

MILBANK AVIATION LEGAL AND INDUSTRY UPDATE

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U.S. SUPREME COURT DECLINES TO HEAR APPEAL IN TROUBLESOME FLORIDA AIRCRAFT LESSOR LIABILITY CASE

As reported in a previous issue of this newsletter, in July 2011, the Florida Supreme Court held in *Vreeland v. Ferrer*, 71 So.3d 70 (Fla. 2011), that certain claims against aircraft owners and lessors under Florida's dangerous instrumentality doctrine are not preempted by 49 U.S.C. § 44112 (1994). In *Vreeland*, Danny Ferrer entered into a lease agreement to lease an airplane from Aerolease of America, Inc. ("Aerolease"). In January of 2005, the plane crashed, killing the pilot and a passenger. The passenger's estate filed a wrongful death action against Aerolease contending that Aerolease, as owner of the aircraft, was liable for, among other things, the negligence of the pilot. Aerolease argued that 49 U.S.C. § 44112, which provides in relevant part that an owner or lessor of an aircraft is liable for damages on land or water only when the aircraft is in the actual possession or control of the owner or lessor, preempts Florida's dangerous instrumentality doctrine. The Florida Supreme Court rejected Aerolease's argument after concluding that 49 U.S.C. § 44112 preempts liability for damages that only occur *underneath* the plane on the earth's surface, but not harm that occurs *within* the aircraft. Thus, the Florida Supreme Court held that Aerolease, as owner of the aircraft, could be vicariously liable for negligence in the operation of the aircraft even though it lacked actual possession or control of the aircraft.

The Florida ruling flies in the face of decisions by the First, Second, Third, Fifth, Sixth, Ninth and Tenth Circuit Courts of Appeals, all of which have expressly held that Congress has preempted all or a part of the field of air transportation and safety.

Aerolease appealed the Florida Supreme Court ruling to the U.S. Supreme Court. The National Aircraft Finance Association ("NAFA") and the Aviation Working Group ("AWG") filed an amicus brief with the Court. NAFA and AWG agreed with Aerolease that the Florida Supreme Court

CAPE TOWN

The Cape Town Convention and related Protocol on Aircraft Equipment (the "Cape Town Convention") entered into force in Fiji on September 1, 2012. The Cape Town Convention will enter into force in the Ukraine on November 1, 2012. Fiji and the Ukraine have each elected to apply Alternative A of Article XI of the Protocol in any insolvency proceedings. Like most "contracting states" that have adopted Alternative A, both Fiji and Ukraine have elected a "waiting period" of 60 days. As of November 1, 2012, a total of 45 countries 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>.

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construed 49 U.S.C. § 44112 too narrowly in holding that its protection to owners and lessors applied only to damages sustained on the ground rather than those in the air as well. They pointed to, among other things, the legislative history surrounding the enactment of 49 U.S.C. § 44112 as an indication of Congress' intent to shield owners and lessors without operational control of an aircraft from liability resulting from the negligent acts of a pilot.

In February of 2012, in a blow to aircraft owners and lessors, the U.S. Supreme Court, without comment, let the Florida

Supreme Court's decision stand by refusing to hear Aerolease's appeal. 132 S.Ct. 1557 (Feb. 21, 2012) (*cert. denied*).

Notwithstanding the U.S. Supreme Court's decision not to hear the *Vreeland* case, *Vreeland* and other similar state court decisions would still appear to be the minority view. However, it serves as a reminder of the importance of including strong indemnity and insurance provisions in any operating lease agreement.

DEAL ROUNDUP

On October 10, 2012, **International Lease Finance Corporation (ILFC)** entered into a \$2.3B unsecured revolving credit facility to replace the \$2B unsecured revolving credit facility entered into in January 2011.

On October 4, 2012, **Mitsubishi UFJ Lease and Finance Co.**, a member of the Mitsubishi UFJ Financial Group Inc, announced it will purchase **Jackson Square Aviation, LLC** for Y100B (\$1.3B) from Oaktree Capital. The sale will be financed with cash and bank loans and is expected to close in December of 2012.

On October 2, 2012, **Emirates** took delivery of the first of four A380 aircraft to be leased to Emirates and financed under **Doric's** \$587.5 million enhanced equipment trust certificates (EETC) issued in June. The Doric EETC is the first example of a non US-based lessor financing its A380 aircraft deliveries in the EETC market.

On October 1, 2012, **Atlas Air** issued a \$143M U.S. Ex-Im guaranteed bond with a coupon rate of 1.562%. Proceeds from the bond issuance will be used by Atlas Air to purchase one Boeing 747-8F aircraft.

On September 27, 2012, **BOC Aviation** priced five-year \$500M senior unsecured notes at 2.875%. Proceeds from the sale of the notes will be used by BOC Aviation for capital expenditures, refinance existing debt and general corporate purposes.

On September 27, 2012, **Air Lease Corporation ("ALC")** issued \$450M worth of senior unsecured notes with an interest rate of 4.50%. Proceeds from the sale of the notes will be used by ALC to finance the purchase of additional aircraft and general corporate purposes.

On September 26, 2012, **Air China** closed a 12-year \$140M U.S. Ex-Im guaranteed bond with a coupon rate of 1.607%. Proceeds from the bond issuance will be used by Air China to finance one Boeing 777-300ER aircraft.

On September 17, 2012, **Willis Lease Finance Corporation ("WLFC")** issued \$390M of senior secured notes through its wholly owned asset backed securities issuer Willis Engine Securitization Trust II. The senior notes have a fixed coupon of 5.50% and are secured by 79 aircraft engines from WLFC. Proceeds from the sale of the notes will be used to repay notes previously issued by Willis Engine Securitization Trust.

On September 13, 2012, **Emirates** closed a \$145.875M U.S. Ex-Im guaranteed bond with a coupon rate of 1.717%. Proceeds from the bond issuance will be used by Emirates to refinance the delivery of one Boeing 777 aircraft.

On September 13, 2012, **Lan** closed a \$368M U.S. Ex-Im guaranteed bond with a coupon rate of 1.732%. Proceeds from the bond issuance will be used to refinance and prefund certain aircraft.

On September 13, 2012, **Aviation Capital Group ("ACG")** priced a \$119.157M U.S. Ex-Im guaranteed bond with a coupon rate of 1.693%. Proceeds from the bond issuance will be used by ACG to refinance three Boeing 737-800 aircraft.

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