

Passive aircraft owners, secured parties and lessors might be liable in an aircraft accident. Timothy J Lynes, partner, Katten Muchin Rosenman LLP, considers the risks under US law.

AIRCRAFT LESSOR AND OWNER LIABILITY: A SEEMINGLY CLEAR CASE OF FEDERAL PRE-EMPTION

Despite seemingly clear federal statutory language that shields passive civil aircraft owners, secured parties and lessors which do not have actual possession or control of civil aircraft from civil liability after an aircraft accident, a number of plaintiffs have attempted, with some success, to hold passive finance parties liable after an aircraft accident based on various state law tort claims. These cases have caused a split in the decisions of various state and federal courts as to the breadth of the immunity granted in the applicable federal statute.

While the cases finding in favour of pre-emption contain more persuasive reasoning and should be followed, Congress should step in and clarify the scope of liability for passive aircraft owners, secured parties and lessors. In the current economic recession, this would encourage sales and financings of civil aircraft and help to limit plaintiff forum shopping for US jurisdictions in accidents otherwise unrelated to the United States.

Applicable statute

Section 44112 of the US Transportation Code (Title 49) (Code) states the following:

- (a) Definitions – in this section –
- (1) “lessor” means a person leasing for at least 30 days a civil aircraft, aircraft engine, or propeller.
 - (2) “owner” means a person that owns a civil aircraft, aircraft engine, or propeller.
 - (3) “secured party” means a person having a security interest in, or security title to, a civil aircraft, aircraft engine, or propeller under a conditional sales contract, equipment trust contract, chattel or corporate mortgage, or similar instrument.
- (b) Liability – a lessor, owner, or secured party is liable for personal injury, death, or property loss or damage on land or water *only when a civil aircraft, aircraft engine, or propeller is in the actual possession or control of the lessor, owner, or secured party*, and the personal



Timothy J Lynes

injury, death, or property loss or damage occurs because of

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

Court survey – cases ruling against federal pre-emption

Three state court decisions have held that passive aircraft owners and lessors may be liable for aircraft accidents under state law tort claims, despite Section 44112 of the Code and its language that appears expressly to pre-empt state tort remedies. In order

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to reach this result, the courts finding that state tort claims are not pre-empted by Section 44112 of the Code misinterpret a Seventh Circuit Court of Appeals decision, *Matei v Cessna Aircraft Co*¹, and ignore the plain language of Section 44112 of the Code.

The Appellate Court of Illinois held, in *Retzler v Pratt and Whitney Co*², that the lessor of an aircraft could be liable for injuries sustained by the plaintiff flight attendant during an emergency landing of the aircraft. The defendant lessor, AMR Leasing Corporation, argued that Section 44112 of the Code shielded it from both federal and state liability in the personal injury action. In ruling that Section 44112 of the Code does not pre-empt state law tort claims the court relied on the *Matei* decision. In *Matei*, the Seventh Circuit Court of Appeals affirmed the trial court's grant of summary judgment to an owner of an aircraft. The *Matei* court held that the owner was not liable for injuries that arose out of an aircraft crash under the predecessor to Section 44112 of the Code, Section 1404 of the Federal Aviation Act of 1958³ (Act), or under Illinois' common law of bailment. The *Matei* court concluded that the trial court correctly found there was no material factual dispute and such facts failed to trigger liability under either Section 1404 of the Act or Illinois bailment law⁴. The Seventh Circuit Court of Appeals did not expressly rule on the question of whether Section 1404 actually pre-empted the state law claims⁵.

The Illinois Court of Appeals in *Retzler* considered the holding in *Matei* and concluded that because the Seventh Circuit considered both Section 1404 of the Act and the Illinois common law claims that it "implicitly rejected the idea that the state claims against the lessors were pre-empted by section 1404."⁶ However, the court's conclusion in *Retzler* is misplaced. The court in *Matei* was merely affirming the summary judgment by the district court and did not expressly rule on the pre-emption issue concerning claims against passive aircraft owners and lessors.

The *Retzler* court further supports its position that Section 44112 of the Code did not pre-empt state law tort claims by relying on the holding of the Third Circuit Court of Appeals in *Abdullah v American Airlines, Inc.*⁷

The *Retzler* court's reliance on *Abdullah* is, however, also misplaced. In *Abdullah* the court held that Puerto Rican common law standards of care for airline employee defendants were pre-empted by the Act. This pre-emption, however, did not apply to state or territorial damage remedies.⁸ The *Abdullah* court did not consider the express terms of Section 44112 of the Code or its predecessor, Section 1404 of the Act. The *Abdullah* court did not consider these provisions because aircraft finance parties were not the defendants and the immunity granted in the statute to owners, lessors and secured parties was not applicable. Nevertheless, the court still found that the substantive state and territory claims were pre-empted by federal law. In fact, the *Abdullah* decision may be more appropriately cited to support an argument that a cause of action for violations of the standard of care under Illinois bailment law is expressly pre-empted by Section 44112 of the Code in

the same manner as the standard of care under Puerto Rican law is pre-empted by the pervasiveness of federal aviation law and regulations.

The Circuit Court of Illinois (a court of general trial jurisdiction) ruled, in *Layug v AAR Parts Trading, Inc.*⁹ that Section 44112 of the Code did not pre-empt state tort claims against the defendant aircraft lessors. *Layug* involved a consolidated wrongful death lawsuit against the current and former lessors of an aircraft operated by Air Philippines that crashed during a domestic flight in the Philippines. In support of its ruling, the Circuit Court cited the court's decision in *Retzler* without further analysis. The Circuit Court also cited to *Matei*, but like the court in *Retzler*, it misinterprets the *Matei* decision by stating that the state law claims in *Matei* were dismissed because they were not "sufficiently pled".¹⁰

As noted earlier, the state law claims in *Matei* were not dismissed because they were pled incorrectly. They were dismissed because there were no material facts in dispute to support proceeding to trial of claims under either Section 1404 of the Act or a state law claim.¹¹ Incredibly, the court in *Layug* goes on to state that "[t]he Defendant's argument with regard to the issue of control of the aircraft is without merit as that was a distinction that had no bearing on the issue of pre-emption in the applicable case law."¹² In this conclusion, the court expressly ignores both the actual holding of *Matei* and express language of Section 44112(b) of the Code, which states: "[a] lessor, owner, or secured party, is liable for personal injury, death, or property loss or damage on land or water only when a civil aircraft, aircraft engine, or propeller is in the actual possession or control of the lessor, owner, or secured party."

It should be noted that in *Layug* the plaintiffs did not sue the airline. Instead, they only sued US-based lessors in Cook County, Illinois, under state law claims of strict products liability, breach of warranty, bailment and spoliation of evidence. This was done presumably to obtain access to the jurisdiction of the courts of the United States and its generous jury awards. The defendant lessors were indemnified by the airline as required by the terms of the relevant lease and, after issuance of the unfavourable trial order, the airline's underwriters settled the case for \$165 million.

Without reliance on either *Matei* or *Retzler*, the Superior Court of Rhode Island (a court of general trial jurisdiction), in *Coleman v Windham Aviation Inc.*¹³ also held that an aircraft owner/lessor may be liable under state law. In *Coleman*, the plaintiff died in an accident when an aircraft, owned by the defendant Windham Aviation and leased to and operated by the defendant Brooks Kay, collided while landing with the plaintiff's aircraft that was attempting to take off. The plaintiff filed a motion for summary judgment to determine that if a jury found defendant Kay liable, the defendant Windham was vicariously liable for Kay's negligence under the law of Connecticut or Rhode Island. The defendant Windham responded

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by claiming that the state law claims of the plaintiff were pre-empted under Section 44112 of the Code.

The *Coleman* court acknowledges that “a cursory review of Section 44112 seems to not only support the defendant’s argument but also present a conflict with applicable state tort law liability”¹⁴. It goes on, however, to state that “a deeper examination of the statute reveals a contrary result”.¹⁵

The *Coleman* court reaches this conclusion in two ways. First, it found that the recodification of the Code in 1994, which led to the replacement of Section 1404 of the Act with Section 44112 of the Code, was to “revise, codify and enact without substantive change certain general and permanent laws, related to transportation”.¹⁶ Secondly, the *Coleman* court concluded that Section 44112 of the Code was substantively different to Section 1404 of the Act in that it only granted immunity to owners or lessors which held a security interest in the relevant aircraft rather than to passive owners generally.¹⁷ The *Coleman* court then disregards the plainly stated immunity of owners generally under Section 44112 of the Code and concludes that since *Windham* as an owner/lessor did not have a security interest, Section 44112 of the Code did not pre-empt the state law tort claims.¹⁸

The *Coleman* court cites the US Supreme Court’s decision in *Cass v United States*,¹⁹ whereby the Supreme Court addressed the effect of recodification on the substance of a predecessor law as a limiting factor on the currently effective statute. In *Cass*, the Supreme Court held that when Congress states that changes in language resulting from recodification are to have no substantive effect, and the meaning of the predecessor statute is clear and different from the meaning that a party desires to relate to the recodified statute, the recodified statute is to be read in conformity with the precedent statute. “In resolving ambiguity, we must allow ourselves some recognition of the existence of sheer inadvertence in the legislative process.”²⁰

In relying on the Supreme Court’s ruling in *Cass*, the court in *Coleman* rejected the aircraft owner’s argument that Section 44112 of the Code shielded it from state tort liability because the court agreed with the plaintiff’s interpretation of the statute that the recodification of Section 1404 of the Act into Section 44112 of the Code “impermissibly expanded the scope of the predecessor statute and [ran] afoul of the legislature expressed intent”.²¹ The court concluded that the legislative history of Section 1404 of the Act indicated that Congress passed it “to facilitate the financing of private airplanes by exempting owners or lessors holding only a security interest in an aircraft from liability for negligent operation of that aircraft”.²² In light of such legislative history, the *Coleman* court held that Section 44112 of the Code did not shield the defendant from liability under state tort claims because the defendant outright owned the aircraft involved in the fatal crash and did not have a security interest in the aircraft. In reaching this conclusion, however, the *Coleman* court ignores the language of Section 1404 of the Act that grants protection to a “...person ...by reason of his interest as lessor or owner...”

In this respect, the *Coleman* court could have easily concluded that the holding of the Supreme Court in *Cass* was not determinative of the issue because the recodification of Section 1404 of the Act into Section 44112 of the Code (and its plainly stated immunity for simple aircraft owners) did not cause a substantive change in the meaning of Section 1404 of the Act. Rather, the recodification was merely a “technical improvement” or the inclusion of simple language to replace the somewhat awkward way Section 1404 of the Act was drafted.²³

Court survey – cases ruling in favour of federal pre-emption

Three court decisions, one federal and two state, have held that Section 44112 of the Code does pre-empt state law tort claims against passive aircraft owners and lessors. While recognizing that Section 44112 of the Code stems from the broader recodification of the Transportation Code in 1994, these courts do not ignore the plain language of the statute, which clearly applies to lessors and owners of aircraft as separate and distinct entities. These courts also correctly interpret *Matei* and reject the ill-founded conclusion of the *Retzler* and *Coleman* courts that the immunity from state law claims, granted in Section 44112 of the Code, only applies to holders of a security interest in the relevant aircraft.

In *Mangini v Cessna Aircraft Co*,²⁴ the plaintiff argued that Section 44112 of the Code again needed to be interpreted in the context of the language and legislative history of Section 1404 of the Act. Like the plaintiff in *Coleman*, the plaintiff in *Mangini* contended that Section 44112 of the Code, despite its clear language granting immunity to passive aircraft owners, afforded liability protection only to those holding a security interest or to long-term lessors and not to owners of aircraft in general.²⁵

The defendant owners responded by arguing that Section 1404 of the Act did in fact cover owners, and that by adding separate and distinct definitions of “lessor,” “owner” and “secured party” in Section 44112 of the Code, Congress clarified an ambiguity that existed without substantively changing the law.²⁶

The Superior Court of Connecticut in *Mangini* held that whether Section 44112 of the Code is viewed as a clarifying revision of Section 1404 of the Act or a substantive enlargement, the result is the same – the aircraft owner’s liability is limited if such party meets the requirements of Section 44112 of the Code. Of particular importance to the court was the construction of Section 44112, which lists “three classes of exempt persons in series with equal grammatical position and stature” that specifically defines each class.

The statute includes a specific definition of “owner”, which omits any connection to security interest. It instead declares an owner to be one who “owns a civil aircraft, engine or propeller”.²⁷ Furthermore, the court explicitly rejects the *Coleman* reasoning as unpersuasive and concludes that, although the congressional record indicates that no substantive changes were intended

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by the recodification of the Transportation Code, it is far more likely that Congress “overstated the general purposes of recodification than Congress inadvertently inserted a precise and unequivocal definition of ‘owner’ and specifically stated that the limitation on liability extended to such well-defined owners”.²⁸

This conclusion is bolstered by US Supreme Court precedent, which states that “[t]he presumption of no substantive change cannot be used to create an ‘artificial’ meaning contrary to ‘what [the statute] says to a plain mind’... [t]he replacement text must still be read ‘in the natural way’”.²⁹ The *Mangini* court goes further and states that the “holding in [the *Coleman*] opinion is that 49 USC Section 44112 means the opposite of what its text plainly states. That conclusion defies common sense and renders the explicit words of Congress nugatory”.³⁰

Based on the above, the *Mangini* court ruled that the state tort claims conflicted with, and were pre-empted by, the federal law enacted as Section 44112.

The *Mangini* court also rejected the holding in *Retzler*. The court notes that most federal courts have found in favour of pre-emption when considering this issue. Interestingly, in support of this proposition, the *Mangini* court cites to the Third Circuit Court of Appeals decision

in *Abdullah*, which, as noted earlier, was the very same decision that the *Retzler* court used to support its holding that state law tort claims were not pre-empted by Section 44112 of the Code.³¹ This supports the argument that the *Retzler* court badly misinterpreted both Section 44112 of the Code and the relevant precedent in reaching a conclusion that the express language of Section 44112 of the Code, which granted immunity to passive aircraft owners, should be ignored.

Similar decisions were made by the United States District Court from the Southern District of Indiana in *In re Lawrence W Inlow Accident Litigation*³² and by the Circuit Court of Florida in *Vreeland v Ferrer*.³³ The plaintiffs in both cases sued a passive lessor and/or owner, and each court ruled that Section 44112 of the Code shielded the defendants from liability and pre-empted the state tort claims. Both courts relied on the plain language of the statute.

The United States District Court for the Southern District of Indiana, in its holding in *Inlow*, goes further by recognizing that there is a split of authority as to whether Section 44112 acts to pre-empt state law claims, but ultimately concludes that the better reasoned cases weigh in favour of pre-emption.³⁴

The opinion also expressly rejects the *Retzler* court’s conclusion that *Matei* stands for the proposition of “implicit rejection” of pre-emption and that the *Retzler* court erred when it relied on *Abdullah*. The *Inlow* court concludes that *Retzler* erred “because its interpretation strayed from the statutory language and ultimately gives Section 44112 no effect...”³⁵

Conclusion – call for congressional action to end forum shopping

Despite clear language in Section 44112 of the Code that shields aircraft owners and lessors from liability, plaintiffs have attempted to manipulate the intent of Congress by insisting that Congress did not in fact mean what it wrote and passed as law. Instead, plaintiffs have persuaded a handful of state courts to look at Section 44112 of the Code through the lens of the ambiguities of Section 1404 of the Act, which is no longer effective law. This was apparently done in *Layug* solely for the purpose to create US jurisdiction for the litigation of claims against passive finance parties in incidents that did not occur in the United States and have no other plausible basis for the claim to the jurisdiction of the courts in the US.

While the better reasoned decisions weigh in favour of pre-emption, and Congress may have believed it had resolved the issue of aircraft lessor and owner liability when it passed Section 44112 of the Code in 1994, it is time for Congress to clarify the issue once again. This will give finance parties comfort and stimulate new aircraft financings both in the US and abroad. It should also help keep insurance rates down for airlines that do otherwise operate to the US.

Finally, it may help prevent the US court system from becoming a forum for aircraft accident litigation that has no connection to the US other than the fact that the US is the home of the finance parties. ■

Footnotes

¹ *Matei v. Cessna Aircraft Co.*, 35 F.3d 1142 (7th Cir. 1994).

² *Retzler v. Pratt and Whitney Company*, 723 N.E.2d 345 (Ill. App. Ct. 1999).

³ §1404 of the Federal Aviation Act reads as follows:

“No person having a security interest in, or security title to, any civil aircraft under a contract of conditional sale, equipment trust, chattel or corporate mortgage, or other instrument of similar nature, and no lessor of any such aircraft under a bona fide lease of thirty days or more, shall be liable by reason of such interest or title, or by reason of his interest as lessor or owner of the aircraft so leased, for any injury to or death of persons, or damage to or loss of property, on the surface of the earth (whether on land or water) caused by such aircraft or by the ascent, descent, or flight of such aircraft or by the dropping or falling of any object therefrom, unless such aircraft is in the actual possession or control of such person at the time of such injury, death, damage or loss.” (Emphasis added)

⁴ *Matei* at p. 1145- 1146.

⁵ The trial court decision in *Matei*, issued by the United States District Court for the Northern District of Illinois, Eastern Division, expressly held §1404 of the Act preempted state law claims, *Matei v. Cessna Aircraft Company*, 1990 WL 43351, p. 4 (N.D. Ill.).

⁶ *Retzler* at p. 352.

⁷ *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999).

⁸ *Abdullah* at p.365.

⁹ *Layug v. AAR Parts Trading, Inc.*, 2003 WL 25744436 (Ill. Cir. 2003).

¹⁰ *Layug* at p. 2.

¹ *Matei* at p. 1145-1146.

² *Layug* at p.2.

³ *Coleman v. Windham Aviation Inc.* 2005 WL 1793907 (R.I. Super. 2005).

⁴ *Coleman* at p. 3.

⁵ *Id.*

⁶ *Id.*

⁷ *Coleman* at p. 5.

⁸ *Coleman* at p. 6.

⁹ *Cass v. United States*, 417 U.S. 72 (1974).

²⁰ *Cass* at p. 83, citing to *Schmid v. United States*, 436 F.2d 987 (Ct. Cl. 1971).

²¹ *Coleman* at p. 5.

²² *Id.*

²³ See H.R. Rpt. 103-180, at 1-6 (July. 15, 1993).

²⁴ *Mangini v. Cessna Aircraft Co.*, 2005 WL 3624483 (Conn. Super.2005).

²⁵ *Id.* at p.2.

²⁶ *Id.*

²⁷ *Id.* at p.3.

²⁸ *Id.* at p.5.

²⁹ *Id.* at p.4 (citing *United States v. Sischo*, 262 U.S. 165, 169 (1923)).

³⁰ *Id.*

³¹ *Id.* at p.5

³² *In re Lawrence W. Inlow Accident Litigation*, 2001 WL 331625 (S.D. Ind. 2001) (*Inlow*).

³³ *Vreeland v. Ferrer*, 2007 WL 5552091 (Fla. Cir. Ct. 2007).

³⁴ *In re Inlow* at p. 15.

³⁵ *Id.* at p. 16.