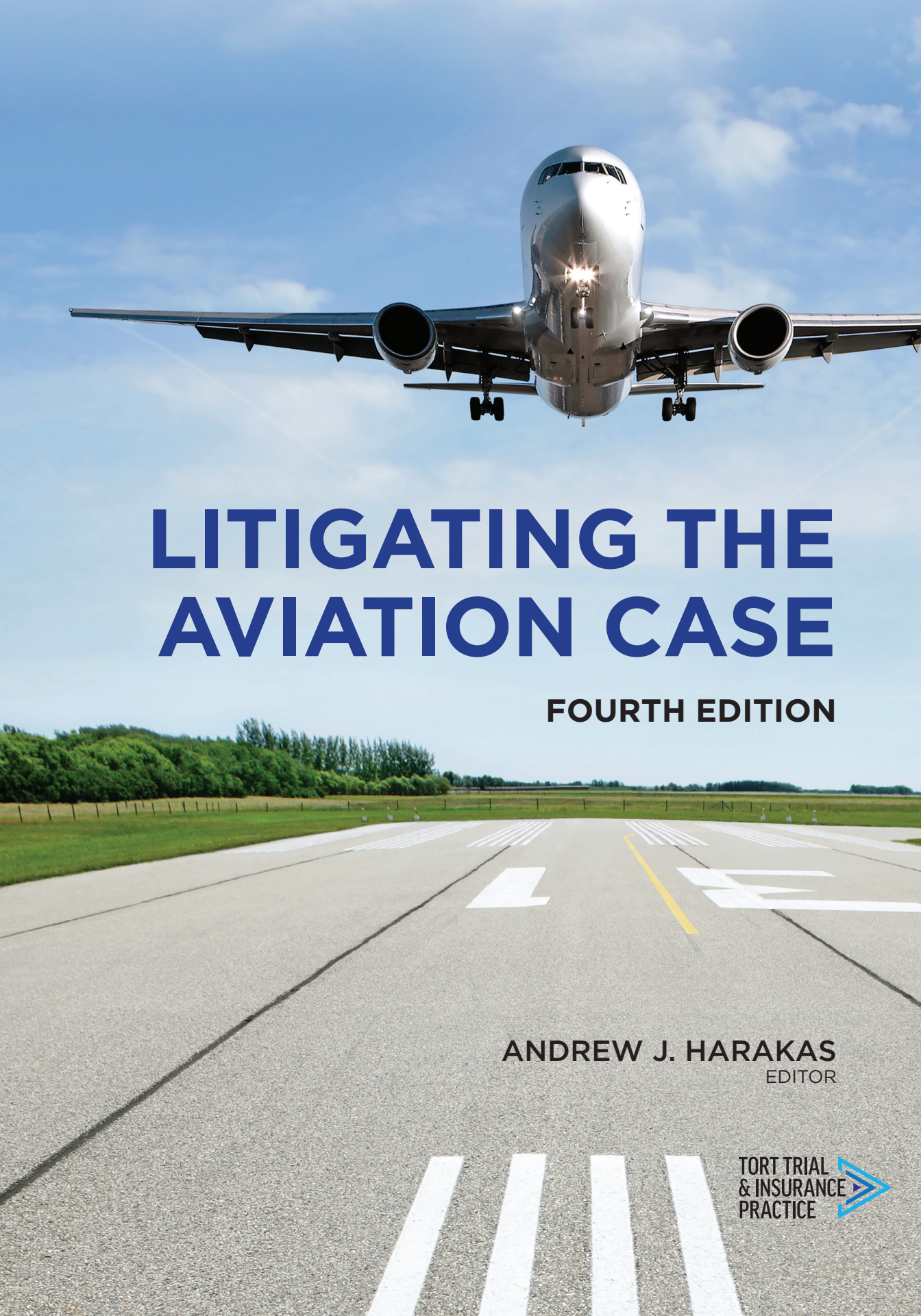

LITIGATING THE AVIATION CASE

FOURTH EDITION

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TORT TRIAL & INSURANCE PRACTICE

CHAPTER TWELVE

LIABILITY OF OWNERS/LESSORS AND NEGLIGENT ENTRUSTMENT

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I. Introduction

Commercial aircraft lessors historically escaped involvement in tort litigation arising out of major commercial aviation losses based on little more than good luck. Lessors were not actively pursued in the past because it was comparatively easy to establish the liability of operators and manufacturers when such entities were subject to the jurisdiction of U.S. courts. Indeed, operators are often statutorily liable.

So why are lessors now among the group of target defendants in U.S. aviation tort litigation? And, occasionally, the only defendant? One reason is a result of the decrease in major aviation disasters in the United States compared to those abroad. In cases that are predominately unrelated to the United States and otherwise would not have much chance in staying in the United States, an owner/lessor with U.S. connections is used as a jurisdictional anchor. Another reason is the relative ease with which a plaintiff can allege the primary claim that is asserted against a lessor—negligent entrustment—based on little more than knowing the identity of the owner/lessor of the aircraft and the operator. With a U.S. forum and a negligence-based claim focused on reputation, plaintiffs are often confident they can avoid summary judgment, negotiate a settlement, and move on without expending significant overhead developing more expert-witness heavy-product-defect cases.

As is generally known, U.S. courts and juries are consistently more generous to plaintiffs than most other forums regardless of the substantive law they eventually apply. Thus, the attraction of a significantly increased potential recovery for a plaintiff enhances the search for a U.S. based defendant. Further, the plaintiff may hope that by naming the lessor as a defendant, the lessor will attempt to implead its lessee, most typically the airline/operator. Such a hope is in recognition that the Warsaw or Montreal Conventions often applicable to lessee operators typically shields them from jurisdiction in the United States as to direct claims by the plaintiffs arising out of non-U.S. crashes. This impleading does not usually occur however,

because the lessor generally requires as a term of the lease that it be included as an additional insured on the operator's insurance policy. In some instances then, aside from the common insurance there really is nothing to stop the lessor from impleading the lessee other than a general desire not to do the work for the plaintiff. There are, of course, a number of other strategic reasons for asserting claims against the owner/lessor that arise on a case-by-case basis. And, the trend of naming lessors has expanded to include non-U.S.-based lessors. Those lessors, however, will generally benefit from a personal jurisdiction defense.

From the outset then, litigating claims involving aircraft lessors can reveal a tangled web of competing interests, making careful consideration of the claims and defenses paramount as this body of law continues to develop. This chapter addresses the potential liability of aircraft lessors in actions governed by U.S. law. We highlight some of the state common law theories that have been pled against lessors, identify sources of statutory liability, and discuss some of the defenses lessors might raise in response to the claims asserted.

II. Plaintiff's Claims against Owners/Lessors

A. NEGLIGENT ENTRUSTMENT

Negligent entrustment, though it appears colorable, is a somewhat curious claim in the context of commercial aviation because the typical arms-length lease transactions at issue are negotiated between sophisticated entities. It has a clearer place in the general aviation sector where a direct entrustment to particular pilots is more common and the assessment of competence is more straightforward. At the same time, it is often seen as the litigation equivalent of placing the owner/lessor between a rock and a hard place. The lessor is obliged to defend not only the airworthiness of the product it leased (akin to a manufacturer or repair facility), but also the reputation of the operator (akin to the airline). Although there is nothing to say such positions are not often consistent, it does take away the potential for shifting of blame among defendants that is present in the more traditional case. An additional challenge for the defense is that the evidentiary restrictions on habit and prior acts are arguably loosened since an element of the claim relates to the reputation of the lessee.

Section 390 of the Second Restatement on Torts, as a specific instance of a section 308 claim, summarizes negligent entrustment as follows:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm . . . is subject to liability for physical harm resulting to them.

As the restatement formulation suggests, negligent entrustment has its roots in claims brought against those permitting children to handle firearms and was thereafter expanded to providing vehicles to minors and intoxicated drivers.[1] These cases tend to present much clearer situations as to determining the competency of the entrustee; there is little dispute an intoxicated driver is generally not fit to operate a vehicle or that most children of a certain age and experience are generally not fit to handle firearms unattended. Entrusting an aircraft can fit this formulation on occasion, but as a highly regulated industry with a comparably significant series of training and certifications necessary to obtain licenses to operate, the determination of competency of the operator is not nearly as clear (and is further complicated where the operator is licensed and the aircraft is registered outside the United States). Nonetheless, the claim is recognized in the aviation context.[2] Of particular note in these representative cases is that the entrustment at issue is to an individual pilot. Such a distinction makes the examination in those cases more in line with the clearer determinations of competency at issue with minor and intoxicated entrustees. In the case of an alleged entrustment by one corporate entity to another corporate entity, with potentially numerous layers of employees to traverse before a particular pilot is flying the aircraft, the standard for the examination of competency of the corporation remains unsettled. In this respect, the court in *Garland* recognized that its Supreme Court had previously addressed the question of whether a duty to make further inquiry as to the competency of another's employee exists: "We hold, unless a customer knows, or has reason to know, that an employee of the contractor is unlicensed, incompetent or reckless, the customer has no duty of further inquiry."[3] This scope of duty suggests a commercial lessor has no duty to inquire of the competency of the individual pilots that a commercial lessee might employ, unless the lessor knows or has reason to know of the status of the pilot, an unlikelihood in most instances.

1. See generally McCall, Kaycee, *Lydia v. Horton: You No Longer Have to Protect Me from Myself*, 55 S.C. L. Rev. 681 (2004) noting Dixon v. Bell, 105 Eng. Rep. 1023 (K.B. 1816) (master that ordered minor servant girl to handle firearm liable for resulting injury to third party), Anderson v. Daniel, 101 So. 498 (Miss. 1924) (father permitting minor son to drive car liable for third-party injuries), Crowell v. Duncan, 134 S.E. 576, 577 (Va. 1926) (father liable for adult son he knew to be habitually intoxicated), and Greeley v. Cunningham, 165 A. 678, 679 (Conn. 1933) (automobile owner entrusted car to woman determined to be incompetent, inexperienced, and reckless driver).

2. *See e.g.* White v. Inbound Aviation, 69 Cal. App. 4th 910 (Cal. App. 4th, 1999) (liability for permitting rental of aircraft to inexperienced and insufficiently trained pilot, known to the renter as such, for flight to known difficult location); Garland v. Sybaris Club Intern., Inc., 21 N.E.3d 24 (Ill. App. Ct., 1st Dist., 2014) (reversing summary judgment after finding fact issue as to whether co-owner knew or should have known that airplane pilot allegedly lacked capability to safely pilot particular airplane).

3. *Garland*, 21 N.E.3d at 45–46 *citing* Evans v. Shannon, 201 Ill. 2d 424, 437 (2002).

As generally formulated to an aviation claim then, negligent entrustment essentially involves two primary enquiries: whether the owner of an aircraft entrusted it to an incompetent or unfit operator (of which it knew or should have known), and whether the incompetency of the operator was a proximate cause of the plaintiff's injury. This formulation will lead to a number of potential material, who-what-when type questions to consider, including the following:

- Who is the owner? How is it owned? Aircraft are often owned as part of asset-backed investment vehicles in which the owner is a bank or collection of banks and investors. Some are traditional mortgaged assets and some are owned outright.
- Who is the lessor? The aircraft owner may not be the lessor. Is there an agency relationship? Is there a lease servicer?
- Who is the lessee? Is it the same as the operator? Is the operator an individual pilot or is it an airline?
- What are the terms of the lease? Is it a true lease? A financial lease? A dry or wet lease? Are there restrictions on use? Does the lessor retain any control of the aircraft?
- When did the entrustment relationship begin? The length of the transaction can trigger certain preemption defenses and also relates to an assessment of what a lessor ought to reasonably know about its lessee.
- Where is the entrustment relationship centered?
- Where is the aircraft based? Where does it operate?
- Why was the aircraft leased? Is it part of a diversified portfolio or the only means for the operator to have access to such an aircraft?
- How did the lessor decide to lease the aircraft? What is the scope of due diligence required?
- How is the competency or fitness of the operator determined? Is it possible for a lessor to independently make such a determination?
- What did the lessor know or should have known of the fitness or competency of the operator?
- How did the accident occur?

The crux of all these questions is that a claim for negligent entrustment is an attack on the lessor's decision to lease in the first instance and potentially its failure to adequately monitor the operation of the aircraft after the lease. It is an easily alleged claim in most instances, but the defense can become complicated. As these types of claims continue to mature, it will be important for practitioners to be mindful of articulating arguments that properly direct the focus on applying sensible standards of care given the relationships of the parties involved, which in some cases may mean the claim is not cognizable or is otherwise preempted.

B. BAILMENT

Bailment theories provide that a lessor is liable to a lessee (or a third-party) for the provision of an aircraft that is defective. As held in *Huckabee v. Bell & Howell, Inc.*,[4] a bailor is liable to an injured third person only if (1) he supplied the chattel in question; (2) the chattel was defective at the time it was supplied; (3) the defect could have been discovered by a reasonable inspection, when inspection is required; and (4) the defect was the proximate cause of the injury. However, "the bailor of a chattel is at common law not liable for the negligence of its bailee merely because of the relationship."[5]

Thus, while negligent entrustment asserts the lessor's negligence is in providing its aircraft to an incompetent operator, bailment asserts the lessor's negligence is in providing a defective aircraft. Such a theory is close to a product liability theory, but keeps the negligence standard of liability. Such a negligence-based theory provides a basis for recovery against a noncommercial supplier that might not otherwise be strictly liable. For practical purposes, the theory provides that a bailor who has been negligent in the maintenance or otherwise in connection with the condition of the aircraft, such that it proximately caused a defect or a defective condition that causes a crash, is liable for any resultant injury.

In other words, a lessor can potentially be liable for a condition that renders the aircraft unreasonably dangerous or defective, which was created by the original manufacturer, by a prior lessee, by a repair facility, or by the lessor itself. At the same time, when the plaintiff asserts a bailment claim, it remains subject to a negligence standard. Thus, the plaintiff will bear the additional burden of proof that the lessor lacked due care in leasing the aircraft. This additional element makes the negligence-based theories inherently more difficult to prove than the strict liability theories. Nonetheless, these negligence theories are potent as they can present questions of fact that a court may rely upon to preclude the entry of summary judgment.

C. OTHER CLAIMS

1. Products Liability—Defective Product

Product liability theories are certainly not new to commercial lessors. Aircraft lessors are a supplier in the stream of commerce, which exposes them to such claims. The U.S. Court of Appeals for the Tenth Circuit noted back in 1950,

> While the airplane manufactured or repaired is not an inherently dangerous vehicle, it was designed, manufactured and repaired to fly in the air, and unless it is

4. Huckabee v. Bell & Howell, Inc., 47 Ill. 2d 153, 158 (1970).
5. Ferrari v. Byerly Aviation, Inc., 131 Ill. App. 2d 747, 749, 268 N.E.2d 558, 559 (3d Dist. 1971).

> made or repaired without mechanical defects it becomes a thing of danger to all in the range of probable foreseeability.[6]

The only debatable question is whether the lessor is in the business of leasing the article alleged to be defective.[7] Such an issue is not likely to be relevant for the majority of commercial aircraft lessors, as the leasing of aircraft (the product causing the injury) will tend to be its only business.

What then are the protections afforded to innocent suppliers of products from strict liability claims? A supplier will generally have a right to indemnity for latent defects from any entity upstream of its position in the stream of commerce. That is, the lessor will have a right to indemnity (through the common law or via statute) against the manufacturer of the allegedly defective product and any other entity from which the lessor obtained the product. As such, assuming the aircraft lessor purchased the aircraft directly from the original manufacturer, the lessor would be able to seek indemnity from the aircraft manufacturer or possibly component part manufacturer for any third-party claim based on strict products liability.

In the typical product liability case a supplier might also deflect its liability by relying on a contractually negotiated indemnity provision that sends its potential strict liability up the distribution chain to the manufacturer. Aircraft purchase agreements, however, often contain indemnity provisions heavily favoring the manufacturer. Lessors have attempted to account for these provisions by including within their leases an assignment of these duties to the operator-lessee. So whereas other industries may see it as more typical for the downstream supplier to be indemnified contractually from the upstream supplier or manufacturer, aircraft manufacturers have traditionally not agreed to such contractual indemnity. This presents a quandary for the aircraft lessor faced with a strict liability lawsuit, particularly as the common insurance between lessors and lessee also makes pursuing an action against the operator a typically unpalatable affair. The lessor thus faces a challenging task pursuing anyone upstream from whom to seek indemnity and is obliged to cooperate with the downstream lessee—not only because the negligence-based actions necessitate, but also because the common insurance counsels for collaboration.

As noted with respect to the negligent entrustment and bailment theories discussed above, the defects sufficient to support a claim for strict liability against a lessor can arise from improper or incomplete maintenance conducted by a repair facility, from negligent operation by a prior lessee that creates a defect, or from its own conduct in maintaining the aircraft when it is between leases.

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6. Vrooman v. Beech Aircraft Corp., 183 F.2d 479 (10th Cir. 1950).

7. *See e.g.*, Patton v. T.O.F.C., Inc., 79 Ill. App. 3d 94 (1st Dist. 1979) (a lessor is strictly liable only if it is engaged in the business of leasing the product causing the subject injury).

2. Products Liability—Failure to Warn

Another claim asserted by plaintiffs against aircraft lessors in the product liability context is based on a failure to warn. Generally, these claims assert the lessor failed to warn the operator of defects in the aircraft at the time it was delivered at lease inception. The general premise is that inadequate warnings or a failure to warn can constitute a defect in a strict product liability action. However, knowledge, either actual or constructive, is most typically a requisite for strict liability for failure to warn.[8] The giving of a warning must be evaluated with reference to the manufacturer or distributor's conduct. To prevail on a failure to warn claim, a plaintiff must prove that the lessor, as the distributor

> did not warn of a particular risk for reasons which fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about. Strict liability is not concerned with the standard of due care or the reasonableness of the manufacturer's conduct. The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific . . . knowledge available at the time of manufacture and distribution. Thus, in strict liability, as opposed to negligence, the reasonableness of the defendant's failure to warn is immaterial.[9]

With the presence of the U.S. manufacturing defendants in litigation, the lessor's liability for a defect in the aircraft is typically a secondary concern. In most instances, a lessor is not liable to warn of an unknown, unspecified defect. However, the lessor may face exposure if maintenance issues are detected in the leased aircraft prior to its delivery to the lessee-operator, and those issues are later determined to have caused or contributed to a subsequent incident or accident. The lessor's ability to show compliance with regulatory requirements in any predelivery inspection is paramount to defending against such claims.

3. Breach of Warranty

Plaintiffs may also seek to assert breach of warranty claims against lessors arguing that they are third-party beneficiaries to the lease agreement. Such claims may assert that the lessor or lessee breach the lease terms by not complying with their respective contractual obligations, those breaches resulted in the incident giving rise to plaintiff's claims, thereby entitling plaintiff breach of contract type damages. Further, plaintiffs will assert that warranty limitations in the operative lease agreement do not act to limit the rights because the plaintiff (or their decedent passenger) never consented to such limitations.

8. Anderson v. Owens-Corning Fiberglas Corp., 53 Cal. 3d 987, 1000 (1991).
9. *Id*. at 1002–03.

Breach of warranty type claims are not as likely to be successful when the lessor provides the aircraft as-is/where-is and the lessee verifies it has inspected and accepts the aircraft upon delivery. Generally, there is little within the promises contained in the lease that a plaintiff can rely upon to support a cause. More importantly, at least one court has determined that a passenger on a leased aircraft is not in privity with the nonoperating lessor and is not a third-party beneficiary of the lease agreement.[10]

At the same time, however, many courts follow the general principle that if a contract is entered into for the direct benefit of a third person, the third person may sue for a breach of the contract in his or her own name, even though the third person is a stranger to the contract and the consideration. However, the courts look to the contract to determine the intent of the parties, particularly to assess whether the benefit to the third person is direct or is but an incidental benefit arising from the contract. A third party is a direct beneficiary when the contracting parties have manifested an intent to confer a benefit upon the third party.[11] Thus, a plaintiff must show the lease agreement intended to inure to the benefit of passengers flying on the leased aircraft. The court is likely to make such a determination based on the agreement's language without resort to parol evidence.

4. Negligent Supervision

Virtually all lease agreements include provisions that specify to varying degrees how a lessee is to maintain the leased aircraft. Some agreements go further, specifying flight crew experience and training requirements. Plaintiffs will cite to these lease requirements in support of their claim that the lessor had a duty to supervise the lessee's operation of the aircraft and maintenance programs. Plaintiffs will assert that the failure to directly supervise the lessee constitutes a breach of the lease agreement, giving rise to a negligent supervision claim.

Beyond the lease wording itself, plaintiffs may rely on principal-agent theories to support such claims. For example, plaintiffs have asserted section 213 of the Restatement (Second) of Agency to support such claims. This section of the Restatement provides as follows:

> A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . in the employment of improper persons or instrumentalities in work involving risk of harm to others: in the supervision of the activity; or . . . in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

10. *See* Gambra v. International Lease Finance Corp., 377 F. Supp. 2d 810 (C.D. Cal. 2005).

11. Ocasek v. City of Chicago, 275 Ill. App. 3d 628, 656 N.E.2d 44, 49 (1st Dist. 1995).

Again, the courts will examine the lease's terms to assess whether the lessee failed to comply with a particular provision and, if so, whether the noncompliance constituted negligent supervision on the lessor's part. One consideration will be whether the noncompliance was material to the cause of the incident in question. For example, the mere fact that a lessee may have been late in making a monthly lease payment is not likely to be grounds to support a negligent supervision claim, when there are no independent grounds to challenge the lessee's maintenance of the leased aircraft.

5. State Statutory Liability

In addition to the common law theories of liability discussed previously, some states still maintain statutes codifying the liability of aircraft owners. These statutes arise primarily as off shoots of the Uniform Aeronautics Act of 1921–1922, the Air Commerce Act of 1926, and the Civil Aeronautics Act of 1938. Around this time, there was a theory of absolute strict liability imposed on owners of aircraft by virtue of the policy of aircraft being considered inherently dangerous instrumentalities. The decade of 1920s was, after all, the heyday of the barnstormers and flying circuses.[12] Such views slowly eroded as the commercial industry expanded and evolved to include the theories discussed previously. Left over from this transition are certain state-specific statues that were originally drafted to address the uniform acts and provide for vicarious liability of aircraft owners. A notable exception is the State of Florida, which has continued to consider aircraft dangerous instrumentalities and, as noted in the discussion of defenses that follows, has curiously interpreted a related federal statute, 49 U.S.C. § 44112.[13] A full summary of these state statutes is beyond the scope of this chapter, but they apply to flights occurring within the airspace of the particular state. Potentially beneficial as the case may be, these statutes often include a significant limitation on recoverable damages against the remote owner.

III. Lessor's Defenses

A. FEDERAL AVIATION ACT—49 U.S.C. § 44112

The primary defense for most aircraft owners and lessors will be reliance on 49 U.S.C. § 44112. The applicable language of the statute provides:

> (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,

12. See http://www.centennialofflight.net/essay_cat/re_category.htm.

13. *See e.g.* Vreeland v. Ferrer, 71 So. 3d 70 (Fla. 2011); Orefice v. Albert, 237 So. 2d 142 (Fla. 1970).

> or propeller is in the actual possession or control of the lessor, owner, or secured party, and the personal injury, death, or property damage or loss occurs because of
> (1) the aircraft, engine or propeller, or
> (2) the flight of, or an object falling from, the aircraft, engine or propeller.

The application of this provision is restricted per the definitions of lessor, owner, and secured party, which are provided as follows:

- **Lessor:** "A person leasing for at least 30 days a civil aircraft, aircraft engine, or propeller."[14]
- **Owner:** "A person that owns a civil aircraft, aircraft engine, or propeller."[15]
- **Secured Party:** "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."[16]

Per the plain language used, the statute presents a potential bar against all but a narrow subset of claims against the lessor, owner, or secured party. Such a party "is liable . . . only when a civil aircraft, aircraft engine, or propeller is in [their] actual possession or control . . ."[17] The bulk of federal courts addressing this statute have thus taken this language as providing an immunity from liability to any contrary state law claims. Certain state courts view the use of the wording "on land or water" in the statute as restricting any application to only the claims of those persons or things injured while on the ground or on the water *underneath* a falling aircraft.

1. Statutory History

Congress originally enacted the lessor immunity provision in 1948 as an amendment to the Civil Aeronautics Act of 1938. The Act was intended to support the nascent aviation industry by protecting the capital sources. As noted earlier, the barnstorming era of aviation had opened up a patchwork of potential claims of absolute liability that were not sensibly applicable to the remote owners or financiers who were investing in the industry. The lessor immunity statute then, sought to encourage the financing and leasing of aircraft by ensuring the nonpossessory financiers and owners would not be exposed to liability due to personal injuries or death resulting from the operation of the aircraft they did not control but was arising, in part, from the statutes noted in section II.C.5. This is in accord with

14. 49 U.S.C. § 44112.
15. *Id.*
16. *Id.*
17. *Id.*

the balance of the Act and regulations promulgated by the FAA, which place the responsibility for the safe operation of aircraft on the air carrier.[18]

Worth noting is the distinction that the lessor must be in "actual," not simply contractual or constructive, control of the aircraft to lose the statutory immunity under the federal statute. As noted in the House Report:

> Provisions of present Federal and State law might be construed to impose upon persons who are owners of aircraft for security purposes only, or who are lessors of aircraft, liability for damages caused by the operation of such aircraft even though they have no control over the operation of the aircraft. This bill would remove this doubt by providing clearly that such persons have no liability under such circumstances.
>
> The relief thus provided from potential unjust and discriminatory liability is necessary to encourage such persons to participate in the financing of aircraft purchases.[19]

Further, House Report No. 80-2091 notes that certain state statutes in effect in 1938 provided for the absolute liability of owners of aircraft for damages caused during the operation of the aircraft.[20] In rejecting the imposition of liability on aircraft lessors, Congress expressed its intent that responsibility for injuries resulting from the operation of leased aircraft resides with the operator:

> An owner in possession or control of aircraft, either personally or through an agent, should be liable for damages caused. A security owner not in possession or control of the aircraft, however, should not be liable for [] damages. This bill would make it clear that the generally accepted rule applies and assures the security owner or lessee [sic], that he would not be liable when he is not in possession or control of the aircraft.[21]

There are relatively few decisions in state or federal court that have dealt with the attempts to circumvent this statute. Although some state courts have refrained from determining that 49 U.S.C. § 44112 preempts state law claims, the federal courts have recognized the preemption and the immunity.

2. Variation in Federal versus State Interpretations

The federal courts that have addressed the statute consistently recognize its preemptive effect subject to an assessment of the owner/lessors control of the aircraft at the time of the accident. In *Matei v. Cessna Aircraft Co.*,[22] the Seventh Circuit upheld the decision of the district court granting summary judgment to an aircraft

18. *See e.g.*, 14 C.F.R. §§ 91.1, 121.1, 125.1, and 135.1.

19. House Report No. 80-2091, regarding the addition of the above language as § 504 to the Civil Aeronautics Act of 1938, 52 Stat. 973; 49 U.S.C. § 401.

20. *See* 1948 U.S.C.C.AN. 1836 at 2.

21. *Id.* at 2.

22. Matei v. Cessna Aircraft Co., 35 F.3d 1142, 1144–46 (7th Cir. 1994).

owner/lessor where the facts showed that the lessee had exclusive possession and control of the aircraft. In upholding the district court's decision, the Seventh Circuit did not specifically address whether [the statute] preempted the plaintiff's state law claim, but the district court had expressly determined that it did.[23] A subsequent decision from the federal district court in Indiana reviewed section 44112 and its precursor, 49 U.S.C. § 1404, and the cases decided thereunder, including *Matei*, and concluded that state common law claims against aircraft lessors who do not operate or control the aircraft at the time of the accident are preempted by this section of the Federal Aviation Act.[24] As the court in *Inlow* noted, "The Seventh Circuit's silence on preemption in *Matei* does not resolve the issue, but the district court's decision in *Matei* is persuasive. The Seventh Circuit adopted the district court's approach and approved its reasoning in all other respects."[25]

The reasoning in the *Inlow* decision has since informed other district courts addressing the statute. In *Ellis v. Flying Boat, Inc., et al.*,[26] Judge Seitz of the federal district court in Florida granted an aircraft lessor's Motion to Dismiss based solely on 49 U.S.C. § 44112. The plaintiffs in *Ellis* brought negligence and strict liability claims against the lessor of the accident aircraft. The lessor moved to dismiss the claims against it based on the allegations in plaintiffs' complaint that the lessee was operating the aircraft on the day of the accident pursuant to a lease of greater than thirty days. The court held that the lessor, " . . . is liable . . . only [when the aircraft] . . . is in the actual possession or control of the lessor . . ."[27] and because the complaint necessarily alleged it was not, granted dismissal. Subsequent complaints against lessors typically seek to plead around the statute, by alleging the lessor maintains control, and seek to establish questions of fact on this issue. And, this has tended to defeat early dismissals, with district courts choosing to treat the factual issues of possession and control as a gatekeeping step to any further interpretation of the statute.[28]

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23. *See* Matei v. Cessna Aircraft Co., 1990 U.S. Dist. LEXIS 3611 (N.D. Ill. 1990) ("This [statute] preempts any contrary state law.").

24. *In re Inlow Accident*, 2001 U.S. Dist LEXIS 2747, 44–45 (S.D. Ind. Feb. 7, 2001)("The plain language of § 44112 establishes that it preempts state common law claims against covered lessors.").

25. *Inlow*, 2001 U.S. Dist LEXIS 2747 at 48.

26. Ellis v. Flying Boat, Inc., et al., Case No. 06-20066 (U.S.D.C. S.D. Fla. May 31, 2006).

27. *Id.*

28. *See e.g.* Iskowitz v. Cessna Aircraft Co., 2010 WL 2822760 (D. Colo. July 16, 2010) (denying summary judgment because of question of control, holding "[i]f [owner] was in actual possession or control of the airplane, then the bar to liability established in 49 U.S.C.A. § 44112(b) is not applicable"); *In re* Hudson River Mid-Air Collision on Aug. 8, 2009, 2012 WL 646005 (D.N.J. Feb. 28, 2012) (recognizing application of statute, but denying summary judgment as to same finding that "issues of fact remain regarding the degree of control that was exercised by [owner/lessor] over the aircraft at the time of the collision"); *cf.* Carey v. Dylan Aviation, LLC, 2010 U.S. Dist. LEXIS 27834, 5, CCH Prod. Liab. Rep. P18,407 (E.D. Pa. Mar. 24, 2010) (while granting remand, noting "[p]ursuant to 49 U.S.C. § 44112(b), an owner or lessor of an aircraft is not

Separately, the district court in *Inlow* took the opportunity to sharply criticize a decision by the Illinois State Appellate Court in *Retzler v. Pratt & Whitney Co.*[29] that rejected the preemptive effect of the statute (despite the Seventh Circuit's prior ruling in *Matei*). The court in *Inlow* noted that to so interpret 49 U.S.C. § 44112 would operate to give the statute no effect.[30] Other state courts, however, have recognized the preemptive effect of the statute.[31]

The state court opinion addressing the statute that is of the most interest, however, is *Vreeland v. Ferrer*.[32] In *Vreeland*, the Florida Supreme Court considered the scope of federal preemption under 49 U.S.C. § 44112 limited only to claims where an aircraft caused injury or damage to persons or property on the ground *underneath* a falling aircraft. This limitation served to exclude from preemption the claims of persons inside the aircraft. The Florida court conducted a somewhat backward examination to reach its conclusion. The court noted that 49 U.S.C. § 44112 did not have an express preemption provision and thus would assess whether there was an implied (field or conflict) preemption. Although this appears a reasonable start, the court seems to have gone off track by inappropriately jumping into the legislative history without first finding any ambiguity in the statute, and then using portions of this history to justify the subsequent interpretation of the wording of the statute. The result of this disordered analysis is the arguable reading of a limitation (the requirement a person or thing be underneath the aircraft as opposed to inside it) that does not appear in the words used. This drew the ire of the dissenting judge, who, citing the long-standing precedence for examining the plain meaning of the words used before resorting to legislative history (even though such history supports the dissents interpretation as well), noted the majority's conclusion "defies reality" and "is inconsistent with the plain meaning of the statute, specifically the plain meaning of 'on land.'" The U.S. Supreme Court did not accept certiorari of the

liable for any resulting injury if the owner did not maintain actual possession or control over the aircraft") *but see In re* Air Crash Near Rio Grande Puerto Rico on Dec. 3, 2008, 2012 WL 760885 (S.D. Fla. Mar. 7, 2012) (finding complaint adequately alleged control to avoid application of statute on motion to dismiss, but in dicta, while having determined the Montreal Convention ultimately controlled, appearing to recognize the Florida Supreme Court decision in *Vreeland* might exclude applicability of the statute because passengers were on board the aircraft as opposed to beneath it on the ground).

29. Retzler v. Pratt & Whitney Co., 309 Ill. App. 3d 906 (1st Dist. 1999).

30. *Inlow*, 2001 U.S. Dist LEXIS 2747 at 51 ("The FAA does not provide remedies for personal injury caused by the operation or maintenance of an aircraft. If § 44112 did not apply to limit liability arising under state law for personal injuries, § 44112 would have no apparent effect.") citing Abdullah v. American Airlines, Inc., 181 F.3d 363, 375–76 (3d Cir. 1999).

31. *See e.g.*, Mangini v. Cessna Aircraft Co., 2005 Conn. Super. LEXIS 3387 (Conn. Super. Ct. 2005); *cf.* The Port Authority of N.Y. & N.J. v. Platinum Jet Mgmt., LLC et al., No. BER-L-1064-11 (N.J. Sup. Ct., May 4, 2012) (applying statute in property damage case).

32. Vreeland v. Ferrer, 71 So. 3d 70 (Fla. 2011).

resulting petition. As such, a conflict among the courts continues to exist suggesting the interpretation of the statute will continue to be a source of litigation.

B. LACK OF OPERATOR NEGLIGENCE

The owner/lessor, if it is not otherwise protected by an application of 49 U.S.C. § 44112, will continue to maintain traditional defense on the merits to a negligent entrustment claim. Presuming the aircraft as provided to the operator was not defective at the time of the transfer, the negligence of the operator as a causal factor in the subject accident remains a requirement in addition to the condition precedent that the operator was incompetent. That is, assuming the facts may show an operator was incompetent (additionally assuming there is an identifiable standard of competency), that operator's incompetence must still have been the proximate cause of the accident. For example, although it may be inappropriate to entrust a car to a drunk driver, if the driver's intoxication had nothing to do with an accident, there is no actionable negligent entrustment. Thus, an owner or lessor is often aligned with the interest of the operator in establishing that there was no negligence on the part of the operator. This can raise interesting issues where an operator's liability is controlled by treaties and is presumed liable such that it may not have the same need to address its conduct as the lessor. Separately, the need to assess the competency of an operator provides the owner/lessor with the potential argument that it can admit an operator was negligent as to the subject incident, but was not systematically incompetent.

C. ACT OF STATE/POLITICAL QUESTION/LACK OF JUDICIALLY IDENTIFIABLE STANDARD OF CARE

Negligent entrustment claims in respect of non-U.S. accidents generally involve aircraft registered in non-U.S. countries, flown by non-U.S. operators. The registration and issuance of certificates authorizing operation of aircraft are arguably government acts and pursuant to the Chicago Convention and are to be recognized as valid by other countries unless the country of issuance does not meet international standards as promulgated via the annexes to the Convention. Because the entrustment claim requires a finding that the operator was incompetent or unfit to operate the aircraft, for a U.S. court to find a negligent entrustment occurred in such situation, it means the court is *not* recognizing the validity of the certificates that represent competency. In order for the court to do so and still comply with the Chicago Convention requirements means the court will have had to consider the country of issuance did not meet international standards. U.S. courts, however, are generally not at liberty to make such a finding and are nevertheless unsuitably equipped to assess whether another country is satisfying these expansive standards. An incompatible result thus occurs as it becomes impossible for the non-U.S. certificates and

licenses issued to the airline and the aircraft to be recognized as valid and yet the airline holding such licenses be held incompetent and unfit. In such case, the court could be requested to abstain from hearing plaintiffs' claim.[33] As the U.S. Supreme Court stated:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.[34]

The U.S. Supreme Court summarized that "[i]n every case in which we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory."[35] The Supreme Court stated further that

> [t]he act of state doctrine is not some vague doctrine of abstention but a principle of decision binding on federal and state courts alike. . . . As we said in *Ricaud*, "the act within its own boundaries of one sovereign State . . . becomes . . . a rule of decision for the courts of this country." Act of state issues only arise when a court must decide—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine.[36]

The official action of other countries aviation authorities certifying the airworthiness of aircraft on their registry, issuing Aircraft Operators Certificates (AOC) and inspecting the operations of the AOC holders are squarely at issue in certain negligent entrustment cases. The acts of a foreign sovereign in issuing licenses to aircraft operators further to its own aviation regulations is the type of act of state to which the doctrine of abstention arguably applies.[37] It is also not appropriate

33. *See e.g.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964) (citing Underhill v. Hernandez, 168 U.S. 250, 252 (1897)).

34. *Id.*; *see also In re* Philippine National Bank, 397 F.3d 768, 773–74 (9th Cir. 2005) (citing Callejo v. Bancomer, S.A, 764 F.2d 1101, 1121–25 (5th Cir. 1985) and Tchacosh Co. v. Rockwell Int'l Corp., 766 F.2d 1333, 1337 (9th Cir. 1985)) ("[T]he [act of state] doctrine is to be applied pragmatically and flexibly, with reference to its underlying considerations."); West v. Multibanco Comermex, 807 F.2d 820, 827 (9th Cir. 1987) ("The act of state doctrine is a combination justiciability and abstention rule developed in pre-Erie days and reaffirmed in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 11 L. Ed. 2d 804, 84 S. Ct. 923 (1964)."); *Callejo*, 764 F.2d at 1121–25 *citing Sabbatino*, 376 U.S. at 428 ("In the act of state context, even if the defendant is a private party, not an instrumentality of a foreign state, and even if the suit is not based specifically on a sovereign act, we nevertheless decline to decide the merits of the case if in doing so we would need to judge the validity of the public acts of a sovereign state performed within its own territory.").

35. W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp. Int'l, 493 U.S. 400, 405 (1990).

36. *Id.*

37. *See e.g.* World Wide Minerals, Ltd. v. Republic of Kazakhstan, 116 F. Supp. 2d 98 (D.D.C. 2000) (the act of state doctrine barred the court from deciding claim that implicated the Republic of Kazakhstan's act of

for U.S. courts to address cases where compliance by foreign officials with foreign regulations would be put at issue.[38] In certain cases then, finding an airline systematically incompetent and unfit to be an operator (as is necessary to assert a negligent entrustment claim) requires the invalidation of the AOC that the airline was issued by its country of registry's aviation authority. This is the type of result that the Act of State doctrine arguably bars.

Article 33 of the Convention on International Civil Aviation (the Chicago Convention) opened for signature, December 7, 1944 (ratified by the United States August 9, 1946) [39] provides,

> Certificates of airworthiness and certificates of competency and licenses issued or rendered valid by the contracting State in which the aircraft is registered, shall be recognized as valid by the other contracting states, provided that the requirements under which the certificates or licenses were issued or rendered valid are equal to or above the minimum standards which may be established from time to time pursuant to this Convention.[40]

As noted in *British Caledonian Airways*, where it was facing concerns foreign registered aircraft might not be as safe as U.S. registered aircraft, "Thus, under Article 33, the judgment of the country of registry that an aircraft is airworthy must be respected, unless the country of registry is not observing the 'minimum standards.'"[41] The court of appeals further advised that according to the FAA, "there are no 'judicially discoverable and manageable standards' by which a court can determine whether the safety provisions of the relevant international agreements have been properly implemented."[42] The court did not dispute the FAA's assertion, rather the court stated it "did not agree that our task is to determine whether the petitioners' aircraft were certified under requirements that meet the minimum safety standards [in the Chicago Convention]."[43] Because the question before the

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not providing an export license to plaintiff); *Callejo*, 764 F.2d 1101 (court refused to intervene in a dispute implicating the legitimacy and applicability of Mexico's exchange control regulations).

38. *West*, 807 F.2d at 828 (9th Cir. 1987) ("The plaintiffs here challenge the compliance of Mexican officials with enforcement provisions of the Mexican regulatory scheme. The acts or omissions of the sovereign is the determinative issue on this claim. The evaluation by one sovereign of foreign officers' compliance with their own laws would, at least in the absence of the foreign sovereign's consent, intrude upon that state's coequal status. Thus, further inquiry into the actual operation of the nationalized Mexican banking system to the extent that it implicates the non-compliance of officials with their own laws is barred under the act of state doctrine.").

39. 61 Stat. 1180, 15 U.N.T.S. 295, T.I.A.S. No. 1591.

40. *Id.*; *see also* British Caledonian Airways Limited v. Bond, 665 F.2d 1153, 1160 (D.C. Cir. 1981) (in action by foreign carriers, court of appeals held order of FAA prohibiting operation of foreign registered aircraft in the U.S. violated Chicago Convention).

41. *British Caledonian Airways*, 665 F.2d 1153, 1160.

42. *Id.* at 1161.

43. *Id.*

court "does not entail examination of technical materials at all" the court held that it did not "lack judicially manageable standards."[44] In the case of negligent entrustment, where the operators competency and the country of registry's satisfaction of safety standards is directly on the line, the situation is quite the opposite and would necessitate an examination of an inordinate amount of technical materials. Such a result arguably reveals a "lack of judicially manageable standards." Further, to the extent the FAA, as a part of the executive branch of the federal government, is already charged with conducting assessments of whether a foreign sovereign is meeting international standards, the judiciary attempting to do so raises a potential intrusion on the separation of powers among the respective branches.

Not to be lost in the foregoing is the notion that a U.S. court remains fully capable of addressing whether an operator was negligent as to a particular accident, but the question of systemic incompetency of a foreign-licensed operator opens up a proverbial Pandora's box of technical assessments that are arguably unsuitable to address in a court setting.

D. NO BREACH OF WARRANTY CLAIMS UNDER AIRCRAFT LEASE

Lessors have two avenues for rebuffing plaintiffs' breach of warranty claims under lease. First, the lease terms themselves form the most direct defense to such claims. Many lease agreements contain a provision expressly disavowing any intent to create rights or provide benefits to third parties. Once again, the courts will look to the contract to determine the intent of the parties to assess whether the benefit to the third person is direct or is but an incidental benefit arising from the contract.

A second provision that expresses the contracting parties' intent to disavow any warranties beyond good title to the aircraft is in the use of "as is" provisions. Such provisions are typically found in purchase agreements for used aircraft;[45] similar provisions often appear in aircraft lease agreements. The use of "as is" provisions attempt to reflect the contracting parties' intention that the buyer is purchasing or leasing the goods in their present condition with whatever faults the goods may possess.[46] Further, courts have held this language implies that the seller/lessor is relieved of any further obligation to reimburse for loss or damage because of the condition of the goods.

44. *Id*. at 1162.

45. *See, e.g.*, AWG—IATA Master Used Aircraft Purchase Agreement, Oct. 2012, https://www.iata.org/whatwedo/workgroups/Documents/legal/master-used-aircraft-purchase-agreement.DOC.

46. Lake Bluff Heating & Air Conditioning Supply, Inc. v. Harris Trust and Sav. Bank, 117 Ill. App. 3d 284, 292, 452 N.E.2d 1361, 1367 (2d Dist. 1983); Pelc v. Simmons, 249 Ill. App. 3d 852, 620 N.E.2d 12 (5th Dist. 1993).

E. NO BAILMENT CREATED

As discussed, plaintiffs seek to use the bailment theory of recovery against lessors to dovetail with a strict products liability claim. Although such claims, based in negligence, typically require a more fact-intensive defense, the lessor does have the ability to successfully present a defense to a bailment theory, as noted in *Matei v. Cessna Aircraft Co.*[47] In *Matei*, an action based, in part, on the Illinois common law of bailment was filed against a lessor on behalf of a pilot who was killed in a crash purportedly caused by the failure of the instrument control lighting system. The lessor prevailed on summary judgment by establishing the aircraft was leased to a third party that had exclusive possession and control of the aircraft from the time of leasing until the date of the crash. Further, the lessor established that it had no knowledge of the alleged defects at the time of leasing. As such, the court found there was no basis for liability under the Illinois common law of bailment. Nevertheless, one can appreciate the discovery required to mount such a defense.

47. *Matei*, 35 F.3d 1142 (7th Cir. 1994).