Where Do They Fit - Fractional Ownership Programs Wedged into Current Air Law Decisions and Guidelines

Kristen A. Bell
WHERE DO THEY FIT? FRACTIONAL OWNERSHIP PROGRAMS WEDGED INTO CURRENT AIR LAW DECISIONS AND GUIDELINES

KRISTEN A. BELL*

THE INCREASED NEED for businesses to engage in a global community over the past several decades has led companies to search for access to safe and affordable air travel. Some have chosen to purchase their own fleet of aircraft because whole ownership of private aircraft can allow a business entity to enjoy flexibility and control. The cost and burden of wholly-owning aircraft, providing for all management services related to operating aircraft, and undertaking any liability associated with the aircraft, however, can make this an undesirable choice for many businesses. Other companies have chosen to charter aircraft on an as-needed basis. Although this approach decreases much of the cost and unnecessary risk of wholly-owned aircraft, companies lose a great deal of flexibility and control when chartering flights. Thus, a few visionaries in the aircraft industry have offered a middle ground since the 1980s¹ to provide these companies with the best of both worlds—the flexibility and control of wholly-owned aircraft with the ability to share costs and operational burdens with other owners. Now, through the shared ownership of the aircraft and the help of a management company to maintain the fleet and organize flights among members, these companies can enjoy the benefits of private aircraft without flying solo.

* Kristen Bell is a J.D. candidate for the class of 2005 at Southern Methodist University Dedman School of Law. She would like to thank the International Aviation Women's Association for their support of women in the study and promotion of aviation law. She would also like to thank her parents and husband, Philip Bell, for their encouragement, patience and friendship.

Part I of this paper will define fractional ownership programs and explain the responsibilities of fractional owners and management companies within a traditional program. Part II will discuss recent legal decisions concerning these programs and introduce the inconsistencies inherent in these decisions. Part III will address the effect these decisions may have on developing law in this area. Parts IV and V will recommend the adoption of certain legal principles to unify the law regarding fractional ownership programs in order to achieve coherent and predictable boundaries for this important part of the aviation industry.

I. UNDERSTANDING FRACTIONAL OWNERSHIP PROGRAMS

The Netjets program was the first attempt at this new approach to air travel and introduced the business community to fractional ownership programs.\(^2\) Programs such as Netjets, created by Executive Jet International ("EJI"),\(^3\) allow corporate executives private access to travel without paying for their own aircraft. Fractional ownership programs are defined as

[M]ulti-year programs covering a pool of aircraft each of which is owned by more than one part and all of which are placed in a dry lease exchange pool to be made available to any program participant when the aircraft in which such participant owns an interest is not available.\(^4\)

Netjets and similar fractional ownership programs act as management companies to orchestrate group ownership programs, allowing affluent individuals or corporate entities to enjoy the convenience of owning personal aircraft without the cost and responsibility of doing it alone. Similar to timeshare memberships, the owners each "own" a portion of the fleet with contractual rights to share and use all aircraft in the fleet. In turn, Netjets manages the fleet by maintaining the aircraft, providing onboard services, and managing contractual agreements among the parties. It is important to understand the roles of both the

\(^2\) See Regulation of Fractional Aircraft Ownership Programs and On-Demand Operations, 66 Fed. Reg. 37,520 (Jul. 19, 2001) (hereinafter "Proposed Rules") ("As of early 2000, the leading fractional ownership programs managed approximately 465 aircraft on behalf of 3,446 shareowners.").

\(^3\) See Troy A. Rolf, The Coming of Age of Fractional Aircraft Ownership Programs, 15 SPG Air & Space Law 11, 11 (2001) ("The original Netjets program [is] considered to be the traditional fractional ownership model.").

\(^4\) Gleimer, supra note 1, at 980-81.
managing company and the fractional owners in determining who has operational control of the aircraft and whether the companies providing management services should be considered "common carriers" under the law.

A. Contractual Duties of the Fractional Owner

The management company requires each owner to sign a series of contracts that outline the owner’s responsibilities in regard to operation of the aircraft and participation in the program. To become part of the program, a fractional owner must agree to share his portion of flight time with others in the program in exchange for the opportunity to use others’ portion of flight time when necessary. First, the fractional owner must sign a Purchasing Agreement that transfers the specified interest in the aircraft to the fractional owner. In addition, the owner agrees not to transfer or sell ownership rights without express permission from the managing company. Secondly, the fractional owner enters into a series of other agreements—an Owners Agreement, a Master Interchange Agreement, and a Management Agreement. Most Management Agreements contain a provision that vests operational control in the fractional owner, not the program manager. In addition, the owners agree to be severally liable for the costs of operating the aircraft and the owners sign a "lease" that allows each owner to use another’s aircraft on an as-needed basis.

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5 The contract outlined is from the “Netjets” program.
6 Executive Jet Aviation, Inc. v. United States, 125 F.3d 1463, 1465 (Fed. Cir. 1997).
7 Id.
8 Id. Both the Owners Agreement and Master Interchange Agreement allow the sharing of fractional interests among other owners of the aircraft. The parties owning an interest in the aircraft were described as "tenants in-common of a chattel." Id.
9 Rolf, supra note 3, at 12 (“[T]he person or company that has operational control is legally the operator of the aircraft and hence may bear ultimate responsibility for all operations of the aircraft . . . . customers of traditional fractional programs are considered aircraft operators, not passive passengers, and the fractional program in this context is not an aircraft operator but rather a contractor employed for the purpose of assisting the customer in the operation of the aircraft.”).
10 Id. at 13-15.
B. RESPONSIBILITIES OF THE MANAGEMENT COMPANY

By entering into a Management Agreement with fractional owners, the management company agrees to maintain and make necessary repairs to the exterior and interior of the aircraft in compliance with FAA regulations. In addition, the management company agrees to keep records and logs of flights as required by the FAA; to pay for the fuel, salary and travel of flight crews; to pay expenses associated with storing, landing and flying the aircraft; and to obtain liability insurance for operation of the aircraft. The company coordinates flights between owners in compliance with the Interchange Agreement and may be responsible for making federal tax payments. Fractional owners pay the management company a monthly maintenance fee for the program manager to carry out these services.

II. LEGAL DECISIONS CONCERNING FRACTIONAL OWNERSHIP PROGRAMS

Because fractional ownership programs lie somewhere between private owners and commercial carriers, finding their place in the body of aviation law has been a challenge. A survey of administrative decisions and case law discussing fractional ownership programs show that the controversy is far from over. Two issues lie at the heart of the legal battle: 1) who is in operational control of the aircraft, and 2) if the management company is in operational control, is the company in the business of “transporting for hire.” The distinction between commercial and non-commercial flight operations affect safety regulations, tax responsibilities, and employee guidelines. In recent years courts have also extended “common carrier” status to numerous flight-related entities. Although the analysis hinges on one issue, operational control of the aircraft, the conflicting legal decisions reveal the difficulty inherent in defining these programs through the standards currently available in aviation law.

11 Executive Jet Aviation, 125 F.3d at 1465-66.
12 Id. at 1466.
13 Rolf, supra note 3, at 14.
14 Executive Jet Aviation, 125 F.3d at 1468-69.
15 Rolf, supra note 3, at 14.
16 See, e.g., Proposed Rules, supra note 2; Executive Jet Aviation, 125 F.3d 1463; Thibodeaux v. Executive Jet Int'l, 328 F.3d 742 (5th Cir. 2003).
FRACTIONAL OWNERSHIP PROGRAMS

A. PART 91 OF THE FEDERAL AVIATION REGULATIONS

The Federal Aviation Regulations ("FAR") consist of several tiers of safety regulation. The provisions relevant to our discussion are Part 91, for private owners, and Part 135, for "common carriers." Fractional ownership programs have generally operated under Part 91 of the FAR, allowing these programs to enjoy less stringent safety standards and regulations. Part 135 of the FAR restricts the type of airport available for use, directs the use of flight crews, and regulates both the "exterior and interior of the aircraft." 

1. The Business Airline Industry

Not only are fractional ownership programs affected by the current instability in the law, but other providers of executive air travel will benefit from unification of the law regarding fractional ownership programs. In-house flight departments, non-fractional management companies, and charter services compete with fractional ownership programs, and they recognize the opportunity they have to become a more appealing alternative to fractional ownership programs if more stringent restrictions and costs are placed on fractional ownership programs.

Before the FAA made its decision regarding the safety regulations for fractional ownership programs, several trade organizations for the air service competitors presented recommendations to the committee. Afraid that a decision to

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17 Proposed Rules, supra note 2. According to the proposed rules, the distinction between Part 91 and Part 135 is who bears the responsibility for "the operation of the aircraft aboard which [the passengers] are flown." Id. Part 91 regulations, the less stringent of the two, are used when the passenger aboard owns or leases the aircraft, and therefore, "exercise[s] full control over and bear[s] full responsibility for the airworthiness and operation" of the aircraft. Id.

18 Id. A regional determination that fractional programs operate under Part 91 has been controlling for several years. Id.

19 Id. at 1003. These include length requirements for runway landings, weather reporting facilities, and visibility minimums not required for Part 91 flights. Id.

20 Id. at 1003-04. Those flights regulated under Part 135 of the FAR are limited in the "number of hours that a crew member may fly . . . and the number of hours that a pilot may be on duty." Id. Furthermore, companies operating under Part 135 have more restrictions on the "hiring and retention of personnel" than companies operating under Part 91. Id.

21 Id.

22 Id. at 1029; for the official text of the proceedings, see Regulation of Fractional Aircraft Ownership Programs and On-Demand Operations, 68 Fed. Reg. 54,520 (Sept. 17, 2003) [hereinafter "Regulation"].
place fractional ownership programs under Part 135 restrictions would lead to stronger restrictions for other similar providers, some competitors to fractional ownership programs stepped forward to distinguish themselves from these programs and to encourage the FAA to maintain its current level of restrictions over fractional ownership programs.\textsuperscript{23} Other programs, such as charter services, regulated under Part 135 of the FAR, were eager to use the evaluation of safety regulations regarding fractional ownership programs to endorse an “industry-wide self-regulating initiative” to allow all companies serving business aviation needs the ability to operate under Part 91 of the FAR.\textsuperscript{24}

Despite their self-interested involvement in the FAA, several organizations proposed a set of guidelines outlining a persuasive solution to the concerns plaguing administrative and judicial decisions regarding fractional ownership programs.\textsuperscript{25} Most importantly, these guidelines propose specific measures to address an important problem with fractional ownership programs—defining who has operational control.\textsuperscript{26} Although the parties sign a contract stating that the fractional owner has operational control of the aircraft, the responsibility that comes with operational control under the FAA regulations can be lost between the owner and the program manager. The proposed guidelines addressed this concern by imposing a requirement upon program managers to “brief the fractional owner on operational control responsibilities,” forcing owners to sign an “acknowledgement of the Fractional Owner’s Operational Control Responsibilities” upon transfer of title, and specifying instances where the program manager, not the fractional owner would be in opera-

\textsuperscript{23} Id. at 1017.

\textsuperscript{24} Id. at 1018-1020. The National Air Transportation Association (“NATA”) represented air charter companies. They suggested that “fractional ownership programs, particularly the extensive interchange feature, constituted a new form of air transportation and should be regulated under Part 135, rather than Part 91. Months later, the board opted to endorse an initiative that would “define fractional ownership and develop safety guidelines” and “at the same time . . . remove some of the archaic regulations burdening Part 135 regulation.” Id.

\textsuperscript{25} Id. at 1022.

\textsuperscript{26} Id. at 1016-1017. Although fractional owners agree that they are in ‘operational control’ of the aircraft they purchase, the aviation industry and the FAA are still concerned that the fractional owners are not informed enough to safely control the aircraft. The Shared Aircraft Committee, however, pointed out that the parties to a fractional ownership contract are “sophisticated business people” and are aware of the importance of the documents they are signing. Id.
tional control of the aircraft. If the fractional owner or program manager fail to meet the FAA guidelines, the FAA has the right to determine the program manager is in operational control and hold them to Part 135 safety regulations.

2. FAA Response

Recently, the FAA engaged in a thorough investigation of fractional ownership programs to determine whether they should continue to operate under Part 91 of the FAR, or be deemed commercial carriers subject to Part 135 of the regulations. Although the Federal Rules Committee expressed concern about the growth of fractional ownership programs and their status as non-commercial carriers, it refused to hold fractional ownership programs subject to Part 135 regulations. Instead, the Committee proposed a new subpart to 91, making it clear that the distinction between Part 91 and Part 135 is whether the aircraft is being used for a commercial purpose. Through this clarification, the FAA has clearly kept arrangements such as “time-sharing arrangements, interchange agreements, and joint ownership arrangements” under the less stringent guidelines of Part 91. By determining that fractional owners “share more of their regulatory characteristics with the owners of non-commercially operated aircraft than with passengers using on-demand operators,” the Committee was able to permit fractional ownership programs to remain under less stringent regulations.

The Committee, however, recognized some differences between whole owners and fractional owners; therefore, it proposed Subpart (k) to apply exclusively to these programs.

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27 Id. at 1023-1025 (emphasis added) ("Specifically, the owner does not have operational control when the aircraft being used is not a program aircraft. A program aircraft is used for administrative purposes ... and when no passengers or property designated by an owner are being carried or when the aircraft being used for the flight is chartered and is being operated under Part 135. . . .").

28 Id. at 1025.

29 See Proposed Rules, supra note 2.

30 Id. Under Subpart (4), a person is allowed "to operate his or her aircraft 'for his personal transportation, or the transportation of his guests when no charge, assessment or fee is made for the transportation.'" Id.

31 Id.

32 Id.

33 Id. ("Fractional owners differ from a majority of whole business or personal aircraft owners in that (1) fractionally-owned aircraft typically have multiple owners, (2) their aircraft's availability is a component of a pooled fleet under a dry lease exchange program . . . , (3) the owners . . . agree to use the services of a."

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Subpart (k) outlines the safety standards of fractional ownership programs and the obligations of the managing company to ensure the "airworthiness and operation of fractional ownership program aircraft." Through its adoption of the heightened regulations found in Subpart (k) of Part 91, the FAA has attempted to clarify its position. Although these programs warrant special regulation and attention, they should not be subjected to the stringent standards for commercial aircraft operating under Part 135 of the FAA regulations.

By adopting Subpart (k) for fractional ownership programs, the FAA has adopted some of the industry's suggestions. Although the FAA has not opted to relieve charter services of Part 135 regulations, it did choose to heighten the standards for these programs so that the safety threats arising from fractional owners having operational control may be diminished. The new provisions require managers to fully train all pilots and crew, maintain more complete records, and implement safer in-flight operations. In addition, the roles of the fractional owner and program manager have been clearly defined by the FAA Subpart (k) proposal to increase responsibility and safe flight operations. Finally, the rules would "provide for the joint and se-

single company to manage their aircraft, and (4) all owners agree to a uniform aircraft configuration.").

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34 Id. It is important to note that management companies may also provide on-demand charter services. This service would still be regulated under Part 135 of the FAR.

35 14 C.F.R. § 91.1001. According to Subpart 91.1001(5), A fractional ownership program . . . means any system of aircraft ownership and exchange that consists of all of the following elements: (i) The provision for fractional ownership program management services by a single fractional ownership program manager on behalf of fractional owners; (ii) two or more airworthy aircraft; (iii) one or more fractional owners per program aircraft, with at least one program aircraft having more than one owner; (iv) possession of at least a minimum fractional ownership interest in one or more program aircraft by each fractional owner; (v) a dry-lease aircraft exchange agreement among all of the fractional owners; and (vi) multi-year program agreements covering the fractional ownership, fractional ownership programs, and dry-lease exchange aspects of the program.

Id.


37 Id. at 360-61; see also Regulation, supra note 22.

38 Gleimer, supra note 36, at 368 ("[T]he contract manager must include provisions to ensure that the owner has the right to inspect and to conduct audits of the program manager, that the program manager has the obligation to ensure
eral responsibility of the owner and program manager for the safe operation of the flight and for compliance with the FARs.”

Although fractional ownership programs still need time to adopt and implement the new provisions in Subpart (k), stability in this area of the law allows program managers and participants to adjust program operations so that they are compliant with FAA regulations.

B. Tax Responsibilities for Fractional Ownership Programs

1. Federal Excise Tax

In 1997, the Federal Circuit was asked to determine whether a fractional ownership program, Executive Jet Aviation ("EJA"), overpaid taxes under the IRC; the important determination lay in whether EJA was a commercial or noncommercial carrier through operation of the "Netjets" program. In 1970, Congress enacted the Airport and Airway Revenue Act ("AARA"), which made a distinction between commercial and non-commercial flights in determining payment of taxes. Non-commercial flights were only required to pay gasoline and nongasoline fuel taxes. Commercial flights, on the other hand, were subjected to an air transportation tax determined by a "percentage of the fee charged for the transportation." The Internal Revenue Code defines "noncommercial aviation" as "any use of an aircraft, other than the use in a business of transporting persons or property for compensation or hire by air." To determine whether "the use of an aircraft" should be taxed under the AARA, the IRS uses the "'possession, command, and control' test to distinguish between commercial and noncommercial operators."
control’ test.” In the past, the IRS has used the FAA’s “concept of ‘operational control’” to determine “who has ‘possession, command, and control’ of the aircraft.” In its independent investigation of fractional ownership programs, the IRS determined that “although the owners are the title owners to the aircraft, they have relinquished possession, command and control, of their respective aircraft to the taxpayer who provides air transportation.” This holding is clearly in conflict with the FAA’s latest decision to assume operational control of the aircraft in the fractional owner.

The courts have supported the IRS’s determination that the private owners have relinquished “possession, control and command” and therefore held that the management company subject to the federal AARA tax for commercial flights. In Executive Jet Aviation, Texaco Air, a subsidiary of Texaco, Inc., was a member in the Netjets program with an undivided one-half interest in a Cessna aircraft. For the Cessna flights, EJA paid the IRS fuel taxes under Section 4041(c) of the IRC as a noncommercial carrier. The IRS, however, determined that EJA was providing commercial transportation subject to the air transportation tax under IRC Section 4261. Through an analysis of the statute and the contractual agreement between EJA and Texaco as fractional owner, the Federal Circuit refused to accept EJA’s argument that it was merely an aircraft manager. Instead, the court found that EJA was in the “business of transporting persons or property for compensation or hire by air . . . .” By

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45 Crowther, supra note 44, at 253-54.
46 Id. at 254 (citing Tech. Adv. Mem. 93-47-007 (Aug. 12, 1993) and 94-04-007 (Oct. 20, 1993)). Although some distinctions can be made between the owners’ relationship to the management company, similarities exist between the entities discussed in these decisions and fractional ownership programs. In determining that the owner retained control in Tech. Adv. Mem. 93-47-007, the court concluded that the management company was merely an agency of the federal agent, not an “independent contractor,” because “the totality of the contract provisions, particularly those whereby [the owner] pays the operational expenses, retains and exercises substantial operational control and assumes the risk of loss indicate that the [management company] is merely acting as an agent of [the owner].” Id.
47 Crowther, supra note 44, at 264-65 (discussing the decision of Tech. Adv. Mem. 93-14-002, which compares fractional ownership programs that align more closely with charter operations, or “wet-lease exchange programs”).
48 Executive Jet Aviation, 125 F.3d at 1466-67.
49 Id. at 1467.
50 Id. at 1468.
51 Id. at 1468-69; see also Crowther, supra note 44, at 273 ("[C]ourts interpreting this language [have] uniformly held that, in order for a company to be en-
upholding summary judgment for the IRS, the court agreed that there were "negligible differences between the Netjets aircraft interchange program and the operation of a commercial air charter business."^{52}

One legal scholar notes an important inconsistency, though, in the analysis of the IRS and the analysis of the Federal Circuit in determining whether EJA should be subject to the federal excise tax.^{53} Interestingly, the IRS focused its decision on who had "possession, control and command" of the aircraft. The Federal Circuit, however, came to the same conclusion through different means—by holding that the program "was engaged in the 'business of transporting persons or property for hire by air.'"^{54} It is arguable that the Federal Circuit's determination relied on the IRS's initial finding that the program manager retained control. A comparison of the decision makers' rationales, however, is an important example of the strong connection that exists between operational control and commercial carriage. If decisions are made without recognizing the relationship between these two concepts, illogical conclusions result that send a conflicting message to both program participants and the aviation community as a whole.

2. Income Tax

The above decisions, when compared to income tax provisions designed to allow an aircraft owner deductions for depreciation of the aircraft from his annual income tax return, highlight the consequences of unsettled law in this area.^{55} In *Executive Jet Aviation*, the court determined that the program manager would be required to pay federal excise taxes for use of the aircraft. Income tax laws, however, have treated "joint owner[s] of property as the tax owner of their share of the property,"^{56} and there is no indication in case law or administrative discussion that this practice will, or should, change.^{57} Some logi-
cal problems are present, however, with these opposing obligations to pay federal taxes. In one instance, the IRS and courts have held that, although the owners technically own the aircraft, the program manager is in control of the aircraft's use, and thus subject to federal excise taxes. On the other hand, the current law concerning income tax on property allows the fractional owners to deduct depreciation of the aircraft from their income tax filings. If the program managers are unable to elicit funds paid for the excise tax from the fractional owners, an unfair result may occur as the program manager pays taxes for the aircraft's use but is unable to deduct any depreciation resulting from that use on its annual payment of federal income tax.

3. State Tax Laws

In addition to the excise tax imposed by the federal government on program managers, fractional owners may also be forced to pay state sales, use and property taxes. In *Fall Creek Construction Company v. Director of Revenue*, the Supreme Court of Missouri was asked to decide whether fractional owners were responsible for payment of use taxes on aircraft in which they owned a fractional interest. The court meeting en banc relied on several factors to determine that the fractional interest in the aircraft was tangible personal property, and therefore, the fractional owner was subject to the use tax under Missouri law. First, the purchasing agreement between the management company and the fractional owner was unambiguous in defining the transfer of interest in the aircraft as a sale of property. Second, the court looked to the FAA's determination that the owner, not the management company, was in "operational control" of the aircraft. Finally, although the aircraft was stored outside of the state and most of its flights occurred outside of the state, the

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58 Janine Cook & Alysse Grossman, *Entering the Private Air Travel Market: Upfront Tax Planning Can Minimize A Bumpy Ride*, 99 J. Tax’N. 201, 208 (2003) (“Sales and use tax concerns also may arise for taxpayers purchasing a fractional interest in an aircraft. Missouri has taken the position that the purchase of a fractional share is a taxable purchase, while New York and Texas have taken the opposite position.” Property taxes are generally “imposed by the state or locality where the aircraft is hangared.”).

59 109 S.W.3d 165, 167 (Mo. 2003).

60 Id.

61 Id. at 170.

62 Id.
court still found a reasonable nexus between the state and the property to hold the fractional owner responsible for use taxes in Missouri.63

Some states have come to the opposite conclusion. In Texas, the Office of the Comptroller sent out a declaration that the program manager is "responsible for any tax on the purchase of the airplane."64 The New York Commissioner of Taxation and Finance came to a similar conclusion—that "a fractional program is a non-taxable transportation service."65 Like the Texas Comptroller's Office, the New York Commissioner determined that aircraft in a fractional ownership program is not "really sold" to the fractional owner.66 Again, the main issue in each case depends on who is in operational control of the aircraft, yet different decisions on the same question result in confusing precedent in case law. Unfortunately, because very few states have answered the domestic issue of state taxes for fractional ownership programs, program participants are unable to make fully informed business decisions regarding involvement in a fractional interest relationship. Because several states have given opinions on the issue, and the instability of the law raises some risk to participants, a lack of uniformity on this issue may lead to forum-shopping by fractional ownership programs looking for a

63 Id. at 171.

64 FYI: Sales Tax, TAX POLICY NEWS (December 2000), at http://www.cpa.state.tx.us/taxinfo/taxpnw/tpn2000/tpn01201.html. Using the Federal Circuit's decision regarding the federal excise tax, the Office of the Comptroller determined that "[a]lthough the participant provides some direction to the pilots, possession of the aircraft remains with the seller. In this situation, the participant is contracting for a nontaxable air charter service, and a taxable sale or rental of an aircraft to a participant does not occur." Id.

65 Crowther, supra note 44, at 308-09 (discussing The Gap, Inc., TSB-A-00(3) S, Adv. Op. N.Y. Comm'r Tax & Fin. (Jan. 28, 2001)). It should be noted that the situation in The Gap was slightly different than the Netjets program described earlier. The program manager performed the same duties but was not the initial seller of the aircraft. Id.

66 Id. In this ruling, the Commissioner outlines several reasons why there is not sufficient transfer of control to warrant a retail sale of the aircraft. Some of these reasons include:

1. The manager arranges for the aircraft to be inspected, maintained, serviced... with respect to appropriate FAA standards and guidelines; 2. [The] manager maintains all records, logs and other materials required by the FAA...; 3. [The] manager retains the right to use the aircraft during periods it is not being utilized in the transportation of... other owners.

Id.
state tax that is economically beneficial to their operational goals.

C. FRACTIONAL OWNERSHIP PROGRAM EMPLOYEES

One important part of the fractional ownership program that has not been fully addressed is how the employees of these programs should be treated. Applicability of union membership, overtime pay, and flight crew work regulations are all affected by these decisions. Without uniform laws that clearly define the nature of the fractional ownership business, employees of these programs may be hurt by the laws that were designed to protect them.

1. Unionization of Employees through the National Mediation Board

The National Mediation Board ("NMB") serves as the federal agency responsible for administering the Railway Labor Act.\(^67\) Through its certification process, common carriers can apply for union representation through the Board. If approved, the Board then oversees collective bargaining agreements among common carriers to verify compliance with the RLA. In 1971, the Board approved union representation for EJA employees.\(^68\) This certification required the Board to determine that EJA had "common carrier" status, and the Board's interpretation of the RLA in this regard is controlling.\(^69\) Therefore, certification of EJA under the NMB implies that EJA and similar program managers may be "common carriers" under the RLA.\(^70\) Other fractional ownership program employees have yet to become unionized, however, and therefore are not yet subject to the NMB interpretation.\(^71\)

2. Fair Labor Standards Act

Most commercial air carriers are exempt from the overtime provisions of the Fair Labor Standards Act ("FLSA") through en-

\(^{67}\) Thibodeaux v. Executive Jet Int'l, 328 F.3d 742, 746 (5th Cir. 2003) ("Thibodeaux II"). The Railway Labor Act provides an exemption to the FLSA overtime provisions for "common carriers" to be discussed infra Railway Labor Act, 45 U.S.C. § 181.

\(^{68}\) Id.

\(^{69}\) Id.


\(^{71}\) Id.
actment of Title II of the Railway Labor Act. Because these carriers are "common carriers" by air, the legislature enacted this exemption to alleviate the possibility of strikes or labor disputes that would obstruct the purpose of the Railway Labor Act—"to keep transportation moving." In response, many commercial air carrier employees have protected themselves from unfair labor practices through union membership. Without notice of a company's FLSA exemption, employees may elect not to unionize because they do not see the benefit of the added protection that these organizations provide. If a court later decides that the company for whom the employees work is exempt under Title II of the RLA, these employees are left without recourse through legal means or collective bargaining.

In Thibodeaux v. Executive Jet International, the Fifth Circuit was asked to determine whether a non-union fractional ownership management company, EJI, was a common carrier under the FLSA. Thibodeaux and other similarly-situated flight attendants were forced to work overtime under Part 91 flights in the Netjets program. They filed suit against the fractional ownership company, claiming that the FLSA required EJI to pay compensation for overtime. The district court refused to grant summary judgment to EJI because it could not hold as a matter of law that flight attendants who worked solely on Part 91 flights were not subject to the FLSA provisions. Furthermore, it did not determine that EJI was a "common carrier" under Title II of the RLA and thus subject to FLSA exemptions.

On appeal, the Fifth Circuit took a different approach than the district court's analysis, which focused on the FAA regulations and recent proposal to keep fractional ownership programs under Part 91 of the regulations. Instead of looking at these administrative determinations, the court utilized a test it...
created in Woolsey v. National Transportation Board. In Woolsey, the Fifth Circuit was asked to determine if a pilot was subject to Part 135 regulations. The court looked to the nature of his business, Premier Touring, Inc., which contracted with musicians to provide flight transportation. The court found that the "crucial determination in assessing the status of a carrier is whether the carrier has held itself out to the public or to a definable segment of the public as being willing to transport for hire, indiscriminately."

The court applied this test to EJI's Netjets program and determined that EJI was a common carrier as a matter of law. Recognizing that Netjets targeted only a small segment of the population, the court still found that EJI held itself out indiscriminately to a definable segment of the public. By marketing through direct mail, in periodicals, and at public events, the court found that EJI "defined itself through its own marketing efforts as being willing to carry any member of that segment of the public which it serves." EJI, therefore, was defined as a common carrier as a matter of law, and Thibodeaux was left without recourse for his unpaid overtime work.

Similarly, in Valdevieso v. Atlas Air Lines, the court refused to require Atlas Air to pay its employees overtime under the FLSA. Again, the court utilized the Woolsey test to determine that a company which owned, operated and maintained a fleet of freighter aircraft used to transport cargo was a "common carrier" under the FLSA exemption. Unpersuaded by the argument that Atlas Air was not a common carrier because it does not service the "public at large," the court held that common carrier status is not determined by the size of the public served, but whether the company holds itself out to "anyone willing to accept its terms and prices." As employees "integral for the transportation of cargo," the loadmasters who brought this suit

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79 993 F.2d 516, 518 (5th Cir. 1993); Thibodeaux II, 328 F.3d 742.
80 Woolsey, 993 F.2d at 518.
81 Id. at 517.
82 Id. at 523 (emphasis added).
83 Thibodeaux II, 328 F.3d at 752-54. The court also gave significant weight to the NMB's determination that EJA, EJI's sister company, was a "common carrier" under the Railway Act as discussed above. Id.
84 Id. at 753.
85 Id.
86 305 F.3d 1283, 1287 (11th Cir. 2002).
87 Id. at 1286-87.
88 Id. at 1287.
were excluded from the overtime protections provided in the FLSA.\textsuperscript{89}

Compared with the determination of the FAA regarding safety regulations for fractional ownership programs, this decision seems to be a clear contradiction of the administrative decision. Although the Fifth Circuit refused to address the question of operational control as defined by the FAA, it clearly assumed that the program manager is in control of the aircraft. This assumption led the court to its final holding—that the manager "indiscriminately holds itself out to the public." If the court had determined that the owner was in control of the aircraft, and that the program manager was merely a service provider for the fractional owners, the conclusion drawn by the court would be illogical. Fractional owners, who transport employees and clients, could not be considered commercial carriers through the court's analysis. Therefore, like the Federal Circuit in the excise tax decision, the Fifth Circuit first had to find that EJI was in control of the aircraft and its flight schedule in order to logically draw the conclusion that EJI was a common carrier under the law. This logical leap, however, was not a decision without consequences. Thibodeaux and other similarly situated flight attendants were left without pay for overtime work because of the court's application of FLSA exemptions.

3. Crew Schedules

Under the FAA's proposed additions to Part 91 regulations for fractional ownership programs, restrictions are also placed on the amount of work the flight crew may perform. Subpart (k) imposes stricter flight, duty and rest requirements for the crew of fractional ownership aircraft.\textsuperscript{90} For example, when flight time exceeds ten hours, the new provision will require the crew to take a rest period equivalent to the total hours on duty.\textsuperscript{91} Although it is clear that these provisions are aimed at promoting safe travel among fractional ownership programs, their effect on the crew employed by the programs should be considered when making any legal decisions regarding the regulation of fractional ownership programs.

\textsuperscript{89} Id.

\textsuperscript{90} Gleimer, \textit{supra} note 36, at 361-62.

\textsuperscript{91} Id. Other provisions include more stringent regulation of airport use and mandatory drug and alcohol testing.
D. COMPANIES RELATED TO AIR TRAVEL

In a relevant legal discussion, courts have found that several companies providing services for air travel are also "common carriers" under the FLSA. In 1934, Congress expanded the Railway Act to include companies that perform "transportation-related services." Congress's reasons for expanding the definition of "carrier" include: (1) to avoid the possibility that certain employees could interrupt commerce with a strike, and (2) to prevent a carrier covered by the RLA from evading the purpose of the Act by spinning off components of its operation into subsidiaries and or related companies.

In District 6, International Union of Industrial v. National Mediation Board, the court gave deference to the NMB's determination of carrier status for an airline caterer because 1) "the nature of the work [was] that traditionally performed by employees of . . . air carriers," and 2) the employer was "directly or indirectly owned or controlled by, or under common control with carrier or carriers." Looking at the case law, which exhibits a broad interpretation for carrier status, the court concluded that air-catering companies can be common carriers for purposes of the RLA.

In Verrett v. The Sabre Group, the court came to a similar conclusion, holding that a company providing information technology to American Airlines was a common carrier for purposes of the RLA. The Sabre Group was responsible for providing computer systems that organized flight schedules, maintenance records, reservations, and other information. Again, the court utilized a two-part test to determine that the Sabre Group was controlled by a common carrier and engaged in transportation-related services.

In each case, the court relies on the rationale given by Congress for the RLA to find these affiliates common carriers under the law. Courts seem eager to extend the FLSA exemption under the RLA to all but the most tenuous affiliate relationships because labor disputes among closely related transportation ser-

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93 Id.
95 Id.
96 70 F. Supp. at 1279.
97 Id.
98 Id. at 1281-83.
serve providers could obstruct commercial travel, and have used these cases to support extension of common carrier status to fractional ownership programs. Arguably, these two entities function quite differently. Extending common carrier status to affiliates that serve commercial flights directly extends the purpose of the Railway Act exemption, to keep transportation moving. Because fractional ownership programs service such a small segment of the population, and have been defined more closely with whole owner programs than charter programs by the FAA, it is unclear how an extension of common carrier status will further the RLA's purpose. Furthermore, the tension between the interpretations made by the FAA, NMB and the Fifth Circuit regarding fractional ownership programs adds to the confusion surrounding this unique business and makes an answer to the role of these programs in the aviation community more difficult to find.

III. OTHER AREAS OF LAW AFFECTED BY THE UNCLEAR STATUS OF THESE PROGRAMS

The decisions discussed above pose important difficulties for the state of the law concerning fractional ownership programs. The FAA, IRS, and FLSA all purport to make decisions on whether a fractional ownership program is a commercial, or "common carrier," under the law. Yet, each entity comes to a different conclusion. The foundation of their decision lies in who is in operational control of the aircraft. If the management company is in 'operational control,' clearly the flights in question are commercial. If the owner is in control, however, it is necessary to find that flights under these programs are non-commercial. In addition to the legal disputes that have already arisen regarding the nature of fractional ownership programs, several issues may be just on the horizon.

A. TORT LIABILITY

As a survey of the administrative and case law suggests, there is a valid question concerning who is responsible for the aircraft in fractional ownership programs. The FAA's determination that fractional ownership programs should remain under Part 91 was based on the assumption that the fractional owner, not the management company, is in operational control of the aircraft.

99 Mark A. Dombroff, Liability and the Growth of Fractional Aircraft Ownership Programs, 16 AIR & SPACE LAW 4, 4 (2002) ("According to the FAA, responsibility for
Some courts, however, have rested their decision on the "commercial" nature of these programs comparing fractional ownership programs to charter programs\(^{100}\) and finding managers of these programs "common carriers" under the law.\(^{101}\) In these decisions, the program manager fills the role as aircraft operator, and the fractional owner more closely resembles a passenger, not a property owner.\(^{102}\)

These competing interpretations over who is really in control of the aircraft in fractional ownership programs may lead to disputes when questions of tort liability are presented to the courts. Most contract agreements between the program manager and fractional owner explicitly vest operational control in the hands of the individual owner.\(^{103}\) In addition, the FAA has determined that fractional owners are in operational control of the aircraft. For purposes of tort liability, however, this can have vast consequences for the fractional owner who also signs an interchange agreement with other aircraft owners and could be held liable for the torts committed by his "partners" in this endeavor.\(^{104}\)

Currently, the IRS and FLSA decisions suggest that program managers will likely be held responsible in cases of tort liability in a court of law. Without a clear decision on the status of these programs, though, there is a valid possibility that fractional owners investing in these programs could be open for large, unexpected liability claims.

**B. Securities Regulation**

In addition, fractional ownership programs may be subject to securities regulations if they are not careful in how they market and structure their business. One practitioner, Kenneth Krohn,
points out that the question lies in whether fractional ownership programs are considered security investments under the Howey test created for implementation of the Securities Act of 1933 and the Securities Exchange Act of 1934. Under the Howey Test, a company can be subject to securities regulation if 1) there is an investment of money; 2) there is a common enterprise; and 3) there is an expectation of profits derived solely from the effort of others. According to Krohn, all of the elements are met through the practice of fractional ownership programs except the requirement that there be an expectation of profits.

If "a purchaser is motivated by a desire to use or consume the item purchased," the securities laws do not apply. The question of whether this element is met with regard to fractional ownership programs lies largely in determining who is in control of the aircraft and whether this entity is in the "business" of providing transportation. If the individual owners use their own interest to provide personal transportation, it is doubtful that these programs will be held investments under the 1933 and 1934 Acts. If, however, the program manager is deemed to be in the business of transporting individuals for hire, like in the Thibodeaux and EJA cases, it is possible that the fractional ownership program and agreements therein could be considered securities under the law. Until the law is decided on this

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105 Kenneth P. Krohn, Fractional Ownership and Timeshare Programs: Are They Subject to the Securities Act of 1933 and the Securities Exchange Act of 1934?, 54 BUS. LAW. 1181, 1181-82 (1999). Securities regulations protect investors by requiring disclosure of company resources and grant "administrative, civil, and criminal remedies against those who violate provisions of the 1933 and 1934 Act." Id.

106 Id. at 1192-93 (discussing the holding in SEC v. W.J. Howey Co., 328 U.S. 293, 298 (1946)).

107 Id. at 1199-1203.

108 Id. at 1200 (citing United Housing Found., Inc. v. Forman, 421 U.S. 837, 852 (1975)).

109 See id. at 1210.

110 Thibodeaux v. Executive Jet Int'l, 528 F.3d 742, 754 (5th Cir. 2003); see also Executive Jet Aviation, Inc. v. United States, 125 F.3d 1463, 1465 (Fed. Cir. 1997).

111 Krohn, supra note 105, at 1210-12 ("[I]t is possible that certain program structural and promotional characteristics, when considered in the aggregate, could rise to a level that causes the predominate attraction of the program to be financial returns, rather than the use of the aircraft . . . the program interests could be deemed to be securities . . . because the interest in the aircraft is subject to an agreement under which the manager is to provide services to the participant related to the aircraft . . . because the participants must hold the aircraft available for use by others, must use an exclusive management agreement agent, and are materially restricted in their occupancy of the aircraft. In addition, there
subject, programs managers must be careful how they structure and market their programs to make the intent of the parties clear. Through an analysis of securities law, Krohn makes several recommendations: 1) contract agreements should not allow the transfer of interests to others;\textsuperscript{112} 2) managers should not allow individuals owners to sell or transfer "for compensation or hire their right to use program aircraft";\textsuperscript{113} 3) the program should avoid taking on any appearance of being a "commercial enterprise";\textsuperscript{114} and 4) promotional efforts should "emphasize the 'use' aspects [of the program], not any 'profit' aspects"\textsuperscript{115} of the program.

IV. UNIFICATION OF THE LAW

Clearly, the legal community is divided when deciding where fractional ownership programs lie in the realm of aviation law. After a tedious investigation, the FAA has determined that they are not commercial carriers subject to Part 135 regulations but should remain under Part 91 of the FAR because they are closer to whole owners than charter operations. To the contrary, the Federal Circuit's interpretation of the IRC and inquiry into fractional ownership status imputes tax liability on these programs as commercial carriers because there is relatively little difference between a program like Netjets and charter flights. Some state courts agree and others have decided to hold the owners responsible for their own share of use taxes, even if used and stored outside of the state most of the time. The NMB and Fifth Circuit have determined that fractional ownership programs are "common carriers" as a matter of law because they "hold themselves out indiscriminately to the public" and more closely resemble a commercial agent, not a service provider. In the midst of this discussion is a contract agreement that explicitly places operational control in the fractional owner. Because of the impact of the conflicting nature of the law, some efforts must be made to unify the administrative and case law so that fractional ownership programs and their participants are aware of their status as air carriers and can make business and legal decisions accordingly.

\textsuperscript{112} Id. at 1225.
\textsuperscript{113} Id. at 1225-26.
\textsuperscript{114} Id. at 1226.
\textsuperscript{115} Id. at 1227.
FRACTIONAL OWNERSHIP PROGRAMS

A. INCREASE SAFETY

Different interpretations regarding the role of program managers and fractional owners creates the potential for safety hazards and should concern the FAA and program participants. The FAA's proposed rules allow fractional ownership programs to remain under Part 91 of the FAR. The less stringent safety regulations under Part 91 allow these flights more discretion in the use and hiring of the pilots and crew, the runway length for airport landings, and the nature of the fractional ownership relationship.116 This decision was made in part based on an understanding that the individual owners are in operational control of the aircraft, and thus, more closely resemble whole aircraft owners.

There is, however, a clear distinction between whole owners and fractional owners that make this comparison incomplete for safety regulations. Arguably, fractional owners are not similar to whole owners of aircraft. Whole owners make a full investment in their aircraft, handle all storage and maintenance of the aircraft, and oversee all operational functions of staffing a crew, keeping records, and avoiding liability. In the case of a fractional owner, the managing company fulfills these necessary functions, so that the fractional owner merely makes his payments and boards the plane. Based on the relationship between the manager and owner in Netjets, and other similar programs, the FAA's determination that Netjets is not engaged in commercial carriage is fair. Some guidelines, however, should be in place to mandate the operations of fractional ownership programs to ensure that the person with operational control has knowledge of and responsibility for the airworthiness of the aircraft. The proposed Subpart (k) will be a viable first step for achieving this goal.

B. PROVIDE NOTICE TO PROGRAM PARTICIPANTS

A significant problem that stems from the varied legal decisions concerning fractional ownership programs is the lack of a body of law from which program participants can make educated decisions about the risks and benefits of being involved in such a program. Companies and their executives have several choices when providing air travel for employees and clients. Fractional ownership programs are a popular choice because

116 Gleimer, supra note 1, at 1003; see also Regulation, supra note 22, at 54,526 & 54,543-44.
they offer the freedom of full ownership without the incredible cost and responsibility. With the growing uncertainty in the law, these programs become less appealing choices for cautious businesspeople. After much legal debate, program participants still do not know where they fit in the body of aviation law. Courts have been willing to betray the intentions of these participants as outlined in the contract, and instead, hold that the program managers are in operational control of the aircraft and therefore commercial carriers under the law. Because questions like tort liability and securities regulation are still undecided by the courts, managers and owners cannot predict the risks associated with involvement in such a program. Courts have made it clear that even explicit contractual statements will not be upheld against a court’s interpretation of statutes and legal precedent, for it is not how these companies perceive themselves, but how they conduct themselves, that is key.¹¹⁷ The erratic nature of the courts in this regard could jeopardize the growth of a popular branch of the business aviation industry. A uniform agreement is necessary to provide notice to program participants of their responsibilities under the law, to allow for businesses to make educated decisions regarding involvement in these programs, and to prompt Netjets and other similar organizations to structure their programs in compliance with the expectations provided by a clear and concise body of law.

C. PROTECT INDIVIDUALS

The decision in Thibodeaux shows how harmful the inconsistencies in the law can be for the individuals involved in these programs. The employees in Thibodeaux’s company, EJI, chose not to join a union like their sister company, EJA. As flight attendants for a fractional ownership program, they had some reason to expect that EJI, a service provider for individual aircraft owners, not commercial entities, would be subject to the laws of the FLSA. Contrary to their expectations, the court in Thibodeaux found that EJI was a “common carrier” and that Thibodeaux had no protection under the law. Although the facts of the case do not describe the election not to participate in the union, a valid argument exists that the employees would have been more likely to unionize had they known they would not be protected from unfair labor practices.

¹¹⁷ Thibodeaux v. Executive Jet Int’l, 328 F.3d 742, 750 (5th Cir. 2003).
The fractional owner in *Fall Creek* is another example of the disadvantages individuals may have from the inconsistent law regarding these programs. In that case, the owner may have acted differently had he known that he would be subject to federal excise taxes through the management company and then be forced to pay use taxes for his “personal property” in Missouri. In the future, those involved in the business of fractional ownership programs will be forced to make similar decisions about their involvement in these programs. Owners should know if they will be held liable for the acts of another fractional owner in “their” aircraft; passengers should be able to fly confident that the minimum safety requirements have been met by a named responsible party; and all involved should have a standard by which to make decisions so that they can make essential legal choices when participating in these programs.

V. RECOMMENDATIONS

Although no body of law is complete and void of legal surprises, one important decision may provide great clarity for the fractional ownership market: is the fractional owner or program manager in operational control of the aircraft? If the fractional owner has control, the law should reflect the non-commercial nature of the owner’s relationship with the manager and other fractional owners. In addition, safety regulations should be adopted to ensure that each owner is aware of his responsibilities in operating the aircraft, and the courts should be more reluctant to place “common carrier” status on these sharing agreements. If, however, the program manager is truly in control of the aircraft, the FAA should closely investigate whether these companies are engaged in “transportation for hire.” If so, there is a strong argument that regulations closer to those described in Part 135, designed to protect passive aircraft passengers uninvolved in the operation of the aircraft, should be required. Furthermore, the commercial nature of the business warrants decisions supporting FLSA exemptions, the federal excise tax, and possible securities regulation. Most importantly, all participants in the program—managers, owners, employees, and affiliate companies—should have notice of their legal rights and obligations under the law.

A. FRACTIONAL OWNERS IN OPERATIONAL CONTROL

Although convincing arguments could be made on both sides, all participants in fractional ownership programs intend for the
owner to be in operational control of the aircraft. The contract, signed by business-minded individuals, explicitly outlines the duties and responsibilities of each party, clearly stating that the fractional owner is in operational control. By purchasing the aircraft, the fractional owner knowingly subjects himself to risks associated with private ownership of the aircraft—namely, depreciation of the property, applicable taxes and liability, at least for his own negligence. The program manager, on the other hand, simply acknowledges a duty to do just what his title suggests—manage the fractional relationship among owners. Like other management organizations, the Netjets program and other similar companies provide all tangential services. These duties include the enforcement of contract agreements, the scheduling of flights and crew, and the maintenance of aircraft and flight records to become compliant with aviation law.

B. The Legal Dilemma

These duties, however broad, should not change the initial contractual relationship between the parties. The FAA’s determination was clear in asserting that the owner retains operational control over the aircraft. It did not hesitate, however, to note that fractional ownership programs are unique and may not fit easily into pre-conceived categories of air service providers. They responded with legal ingenuity—if these programs are different, we should treat them differently. Therefore, they created provisions that were fair and rational in light of lengthy investigations and input from various sources.

The courts, on the other hand, have not responded with the same flexibility. They continue to measure the status of fractional ownership programs by determining whether they are commercial carriers or not. Unfortunately, fractional ownership programs do not fit nicely into either category. Because commercial and non-commercial entities share the roles and responsibilities of safe and efficient air travel, cramming them into one of these categories makes for an ill fit. To many courts reviewing these cases, the business component of recruiting buyers overrides all other components of the relationship between the fractional owners and its members. Arguably, the courts should adopt a new approach to fractional ownership programs similar to the one adopted by the FAA.
C. THE SOLUTION—ENSURING OWNER CONTROL

Clearly, the question of who has operational control over the aircraft is as important to recent legal decisions regarding fractional ownership programs, which have held that these managers are commercial entities, as to the FAA safety regulations, which overtly expressed its understanding that the non-commercial entity is in operational control. To avoid antithetical decisions regarding these programs in the future, measures should be taken to ensure that the owner is truly in operational control of the aircraft.

Subpart (k) has already taken steps in this direction. By requiring owners to be “briefed” on their duties and responsibilities and having them sign an acknowledgement upon entering the contract, the FAA provisions will ensure that the owners are aware of their responsibilities. Furthermore, the FAA has given the fractional participants more ownership over the aircraft. Although the program manager coordinates the flights, hires the flight crew, and maintains the aircraft, the FAA proposes that the owner should have the authority to check flight records and logs and override any assignment of a crew to a particular flight. Fractional owners may have been slow to take such action in the past; however, an awareness of their responsibilities and potential liability may spurn more active participation on the part of the owners.

Most importantly, a clear definition for fractional ownership programs should be outlined, and this definition should permeate all legal decisions concerning these programs. Again, the FAA proposal attempts to define specific programs that will be subject to Subpart (k). Netjets and other similar programs may attempt to alter their program to more closely resemble wholly owned private aircraft, subject to Part 91 regulations.

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118 Regulation, supra note 22, at 54,525. Enforcement of this provision is still being investigated by the implementation team.

119 14 C.F.R § 91.1001. Subsection (8) defines the administrative functions of fractional ownership management as: (i) establishment and implementation of program safety guidelines; (ii) employment, furnishing or contracting of pilots and other crewmembers; (iii) training and qualification of pilots and other crewmembers and personnel; (iv) scheduling and coordination of the program aircraft and crews; (v) maintenance of program aircraft; (vi) satisfaction of recordkeeping requirements; (vii) development and use of a program operations manual and procedures; and (viii) application for and maintenance of management specifications and other authorizations and approvals.

120 Regulation, supra note 22, at 54,531.

121 14 C.F.R. § 91.1001.
Clear guidelines must delineate these fractional ownership program managers from other managing agents. By looking at the nature of the fractional ownership business, Netjets and other program managers initially own the aircraft and then sell fractions of the craft to other owners. This is different from a managing agent, who may market to owners, but is not involved in initial procurement of the craft. This distinction is important as it goes to the heart of who is in operational control. Because of the ease with which Netjets provides its service, so that a fractional owner only has to sign a pre-printed contractual agreement and make appointments to use the aircraft, it has become a successful branch of private aircraft ownership. If these companies attempt to lose this control both before and after procurement of the craft by the owner, they are likely to find that the service they provide is not only just like that of a managing agent, but also more of a burden than benefit to its customers.

In addition, specific regulations must be in place to ensure that any program manager exhibiting more control than allowed by the FAA will be considered Part 135 “commercial carriers.” If a company is really acting as a charter service, with only private owners as a proxy for operation, clearly these programs should be treated as such. This can be monitored by auditing both the contract agreements and working relationship of the manager and owners in these programs. Once the ‘fractional ownership program’ is clearly defined as those operations run like the Netjets program, and narrow definitions are put into place to ensure that fractional ownership programs must operate under Subpart (k), the FAA and courts can act with knowledge and confidence in making legal decisions concerning these programs.

1. Unification in Legal Disputes
   a. Tax Decisions

   As discussed above, these decisions rest on 1) who is in “possession, command and control” of the aircraft and 2) whether the program manager is “in the business of transporting for hire.” Therefore, again the ultimate question to be determined is who is in operational control of the aircraft. With the new finding by the FAA, and the pursuant regulations to ensure that the fractional owner really is in control of the use of the aircraft, a stronger argument lies on the side of determining that these flights are not commercial. If a fractional ownership program falls within the strict parameters of Subpart (k), the IRS and cir-
circuit courts should apply non-commercial taxes accordingly, not the federal excise tax. In this case, the fractional owners would be forced to pay taxes; however, they would also be allowed to deduct depreciation of the aircraft from their income tax. In addition, state use and sales taxes could apply to the fractional purchase of interest in the aircraft according to standard taxes for private aircraft owners.

b. FLSA

Furthermore, if the fractional ownership program falls within the purview of the FAA’s definition, these programs should not be exempt under the FLSA. Although the program manager markets its services, the fractional owner is in operational control of the aircraft, and under the new guidelines, may have the final say over use of the crew and flight duties.\(^{122}\) As a passenger on his own plane, the owner should not receive the same protection afforded the passengers on commercial flights at the expense of the employee. Clearly, applying the FLSA exemption to these programs does not further the objectives of Title II of the RLA. The need to keep “transportation moving” in fractional ownership programs is an internal, private need rather than a public concern warranting legal remedy. Instead of applying the exemption, which allows fractional owners to be non-participants in the treatment of employees servicing their own flights, these programs should be subject to the FLSA provisions. If costs are incurred due to required overtime pay, fractional owners may be encouraged to take a more active role in regulating the crew’s time and duties during the flights.

c. Future Legal Decisions

In addition to removing the inconsistencies already present in the law concerning these programs, setting clear standards that ensure fractional owners are in operational control of the aircraft is important in providing notice for future decisions. First, owners that are in operational control of the aircraft will be liable for accidents that arise from use of this aircraft. Knowing this outcome, these owners can take steps to regulate their liability for losses that another fractional owner may have caused. By recognizing the risks associated with fractional ownership programs, businesses can work to change contract agreements with

\(^{122}\) New regulations in Subpart (k), which limit the use of the crew and require rest times, may also affect overtime compensation within these programs. Id.
other fractional owners to protect their assets and take a more active role in the operation of the aircraft to ensure the least chance of liability.

Furthermore, a decision that is clear in granting fractional owners operational control over the aircraft in which they own an interest is important to alleviating concerns that these programs may be subject to securities regulation in the future. If the owners are in control of the aircraft, there will be no rationale for application of securities regulation. Although a program manager provides services for the owners’ aircraft, true ownership is in the hands of the fractional owner whose interest in the aircraft is solely for transportation of employees and/or clients. Therefore, the third prong of the Howey Test, which requires the aircraft to be used in the expectation of profits, would not be met.

2. Furtherance of Public Policy

A decision holding program managers in operational control of the aircraft would have negative consequences on the business and aviation community: 1) fractional ownership programs would become charter organizations under the law, depriving both owners and program managers of the benefits of the unique nature of these programs, and 2) fractional owners would have permission to take a passive role in ensuring the airworthiness of the aircraft in which they own an interest, leaving the responsibility to program managers alone. To the contrary, a concise definition regulating the operation of fractional ownership programs, which places operational control in the hands of the fractional owner, and requiring the fractional owner to take on the risks and liabilities associated with aircraft ownership, would further important public policy. Uniform mandates in the law that recognize the non-commercial nature of these programs and shared responsibilities by both owners and managers will work to increase public safety, give notice to program participants, and protect individuals affiliated with Netjets and similar programs.

By adopting the provisions of Subpart (k), the FAA has taken large steps in ensuring safer travel. Because air travel requires heightened safety requirements, the FAA should provide a mechanism for holding owners and program managers responsible for maintaining compliance, which would ensure safer air travel. In addition, if fractional owners are held in operational control of the aircraft, they would have both the power and duty
to take an active role in the maintenance of the craft and selection of the crew. This allows fractional ownership programs to safely retain their unique status in the body of air service providers, having more control than charter services without the immense work associated with wholly-owned aircraft. At first, program participants may be hesitant to change their existing program; however, requiring the owners to become more engaged in the program's operations and bear more responsibility will make large strides in ensuring safer air travel.

If the laws are harmonized, so that fractional ownership programs are treated similarly by every law-making body, then program participants and affiliated individuals will receive the legal protection that has been deemed paramount by American courts. By holding the fractional owner in operational control of the aircraft, all program participants will be aware of their responsibilities and risk of liability before engaging in the fractional ownership program. Business decisions, contract agreements and negotiations can be made with the knowledge of potential legal outcomes. In addition, employees and other affiliated services can make decisions to protect their legal interests—whether it is to join a union, apply for overtime wages, or agree to go on strike.

VI. CONCLUSION

Regardless of the outcome, a legal determination regarding these programs must be made. If it is determined that the program manager is truly in operational control of the aircraft, the law would essentially eliminate the fractional ownership business and essentially hold all similar entities as charter services under the law. If the legal community can adopt fair laws that further the purpose of mandates and regulations, while honoring the intent of the contracting parties, it should make every attempt to do so.

In the case of fractional ownership programs, the laws have been erratic and the decisions conflicting. All findings, however, rest on the answer to the same question—determining who is in operational control of the aircraft. If other administrative bodies and legal courts would be willing to adopt the findings of the FAA, the law would become more harmonized, legal precedent would be consistent and instructive, and important public policy would be furthered. If operational control is in the hands of the fractional owner, and the flights are therefore non-commercial in nature, the unique nature of these programs
would be recognized and the intent of the program participants would be met.

Although it may seem that placing liability in the hands of a distant, fractional owner would decrease the level of safe travel in these programs, this decision would likely have the opposite effect. In practice, fractional owners would become more involved in the process, and program managers would have the extra incentive to maintain safety compliance as a means of customer satisfaction for a more interested consumer base. Because Subpart (k) clearly defines the fractional ownership program, preventing companies with more control from operating under the less stringent standards of Part 91, this decision would allow fractional ownership programs to survive and yet meet necessary trade standards for safety.

This finding would have a positive impact on other conflicts in the law. Fractional owners would be responsible for paying taxes on their fractional interest but would enjoy the tax deductions for the aircraft’s use each year. Because employee complaints would essentially have no effect on the public market, holding these programs to the FLSA overtime provisions is appropriate under the provisions of the statute and provides a legal remedy for employees unable to protect themselves. Although fractional owners may object to liability for accidents caused by their aircraft, a decision in the law provides important notice allowing these owners to make contractual arrangements protective of each owner’s individual rights.

Just like the introduction of any new business enterprise, fractional ownership programs have faced the confusion that belies our legal system—finding its place and forging a way within existing aviation law. Although the merits of American law should not be undermined, it is time for the law to decide where fractional ownership programs stand in the aviation community. Without a standard, judicial and administrative decisions will continue to confuse program participants. No longer can important issues be lost between owners and program managers. Operational control is best served if placed with the fractional owner, requiring both parties to seek safe travel and fair operations of the aircraft to ensure the continued success of this important part of the aviation industry.