

1988

An Overview of Registration, Recordation, Ownership, and Secured Interests in Aircraft under the Federal Aviation Act of 1958

Leo W. Nelsen

Recommended Citation

Leo W. Nelsen, *An Overview of Registration, Recordation, Ownership, and Secured Interests in Aircraft under the Federal Aviation Act of 1958*, 53 J. AIR L. & COM. 933 (1988)
<https://scholar.smu.edu/jalc/vol53/iss4/3>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

**AN OVERVIEW OF REGISTRATION,
RECORDATION, OWNERSHIP, AND SECURED
INTERESTS IN AIRCRAFT UNDER THE
FEDERAL AVIATION ACT OF 1958**

LEO W. NELSEN*

THE PURPOSE OF this paper is to acquaint the reader with the basic registration and recordation provisions of the Federal Aviation Act of 1958 (the "Act") and to survey the recent reported decisions interpreting key provisions of the Act. This paper is an overview and obviously is much too brief to serve as an exhaustive discussion of this area of the law. Some working knowledge of the federal system for registration and recordation of interests in aircraft is essential for the attorney handling aviation matters, for anyone involved in aircraft financing and insurance, and for anyone else who in any way deals with ownership of or secured interests in aircraft.

Since the passage of the Civil Aeronautics Act in 1938,¹ the federal government has required that conveyances and instruments affecting title to aircraft be recorded with a central federal clearing house. The 1938 Act was superseded by the Federal Aviation Act of 1958,² which reenacted the registration and recordation provisions found in

* Partner, Lucas & Murphy, P.C., St. Louis, Missouri. B.A. 1970, University of Nebraska at Omaha; M.A. 1975, University of Minnesota; J.D. 1980, Washington University.

¹ Civil Aeronautics Act, ch. 601, tit. V, 52 Stat. 973, 1005-07 (1938) (current version at 49 U.S.C. app. §§ 1401-06 (1982)).

² 49 U.S.C. app. §§ 1401-06 (1982).

the Civil Aeronautics Act.³

I. AN OVERVIEW OF THE REGISTRATION
AND RECORDATION PROVISIONS OF THE
FEDERAL AVIATION ACT OF 1958:
SECTIONS 501-506

The registration and recordation provisions of the Federal Aviation Act of 1958, Sections 501 through 506, are codified in Title 49 of the United States Code, Sections 1401 through 1406. Section 501, codified in 49 U.S.C. § 1401, makes it unlawful for any one to operate an unregistered aircraft, and describes in some detail eligibility for registration, suspension and revocation of registration, and the effect of registration.⁴ This section explicitly states however, that registration is evidence only of nationality, and not of ownership.⁵ Section 502, codified in 49 U.S.C. § 1402, provides for the separate registration of aircraft engines, propellers and other appliances.

Section 503, codified in 49 U.S.C. § 1403, is the central provision of the Act, if the amount of litigation generated is any indication of importance. This section, entitled "Recordation of aircraft ownership," provides that the Secretary of Transportation shall establish and maintain a system for the recording of conveyances that affect the title to, or any interest in, any civil aircraft in the United States.⁶ This section also requires the recording of leases,

³ See H.R. REP. NO. 2360, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. CONG. CODE & ADMIN. NEWS 3741, 3755.

⁴ 49 U.S.C. app. § 1401(a)-(f) (1982).

⁵ 49 U.S.C. app. § 1401(f) (1982); *see* *Northwestern Flyers, Inc. v. Olson Bros. Mfg. Co.*, 679 F.2d 1264, 1270 n.13 (8th Cir. 1982)(questions regarding title of ownership are not controlled by the Federal Aviation Act); *see also* 14 C.F.R. § 47.5(c) (1988).

The FAA does not issue any certificate of ownership or endorse any information with respect to ownership on a Certificate of Aircraft Registration. The FAA issues a Certificate of Aircraft Registration to the person who appears to be the owner on the basis of the evidence of ownership submitted pursuant to Sec. 47.11

Owner "includes a buyer in possession, a bailee, or a lessee of an aircraft under a contract of conditional sale, and the assignee of that person." *Id.* at § 47.5(d).

⁶ 49 U.S.C. app. § 1403(a)(1) (1982); *see* 49 U.S.C. app. § 1301(17) (1982) and

mortgages, equipment trusts, contracts of conditional sale and other instruments executed for security purposes in aircraft engines of 750 horsepower or more and propellers suitable for use on such engines.⁷ Section 503, in relevant part provides:

(c) No conveyance or instrument the recording of which is provided for by subsection (a) of this section shall be valid in respect of such aircraft . . . against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Secretary of Transportation Each conveyance or other instrument recorded. . . shall from the time of its filing for recordation be valid as to all persons without further or other recordation⁸

As between the immediate parties to the transaction, a failure to record by one, or both, will not affect their interests in the aircraft.⁹ For purposes of perfecting an ownership or security interest in aircraft, the critical date is the date of filing for recordation, not the actual date of recordation, which in actual practice can be weeks after filing.¹⁰

14 C.F.R. § 49.17(a) (1988) which define the term "conveyance" as used in the Act to mean "a bill of sale, contract of conditional sale, mortgage, assignment of mortgage, or other instrument affecting title to, or interest in, property." 14 C.F.R. § 49.17(b) (1988) provides that the kinds of conveyances recordable include those used as evidence of ownership under 14 C.F.R. § 47.11 (1988).

⁷ 49 U.S.C. app. § 1403(a)(2) (1982).

⁸ 49 U.S.C. app. § 1403(c),(d) (1982).

⁹ 49 U.S.C. app. § 1403(c) (1982); see *California Chieftan v. Air Vermont, Inc.* (*In re Air Vermont, Inc.*), 761 F.2d 130, 135 (2d Cir. 1985) (section 1403 does not invalidate an unrecorded conditional sales contract between the immediate parties to the dispute and provides a valid basis for repossession); *In re Island Helicopter Corp.*, 63 Bankr. 515, 522 (Bankr. E.D.N.Y. 1986) (section 1403(a) cannot be used to invalidate an otherwise valid transfer as between the immediate parties to the transfer); *Smith v. Joliet Airmotive, Inc.*, 35 Ill. App. 2d 2, 181 N.E.2d 817, 819 (1962) (bill of sale from seller to buyer was valid as between these parties even when not recorded); *Norris v. Insurance Co. of N. Am.*, 26 N.C. App. 91, 215 S.E.2d 379, 388 (1975) ("The clear implication of [§ 1403] is that the conveyance, even though not recorded, is valid as against the person making the conveyance. . . .").

¹⁰ "Each conveyance or other instrument. . . shall from the time of its filing for recordation be valid as to all other persons. . . ." 49 U.S.C. app. § 1403(d) (1982);

Section 504, codified in 49 U.S.C. § 1404, limits the liability of security owners to injuries caused when the subject aircraft is in the actual possession or control of the security holder.¹¹ Section 505, codified in 49 U.S.C. § 1405, provides for the issuance, suspension, and revocation of dealers' aircraft registration certificates.¹²

Section 506 of the Act, codified in 49 U.S.C. § 1406, requires that the applicable law in determining the validity of any instrument filed under Section 503 is the law of the state in which the instrument is delivered. Additionally, section 1406 preempts state law as it relates to choice of law.¹³

The validity of any instrument the recording of which is provided for by section 1403 of this title shall be governed by the laws of the State . . . in which such instrument is delivered, irrespective of the location or the place of delivery of the property which is the subject of the instrument.¹⁴

see 14 C.F.R. § 47.39 (1988) ("[A]n aircraft is registered on the date and at the time the FAA Aircraft Registry receives the [required] documents"); 14 C.F.R. § 49.19 (1988) ("A conveyance is filed for recordation upon the date and at the time it is received by the FAA Aircraft Registry."); *Armstrong v. State Bank of Towner (In re Gelking)*, 754 F.2d 778, 780 (8th Cir. 1985), *cert. denied*, 473 U.S. 906 (1985).

¹¹ 49 U.S.C. app. § 1404 (1982). "No person having a security interest in, or security title to, any civil aircraft . . . shall be liable by reason of such interest or title . . . for any injury to or death of persons, or damage to or loss of property . . . caused by such aircraft . . . unless such aircraft is in the actual possession or control of such person at the time of such injury, death, damage or loss." *Id.*

¹² 49 U.S.C. app. § 1405 (1982). "The Secretary of Transportation may . . . provide for the issuance, and for the suspension or revocation, of dealers' aircraft registration certificates" *Id.*

¹³ See *Sanders v. M.D. Aircraft Sales, Inc.*, 575 F.2d 1086 (3d Cir. 1978). "Thus there has been preemption by federal law only to the limited extent that Congress has sensibly federalized choice of law, thereby freeing aircraft financing from the forum shopping which the rule of *Klaxon Co. v. Stentor Elec. Mfg. Co.* might otherwise produce." *Id.* at 1088 (citation omitted); see also *Interfirst Bank Clifton v. Fernandez*, No. 87-1321, (5th Cir. 1988) (1988 LEXIS 6233). Section 1406 is a federal choice-of-law rule for determining the substantive validity of an instrument. *Id.* at 19.

¹⁴ 49 U.S.C. app. § 1406 (1982).

II. *PHILKO AVIATION, INC. v. SHACKET*

Prior to its decision in *Philko Aviation, Inc. v. Shacket*,¹⁵ the United States Supreme Court had not interpreted any of the recording provisions of the Federal Aviation Act. There was general, although not universal, agreement that Congress in enacting these provisions of the Act did not preempt the entire field of conveyances of interests in aircraft.¹⁶ Most courts that considered the issue concluded that the Congressional purpose for enacting Section 503 was to establish a single national filing system for the recording of documents evidencing title and security interests in aircraft.¹⁷ The Act, however, did not legislate priorities among holders of various competing interests in aircraft.¹⁸ Thus questions of priority between competing

¹⁵ 462 U.S. 406 (1983).

¹⁶ See, e.g., *Danning v. Pacific Propellor, Inc. (In re Holiday Airlines)*, 620 F.2d 731, 733-35 (9th Cir.), cert. denied, 449 U.S. 900 (1980) (validity of artisans' liens on aircraft is determined by state law and such matters are not preempted by the Federal Aviation Act); *Texas Nat'l Bank of Houston v. Aufderheide*, 235 F. Supp. 599, 602-04 (E.D. Ark. 1964) (Federal Aviation Act does not preempt state law addressing original validity of liens and title); *American Aviation, Inc. v. Aviation Ins. Managers, Inc.*, 244 Ark. 829, 427 S.W.2d 544, 546-47 (1968) (Congress has not preempted the entire field of aircraft conveyances); *Bitzer-Croft Motors, Inc. v. Pioneer Bank & Trust Co.*, 82 Ill. App. 3d 1, 401 N.E.2d 1340, 1344-45 (1980) (validity of aircraft title instruments filed under Federal Aviation Act is resolved under state law); *Johnston v. Simpson*, 621 P.2d 688, 690 (Utah 1980) (state law continues to determine the validity of conveyances and instruments affecting title to aircraft after the passage of the Federal Aviation Act).

¹⁷ See, e.g., *Gary Aircraft Corp. v. General Dynamics Corp. (In re Gary Aircraft Corp.)*, 681 F.2d 365, 368-72 (5th Cir. 1982), cert. denied, 462 U.S. 1131 (1983) (the Federal Aviation Act of 1958 creates a single national recording system for interests in aircraft but does not displace state law assignment of priorities to interests in aircraft); *Bitzer-Croft Motors*, 401 N.E.2d at 1345.

¹⁸ See, e.g., *Gary Aircraft Corp.*, 681 F.2d at 368-72 (the Federal Aviation Act of 1958 creates a single national recording system for interests in aircraft but does not displace state law assignments of interests in aircraft); *Danning*, 620 F.2d at 733-35 (the validity of artisans liens on aircraft is determined by state law and such matters are not preempted by the Federal Aviation Act); *Industrial Nat'l Bank of R.I. v. Butler Aviation Int'l, Inc.*, 370 F. Supp. 1012, 1015-17 (E.D.N.Y. 1974) (Congress did not intend the Federal Aviation Act to preempt all state law concerning priorities of lien and title interests in aircraft); *Texas Nat'l Bank of Houston* 235 F. Supp. at 602-04 (Federal Aviation Act does not preempt state law addressing general validity of liens and title); *Aircraft Inv. Corp. v. Pezzani & Reid Equip. Co.*, 205 F. Supp. 80, 82 (E.D. Mich. 1962) (Congress has not impaired the existence and effectiveness of state laws of defining liens and title); *American Avia-*

interests were left to state law with two minor exceptions, neither of which is relevant for purposes of this paper.¹⁹

Much of the litigation over competing interests in aircraft concerns the situation where a buyer in ordinary course of business²⁰ purchases an aircraft that is either

tion, 427 S.W.2d at 546-47 (Congress has not preempted the entire field of aircraft conveyances); *Bitzer-Croft Motors*, 401 N.E.2d at 1344-45 (validity of aircraft title instruments filed under Federal Aviation Act is resolved under state law); *Cessna Finance Corp. v. Skyways Enters., Inc.*, 580 S.W.2d 491 (Ky. 1979) (Federal Aviation Act does not preempt state priorities law); *Southern Jersey Airways, Inc. v. National Bank of Secaucus*, 108 N.J. Super. 369, 261 A.2d 399 (Ct. App. 1970) (Federal Aviation Act does not preempt state priorities law); *Johnston*, 621 P.2d at 690 (state law continues to determine the validity of conveyances and instruments affecting title to aircraft despite passage of the Federal Aviation Act). *But cf.* *Sun Bank v. Snell (In re Cone)*, 11 Bankr. 925, 927-29 (Bankr. M.D. Fla. 1981) (Federal Aviation Act preempts state law as to priority of liens); *Dowell v. Beech Acceptance Corp.*, 3 Cal. 3d 544, 476 P.2d 401, 402-05, 91 Cal. Rptr. 1 (1970), *cert. denied*, 404 U.S. 823 (1971) (holder of a prior recorded security interest prevailed over a subsequent buyer in ordinary course who failed to record and who failed to search the FAA Registry; to follow a state law rule protecting such a buyer would eviscerate "[t]he federal policy to foster recordation and to protect recorded interests. . . ."); *O'Neill v. Barnett Bank of Jacksonville*, 360 So. 2d 150, 152 (Fla. Dist. Ct. App. 1978) (Federal Aviation Act preempts the U.C.C. provision dealing with buyers in ordinary course of business thereby rendering a properly registered security interest enforceable against such a buyer); *Continental Radio Co. v. Continental Bank & Trust Co.*, 369 S.W.2d 359, 362 (Tex. Civ. App. 1963) ("Congress clearly undertook to pre-empt the field of conveyancing of interests in aircraft . . .").

¹⁹ The statute creates substantive priorities in one area. It recognizes and provides for the recordation of the "basket lien", which is a lien over stocks of spare parts maintained for installation in aircraft. 49 U.S.C. app. § 1403(a)(3) (1982). It further provides that a recorded interest in a specific engine shall have priority over both previously and subsequently recorded basket liens. *Id.* § 1403(d).

²⁰ The Uniform Commercial Code (U.C.C.) section 1-201(9) defines buyer in ordinary course of business as "a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party buys in ordinary course from a person in the business of selling goods of that kind . . ." U.C.C. § 1-201(9) (1982). Section 9-307(1) of the U.C.C. provides that "[a] buyer in ordinary course of business . . . takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence." A buyer in ordinary course of business has no duty to examine the FAA title records before buying. U.C.C. § 9-307(1) (1982). *See* *Northern Ill. Corp. v. Bishop Distrib. Co.*, 284 F. Supp. 121, 125 (W.D. Mich. 1968); *Texas Nat'l Bank of Houston*, 235 F. Supp. at 604; *Cessna Fin. Corp.*, 580 S.W.2d at 494 n.7. *But cf.* *Dowell*, 91 Cal. Rptr. at 5 (a buyer in ordinary course by definition [U.C.C. 1-201(9)] is one who buys from one in the business of selling goods of that kind). *See, e.g., Aircraft Trading & Serv., Inc. v. Braniff, Inc.*, 819 F.2d 1227, 1233 (2d Cir.), *cert. denied*, 108 S. Ct. 163 (1987) (purchase of an engine from an airline was the purchase of capital equipment and did not bestow

subject to an existing security interest recorded with the FAA Registry, or subsequently becomes subject to a recorded security interest. The majority of the courts that confronted this issue held that such a buyer, even though he failed to file his bill of sale, or in any other way record his ownership with the FAA, nevertheless defeated a perfected security interest in the aircraft.²¹ The California Supreme Court in the case of *Dowell v. Beech Acceptance Corp.*,²² issued the leading decision articulating the minority view that a buyer in ordinary course of business who failed to record his interest in an aircraft with the FAA would not defeat a perfected security interest properly recorded with the FAA prior to the sale.

upon purchaser the status of buyer in ordinary course); *O'Neill*, 360 So. 2d at 152 (a sale incidental to the seller's principal business does not make the seller a person in business of selling goods of that kind and thus the purchaser of an airplane from a fixed base operator did not render the purchaser a buyer in ordinary course). However, an aircraft dealer can itself be a buyer in ordinary course of business. *Cessna Fin. Corp.*, 580 S.W.2d at 494. A buyer in ordinary course acquires all the title that his seller has to convey, extinguishes the security interest created by this seller, and "shelters" the subsequent transferees of the buyer in the ordinary course by conveying to them title free of the security interest created by the original seller. See U.C.C. § 2-403 (1982); *Gary Aircraft Corp.*, 681 F.2d at 376-77.

²¹ See, e.g., *Sanders*, 575 F.2d at 1089 (buyer of airplane in ordinary course of business took title free and clear of finance company lien); *United States Aviation Underwriters, Inc. v. WTAE Flying Club*, 300 F. Supp. 341 (W.D. Pa. 1969) (buyer took possession of aircraft free of prior chattel mortgage, although the lien was perfected by a filing with the FAA because buyer acted in good faith with no knowledge of prior lien); *Texas Nat'l Bank of Houston*, 235 F. Supp. at 604 (Bank's FAA recorded security interest in aircraft arising from floor plan mortgage of retail aircraft dealer's inventory would not defeat subsequent purchaser's interest in the aircraft); *Bank of Hendersonville v. Red Baron Flying Club, Inc.*, 571 S.W.2d 152 (Tenn. App. 1977), cert. denied, 439 U.S. 1089 (1979) (recorded security interest with the FAA is not superior to the rights of a purchaser for value without notice of the security interest); Cf. *Haynes v. General Electric Corp.*, 432 F. Supp. 763 (W.D. Va. 1977), aff'd, 582 F.2d 289 (4th Cir. 1978) (buyer in ordinary course who recorded his bill of sale with FAA defeated prior recorded security interest of lender); *Lochhead v. G.A.C. Fin. Corp. of Camelback*, 6 Ariz. App. 539, 434 P.2d 655 (1968) (as a matter of law, recording with the FAA will not necessarily defeat the unrecorded prior interests of a bona fide purchaser); *Idabel Nat'l Bank v. Tucker*, 544 P.2d 1287 (Okla. App. 1975) (buyer in ordinary course took free of the bank's prior recorded security interest even though the buyer failed to file his bill of sale with the FAA until after the bank repossessed the plane).

²² 3 Cal. 3d 544, 476 P.2d 401, 91 Cal. Rptr. 1 (1970), cert. denied, 404 U.S. 823 (1971); see *supra* note 20.

The Supreme Court's decision in *Philko Aviation*, however, has effectively overruled these earlier decisions to the extent that they held that a buyer in ordinary course of business who failed to record his ownership interest with the FAA had a claim to the aircraft superior to the holder of a perfected security interest. In *Philko Aviation*, Smith, a dealer in aircraft, sold a new airplane to the Shackets who paid full price and took possession of it. Smith did not give the original bill of sale to the Shackets but gave them photocopies and assured them that he would "take care of the paperwork."²³ Immediately after the sale to the Shackets, Smith purported to sell the airplane to Philko Aviation. Smith gave Philko Aviation the original title documents, but not the airplane, claiming that the plane was having electronic equipment installed in Michigan. After Philko completed the purchase from Smith, Philko recorded its interest in the airplane with the FAA. The Shackets, relying upon Smith's assurances, never recorded their bill of sale with the FAA.²⁴

After the duplicity of Smith was revealed, the Shackets instituted a declaratory judgment action to determine title to the aircraft. The Shackets argued that as purchasers in good faith, state law gave them priority. Philko asserted title under Section 1403(c) because the Shackets never recorded with the FAA.²⁵

The United States District Court for the Northern District of Illinois entered summary judgment in favor of the Shackets, reasoning that Section 1403(c) did not preempt state law regarding title transfers.²⁶ The Shackets were characterized as bona fide purchasers of the plane in the

²³ *Philko Aviation*, 462 U.S. at 407.

²⁴ *Id.* at 408. On remand it was determined that the Shackets, following the purchase of the airplane, made repeated inquiries of Smith about the registration of the airplane. Unable finally to reach Smith, they attempted to record their temporary registration papers, not having any of the original chain-of-title bills of sale. The FAA would not accept these documents for registration because Philko's claimed interest in the aircraft was already a matter of record. See *Shacket v. Roger Smith Aircraft Sales, Inc.*, 651 F. Supp. 675, 694 (N.D. Ill. 1986).

²⁵ *Philko Aviation*, 462 U.S. at 408.

²⁶ *Shacket v. Roger Smith*, 497 F. Supp. 1262, 1267 (N.D. Ill. 1980).

ordinary course of business, and thus secured good title to the airplane under the Illinois Uniform Commercial Code. The court held that Philko was not a buyer in ordinary course of business under an entrustment theory, which would have enabled Philko to acquire title from Smith free of the Shackets' interest. The transfer to Philko amounted to a transfer of a security interest and not a purchase. Thus, Philko was only a secured party. The conflict was, therefore, between a bona fide purchaser who failed to record and the holder of a subsequently recorded security interest.²⁷ The district court correctly noted that nearly all of the reported decisions at that time held that the purchaser prevailed over the holder of a recorded security interest.²⁸ The Seventh Circuit affirmed the decision of the district court.²⁹

The Supreme Court, however, reversed in an opinion by Justice White writing for a unanimous Court, with Justice O'Connor concurring in the result. The court held that Section 503(c), codified in 49 U.S.C. § 1403(c), prohibits all transfers of aircraft title from having validity against innocent third parties unless the transfer was evidenced by a written instrument, and the instrument was recorded with the Federal Aviation Administration.³⁰ According to the Court's reasoning, this conclusion is dictated by the legislative history of Section 503 which indicates that "Congress must have intended to preempt any state law under which a transfer without a recordable conveyance would be valid against innocent transferees or lienholders who have recorded."³¹ Any other interpretation would defeat the congressional purpose of creating a central clearing house.³²

Although the first person to record his interest with the FAA is not necessarily assured of priority, all interests

²⁷ *Id.* at 1270.

²⁸ *Id.*

²⁹ *Shacket v. Philko Aviation, Inc.*, 681 F.2d 506 (7th Cir. 1982).

³⁰ *Philko Aviation*, 462 U.S. at 407.

³¹ *Id.* at 410.

³² *Id.* at 411.

must be federally recorded before they can obtain whatever priority they are entitled under state law.³³ Justice White quoted with approval from a 1958 article, "Liens in Aircraft: Priorities":

The only situation in which priority appears to be determined by operation of the [federal] statute is where the security holder has failed to record his interest. Such failure invalidates the conveyance as to innocent third persons. But recordation itself merely validates; it does not grant priority.³⁴

The Court concluded that if Philko had actual notice of the transfer to the Shackets or if, under state law, Philko failed to acquire or perfect the interest that it purported to assert, Philko would not have an enforceable interest, and the Shackets would retain possession of the aircraft.³⁵ The Court created a possible due diligence exception when it added that there may be situations in which transferees, such as the Shackets, used reasonable diligence to file and cannot be faulted for the failed recordation of the crucial documents.³⁶

The Supreme Court thus resolved some of the lingering questions concerning the interplay between the recordation provisions of the Federal Aviation Act and state law. The Act preempts state law only to the extent that it creates a central clearing house where all written instruments reflecting a transfer of interest in aircraft must be recorded. State law determines priorities, but in order for the interests to obtain the priority they are entitled to under state law, the interests must first be recorded. Although the decision in *Philko Aviation* finally settled mat-

³³ *Id.* at 412. *Cf.* *Bank of Oklahoma v. Martin*, 744 P.2d 218 (Okla. Ct. App. 1987) (after *Philko Aviation*, filing of a U.C.C. financing statement in accordance with state law is not effective to defeat a security interest in an aircraft that was subsequently filed with the FAA).

³⁴ *Philko Aviation*, 462 U.S. at 413 (quoting Scott, *Liens in Aircraft: Priorities*, 25 J. AIR L. & COM. 193, 203 (1958)).

³⁵ *Id.* at 414.

³⁶ *Id.*

ters of priority, the Court left a number of other issues unresolved.

1. In remanding the case for further consideration, the Supreme Court recognized as a possible dispositive issue whether Philko had "actual notice" of the transfer to the Shackets, as that term is used in section 503(c) of the Act.³⁷ If so, the Shackets' failure to record would not act to defeat their right of ownership. The court's opinion, however, does not provide any guidance in interpreting what constitutes "actual notice."³⁸

2. The *Philko Aviation* opinion also suggests that there may be an exception that would protect a transferee who has not recorded but who has used reasonable diligence in attempting to record. The opinion, however, offers no further elaboration.

3. Because all transfers of aircraft, to be effective against innocent third parties, must be evidenced by a written instrument filed with the FAA, what is the effect of a late filing? Is it effective to preserve whatever rights the transferee would obtain under state law or is there a point beyond which a late filing is a nullity and preserves nothing?

4. Who are the *innocent third parties* the Court refers to when it states that the Act prohibits all transfers of title to aircraft from having validity against "innocent third parties" unless the transfer has been evidenced by a written instrument and the instrument has been recorded with the Federal Aviation Administration?

5. What is meant by a "transfer" when the Supreme Court speaks of "transfers of title to aircraft?" Does this

³⁷ *Id.*

³⁸ Several earlier cases have discussed the definition of "actual notice", as the term is used in section 503(c) of the Act. 49 U.S.C. § 1403(c) (1982). *See, e.g.,* Marsden v. Southern Flight Serv., Inc., 227 F. Supp. 411, 416 (M.D.N.C. 1961) (possession alone of an aircraft is not sufficient to give third parties notice of the possessor's interest); Lochhead v. G.A.C. Fin. Corp. of Camelback, 6 Ariz. App. 539, 434 P.2d 655, 658 (1968) (if seller does not have possession of the aircraft at the time of the sale, the lack of possession alone is not sufficient to give any potential buyer or security holder "actual notice" of a previous interest in the aircraft, but it does shift the burden to the potential buyer, or security holder, to show what inquiry was made to explain the seller's lack of possession which "might affect the bona fides of the transaction"); *Cf. Aircraft Inv. Corp. v. Fisher Flying Serv., Inc.*, 183 So. 2d 441 (La. Ct. App. 1966).

include non-contractual liens such as possessory (e.g., artisan's, garageman's, and bailee's) liens and judicial liens?

III. POST-*PHILKO* DEVELOPMENTS

A number of these issues and others are addressed in reported opinions in the five years following the Supreme Court's decision in *Philko Aviation*.

A. What Constitutes "Actual Notice" under 49 U.S.C. § 1403(c)?

If a secured party has actual notice of an unrecorded transfer, Section 1403(c) does not prevent effective transfer of title to the party with the unrecorded interest. The most recent case to address this issue is *Shacket v. Roger Smith Aircraft Sales, Inc.*,³⁹ the district court's decision on remand from the Supreme Court's decision in *Philko Aviation*. Judge Shadur concluded that Philko, Smith Aircraft's lessor and affiliated company, was intimately aware of Smith's precarious financial condition, and that these circumstances should have put Philko on inquiry notice.⁴⁰ Relying upon the *Lochhead* case,⁴¹ the court concluded that the term "actual notice" under Section 1403(c) includes not only actual notice of an unrecorded interest, but also circumstances that should have provoked further investigation, or inquiry notice.⁴² Philko thus had "actual notice" of the transfer and because of this could not defeat the Shackets' unrecorded interest in the aircraft.

The Seventh Circuit recently affirmed Judge Shadur's decision.⁴³ In so doing, the court concluded that under Section 1403(c) "actual notice" included not only "knowledge that one's seller lacks good title but also knowledge of facts that would lead a reasonable person to inquire further into the seller's title," or "implied actual no-

³⁹ 651 F. Supp. 675 (N.D. Ill. 1986).

⁴⁰ *Id.* at 691-93.

⁴¹ 434 P.2d at 655; *see supra* note 38.

⁴² *Shacket v. Roger Smith*, 651 F. Supp. at 690.

⁴³ *Shacket v. Philko Aviation, Inc.*, 841 F.2d 166 (7th Cir. 1988).

tice.”⁴⁴ The court, aware of the semantic difficulties encountered in differentiating between the various degrees of notice, emphasized that such notice is not to be confused with constructive notice.⁴⁵

The only other post-*Philko Aviation* case to discuss “actual notice” is *South Shore Bank v. H & H Aircraft Sales, Inc.*⁴⁶ In *South Shore Bank*, the Massachusetts Court of Appeals was asked to determine the relative priorities of a buyer who failed to record his ownership interest in an airplane, and a bank whose recorded security interest in the airplane arose after the sale of the airplane to the buyer. The buyer argued that the circumstances of the case, which included the seller’s lack of possession of the airplane, and the seller’s deposit of the buyer’s down payment check with the bank, constituted “inquiry-provoking facts” which amounted to “actual notice.”⁴⁷ The court conceded that the term “actual notice”, as used in Section 1403(c), may include knowledge of facts which provoke inquiry.⁴⁸ The issue, however, was not properly before the court because the buyer-appellant failed to plead “actual notice” as an affirmative defense.⁴⁹ Even if the issue of “actual notice” had been properly raised, there was not a strong factual basis in the record to warrant finding that the facts presented were sufficient to put the bank on ac-

⁴⁴ *Id.* at 170.

⁴⁵ *Id.* at 171.

Admittedly, the line between “constructive notice,” which is not within the scope of 49 U.S.C. § 1403(c), and “implied actual notice,” which is, is a fine one. But “constructive notice” often means no notice, while “implied actual notice” requires (1) actual knowledge of (2) highly suspicious circumstances, coupled with (3) an unaccountable failure to react to them. This in turn is a shade short of the form of actual knowledge that consists of closing your eyes because you’re afraid of what you would see if you opened them. . . Knowledge of fishy circumstances that would move a reasonable person to inquire further is enough.

Id. (citations omitted).

⁴⁶ 16 Mass. App. Ct. 472, 452 N.E.2d 276 (1983).

⁴⁷ *South Shore Bank*, 452 N.E.2d at 279.

⁴⁸ *Id.* at 280.

⁴⁹ *Id.* at 279-81.

tual notice.⁵⁰

B. *What Constitutes Reasonable Diligence?*

The Supreme Court in *Philko Aviation* suggested that there may be situations in which the transferee uses "reasonable diligence" to file, and cannot be faulted for the failure of the crucial documents to be recorded.⁵¹ In those situations, Section 1403(c) will not invalidate the ownership interest of the transferee. The Court provided no further guidance on this issue but left it to be determined on remand. Two cases have subsequently addressed this issue, and have reached opposite conclusions.

The district court in *Philko Aviation*, hearing the case on remand, determined that the Shackets fell within the reasonable diligence exception to Section 1403(c).⁵² The court found the Shackets' reliance on Smith to file the bills of sale with the FAA, a common practice of the industry, was reasonable.⁵³ In addition, the Shackets continued to contact Smith regarding the status of their registration. Two months after the sale, when they were unable to reach Smith, they unsuccessfully attempted to file their temporary aircraft registration with the FAA.⁵⁴ "Reasonable diligence required no more from the Shackets."⁵⁵

The Seventh Circuit affirmed the district court's most recent decision on the basis that Philko had "actual notice" of the transfer. The appellate court did not review Judge Shadur's conclusion that the Shackets exercised reasonable diligence in attempting to record their ownership interest in the aircraft.⁵⁶ In fact, the Seventh Circuit in its opinion expressed serious doubts as to the availabil-

⁵⁰ *Id.* at 280-81.

⁵¹ 462 U.S. at 414.

⁵² *Shacket v. Roger Smith*, 651 F. Supp. at 693.

⁵³ *Id.*

⁵⁴ *Id.* at 693-94.

⁵⁵ *Id.* at 693.

⁵⁶ *Shacket v. Philko*, 841 F.2d at 171.

ity of this defense in all but the most extraordinary of cases:

But we do not want to be understood as necessarily agreeing with his finding. Although the Supreme Court left the door open a crack for the previous purchaser who tries but fails to file, the circumstances must be extraordinary before the nonfiler can be allowed to squeeze through. For, in definition, in a case where the nonfiler's reasonable diligence is relevant the filer was a bona fide purchaser who could not possibly have determined that there was a previous unrecorded transaction which might someday rise up and destroy his title.⁵⁷

The district court hearing *Philko Aviation* on remand declined to follow *South Shore Bank v. Johnson Hydraulic Mfg. Co.*⁵⁸ In this case, the Illinois Court of Appeals considered the validity of the the reasonable diligence exception suggested by the Supreme Court in *Philko Aviation*. The court held that if this exception existed, it was not applicable where the buyer relied upon the dealer's promise to file the bills of sale with the FAA.⁵⁹ Fourteen months after learning of the dealer's fraud, the buyer finally attempted to record its ownership with the FAA. The Illinois Court of Appeals condemned the practice of allowing the dealer to forward the bills of sale to the FAA.

In our opinion, mere reliance on another to perform the ministerial duties of forwarding documents to the FAA for recording, even if shown, as here, to be a customary practice between the parties to a transaction, does not qualify the unrecorded interest-holder for a "due diligence exception" to the federal recordation statute. Nor, as we see it, has due diligence been demonstrated by a prompt attempt to record upon learning of a fraud in the transaction some fourteen months after the purchase is closed.⁶⁰

⁵⁷ *Id.* at 171 (citation omitted).

⁵⁸ 131 Ill. App. 3d 1024, 477 N.E.2d 1 (1985).

⁵⁹ *Johnson Hydraulic*, 477 N.E.2d at 3-4.

⁶⁰ *Id.*

C. *Is Belated Recording Effective to Obtain State Law Priorities?*

In *Aircraft Trading & Serv., Inc. v. Braniff, Inc.*,⁶¹ the plaintiff vendor (ATASCO) sold a jet airplane engine to Northeastern in December 1982. ATASCO retained a chattel mortgage in the engine, but failed to record it with the FAA until March 1985. The Second Circuit held that this tardy recordation nonetheless preserved for ATASCO whatever priority its interest was entitled to under state law.⁶² ATASCO then prevailed over a subsequent purchaser of the engine, who perfected its ownership interest by recording after ATASCO finally recorded.⁶³

Finally, we note that the U.C.C. does not require a security interest to be filed immediately or promptly, . . . although it is the most prudent course for a cautious lender. Delay in perfection does not preclude perfected status at a later time upon filing. While the secured party's interest may be subordinated to interests of others arising prior to filing, "[h]e can, of course, file even after a delay, and protect himself against interests arising subsequent to such filing."⁶⁴

The Second Circuit cited with approval *South Shore Bank v. Tony Mat, Inc.*, a recent Third Circuit case.⁶⁵ In this case, the infamous H & H Aircraft Sales again promised a buyer (Tony Mat) that it would handle the registration of the bill of sale with the FAA.⁶⁶ (This apparently was the same fraudulent scheme perpetrated by H & H in *Johnson Hydraulic* and *South Shore Bank v. H & H Aircraft Sales*.⁶⁷) H & H did not register the original bill of sale with the FAA and, instead, used them to procure a loan from the bank using Tony Mat's plane as collateral.⁶⁸ The bank then

⁶¹ 819 F.2d 1227 (2d Cir.), *cert. denied*, 108 S. Ct. 163 (1987).

⁶² *Aircraft Trading & Serv.*, 819 F.2d at 1232.

⁶³ *Id.* at 1236.

⁶⁴ *Id.* at 1235 (citations omitted).

⁶⁵ 712 F.2d 896 (3d Cir. 1983).

⁶⁶ *Id.* at 897.

⁶⁷ See *supra* notes 46-50 and notes 58-60 and accompanying text.

⁶⁸ *Tony Mat*, 712 F.2d at 897.

perfected its interest by recording the security agreement with the FAA. H & H defaulted on its loan and the bank instituted a declaratory judgment action to determine its rights in the airplane. After the suit was brought, Tony Mat finally recorded its purchase with the FAA. The Third Circuit concluded that even this tardy filing preserved for Tony Mat whatever priorities its interest obtained under state law.⁶⁹

A more problematic case is *Johnson Hydraulic*.⁷⁰ A procedurally complicated case, it contains language that can be interpreted to mean that where a purchaser has not exercised reasonable diligence to record his purchase with the FAA, eventual recordation will be treated as a nullity against any previously perfected security interest: "We agree that the belated 'recording' in this case was a nullity as against South Shore."⁷¹ The attempted recordation referred to in the opinion was made by Johnson Hydraulic fourteen months after the sale, after learning that H & H (the seller) had failed to record the bills of sale. The FAA refused to record the proffered documents because of the bank's prior recorded security interest.⁷²

In a declaratory judgment action, which was brought later, it was determined that Johnson's interest in the aircraft under Illinois law had priority over the bank's interest. Based upon this judicial determination, the FAA permitted the recordation of Johnson's ownership interest.⁷³ The bank appealed the trial court's decision, and while the appeal was pending the Supreme Court decided *Philko Aviation*. The Illinois Court of Appeals, in a *per curiam* opinion, reversed and remanded the matter to the trial court with instructions to reconsider the case in light of *Philko Aviation*.⁷⁴ Because the case, as originally presented to the trial court for determination, involved

⁶⁹ *Id.* at 898-99.

⁷⁰ 131 Ill. App. 3d 1024, 477 N.E.2d 1 (1985).

⁷¹ *Johnson Hydraulic*, 477 N.E.2d at 4.

⁷² *Id.*

⁷³ *Id.* at 2.

⁷⁴ *Id.*

facts nearly identical to those in *Philko Aviation* (an unrecorded buyer versus a holder of a subsequent security interest which was perfected by recordation) the trial court correctly concluded that the buyer's unrecorded interest could not prevail over the perfected security interest of the bank.⁷⁵ The appellate court affirmed this decision, noting that the case was factually like *Philko Aviation*, and that it did not involve two recorded competing interests, the argument that Johnson Hydraulic advanced on appeal.⁷⁶

To the extent that *Johnson Hydraulic* can be interpreted to mean that a belated recording with the FAA is a nullity, it would not appear to be sound law. The better reasoned approach is found in cases like *Aircraft Trading & Serv.*⁷⁷ and *Tony Mat.*⁷⁸ Whether the buyer has exercised reasonable diligence in attempting to record should only be considered when the buyer has failed to record. It should not negate a late filing.

D. Who Are "Innocent Third Parties"?

The Supreme Court in *Philko Aviation* refers to "innocent third parties" against whom transfers, not evidenced by a federally recorded written instrument, will be invalid.⁷⁹ Although this term is key to the holding of the case, it is neither a term used in the Act, nor is it explained by the Court elsewhere in its opinion.

Several recent cases have interpreted the term "innocent third party." *Bergquist v. Anderson-Greenwood Aviation Corp. (In re Bellanca Aircraft Corp.)*⁸⁰ and *Compass Ins. Co. v. Moore*⁸¹ both deal with the rights of judicial lien creditors vis-a-vis the rights of a bona fide purchaser of an aircraft.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ 819 F.2d 1227 (2d Cir.), *cert. denied*, 108 S. Ct. 163 (1987); *see supra* notes 61-64 and accompanying text.

⁷⁸ 712 F.2d 896 (3d Cir. 1983); *see supra* notes 65-69 and accompanying text.

⁷⁹ 462 U.S. at 407.

⁸⁰ 56 Bankr. 339 (Bankr. D. Minn. 1985).

⁸¹ 806 F.2d 796 (8th Cir. 1986).

Both courts reached similar conclusions. Each court noted that the purpose behind the enactment of the recording provisions of the Federal Aviation Act is "to protect persons who have dealt on the faith of the FAA register, as to whom it would be fraud to give effect to unrecorded interests to their detriment."⁸² Because judicial lien creditors do not lend money or act on the basis of FAA records, they are not the "innocent third parties" whom the Act protects from unrecorded transfers.⁸³ The Eighth Circuit in *Compass Insurance*, noted that:

[A] judgment creditor is not the kind of innocent third party who engages in transactions in reliance on the FAA register intended to be protected by the Act. . . "While it is clear that purchasers of or persons taking security interests in aircraft must and do significantly rely on the FAA register. . . the same cannot be said of general creditors. . . . Instead such creditors bargain on the basis that, in the absence of collection, a debt may be later reduced to judgment and thereby be enforced against the then existing property interests of the judgment debtor. . . [They do] not deal on the faith of the FAA register to the extent that [they] should benefit from its protections. . . ."⁸⁴

Both *Compass Insurance* and *Bellanca Aircraft* cited with approval the older cases of *Curtis v. Carey*⁸⁵ and *Marshall v. Bardin*,⁸⁶ which likewise held that a judicial lien creditor is not entitled to the protection of the recording provisions of the Federal Aviation Act.⁸⁷ It thus appears that where the competing interests involve an unrecorded bona fide purchaser and a judicial lien creditor, the lien creditor cannot prevail on the basis that the purchaser failed to record.

The *Compass Insurance* case also exemplifies what the

⁸² *Compass Ins.*, 806 F.2d at 799; *Bellanca Aircraft*, 56 Bankr. at 379 (quoting *CIM Int'l v. United States*, 641 F.2d 671, 674 (9th Cir. 1980)).

⁸³ *Compass Ins.*, 806 F.2d at 799; *Bellanca Aircraft*, 56 Bankr. at 378.

⁸⁴ *Compass Ins.*, 806 F.2d at 799 (citations omitted)(quoting in part *Bellanca Aircraft*, 56 Bankr. at 379).

⁸⁵ 393 S.W.2d 185 (Tex. Civ. App. 1965).

⁸⁶ 169 Kan. 534, 220 P.2d 187 (1950).

⁸⁷ *Marshall*, 220 P.2d at 191; *Curtis*, 393 S.W.2d at 189.

Supreme Court means in *Philko Aviation* when it states that the Shackets' failure to record would not be a defense against Philko if "Philko failed to acquire or perfect the interest that it purports to assert for reasons wholly unrelated to the sale to the Shackets. . . ." ⁸⁸ In *Compass Insurance*, the insurance company did not acquire its judicial lien on Moore's airplane until long after the insurance company's judgment debtor had sold it. ⁸⁹ The Eighth Circuit, deciding *Moore* on this basis, held that the judgment lien of the insurance company did "not attach to property which at that time was no longer owned by or in the possession of the judgment debtor." ⁹⁰ An attaching creditor acquires no greater rights in the property than the debtor had at the time of the attachment. ⁹¹ Thus, a bona fide purchaser in possession of an aircraft, despite the fact that he failed to record, cannot be defeated by the holder of a security interest which has not attached or been perfected. ⁹²

E. *Must Possessory Liens Now Be Recorded with the FAA?*

Possessory liens are those liens, such as an artisan's lien, a garageman's lien and a bailee's lien, that arise by operation of law on property in the possession of persons who have supplied goods and or services which enhance

⁸⁸ 462 U.S. at 414.

⁸⁹ 806 F.2d at 798. The insurance company acquired a judicial lien in December 1981, and filed its lien with the FAA in June 1982. The judgment debtor transferred title to the aircraft in August 1979. *Id.* at 797.

⁹⁰ *Id.* at 799.

⁹¹ See *Marshall*, 169 Kan. at 534, 220 P.2d at 187, (citing *Fort Pitt Nat'l Bank v. Williams*, 43 La. Ann. 418, 9 So. 117 (1891)). Cf. *Armstrong v. State Bank of Towner (In Re Gelking)*, 754 F.2d 778, 781 (8th Cir.), *cert. denied*, 473 U.S. 906 (1985) ("Attachment, of course, is a necessary step in the perfection of a security interest. . . . Further, in order for a security interest to attach, the debtor must have 'rights in the collateral'".) (citations omitted).

⁹² *Accord General Dynamics Corp. v. Zantop Int'l Airlines*, 147 Ariz. 92, 708 P.2d 773 (Ariz. Ct. App. 1985). A judgment creditor cannot, by levy, acquire an interest in an aircraft already transferred by his judgment debtor. *Id.* at 775. *But cf. Bank of Honolulu v. Davids*, 709 P.2d 613 (Haw. Ct. App. 1985). This case appears to be incorrectly decided. The court allowed a judgment creditor, whose lien arose after the judgment debtor sold the airplane, to defeat a subsequent bona fide purchaser who failed to record. *Id.* at 620.

or preserve the value of the property.⁹³ They are not contractual in nature in the sense of the typical security interest (*e.g.*, a chattel mortgage or a conditional sales contract).⁹⁴ Most, if not all, states have statutes which provide that artisans, garagemen and bailees, among others, have liens upon collateral in their possession in order to guarantee payment.⁹⁵ Section 9-310 of the Uniform Commercial Code provides that such possessory liens generally have priority over a perfected security interest in the same property.⁹⁶

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.⁹⁷

In this way, fixed base operators and other providers of goods and services to aircraft are able to ensure themselves payment, without concern for other security interests in the aircraft.

Most of the reported cases concerning competing interests between an unrecorded possessory lien (perfected by possession of the aircraft) and a competing recorded security interest in an aircraft have held in favor of the holder of the unrecorded possessory lien who is in possession of the aircraft.⁹⁸ There are no published opinions

⁹³ See Official Comment, U.C.C. § 9-310 (1982).

⁹⁴ Cf. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 22-2 at 757-58 (1972) "Thus Article Nine [of the U.C.C.] applies to consensual security interests (as well as to certain sales). It follows that the Article does not apply to judgment liens, judicial liens, statutory liens and other forms of security that arise by operation of law rather than via agreement of the parties." *Id.*

⁹⁵ See, *e.g.*, MO. REV. STAT. § 430.020 (1986) which creates a lien in vehicles or aircraft in favor of persons who store or furnish labor and materials on any such vehicle or aircraft. *Id.*

⁹⁶ U.C.C. § 9-310 (1982).

⁹⁷ *Id.*

⁹⁸ See, *e.g.*, *Danning v. World Airways, Inc. (In re Holiday Airlines Corp.)*, 647 F.2d 977 (9th Cir. 1981), *cert. denied*, 454 U.S. 1146 (1982) (an FBO's unrecorded

concerning priority of possessory lien cases since the Supreme Court's decision in *Philko Aviation*.⁹⁹

Section 503 of the Federal Aviation Act, by its language, requires the filing of "any conveyance which affects the title to, or any interest in, any civil aircraft" ¹⁰⁰ The applicable federal regulation provides that Subpart C—Aircraft Ownership and Encumbrances Against Aircraft applies to the recording of such "conveyances" as "notice of tax lien or of other lien." ¹⁰¹ The language of both the statute and the regulation is thus broad enough to encompass possessory liens and require their filing.¹⁰² After *Philko Aviation*, the prudent course for

consensual lien for services, repairs and storage which was perfected by possession had priority over a recorded security interest); *Nat'l Bank of R.I. v. Butler Aviation Int'l, Inc.*, 370 F. Supp. 1012 (E.D.N.Y. 1974) (possessory storage lien not subordinate to prior recorded security interest); *Carolina Aircraft Corp. v. Commerce Trust Co.*, 289 So. 2d 37 (Fla. Dist. Ct. App. 1974) (holder of mechanic's lien took priority over prior recorded security interest); *Southern Jersey Airways, Inc. v. National Bank of Secaucus*, 108 N.J. Super. 369, 261 A.2d 399 (1970) (mechanic's failure to record lien did not invalidate his claim against subsequent creditor's recordation of lien). *But cf.* *Crescent City Aviation, Inc. v. Beverly Bank*, 139 Ind. App. 669, 219 N.E.2d 446 (1966) (recorded security interest prevailed over prior unrecorded mechanics' lien); *Smith v. Eastern Airmotive Corp.*, 99 N.J. Super. 340, 240 A.2d 17 (1968) (overruled in relevant part by *Southern Jersey Airways*, recorded security interest took priority over prior unrecorded aircraft repair and storage lien).

⁹⁹ *But see* *Flightcraft, Inc. v. Continental Desert Properties, Inc.*, No. 1304 (E.D. La. Sept. 7, 1987) (1987 LEXIS 8513). The court acknowledged that the Ninth Circuit in *Danning v. Pacific Propeller, Inc.* (*In re Holiday Airlines*) apparently felt that registration with the FAA was a necessary requisite before the artisan's lien creditor becomes secured. The court in *Flightcraft*, however, declined to follow this precedent because the Fifth Circuit had not addressed the issue and thus proceeded to consider the matter independent of the recordation requirement. The court concluded that under Louisiana law, even assuming that an artisan's lien in the aircraft had been properly perfected, the finance company which held the equivalent of a Louisiana vendor's lien that had been properly perfected by registration with the FAA defeated a subsequent artisan's lien.

¹⁰⁰ Federal Aviation Act, *supra* notes 5-10, and accompanying text.

¹⁰¹ 14 C.F.R. § 49.31(a) (1987) (emphasis added).

¹⁰² *See* *Danning v. Pacific Propeller, Inc.* (*In re Holiday Airlines*), 620 F.2d 731, 735 (9th Cir.), *cert. denied*, 449 U.S. 900 (1980) (artisans' liens are within the ambit of the Federal Aviation Act). Where state law provides for the filing of notices of possessory liens, such liens are perfected by filing with the FAA irrespective of the fact that the lien was not filed in accordance with state law. 620 F.2d at 735. *See also* *McCormack v. Air Center, Inc.*, 571 P.2d 835 (Okla. 1977).

those holding such liens is recordation of a notice of lien with the FAA.

F. *The Effect of Philko Aviation, Inc. v. Shackel on the Typical Buyer in the Ordinary Course Case*

As indicated above, the vast bulk of the litigation under the recording provisions of the Federal Aviation Act concerns the competing interests of a buyer in the ordinary course of business, and the holder of a security interest in the aircraft. The Supreme Court has interpreted Section 1403(c) to require that transfers of aircraft, in order to be effective against innocent third parties, must be evidenced by a written instrument filed with the FAA.¹⁰³ Therefore, an unrecorded buyer in ordinary course will no longer be able to defeat a recorded security interest created by his seller. The pre-*Philko* cases that allowed an unrecorded buyer in ordinary course to prevail over the holder of a perfected security interest are no longer viable to this extent.¹⁰⁴

After *Philko Aviation*, there can be no doubt that in order for a buyer in ordinary course to defeat a perfected security interest created by his seller, the buyer must record his bill of sale or other ownership documents with the FAA registry. The several cases concerning this subject since *Philko Aviation* acknowledge this.¹⁰⁵

¹⁰³ *Philko Aviation*, 462 U.S. at 409-10.

¹⁰⁴ See *supra* note 21 for examples of pre-*Philko Aviation* cases holding that unrecorded buyers can defeat prior perfected security interests.

¹⁰⁵ See, e.g., *Aircraft Trading & Serv., Inc. v. Braniff, Inc.*, 819 F.2d 1227 (2d Cir.), *cert. denied*, 108 S. Ct. 163 (1987) (all interests must be federally recorded before they can obtain whatever priority they are entitled to under state law); *In re Air Vermont, Inc.*, 45 Bankr. 931 (Bankr. D. Vt. 1985) ("It is well settled that state laws allowing undocumented or unrecorded transfers of interests in aircraft to affect innocent third parties are preempted by the Federal Aviation Act . . ."); *In re Air Vermont, Inc.*, 45 Bankr. 926 (D. Vt. 1984) (citing *Dowell v. Beech Acceptance Corp., Inc.*, 3 Cal. 3d 544, 476 P.2d 401, 91 Cal. Rptr. 1 (1970), *cert. denied*, 404 U.S. 823 (1971), for the proposition that the holder of a prior recorded security interest in aircraft is entitled to prevail over a subsequent buyer in ordinary course of business who does not record).

IV. CONCLUSION

Although *Philko Aviation* has significantly altered the law in this area, it has introduced some measure of certainty. Any transfer or conveyance affecting title to an aircraft is no longer valid against innocent third parties (i.e., purchasers and lenders, but not judicial lien holders) unless it is evidenced by a written instrument on file with the FAA Registry in Oklahoma City. Anyone involved with ownership or security interests in aircraft should be keenly aware of the necessity of recording with the FAA and should be familiar with Title 14, Parts 47 and 49 of the Code of Federal Regulations, which detail the required procedures.¹⁰⁶

Advice to aircraft buyers (and to all others claiming interests in aircraft) at this time should be: Always record promptly and don't rely on a dealer's assurance that it will "take care of the paper work."¹⁰⁷

¹⁰⁶ See *supra* notes 6-10 and accompanying text.

¹⁰⁷ Reiley, *Preemption of Article 9 by the Federal Aviation Act: New Meaning to "Buyer Beware"*, 18 U.C.C. L.J. 242, 253 (1986).

Comments

