# MILBANK AVIATION
## LEGAL AND INDUSTRY UPDATE

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## TROUBLESOME FLORIDA SUPREME COURT RULING HOLDS THAT FEDERAL LAW DOES NOT PREEMPT STATE COURT LIABILITY CLAIMS AGAINST AIRCRAFT LESSORS

Last month, the Florida Supreme Court held in Vreeland v. Ferrer that liability claims under Florida law, specifically claims based on Florida's dangerous instrumentality doctrine, are not preempted by 49 U.S.C. § 44112. Under Florida's dangerous instrumentality doctrine, the lessor or owner of an aircraft (a dangerous instrumentality) could be vicariously liable for a pilot's negligence. Like a handful of other state court decisions that have also found that liability claims are not completely preempted, the Florida Supreme Court decision relied on ambiguous language in 49 U.S.C. § 44112.

49 U.S.C. § 44112 addresses the liability of aircraft owners, lessors and secured parties for personal injury, death, or property loss. It states:

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

In Vreeland, an aircraft leased by Aerolease of America, Inc. ("Aerolease") crashed, killing the passenger and pilot. Vreeland, as administrator of the passenger's estate, sued Aerolease, arguing that "Aerolease, as owner of the aircraft, was liable and responsible for the negligence of [the pilot] in the operation and inspection of the aircraft."

## CAPE TOWN

The Cape Town Convention and related Protocol on Aircraft Equipment (the "Cape Town Convention") will enter into force in Kazakhstan on October 1, 2011 and will enter into force in the Russian Federation and Tajikistan on September 1, 2011. As of October 1, a total of 39 countries will have ratified or acceded to the Cape Town Convention. A complete list of contracting states can be found at http://www.unidroit.org/english/conventions/mobile-equipment/main.htm.

The trial court granted summary judgment in favor of Aerolease, holding that Aerolease was not liable because 49 U.S.C. § 44112 preempted Florida law and "Aerolease was not in actual possession or control of the aircraft at the time of the crash." The intermediate appellate court affirmed this aspect of the trial court's decision. However, the Florida Supreme Court, after a *de novo* review, concluded that "[t]o the extent that the doctrine applies to injuries, damages, or deaths that occur on the surface of the earth, the doctrine conflicts with, and is therefore preempted by, section 44112." The court reasoned that in every version of the statute, there has always been a geographic requirement ("on land or water" or "on the surface of the earth") and this requirement "may be read to specify that the limitation on liability only applies to death, injury, or damage that is caused to people or property that are physically on the ground or in the water"; "[s]pecifically, the limitation on liability would only apply to individuals and property that are underneath the aircraft during its flight, ascent, or descent." Therefore, the Florida state law claim based on the dangerous instrumentality doctrine was not preempted by 49 U.S.C. § 44112 in this situation because the passenger died "while he was a passenger in a plane that crashed—not on the ground beneath the plane."

The dissent in Vreeland noted that the decision "defies reality," is inconsistent with the plain meaning of the statute and does not "explain why an airplane crash does not cause an injury on the surface of the earth regardless of whether the injured person was in the airplane or standing on the ground."

Fortunately, the Vreeland case is only one of a small number of cases that have taken the view that 49 U.S.C. § 44112 is not intended to completely preempt state law. All of the federal court cases that we have found addressing this issue have held that 49 U.S.C. § 44112 preempts state law doctrines of liability for personal injury, death, or property loss caused by aircraft against owners, lessors, or secured parties who do not have actual control or possession of the aircraft. A number of state courts have similarly held that 49 U.S.C. § 44112 operates in a preemptive fashion to preclude state law claims against lessors in such circumstances. Furthermore, the Florida Supreme Court does not discuss a crucial aspect of the legislative history of the federal statute, which explains that the intent was to protect lessors, owners and secured parties who have "no control over the operation of the aircraft" from "unjust and discriminatory liability" and "is necessary to encourage such persons to participate in the financing of aircraft purchases."

The Vreeland case and other similar state decisions remain the minority view on the scope of 49 U.S.C. § 44112. Nevertheless, the Vreeland case is an important reminder that the extent to which 49 U.S.C. § 44112 protects lessors and aircraft financiers from liability claims under state law is far from certain and that aircraft lessors and financiers should continue to be vigilant in ensuring that sufficient insurance covering the operation of their aircraft is maintained.

## DEAL ROUNDUP

On July 1, **Hawaiian Airlines** secured $326MM in loans to purchase and lease aircraft. **Boeing**, through 15 different facilities, will provide $193MM of loans, each with a fixed rate of 8%, term of eight years, and subject to a balloon payment at maturity. Hawaiian also secured a 12-year loan for $66MM, and 12-year and 8-year loans totaling $67MM.

On July 5, **Omega Leasing** closed a $190MM term loan to finance 14 Trent engines.

On July 15, **Flight Options** secured a three-year $167MM loan from BNDES, Brazil's development bank. The Brazilian Ministry of Finance will guarantee the loan, which will be used to purchase 20 Embraer Phenom jets.

On July 20, **Ryanair** closed a Euro-denominated floating rate €156MM ($222MM) bond at Euribor + 70bps that matures on January 20, 2023. The bond is guaranteed by US Ex-Im Bank and will be used to refinance a portion of the purchase price for eight Boeing aircraft that were delivered earlier this year.

On July 20, **American Airlines** announced firm orders for 260 Airbus and 200 Boeing aircraft. Airbus and Boeing have committed to financing 230 aircraft, worth $13BN, through operating leases.

On August 3, **ILFC** announced it will purchase AeroTurbine, AerCap's engine management unit, for $238MM. AerCap will continue to guarantee AeroTurbine's obligations under its $425MM revolving credit facility until December 14. AeroTurbine is expected to amend and restate the credit facility entirely prior to December 14.

On August 10, **Delta Air Lines** and **Aeromexico** announced that Delta will invest $65MM in Aeromexico. In exchange, Delta will receive a 3.5 percent equity stake in Aeromexico.

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