at 42.

²²⁴ *Id.* at 9.

²²⁵ Genesis Lease Ltd., Annual Report (Form 10-K), at Introduction (Mar. 10, 2008), *available at* <http://quote.morningstar.com/stock-filing/Annual-Report/2007/12/31/t.aspx?t=GLS&ft=&d=cc68879058232967>.

²²⁶ *Id.*

²²⁷ This company also reports that they do not manage their leased aircraft any differently than their mortgaged aircraft.

²²⁸ As will be discussed in more detail later in this part, certain lessors rely fully on their lessees to properly maintain and operate their aircraft during the terms of their leases and their technical staffs are used only for deliveries, returns, and lease defaults. Moreover, even the lessors that take some interest in how their lessees are maintaining and operating their aircraft during the lease terms do so on a very limited and only observational basis.

²²⁹ Even when lessors take possession of aircraft, they store the aircraft with third party storage facilities and the only maintenance is storage upkeep, which is minimal and provided by the storage facility.

²³⁰ This is based on Vedder Price's discussions with clients and other leasing companies.

pany's financial interest in its leased aircraft, not to operate, maintain, possess, or control such aircraft.²³¹

In addition to understanding how leasing companies are structured, it is important to clarify various provisions in a typical lease that can also be the cause of misconceptions as to a lessor's ability to exert control over its aircraft. In an aircraft lease, there are provisions that, if read in isolation or without considering the structure of the lessor, appear to give a lessor significant control over its leased aircraft. However, when these provisions are read carefully, and in the context of the structure of today's lessor, they do not impart possession or control to a typical lessor.

As an example of such a provision, leases generally contain provisions stating that the lessee may be required to return the aircraft or that the aircraft could be repossessed in the occurrence of an event of default as defined by the lease.²³² This right of possession only triggers upon default and does not give the lessor any control over the aircraft in any other circumstances. Moreover, these rights to repossession as articulated in the lease put the lessor in the strongest position possible to repossess the aircraft, but may be of little practical value. A lessor may have difficulty repossessing an aircraft if the lessee does not cooperate. In this event, a lessor will need a court order, which can take some time to obtain. Furthermore, in many jurisdictions, courts may be unable (e.g., because of bankruptcy laws) or unwilling (because of a desire to give the airline business breathing space to survive) to act quickly to order the return of an aircraft to an operating lessor even when the airline is in clear breach of its obligations. In these respects, lessors are in exactly the same position as lenders.

Other provisions that may cause confusion, and which did so in the *Layug* case, are various powers of attorney.²³³ Since a lessor retains an insurable interest in the aircraft, mandatory insurance provisions for the benefit of the lessor, including power of attorney privileges, are common in leases and in financing arrangements.²³⁴ In the *Layug* decision, the court misinterpreted the power of attorney clause to mean that the lessor retained control over the aircraft.²³⁵ This interpretation was incorrect,

²³¹ See *supra* note 216.

²³² See *supra* note 218.

²³³ See *supra* note 31.

²³⁴ See *supra* note 218.

²³⁵ See *supra* note 31 (detailing the lease provision in question).

and these provisions do not provide lessors enough control over the aircraft to preclude them from claiming protection under § 44112.

Also common are deregistration powers of attorney pursuant to which a lessee gives a lessor the power to execute documents in the name of the lessee in order to deregister an aircraft from the relevant country's aircraft registry.²³⁶ The lessor can use such a power of attorney only when a lessor must repossess and export an aircraft due to a lessee's default under the lease.²³⁷ A deregistration power of attorney does not evidence a lessor's control over the aircraft during the lease term, but simply permits a lessor to take the necessary action to properly protect its position by repossessing its aircraft upon default.²³⁸ Moreover, a deregistration power of attorney is limited by the laws of the country in which the aircraft is registered. Certain countries have legal systems that do not provide for the concept of self-help remedies and may not honor deregistration powers of attorney.²³⁹

Maintenance provisions can also give the illusion of control. In fact, no other provision in a lease relates more directly to the possession and control of an aircraft than the provisions that govern how an aircraft is to be maintained and operated.²⁴⁰ In both the typical long-term aircraft finance lease and operating lease, it is clear that the responsibility for maintenance and the condition of the aircraft shifts to the lessee. Lessors have inspection rights that are generally extremely limited such that the lessors cannot interfere with the lessees' maintenance activities. Certain lessors will not even exercise their inspection rights during the lease terms, choosing instead to rely fully on the lessees (and the local aviation authorities' supervision) to properly maintain their aircraft. Furthermore, even the lessors that inspect will usually do so only when the aircraft is undergoing heavy maintenance, which only happens approximately once

²³⁶ Julian Reddyhough, *Asset Finance*, May 20, 2003, <http://www.securitization.net/international/article.asp?id=485&aid=2688>.

²³⁷ *Id.*

²³⁸ See, e.g., UNIDROIT, *PROTOCOL TO THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT*, (2001), <http://www.unidroit.org/english/conventions/mobile-equipment/aircraftprotocol.pdf> (including form of deregistration power of attorney as annex).

²³⁹ See *id.* (addressing "[d]efault remedies, priorities and assignments" in Chapter II).

²⁴⁰ See *supra* note 218.

every fifteen months.²⁴¹ These lessors readily confirm that their inspection rights cannot interfere with the lessees' ongoing maintenance and have no expectations of influencing the lessees' planned maintenance. The lessees' maintenance is dictated by their maintenance programs, which are approved by the local aviation authorities. As long as the lessees are in compliance with the maintenance programs, the lessors have no rights or ability to change anything the lessees are, or are not, doing.

Lessors' rights go beyond inspection, to approval, only in specific circumstances where lessors have more invested in the condition of the aircraft. The lessor relies on the condition of the aircraft because it typically plans on leasing its aircraft to another operator when the term of the lease expires. Maintenance provisions requiring that lessors approve maintenance workscopes and pay for a portion of the cost of such maintenance, typically based on amounts previously paid by the lessee to the lessor (referred to as "maintenance reserves" or "supplemental maintenance rent"), are not intended to put the lessor in control of the aircraft's maintenance, but simply to ensure that adequate funds will be available to pay for specified maintenance procedures that the lessee is obligated to perform.²⁴² In discussing maintenance provisions, lessors regularly maintain that the purpose of the approval rights is merely to ensure that the work being performed is eligible for reimbursement and that lessors rarely suggest changes to the workscope.²⁴³ As noted above, the lessors readily acknowledge that they have no ability to suggest such changes, or to otherwise influence the lessees' maintenance, as long as the lessees are in compliance with their maintenance programs.²⁴⁴ Consequently, the approval process merely means that the lessors are verifying that the workscopes are consistent with, and satisfy the requirements of, the maintenance programs and the local aviation authorities' requirements.

²⁴¹ *Airlines 101—A Primer for Dummies*, *supra* note 160, at 29. These inspections are known as "C checks," while heavy maintenance inspections, also called "D checks," occur every six to eight years. *Id.*

²⁴² STANDARD & POOR'S STRUCTURED FINANCE, AIRCRAFT SECURITIZATION CRITERIA, 65–66, New York (1999), *available at* http://www2.standardandpoors.com/spf/pdf/fixedincome/Criteria_Book_10.pdf.

²⁴³ *See supra* note 216.

²⁴⁴ *See supra* Part IV.B.

When analyzing whether certain provisions in a lease, such as powers of attorney or provisions relating to maintenance or inspection, give a lessor any rights that could effectively give the lessor possession or control of an aircraft, it is instructive to consider that virtually all leases have "quiet enjoyment" provisions.²⁴⁵ This provision provides that, so long as the lessee is not in default, the lessor cannot in any way interfere with the lessee's operation of the aircraft. Given such a restriction on the lessor, it is difficult to see how a lessor could affect any element of possession or control over the aircraft.

Understanding the development of leases, the types of lessors, and their structures demonstrates how little control lessors have over their own aircraft. It is important to note that the little amount of control is not because, as the press after the *Layug* case suggested, lessors have no concern for the aircraft, but because those responsibilities are given to the operator when the aircraft is on lease.²⁴⁶ Thus, it is clear that Congress intended that lessors be shielded from liability. Congress's desire is to facilitate financing of aircraft so that they are available in the marketplace and to protect parties not in control of an aircraft from liability.²⁴⁷ To honor Congress's intent, the initial guideline must be that all lessors are protected by § 44112 for the two main reasons we have touched upon in this section. First, lessors are financiers. This is true even in the event of an operating lessor because the lessor is affording an airline or other lessee the opportunity to acquire an aircraft for the time that it needs it. Second, lessors do not participate in the maintenance or operation of their aircraft and thus have no control over their aircraft. Lease provisions that appear to be an exercise of control, when more closely read, generally are not. To the extent that there is a question as to whether a lessor's role in a transaction could create circumstances where a lessor should face liability, the statute already requires that in order for a lessor to be protected, the lessor must have no control over the aircraft. Thus, the exceptional lessors that do exercise control over an aircraft would be excluded from protection. The important

²⁴⁵ See *supra* note 218.

²⁴⁶ See *supra* Part I.B (detailing press releases by the *Layug* plaintiffs' attorneys). Likewise, lessors should not bear the burden of regulating aircraft on lease to various lessees in various countries. The industry already has sufficient oversight in the form of aviation authorities whose responsibility is not complicated by commercial considerations.

²⁴⁷ See *supra* Part III.

point to realize is that those exceptions can be found only by a court's independent analysis on the "possession or control" element—something that has been missing from the courts' holdings.

C. ANALYZING THE ELEMENT OF "ACTUAL POSSESSION OR CONTROL"

In addition to confusion over preemption and whether certain types of lessors or owners are covered under § 44112, relevant case law also demonstrates that courts are unwilling, or unable, to evaluate the element of "actual possession or control" of an aircraft by a party. In reviewing the § 44112 case law, there seems to be subtext indicating many courts are uncomfortable with the potentially broad scope of the preemption, which has caused such courts to seek exceptions and exclusions.²⁴⁸ It is hard to imagine that Congress was not concerned with creating an overbroad exemption. Thus, the logical question is what did Congress do to provide an appropriate scope for preemption. The answer is that Congress did limit the scope of preemption by providing that the preemption applies only where the party seeking protection did not have "actual possession or control."²⁴⁹ Consequently, once a defendant asserts § 44112 as protection from liability and is deemed an owner, lessor, or secured party, the next step should be to evaluate that party's level of possession or control over the aircraft. It is at this second step that lessors or owners may be excluded from protection, depending on their role in the transaction. If applied properly, the analysis of "possession or control" should create appropriate limits to the protections under § 44112.

In order to evaluate the issue of possession and control, it is important to understand the varying levels of control lessors and owners have in different transactions. Distinguishing between secured parties, owners, and lessors without an evaluation as to such party's level of control over an aircraft misses the clear meaning, as well as the intent, of § 44112. Like secured parties, some lessors simply retain a contractual right to repossess an aircraft in the event of a default of the operator's obligations under the lease, with no other amount of possession or control over the aircraft. The same applies to true lessors, who, though they hold title and get the aircraft back at the end of the lease

²⁴⁸ See *supra* Part II.A.

²⁴⁹ See 49 U.S.C. § 44112(b) (2006).

term, maintain no control over the aircraft during the term of the lease and rarely, if ever, see the aircraft from the day it is delivered to the day it is returned.²⁵⁰ Other lessors have express contractual rights giving them more control over their aircraft.²⁵¹ This type of “hands-on” lessor may have an element of control over the aircraft and perhaps should be excluded from protection under the statute.

It is hard to argue that a lessor should be excluded from the protection of § 44112 simply because it gets its aircraft back at the end of the lease or because the lease provides appropriate protections in the event that the lessee is not performing the lessee’s obligations under the lease. Whether a defendant is covered by the statute should not be based on a classification of that defendant as a secured party versus an owner or lessor when § 44112 is meant to protect all three categories and Congress has provided an express standard for determining liability based on possession or control.²⁵² Unfortunately, courts are not understanding or applying “possession or control” in their decisions.

It is interesting to review the cases with regard to possession and control to determine what courts are missing. For example, the defendant in *Retzler*, AMR, was a corporate affiliate of the operator;²⁵³ thus, it could be argued that the defendant ultimately controlled the aircraft through corporate interrelationships. However, the *Retzler* court never considered the issue of control.

Similarly, in *Inlow*, the aircraft was operated by a sublessee, Consec, Inc.²⁵⁴ Consec Investment Holding Company (CIHC), which owned Consec, Inc., was the sublessor and was leasing the aircraft from General Electric Capital Corporation for financing purposes.²⁵⁵ The *Inlow* court held that because the

²⁵⁰ See STANDARD & POOR’S STRUCTURED FINANCE, *supra* note 242, at 65–66 (“Most operating leases provide that the lessee is liable for all maintenance costs which may arise. In the event that an aircraft is forcibly repossessed following for example a rental payment default by the airline, the aircraft may require some outstanding maintenance work before it is in a condition to be re-leased or sold to another airline.”).

²⁵¹ See *Mangini v. Cessna Aircraft Co.*, Nos. X07CV044001467S & X07CV044003418S, 2005 WL 3624483, at *1 (Conn. Super. Ct. Dec. 7, 2005).

²⁵² See 49 U.S.C. § 44112.

²⁵³ *Retzler v. Pratt & Whitney Co.*, 723 N.E.2d 345, 349 (Ill. App. Ct. 1999).

²⁵⁴ *In re Lawrence W. Inlow Accident Litig.*, No. IP 99-0830-C H/G, 2001 WL 331625, at *1 (S.D. Ind. Feb. 7, 2001).

²⁵⁵ *Id.* at *1, *8.

aircraft was subject to a lease of more than thirty days, CIHC was a lessor and thus, could not be held liable under § 44112.²⁵⁶ However, the lease from CIHC to Consecro, Inc. was seemingly for tax purposes²⁵⁷ and thus, again, it could be argued that CIHC had control over the aircraft. Yet again, the court did not analyze true ownership structure and the amount of control held by the lessor.

It is clear based on these decisions that courts need guidance on how to apply facts when addressing whether a particular aircraft financier is “in possession or control.” There are complex issues relating to exempting lessors from protection under § 44112 based on differentiating between different types of owners and lessors and on fully understanding lease transactions. A history of leasing, as well as a better general understanding of leasing transactions, is necessary for courts to correctly evaluate the cases.

With lawsuits continuing, it is important to address the issues highlighted by the *Layug* case and related case law. To do this and to put the issues this article has analyzed into perspective, it is necessary to have a general understanding of the industry and how modern transactions are structured. The next part describes leasing in the context of today’s aviation-finance market in order to provide a basis for clarifying § 44112 to alleviate the current divergent and troubling case law, as well as honoring Congress’s initial intent in enacting § 44112.

V. ADDRESSING THE ISSUES

The large and unexpected settlement in *Layug* has left the aviation-finance industry (in particular, lessors) in fear of further litigation resulting from the operation of aircraft completely out of their control. This fear could potentially lead to an unwillingness of both financiers and insurers to continue to participate in the market. While there does exist some well-reasoned case law on point, preemption of state-law claims is not clear precedent. Thus, it is imperative that the statute be revised to more clearly convey its purpose to preempt claims available under state law.

Additionally, the analysis of the case law also demonstrates further confusion on the separate issue of whom § 44112 is meant to protect. Despite the plain language of the statute and

²⁵⁶ *Id.* at *14, *18.

²⁵⁷ *See id.* at *7 (discussing “state tax benefits” associated with “holding certain intangible assets in Delaware”).

the documented inclusion of lessors contained in the legislative history, courts have erroneously held that lessors in certain, but not clearly defined, transactions are not protected. This flaw can lead to the same potential result—the unwillingness of lessors to participate in the market for fear of being subjected to inordinate amounts of financial liability for aircraft that the lessor does not control or possess. A survey of the different types of leases and lessors demonstrates that leasing transactions are more complicated than courts seem to appreciate and also that lessors generally have very little control over an aircraft.²⁵⁸ Based on a careful examination of today's leasing companies and the provisions in a typical lease, it is clear that lessors should be included in the protection of § 44112. Clarifying that lessors are covered under § 44112 will further Congress's intent in shielding lessors from liability without unfairly protecting lessors that have possession or control over their aircraft. Accordingly, the statute also must be revised to more definitively include all lessors in the absence of possession or control.

In order to preserve lawsuits by sympathetic plaintiffs in cases where § 44112's preemption otherwise would provide for dismissal, courts have found ambiguities in the current statute, as well as its legislative history, to argue against preemption, based on either no preemption of state-law claims or no protection for certain lessors. A thorough and logical review of § 44112, including its predecessor statutes and the legislative history, provides compelling arguments that § 44112 both preempts state-law claims and protects lessors. The logical conclusion to such analysis, therefore, is to amend § 44112 to eliminate the ambiguities that have allowed courts to issue contrary rulings.

A. REVISING THE STATUTE

The confusion and inconsistent precedent that exists with respect to the issues discussed throughout this article should be addressed by an amendment to § 44112. An appropriate amendment would alleviate lessors' and owners' fears of being subjected to liability for an aircraft on lease and out of their possession and control. Otherwise, the original intent of the statute, to facilitate the availability of aircraft,²⁵⁹ will be in jeopardy. As in the case of the first revision to the statute that in-

²⁵⁸ See *supra* Part IV.B.

²⁵⁹ See H.R. REP. NO. 80-2091 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1836, 1836 and text accompanying *supra* note 107.

cluded engine lessors to alleviate their fear of liability,²⁶⁰ it is time for another revision to clearly set forth the elements of the statute, the parties within its purview, and its intention to preempt state law. Thus, this article proposes revising the statute as follows:

§ 44112. Limitation of liability

(a) Definitions. In this section:

(1) “actual possession” means that the aircraft, engine, or propeller is in the physical custody of the lessor, owner, or secured party at the time of the incident.

(2) “control” means that the lessor, owner, or secured party has responsibility for initiating and conducting or terminating a flight.

(3) “lessor” means a person leasing for at least 30 days a civil aircraft, aircraft engine, or propeller.

(4) “owner” means a person who owns a civil aircraft, aircraft engine, or propeller.

(5) “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.

(b) Liability. A lessor, owner, or secured party is NOT liable for personal injury, death, or property loss or damage THAT OCCURS on land, IN THE AIR,²⁶¹ OR ON water, UNDER ANY FEDERAL OR STATE-LAW CLAIM, except 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

²⁶⁰ See Civil Aeronautics Act of 1938, ch. 482, sec. 401, § 504, 62 Stat. 470, 470 (1948) and text accompanying *supra* notes 125–26.

²⁶¹ The minor addition of “in the air” is in response to the case of *Storie v. Southfield Leasing, Inc.*, where, reluctant to make a determination over whether § 1404 was intended to preempt state-law claims, the court made a troublesome distinction. The court opined that because the federal statute applied to injuries “on land or on water,” the plaintiff’s claim under a Michigan statute (which imposed liability upon aircraft owners for injuries suffered *inside* the aircraft) was not preempted. *Storie v. Southfield Leasing, Inc.* 282 N.W.2d 417, 420–21 (Mich. Ct. App. 1979). The court stated,

A close reading of 49 U.S.C. § 1404 leads us to conclude, however, that the Federal statute is inapplicable to the situation . . . [T]he injury occurred inside the aircraft and not upon the surface of the earth. We do not read 49 U.S.C. § 1404 as preventing the states from imposing liability upon the owners of airplanes in these circumstances.

Id. at 421.

- (2) the flight of, or an object falling from, the aircraft, engine, or propeller.

As to preemption, the above editing changes the provision so that it states that lessors, owners, or secured parties are *not* liable *except* in the given circumstance of being in possession or control of the aircraft. This takes the emphasis from the positive (lessors *are* liable) to the negative (lessors *are not* liable) and then lists the exception and, consequently, more clearly focuses the interpreting court's attention to the fact that lessors, owners, and secured parties are generally not liable. The second change, the addition of "under any federal or state-law claim" will clarify to courts that § 44112 is intended to preempt all remedies available under either federal or state law when the requirements of the statute have been met.

As to the inclusion of lessors, the existence of three separate parties is already evident in the statute,²⁶² but since there remain divergent opinions by the courts, any proposal for a revision to § 44112 should clarify that the exemption from liability is available to all three categories. Consequently, when a subsequent court reviews the legislative history, Congress's intent to protect all three parties will be clearer than it exists in the legislative history now.

Providing guidelines regarding "actual possession and control" will assist courts in evaluating who was ultimately responsible for the aircraft and thus who should be subject to liability. Drawing attention to this requirement may lessen the possibility that the court will skip over an analysis of this element altogether.

These suggested changes will clarify the confusion caused by current court decisions, update § 44112 to conform to the realities of the current leasing market, and protect Congress's original intention to facilitate aircraft availability. In 1948, Congress enacted a limitation on liability to protect the parties that supply available aircraft to the marketplace when those parties do not have actual control over the aircraft. Current case law threatens to disrupt Congress's original intent. It is time to ensure that its intent is properly preserved.

²⁶² See 49 U.S.C. § 44112(a) (2006) (defining "lessor," "owner," and "secured party").