



INNERMARKER

Newsletter of the Aviation Law Section

State Bar of Michigan
Donald C. Frank, Editor

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I. President's Letter

By: **Steven M. Chait**
Chairperson

Welcome to the latest edition of the "Innermarker"! My thanks go to our new Editor, Professor Charles Senger of Thomas Cooley Law School. Without a lot of volunteer effort by Professor Senger, Donald Frank, and all of our members who generously took the time to prepare and contribute the articles, this Innermarker would not be currently before your eyes!

On Friday, September 28, 2007, the Aviation Law Section of the State Bar of Michigan will be having its Annual Meeting at the Amway Grand Plaza in Grand Rapids at 2:00 p.m. We have an interesting program in store for you regarding the state of Aviation Law both in the State of Michigan and nationwide. We are also fortunate to have Michael F. McKinley, Esq., of the Federal Aviation Administration (FAA), Great Lakes Regional Counsel Office as a guest. We will be having a panel discussion and will be debating some interesting and controversial issues facing the aviation industry at this time.

Also, we will be viewing some aviation short films, which have recently been made in Michigan.

We hope that all of you will take Friday afternoon off to come join us and also enjoy the catered recep-



Steven M. Chait, Chairperson of the Aviation Section, addresses those attending the Aviation Section Presentation held at Eastern Michigan University.

tion, which we have in store for you after the program! Come early and tour the various exhibitor booths at the State Bar Convention.

Also, on September 28, my second term as Chairperson of the Aviation Law Section will come to an end as David R. Baxter takes the baton to run with for a while.

During my tenure as the 2006-2007 Chairperson, I have worked to make the Aviation Law Section even more vibrant and increase the number and types of activities offered to our membership.

This year a number of our members attended the National Transportation Safety Board Bar Association Annual Meeting in Pensacola, Florida and our Section was an honorary sponsor of that event.

In February of 2007, our Section provided a panel of speakers at the Great Lakes International Aviation Conference (GLIAC), which was conducted at the Rock Financial Showplace in Novi. We had a very lively

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Mr. Glenn L. Brown, Senior Attorney, Regional Counsel's Office, Federal Aviation Administration, Great Lakes Region at the Section Presentation at Eastern Michigan University.

Note from the Chairperson –

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debate regarding the amendments to the Michigan Aeronautics Code made in 2006, which made airport trespass a criminal misdemeanor. We had members of the Michigan Aeronautics Commission (MAC), The Airport Support Network Administrator of The Aircraft Owners and Pilots Association (AOPA), the FAA, members of the Michigan Association of Airport Executives and members of our Section, including Don Frank, Dean Greenblatt, Karl Randall, Euel Kinsey, Jr., and myself.

We were later advised that this turned out to be one of the most controversial and successful seminar presentations of the entire GLIAC Conference.

On July 7 and 8, 2007, the Aviation Law Section, through the efforts of Chairperson/Emeritus Dean G. Greenblatt, obtained 50 complimentary tickets to the "Thunder Over Michigan" Air Show at Willow Run Airport in Ypsilanti. It is my understanding that these tickets, valued at between \$10 and \$20 per ticket, were all spoken for by members of the Aviation Law Section who responded to our email to the members. This was a very successful and enjoyable outing and we all had outstanding weather (meaning hot) to enjoy the United States Navy Blue Angels and the other air show performers. It certainly was an example of our members getting more than their money's worth for their \$25 per year dues to be a member of our Section!

FUTURE ACTIVITIES

A. Aviation Law Seminars

We have also scheduled our 2007 annual free seminars for the flying public. This year we have scheduled Aviation Law Seminars for pilots and mechanics for

Wednesday, September 26, 2007, at the Aviation Station at the Oakland County International Airport (OCIA) from 7:00 p.m. to 9:00 p.m. On the following evening, Thursday, September 27, 2007, a similar Aviation Law Seminar will be conducted at the Aviation Campus of Western Michigan University at the Battle Creek International Airport from 7:00 p.m. to 9:00 p.m. The speakers at the seminars are scheduled to be myself; Chairperson/Emeritus Dean G. Greenblatt; Chairperson Elect David R. Baxter; and Members Don Frank and Peter R. Tolley. We will also have Michael F. McKinley of the Federal Aviation Administration Great Lakes Regional Counsel Office as a guest speaker.

These seminars also qualify for the FAA Wings Program for all pilots who attend. (I've often felt these seminars define me as a "clever lawyer" since just for listening to myself criticize and bad mouth the FAA for 15 minutes, I become entitled to my next set of wings in the FAA's Wings Safety Program!)

All of our members are welcome and invited to attend these seminars ~ see you there!

B. Michigan Air National Guard Aerial Gunnery Range

The Michigan Air National Guard (ANG) has an Aerial Gunnery Range in Grayling, Michigan where A-10 Thunderbolt II "Warthog" aircraft based at Battle Creek, Michigan as well as F-16 Falcon Fighters based at Selfridge, practice with live ammunition. There is a modern building at the site, which contains a scoring tower, much like an FAA control tower, and the aircraft fire live machine guns, live missiles (with practice warheads), practice bombs and set off flares designed to keep the ground based heat seeking missiles from finding their way to the aircraft.

My son, who is a film school graduate, had the opportunity to attend one of the Air National Guard live fire practice sessions where he filmed a public service announcement for the ANG (and for which he received a medal)!

We have now gotten the Aviation Law Section invited and we are working out the dates with the Michigan Air National Guard, hopefully to occur this fall before it gets too cold.

We might also combine this outing with a luncheon at one of the resorts in the area, such as Garland. We could probably also provide transportation to and from the local airport for those who would like to fly in.

As my term as Chairperson winds down and I anxiously look forward to assuming my role as Chairperson/Emeritus (which I believe translates roughly from the Latin as "has-been"), the health of the Aviation Law Section is quite good. We now have more members

than at any time in this Section's history.

Thanks to Oakland County Manager of Aviation Karl Randall's fine job as Section Treasurer, we have a healthy sum in the treasury.

We have tried to make greater use of emailing letters and notices to our members, to save on the costs of paper mailings, postage, etc. I have heard from a few members that they have missed some of the emails, which we sent this year. If you have not been receiving our Section's emails, please contact my office, as we have put together an updated email list for all of our members. Let us know if you have any updates.

We look forward to the coming year of many interesting seminars, newsletters, social events and updates of important aviation matters for our members.

Thank you for being a member of the Aviation Law Section! ■

II. TSA Criminal History Record Checks and the Unsuspecting Airline Employee. ©

*By: Dean G. Greenblatt, Esq.
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By most measures of aviator success, Paul Pilot (not his real name) had reached a lofty goal – an upgrade to captain of a Boeing 757. Paul had been flying internationally for a major airline for over 6 years and he'd finally made the big time – flying heavy iron with all the prestige, pay, respect and perks normally associated with such an achievement. But he never suspected that a minor change in federal regulations could destroy all that he had achieved. Suddenly Paul's profession, his marriage and his family's future and financial security were all at risk.

Paul's resume reads like a typical aviation addict. While in college, he pumped fuel for an FBO to earn money for flight training. After earning his Private, Commercial, and CFI certificates, Paul worked as a flight instructor for a couple of years before landing his first airline job in flying freight in well-worn Cessna 404's and Beechcraft Barons.

The airline Paul flew for had several different "out-stations." Like all pilots at this airline, Paul was expected to live at his assigned out-station. It was a well-known fact that the biggest gripe among the pilots was that they were all too frequently rotated from one out-station to

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another. Paul himself was based in the Upper Peninsula (“UP”) of Michigan when he was first hired, but had been moved three times in the first year he’d worked for the airline. It was in fact this nomadic existence that contributed to Paul’s legal troubles.

In the early 1990s, while based in Michigan, Paul opened a checking account at a local bank which only had branches in the Upper Peninsula of Michigan. In May of the same year, Paul’s was reassigned to an outstation in Illinois, so he packed up his possessions, closed his checking account, and drove to Illinois to start over once again.

Nine months later Paul was once again assigned to the outstation in Michigan. On his drive back to the UP, he was stopped by the Michigan State Police for expired plates. At this time Paul found out that he had an outstanding arrest warrant for “*Uttering and Publishing*” from the District Court. It turned out that a couple of days after Paul had closed his checking account, he mistakenly wrote one last check for groceries. Although the grocery store had attempted to notify Paul of the bounced-check, he never got the notice. The grocery store’s manager then made a complaint with the local prosecutor. Eventually, an arrest warrant was authorized since Paul had failed to appear in Court. Because the checking account was closed before the check was written, the prosecutor charged Paul with Uttering and Publishing – no account check, a two-year felony.

The felony charge carried a recommended sentence of up to 30 days in jail, although most people without a criminal record serve no time for their first offense. At a pretrial hearing, Paul’s defense attorney suggested that Paul plead guilty, in exchange for a commitment from the Court to serve no jail time. Not wanting to risk losing his airline job or having to explain why he would be unavailable for flying, Paul opted to plead guilty and pay the fine. In return, he received six-months probation and \$500 in fines and court costs. Paul also pled guilty to expired plates and paid a \$90 fine.

And this is when, unbeknownst to him, Paul’s career started to unravel. After 6 months had passed, Paul was discharged from probation. He then continued on his career path – eventually moving up to regional passenger turboprops, earning type ratings in the Jetstream 31 and Dornier 328, and eventually progressing to the Boeing 757. He rarely gave a moment’s thought to his minor legal trouble in Michigan. Unfortunately for him, a modest federal regulatory change in 2001 would make his former legal troubles anything but minor.

In the aftermath of the terrorist attacks of September 11, 2001, Congress enacted a change to the FAR’s.

These regulations were modified to provide enhanced protection from individuals who might be complicit in a future terrorist attack on the country’s aviation infrastructure. Unfortunately for pilots like Paul, the changes were retroactive. They affected those already in the aviation industry and they offered no method of appeal.

When Paul was initially hired by the freight airline, the regional passenger airline, and finally the major airline, each airline was required by Federal Aviation Regulations (FAR) part 107 to conduct an employment background check. Under the regulation, in order to allow any employee access to the Security Identification Display Area (“SIDA”), or airport “sterile area,” the employer needed only to obtain the dates, names, phone numbers, and addresses of previous employers. Pilots were also required to explain any employment gaps of more than 12 months during the previous 10-year period. Airlines required verification of employment for the previous 5-year period of employment either in writing, by documentation, by telephone, or in person. Each subsequent employing airline then relied on the employment verifications conducted by the preceding airline. Criminal history background checks were not specifically required, but if the employment verification revealed convictions for federal offenses related to aircraft or serious felonies a fingerprint based criminal history record check (CHRC) would be required. A CHRC was also required if the pilot could not explain an employment gap of 12 months or more.

Following the terrorist attacks of September 11, 2001, the FAA Administrator determined that the existing background checks for pilots were inadequate to protect against terrorist threats. So on November 14, 2001, FAR 107.31 was renumbered 107.209 and required fingerprint-based criminal history record checks for all new and existing persons needing access to airport sterile areas or SIDAs. Airlines were required to conduct the Criminal History Record Checks no later than December 6, 2002. Disqualifying criminal convictions for offenses that occurred during the 10 years prior to the date of the record check would result in the immediate denial of the pilot’s SIDA access and termination by the airline.

The new list of disqualifying offenses included:

1. Forgery of certificates, false marking of aircraft, and other aircraft registration violation; 49 U.S.C. 46306.
2. Interference with air navigation; 49 U.S.C. 46308.
3. Improper transportation of a hazardous material; 49 U.S.C. 46312.
4. Aircraft piracy; 49 U.S.C. 46502.
5. Interference with flight crew members or flight attendants; 49 U.S.C. 46504.

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6. Commission of certain crimes aboard aircraft in flight; 49 U.S.C. 46506.
 7. Carrying a weapon or explosive aboard aircraft; 49 U.S.C. 46505.
 8. Conveying false information and threats; 49 U.S.C. 46507.
 9. Aircraft piracy outside the special aircraft jurisdiction of the United States; 49 U.S.C. 46502(b).
 10. Lighting violations involving transporting controlled substances; 49 U.S.C. 46315.
 11. Unlawful entry into an aircraft or airport area that serves air carriers or foreign air carriers contrary to established security requirements; 49 U.S.C. 46314.
 12. Destruction of an aircraft or aircraft facility; 18 U.S.C. 32.
 13. Murder.
 14. Assault with intent to murder.
 15. Espionage.
 16. Sedition.
 17. Kidnapping or hostage taking.
 18. Treason.
 19. Rape or aggravated sexual abuse.
 20. Unlawful possession, use, sale, distribution, or manufacture of an explosive or weapon.
 21. Extortion.
 22. Armed or felony unarmed robbery.
 23. Distribution of, or intent to distribute, a controlled substance.
 24. Felony arson.
 25. Felony involving a threat.
 26. Felony involving –
 - i. Willful destruction of property;
 - ii. Importation or manufacture of a controlled substance;
 - iii. Burglary;
 - iv. Theft;
 - v. Dishonesty, fraud, or misrepresentation;
 - vi. Possession or distribution of stolen property;
 - vii. Aggravated assault;
 - viii. Bribery; or
 - ix. Illegal possession of a controlled substance

punishable by a maximum term of imprisonment of more than 1 year.

27. Violence at international airports; 18 U.S.C. 37.
28. Conspiracy or attempt to commit any of the criminal acts listed in this paragraph.

The Transportation Security Administration (“TSA”) has since assumed responsibility for enforcement of the CHRC regulations, which have been moved to 49 CFR §1542.209.

Like every other pilot in the nation, Paul was required to fill out the CHRC paperwork. When doing so, he indicated that he did not have any of the criminal convictions listed as disqualifying since “uttering and publishing” did not appear on the list. Paul was also required to report to the Airport Police office at his assigned outstation for fingerprinting. Six weeks later, Paul’s Chief Pilot called him at home and advised him that a copy of the criminal record received from the FBI indicated a disqualifying conviction for “Uttering and Publishing” – a felony involving dishonesty, fraud or misrepresentation. Paul was told that his SIDA authority was immediately revoked, and that he was placed on administrative suspension until he cleared up his record. Because of Paul’s exemplary employment history with the airline, the Chief Pilot gave Paul thirty days to clear-up his criminal record.

Devastated, yet determined not to let a bad check ruin his aviation career, Paul sought to appeal the airline’s requirement to revoke his SIDA access. Unfortunately, the airline was unable to grant Paul access to a SIDA because there is no exception written into the new regulation. After placing multiple calls to the FBI, Transportation Security Agency (TSA) and Michigan State Police – all of whom were unable to help – Paul contacted his union’s attorney for advice. The union attorney suggested that Paul try and get his criminal conviction expunged by hiring a local Michigan attorney. Paul spoke with five different attorneys who all explained that Michigan law provides for the expunction of felony convictions based upon MCL 780.621. However, this statutory relief is not available for a person who is convicted of more than one offense. Because Paul pled guilty to driving with an expired license plate in addition to “uttering and publishing,” he had more than one conviction. This made him ineligible for expungement of the felony. Each lawyer Paul hired attempted to appeal his misdemeanor conviction for expired plates. Some filed motions with the district court where he originally pled guilty to the misdemeanor. But, unfortunately for Paul, all of his motions were denied.

Luckily for Paul, five days before his scheduled

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termination, an internet search turned up an aviation attorney who was able to help. His new attorney, John, was intimately familiar with the FAA and TSA regulations, and had a good working knowledge of Michigan Criminal Law. John immediately set out to bypass the expungement statute and work directly with the county prosecutor to overturn the conviction. John also convinced the county prosecutor that the retro-active effect of federal law was working to strip an otherwise responsible, productive and hard-working pilot of his career. Although the prosecutor wouldn't stipulate to the claims made in a motion to set aside the uttering and publishing conviction, he did agree not to object to the motion at the hearing if Paul agreed to plea guilty to a lesser misdemeanor charge. Thanks to an understanding court clerk, a motion hearing was scheduled with the original sentencing judge for the very next day. The judge granted Paul's motion to set aside the conviction for uttering and publishing nunc pro tunc to the date of the original conviction and accepted Paul's plea of guilty to non-sufficient funds check, first offense (MCL 750.131(3)(a)(i)), a misdemeanor. Paul's attorney, John, then immediately overnighted a certified copy of the Order Setting Aside the Conviction, nunc pro tunc to the airline's Chief Pilot and the Michigan State Police Central Records Division in Lansing, Michigan. The Chief Pilot immediately reinstated Paul's SIDA privileges and the State Police returned the original fingerprint card and record of conviction to Paul's attorney.

The Rest of the Story:

Michigan's is recognized by the TSA as one of fourteen states where an expungement can act to nullify a conviction for SIDA access purposes. Sixteen other states offer expungements, but an expungement won't act to nullify the conviction because they come with some lingering conditional limitation on the convicted. A gubernatorial pardon is universally recognized as a method to nullify a conviction by the TSA. In states that don't offer expungements, and in states where an expungement is conditional, a pardon or a set-aside of the conviction combined with a withdrawal of the guilty plea might be the only possible relief for an aviation employee needing unescorted SIDA authority. The TSA offers no administrative appeal process, and for state offenses, there would seem to be no relief available through the federal court system. ■

III. Quit Blaming the Pilot! Take a Closer Look at the MU-2 Series Aircraft

By: John D. McClune

Schaden, Katzman, Lampert & McClune

Recent MU-2 series aircraft crashes highlight the need for the Federal Aviation Administration (FAA) to readdress and/or take a closer look at issues of airworthiness and certification of the MU-2 series aircraft.

The MU-2 series aircraft's accident history speaks for itself, ranging from 5+ times the accident rate than competitor twin engine aircraft in terms of accidents per hours flown. The accident and fatality rate is very high, especially following an in-flight emergency. As an example, of nine (9) MU-2B aircraft accidents from December, 2004 to January, 2007 alone, eight (8) of them involved fatalities and fourteen (14) people have died. See *Internet* at <http://www.ntsb.gov>. Is it possible that the MU-2 series aircraft has a flawed design-that it is not the pilot?

Unfortunately, the way the aircraft certification system works is that manufacturers get to wear two hats during the aircraft certification process under what's called Delegated Option Authority (DOA), and the FAA typically relies upon the manufacturers to meet the minimum airworthiness requirements and merely spot checks their work. See generally *United States v. Varig Airlines*, 467 U.S. 797, 816-818 (1984). See also M. Schiavo, Former Inspector General of the United States Department of Transportation, *Flying Blind Flying Safe*, Avon Books, pp. 51-52, 177-189 (1997) (indicating that the FAA works for the aviation industry as opposed to the flying public; the manufacturers typically police themselves and certify their own products, as the FAA engineers typically have less training and experience than their counterparts in the industry)

Our firm has litigated design/manufacturing defect claims against Mitsubishi Heavy Industries over the MU-2B aircraft, and in one case found two (2) former Mitsubishi employees who came forward to support allegations that Mitsubishi had knowingly misrepresented, or concealed or withheld, required information from the FAA regarding the airworthiness of the MU-2B aircraft during type certification. See *Rickert v. Mitsubishi Heavy Industries, Inc.*, 929 F Supp 380 (D. Wyo. 1996). Our firm has studied the aircraft's single engine handling qualities and characteristics in another case, and inspected documents under the Freedom of Information Act at the FAA's Wichita, Kansas field offices which were quite surprising in this regard.

The FAA has had many chances to address design issues with the aircraft and to look at the certification bases. In fact, the FAA previously conducted two Special Certification Reviews (SCRs) of the MU-2B, one in 1983-1984 and another in 1996-1997.

Following the 1983-1984 SCR, the FAA determined that all models of the MU-2B compiled with its CAR 3 certification basis. Three different Airworthiness Directives (AD's) were issued to address elevator trim brackets, improved pitot heads, and lockwire safety of the engine inlet bleed air line coupling nuts. Also, Mitsubishi Heavy Industries (MHI) issued several flight manual revisions.

Following the 1996-1997 SCR, the FAA concluded that the JCAB conducted the original icing certification of the MU-2B series airplanes correctly under the CAR, and FAA issued the type certificates correctly, including the approval for flight into known icing conditions. The FAA issued two ADs (and AMOCs) based on recommendations from this SCR team. One of these Airworthiness Directives mandated pilot training via video prior to operating in icing conditions. In addition to recommendations that FAA has already addressed, the team also recommended the following items that were never incorporated:

- Require through an AD the installation of an ice detector on all MU-2B series airplanes.
- Require an AFM limitations section change that mandates a propeller negative torque sensing (NTS) and feather valve check prior to the first flight of the day. Mitsubishi Heavy Industries issued a flight manual revision for this, but FAA did not mandate it.

Notwithstanding these two SCRs, an alarming rate of MU-2 series accidents and deaths continued.

As recently as September 30, 2005, the FAA Flight Standards Office began a "safety evaluation" of the MU-2 series aircraft, issuing a letter describing same and acknowledging that the MU-2 series aircraft had been involved in eleven (11) accidents over the past 18 months.

An FAA Office of Aircraft Investigation report discussed in the FAA's "Final Report" on the safety evaluation indicates that a MU-2B pilot is seven (7) times more likely to lose control and have a fatal accident during an emergency when compared to pilots flying similar types of airplanes in similar situations. See Final Report published on the Internet at <http://www.faa.gov>. The FAA observed that "the MU-2B series airplane is a complex aircraft requiring operational techniques not typically found in other light turboprop aircraft, but similar to those of turbo-jet aircraft that require a type rating. Fully understanding the system complexity is much more

critical during an emergency situation." *Id.* Notwithstanding, the Final Report determined that Special Federal Airworthiness Regulations (SFARs) unrelated to the design of the aircraft were necessary:

After reviewing all the data available, the FAA concluded that a SFAR would best address many of the issues presented in the "Completed Actions and Proposed Recommendations" section of this report. These issues include requiring:

- Specific pilot training and testing of the pilot's skills.
- Specific maintenance training.
- FAA-approved standardized pilot checklist.
- The latest revisions to the maintenance manual and the AFM.

An SFAR is quick to implement and easy to revise as necessary. Including all of the above items in one SFAR would put many of the necessary actions in one document so it is easily understood and easily accessible to the owners/operators, mechanics, and others involved with the MU-2B series airplanes.

The FAA believes that the implementation of the actions in this report will not only address the present continued operational safety of these airplanes, but also allow us to more fully address these issues in the future. *Id.*

When is enough, enough? How can the FAA continue to look to the pilot on these facts? The SFAR is not the answer. The pilot is not always the problem. ■



Former Chairmen Dean G. Greenblatt and Myron F. Poe talk to the Section's featured speaker, Mr. Glenn L. Brown.

IV. General Aviation Aircraft, Pilots and Owners Beware: The Real Problem and Effects of Lack of Adequate Insurance in General Aviation

By: **John D. McClune**,
*Schaden, Katzman, Lampert & McClune
Troy, Michigan*

For many years, our firm has represented plaintiffs (i.e., pilots and passengers) in personal injury and wrongful death general aviation and commercial air disaster litigation. As far as the general aviation industry is concerned, we have seen a serious problem rear its ugly head over and over again: lack of adequate aviation insurance.

Typically, general aviation pilots and aircraft owners (and their families) do not even realize the extent of the problem until it is too late, i.e., following a devastating crash causing multiple severe injuries and/or fatalities. Everyone (from passengers to pilots, aircraft owners, and their families) are surprised to learn that there is only a small \$100,000 or \$200,000 “per passenger” limit¹ or a single “per occurrence” one million dollar (\$1,000,000) limit applicable to all claims against the insured pilot and/or aircraft owner following a crash.²

The general aviation insurance industry is caught in an ethical quandary of sorts. The industry wants to market to pilots and aircraft owners one million dollar (\$1,000,000) general aviation insurance products for sales purposes (many times leading a pilot or aircraft owner to believe he/she has one million dollars to provide to his family, to an injured passenger, or to the family of an injured or deceased passenger.) At the same time, the industry wants to pay a small amount in claims.

The industry claims that it is the pilots and aircraft owners who ask for the lesser \$100,000 insurance limits and that the policy language is clear. This reasoning is flawed. First, often pilots and owners look at the “per occurrence” limits and believe they have more coverage. It is not easy for a non-lawyer to determine what the limits are in an aviation insurance policy with multiple definitions and endorsements. It is common to find in the fine print and policy definitions within a general aviation aircraft policy of insurance that the smaller “per passenger” limit is applicable to any such claim. Even

if a one million dollar (\$1,000,000) “per occurrence” limit is found applicable, this is hardly enough money to compensate the various losses to the injured or killed victims and their survivors. Moreover, pilots and owners would undoubtedly choose higher limits for their families and passengers if those limits were affordable.

The industry also suggests that aviation insurance claims have been exceeding insurance premiums, giving the imprimatur of industry in trouble. This argument also lacks any teeth, as explained in more detail infra.

A. General Aviation Aircraft Ownership, Insurance Limits and Policy Interpretation

A brief hypothetical follows. Foxtrot LLC owns and operates a general aviation, twin engine aircraft, and its sole owner is the pilot-in-command. The aircraft has three passengers unrelated to the pilot, and is over-gross. The aircraft owner is found to leave a known engine problem uncorrected, and that engine problem causes an engine failure shortly after takeoff, causing a loss of control and a crash, killing all onboard. The pilot violates the Pilot Operating Handbook (POH) re: weight and balance, as well as single engine operation. The cause of the crash is determined by all parties to be loss of engine power caused by a preexisting known problem, and pilot error. Each of the three deceased passengers’ families lost their sole bread winner and a parent. Minor children survive, along with the non-working parent in all three cases. The only viable claims the passengers’ families have is against the aircraft owner and pilot’s estate.

The pilot’s widow was told by her husband (who is Foxtrot LLC’s sole owner) before the crash that he had a million dollar insurance policy in the event that anything happened. A copy of the policy is provided to the attorneys following the crash. It turns out that the aircraft owner is, in fact, insured under an AIR policy of insurance, and the pilot is listed in the pilot endorsement and found sufficiently qualified. The AIR declaration sheet indicates that there is a \$100,000 “per passenger” limit, and a \$1,000,000 “per occurrence” limit. The question becomes how much insurance is available to each deceased passenger’s estate and survivors?

Of course, the answer to this question depends on the definition and endorsement language of each aircraft policy which needs to be reviewed in detail, word by word. Many times the analysis leads to the conclusion that only the “per passenger” limit is applicable to each claim. That would not even cover the mortgage on a deceased passenger’s family’s home. In some cases, the “per occurrence” limit has been found applicable and to be split between the various passengers’ estates and survivors. Notwithstanding, under either scenario, there is hardly enough insurance to cover the actual financial

and emotional loss to the families.

Old Republic Ins. Co. v. Durango Air Service, Inc.,³ a declaratory judgment action litigated by the author's firm following a consent judgment, involved the interpretation of an Old Republic aviation policy. The court held that the non-passenger survivors were not limited by the "per passenger" limits in the policy. The insurance policy's language mandated that seat limitation only applied to passengers and not to their non-passenger survivors. The *Durango* court stated in pertinent language:

That provision makes no mention of limiting liability for *non-passenger* bodily injury. This makes it clear that the Policy limitation was intended to apply to bodily injury sustained by *passengers*, but not to injuries sustained by *non-passengers*... In short, if Old Republic had meant to limit its coverage for mental anguish and other noneconomic injuries to non-passengers by including such claims within the scope of coverage for injury to passengers, it could have done so explicitly. The language of the Policy clearly explains that non-passengers' claims for mental anguish are covered and are independent of the \$100,000 limitation for passenger injury.

On October 16, 2006, the court in *Global Aerospace v. Pinson*⁴ the issue of insurance policy interpretation again reared its head. The *Pinson* court found that:

This language as well as the definition of "bodily injury" provides coverage for "mental anguish" as a "bodily injury" suffered by "any person" "as the result of any one occurrence." Under the terms of the policy the "because of" language relied on by appellants is restricted to passenger damages. Vance's and Ryan's mental anguish claims give rise, by the terms of the policy and by definition, to their own bodily injury. We conclude that because the policy clearly provides coverage for all persons suffering from mental anguish as a result of the use of the aircraft, Maria's sons' mental anguish claims are not limited by the \$100,000 "each person" limitation. Under the policy's language, the bodily injury damages claimed by Vance and Ryan are claims of non-passengers, separate from the bodily injury claims of their mother, and, as such, the \$1,000,000 occurrence limitation, not the per passenger limitation, applies.⁵

*Martirosov v. Shenandoah Flight Services, Inc.*⁶ is a recent opinion from Rockingham County, Virginia, wherein the court interpreted similar language in a USAIG All Clear policy and held that the survivors of a pilot and a co-pilot (or student pilot) were not subject to

the "each passenger" limitation. In that case the court ruled that the only limit on the coverage for the survivors' claims was the one million dollar (\$1,000,000) "each occurrence" limit.

The Michigan Court of Appeals reached essentially the same result, albeit through a different means. In *Stansbery v. Central Sales & Leasing, Inc.*⁷ the court interpreted an Old Republic aircraft insurance policy and held that the terms of the Old Republic policy provided that "non-passenger" survivors of the decedents could recover for their bodily injuries and that "bodily injury" by definition included the survivors' claims for their mental anguish. The *Stansbery* court held that the plain language of the policy supported the trial court's determination that each decedent's survivor under Michigan's wrongful death statute was entitled to an amount up to \$100,000 because *each survivor* of each decedent was a person suffering bodily injury, i.e., mental anguish, to whom the "per passenger" limit separately applied.⁸

The analysis of these aviation insurance cases makes sense, especially when considering contract law and public policy principles. A well established tenet of contract law is that the policy the insurer underwrites should be strictly construed against its drafter. Regarding public policy, the aviation industry, which has been collecting substantial premiums from the pilots and/or aircraft owners over the years, are making significant profits. The industry is not hurting, and is best able to absorb the loss in this situation. This will be shown *infra*. Typically, aircraft owners and pilots' estates have little to no assets. LLC entities are often created for the sole purpose of owning the aircraft, with no other assets. Many passenger families have reservations at going after an estate of a pilot above and beyond insurance limits, as all involved have suffered a most tragic loss. However, the passengers did nothing wrong and as a result of alleged negligence, their families often cannot even financially survive without their breadwinner and mentor. The economic and non-economic loss is enormous. Survivor injuries are real, and easily meet the definition of the particular aviation policy. The insurers should not get off the hook. If so, this could lead to more litigation, and force the passengers' estates to attempt to pierce the corporate veil to attempt to go after aircraft owners and pilots' estates' personal assets, especially if those assets are significant.

Despite the four aforementioned aviation insurance coverage cases and sound public policy principles, other courts and aviation policies have dictated a different conclusions. For instance, the court in *Hause v. Bresina*⁹ distinguished *Durango*, and held that:

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We are not persuaded that the analysis in *Durango* applies to this policy. Importantly, we note the *Durango* policy lacks the “regardless of the number of persons” language found in Old Republic’s policy here. As noted, we believe this shows the intent of the parties in this case to include all claims arising because of the bodily injury to one passenger under the “each person” limit. In addition, we are satisfied the “all damages, including damages for care and loss of service because of bodily injury to passengers” language clearly limits Old Republic’s liability for the claims of nonpassengers which result from bodily injuries to passengers.¹⁰

B. Contrary to Rumor and Speculation, The Aviation Insurance Industry is Not Hurting.

The aviation insurance business has been a very profitable one. As represented on the website of HCC Insurance Holdings, Inc., which constitutes a group of companies, consisting of Houston Casualty Company, U.S. Specialty Insurance Company and Avemco Insurance Company (which insure general aviation aircraft), HCC professes to be:

the largest specialty insurance groups in the United States and consists of insurance company, underwriting agency and intermediary operations. HCC has assets of over \$3.0 billion and its shares are traded on the NYSE (symbol: HCC) with a market capitalization of over \$1.5 billion.¹¹

General Re Corporation, a subsidiary of Berkshire Hathaway Inc.:

is a holding company for global reinsurance and related operations. It owns General Reinsurance Corporation and holds a controlling interest in Kölnische Rückversicherungs-Gesellschaft AG (Cologne Re). Together, General Re and Cologne Re conduct business as Gen Re.

Gen Re is one of the largest reinsurers worldwide. In addition to being a market leader in the U.S., Gen Re is represented in all major reinsurance markets through a global network in 67 locations, supported by over 2500 employees worldwide.¹²

For year end 1995, General Re’s unaudited pro forma income statement showed a net income of approximately \$825 million and total assets of \$35,900 million.¹³ Included in General Re’s family of companies is United States Aviation Underwriters (USAU),¹⁴ which

touts itself as “America’s largest, most experienced aviation insurance organization.”¹⁵

According to a September, 2001 (10th Ed.) of the “General Review,” published by General Re-New England Asset Management, Inc., a study was conducted of 1,441 company/groups from the Sheshunoff Information Services, Inc. (One Source) database, which apparently “represent nearly 100 percent of the U.S. property/casualty industry.”¹⁶ That study revealed that the five year operating results showed a combined net income after taxes of: \$25.61 billion in 2000, \$28.39 billion in 1999, \$34.84 billion in 1998, \$41.86 billion in 1997, and \$26.70 billion in 1996.¹⁷

These examples obtained merely by searching the *Internet* make clear that the aviation insurance industry is a profitable one.

C. How Long Can the Aviation Insurance Industry Continue to Speak Out of Both Sides of the Same Mouth?

Aviation insurers underwrite various risks. One risk was allegedly lowered by a federal statute, The General Aviation Revitalization Act of 1994 (“GARA”).¹⁸

GARA is an eighteen (18) year federal statute of repose that the aviation industry pushed through Congress. Unless certain exceptions or re-tolling provisions contained in the statute are met, a claimant will not be able to pursue a claim against an aircraft or component manufacturer if the aircraft and component at issue is over 18 years old.¹⁹ This statute has created new revenues for the aviation insurance industry.

GARA is believed by the author to be unconstitutional and seriously flawed.²⁰ GARA is the first statute in the history of the United States that went into an area of traditional state regulation and *only* took away traditional state rights and remedies, providing nothing in their stead nor added safety.²¹ If one looks at statistics in general aviation, the average age of a general aviation aircraft is about 30+ years old. Approximately 90% of all accidents are general aviation accidents.²² Aircraft manufacturers admit that the average age of a multi-engine general aviation aircraft in 1997 ranged between 28 and 34 years of age.²³

In one predecessor proposed bill in 1989 called The General Aviation Accident Liability Standards Act of 1989, that was never passed, the Senate was very concerned about a 20 year statute of repose, stating:

Under the terms of this bill, generally no one could recover for harm arising from an accident involving a general aviation aircraft that is over 20 years old. ...If this bill were adopted, Congress would be exempting over half the aircraft in the country from potential recovery.

As a result, general aviation manufacturers would be receiving a windfall at the consuming public's expense. Although some States have established some statutes of repose, for Congress to impose such strict barriers to recovery would not be in the best interests of this Nation.²⁴

Nonetheless, in 1994, Congress found that a shorter repose period of 18 years, well before an general aviation aircraft even reaches its average age, to be reasonable. It makes no rational sense.

GARA was a guised means to one end: an attempt to revitalize a general aviation market which was *allegedly* experiencing a product liability crisis. The industry represented to Congress that product liability litigation was the primary and most devastating, if not the sole cause of this decline—that frivolous product liability lawsuits caused the problem. However, there were independent, unrelated reasons for the decline of the general aviation aircraft market, including:

- The much higher profit margins for multi-engine turbo prop and turbine aircraft (i.e., business jets), compared to the lower profits and high costs of the manufacture of general aviation aircraft;
- Different market structures, further isolating the general aviation aircraft;
- The high interest rates, high rate of inflation, and economic disaster of the late 1970s and early 1980s, making it less likely for a household to afford a general aviation aircraft.
- The over-saturation by the industry in the late 1970s, leaving a large surplus of general aviation aircraft;
- The emerging kit plane market, which offer consumers a cost-effective alternative with more flexibility; and
- Political and economic incentives to re-enter the general aviation market (i.e., deals by state and local governments that include free land, property tax abatement, \$20 million in cash, and subsidized worker training programs).²⁵

Contrary to the representations made in Congress, at least one general aviation aircraft manufacturer made record profits just prior to GARA.²⁶ Representations were made by the manufacturers in their annual reports that pending litigation had no effect on the profitability of their company, and the prices of general aviation aircraft have not fallen, but have actually increased according to aircraft blue books.²⁷ Regarding “revitalization,” it is clear that basic economics (such as supply, demand,

and fractional ownership) have revitalized the general aviation market, not GARA.²⁸

The industry pointed to pilot error as causing the vast majority of crashes.²⁹ Congress glossed over the fact that aircraft and component manufacturers actively participate in National Transportation Safety Board (NTSB) investigations of crashes of general aviation aircraft. Yes, the majority of NTSB probable cause determinations in general aviation accidents point to pilot error, but the system is flawed.³⁰

One would think that as the aviation insurance industry is reaping additional revenues from application of this one-sided GARA statute through less claims and pay-outs in the manufacturing end, it would pass down those revenues by doubling or tripling coverage limits to pilots and aircraft owners at or near current premium rates. One would think that the industry has begun to underwrite larger limits at the same or lower premiums for aircraft owners and pilots, right? Wrong.

The industry continues to charge a high premium to pilots and aircraft owners for grossly insufficient amounts of coverage. This is a real problem to those injured or families of those killed in general aviation aircraft. GARA, in practice, has only exacerbated the problem and strengthened the general aviation insurer's oligopoly. How can an industry put in its pocket the revenues created through immunizing the aircraft and component manufacturing industry well before an aircraft even reaches its average age, and not offer affordable increased coverage limits to its aviation insurance policy holders?

D. The Need for Change.

The million dollar question remains: How can we vector around this clear problem of under-insurance in general aviation? The answer is that it does not look too good right now. Cases finding a “per occurrence” limit applicable remain too few and far between, and the “per occurrence” limits are insufficient. More importantly, the aviation insurance industry is very powerful.³¹ By way of example, in litigation one aviation insurer sometimes represents multiple alleged tortfeasors involved in a single general aviation crash (necessitating the creation of a “Chinese wall”).

As one diehard Detroit Lions football fan can attest, we as fans can complain all we want about Detroit Lions' ownership and management, but we all continue to buy tickets for Sunday's games. The only real way to send a message is to stop attending the games. Will we fans stop going to the games? Unlikely. Will people stop getting into these airplanes and stop buying these under-insured products? Probably not. After all, most

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people are naive to the problem of under-insurance (as stated, most aircraft owners and pilots do not realize the extent of the problem until it is too late). There is simply little to no incentive to the insurers at this point. This needs to change.

Endnotes

1. Also referred to as "each passenger" or "each person" or "per person." For ease of reading, only a "per passenger" limit will be discussed in this article.
2. The example of a \$100,000 "per passenger" and one million dollar (\$1,000,000) "per occurrence" limit is used in this article because those amounts represent a very common general aviation aircraft policy limit in cases we litigate. On occasion, there are other product combinations and limits applicable depending on the circumstances. For example, a few wealthy general aircraft owners can afford premiums for what is called a "smooth" limit of one million dollars or more per seat. This means that each injured passenger or family of a deceased passenger can recover a larger "smooth" limit. However, my experience is that "smooth" general aviation policies are few and far between. As explained by AOPA Aircraft Insurance article:

Apparently, these higher, and smooth, limits are available provided that the pilot does annual recurrent training and flies a number of hours per year that the insurance company is comfortable with. In a twin that might be 100 hours per year, in a single it might be 50 hours per year. The insurance companies are loath to offer high limits to pilots with limited experience.

These multimillion-dollar smooth limits are costly, which is why many insureds opt for sub-limited policies.

See *Internet* at http://www.aopaia.com/display_article_03.cfm. This article discusses the most common \$100,000 "per passenger" and one million dollar (\$1,000,000) "per occurrence" limit.

3. 283 F.3d 1222 (10th Cir. 2002)
4. 208 S.W. 3d 687 (Tex. App.-Corpus Christi 2006)
5. *Id.* at 692.
6. 64 Va. Cir. 163, 2003 WL 23312786 (2003)
7. Michigan Court of Appeals Case. No. 170598 (1996) (unpublished), *leave to appeal denied* 560 NW2d 636 (Table) (1997)
8. Arguments in recent non-aviation insurance litigation suggest the possibility of finding bodily injuries to multiple people qualifying as multiple occurrences, rather than a single occurrence. See *Appalachian Insurance Company v. General Electric Company*, 19 A.D.3d 198 (1st Dept 2005)
9. 256 Wis.2d 664, 673-674, 649 N.W.2d 736 (2002)
10. See also *AIG Aviation, Inc. v. Estate of Adsuna*, 17 Fed.

Appx. 616 (9th Cir. 2001) (UNPUBLISHED in Federal Reporter) ("This is a declaratory action by an insurance policy administrator to determine whether a parent's claim for loss of society of a minor child is subject to the insurance policy's per passenger limit. The district court, applying Alaska law, held that the per passenger limit applies to the parent's claim, and we affirm.") Please note that the cases for and against listed above are not an all-inclusive list of the cases on both sides of the issue, but merely a sampling to illustrate the point.

11. See *Internet* at <https://www.avemco.com/breakingnews/pressrelease12.asp>, and <http://www.hcc.com>
12. See *Internet* at <http://www.genre.com/page/0,1019,expandID%253D5%2526ref%253DAboutUs-en%2526childID%253D6,00.html>
13. See General Re Corp.'s 8K filing dated 7/19/96 published on the Internet at: <http://sec.edgar-online.com/1996/07/19/00/0000317745-96-000003/Section4.asp>; and 6/30/96 10Q published at: <http://www.secinfo.com/d9M9u.9b.htm> (showing as of June, 1996, total assets of \$37,800 million)
14. *Id.*
15. See *Internet* at <http://www.usau.com/USAU.nsf/Doc/Careers&Opportunities> USAIG and United States Aviation Underwriters (USAU) are related companies. According to their website, USAU manages USAIG, a "group or pool of individual insurance companies which collectively functions as a worldwide insurance market for all types of aviation and aerospace accounts." See *Internet* at <http://www.usau.com/USAU.nsf/Doc/AboutUSAIG>

Cincinnati Financial Corporation, which with respect to commercial casualty "participa[tes] in USAIG, a joint underwriting association, from 2003 to prior" had as of September 30, 2006, total assets of \$17,671 million and a net income of \$800 million. See Form 10Q published on the Internet at http://media.corporate-ir.net/media_files/irol/11/110365/quarterly/Q30610Q.pdf
16. See *Internet* at <http://www.genre.com/sharedfile/pdf/GenReviewIssue10.pdf>
17. *Id.*
18. 49 U.S.C.A. § 40101, Note
19. See McClune, John D., "A Primer on Case Law Interpreting the General Aviation Revitalization Act of 1994, 49 U.S.C.App. § 40101, Note ('GARA')," published at www.schadenlaw.com and the June 2, 2006, American Bar Association, Aviation Litigation Committee CLE Seminar in New York.
20. *Id.*
21. *Id.*
22. See Volpe National Transportation Center Report, p. v and 2, n.3, published on the Internet at www.hf.faa.gov/docs/volpe/volpe972.doc
23. See GAMA 1997 Age by Fleet Chart; see also GAMA 2002 Statistical Databook at <http://www.gama.aero/downloads/2002StatisticalDatabook.pdf> (31 years old was the average fleet age as of 2002).

24. S. REP. 101-303, S. Rep. No. 303, 101ST Cong., 2ND Sess. 1990, 1990 WL 259304 (Leg.Hist.)
25. See S. Tarry and L. Truitt, *Rhetoric and Reality: Tort Reform and the Uncertain Future of General Aviation*, 61 J. Air L. & Com. 163 (1995); J. Anton, *A Critical Evaluation of The General Aviation Revitalization Act of 1994*, 63 J. Air L. & Com. 759, 772 (1998); P. Stuckman, *It Isn't That the Tort Lawyers Are So Right, It's Just That the Tort Reformers Are So Wrong*, 49 Rutgers L. Rev. 485 (1997); American Trial Lawyers' Association, *Warning: The General Aviation Liability Bill is Unfair to Consumers and Victims* (citing a statement from Cessna itself).
26. 49 Rutgers L. Rev. at 530 ("Cessna made record profits in 1992 and 1993...").
27. See the *Internet* at <http://www.aircraftbluebook.com>
28. See March 06, 1997, Testimony of Scott E. Tarry, Ph.D., Assistant Professor of Political Science Southern Illinois University at Carbondale, before the Senate Commerce, Consumer Affairs, Foreign Commerce, and Tourism, 1997 WL 151801 (F.D.C.H.) (analyzing GARA and explaining other factors leading to the decline and rebirth of general aviation in the United States).
29. For example, see S. REP. 101-303, S. Rep. No. 303, 101ST Cong., 2ND Sess. 1990, 1990 WL 259304 (Leg.Hist.) ("It is true that over 50 percent of the 210,000 active aircraft in the general aviation fleet are now more than 20 years old. But data from the National Transportation Safety Board indicates that the primary cause of 90 percent of general aviation fatal accidents is pilot error.") For a recent example, see Joseph T. Nall Report, *General Aviation Accidents (2005)* (concluding that in 2004, 75.5% of accidents are attributable, in whole or in part, to pilot error), located on the *Internet* at <http://www.asf.org/nall>
30. The system allows the manufacturers to test and inspect their own products following an aircraft crash, usually in the presence of a FAA or NTSB representative. Experts hired by passenger victims' families cannot participate. This inherent bias in this system is one reason NTSB reports are not admissible in civil actions. 49 U.S.C. § 1154(b).
31. "The global aviation insurance market includes a number of major participants, such as Global Aerospace, USAIG and AIG who between them account for an estimated 26% of the world's aviation premiums." See Amlin 2005 Annual Report, posted on the *Internet* at http://www.investis.com/aml/reports/AnnualReport_2005/competition.html. ■

V. Update on Michigan Opinions Dealing with Aviation Law and Issues

**By: David R. Baxter
Nagi, Baxter & Seymour, P.C**

Several recent (and not so recent) Opinions have

issued from Michigan and Federal Courts applying Michigan law on various legal issues regarding aviation related cases and fact circumstances, which may be of interest to members.

Airports and Government Immunity

In *McMahon v. Wayne County Airport Authority, et al*, USDC-EDMich. Docket #04-74133, issued July 28, 2006, the District Judge granted Wayne County Airport Authority summary judgment on several grounds. In *McMahon* Plaintiff's S-58DT Sikorsky helicopter struck one of six unlit 65-foot light poles located adjacent to the south cargo ramp at Willow Run Airport in December 2003. Although the rotorcraft was destroyed, fortunately no loss of life ensued. No map provided to the general public and no NOTAMs identified the existence of the poles on the airfield.

The Court found that the FAA regulated aviation traffic and airport facilities and regulated potential obstructions in airspace pursuant to 14 CFR 77 (FAR Part 77).

The Court issued its Opinion granting summary judgment to Wayne County Airport Authority and its Airport Director, finding that the Plaintiff's State law claims regarding the light poles were preempted by Federal regulation and, pursuant to FAR Part 77, declared the light poles were not obstructions to navigable airspace and dismissed Plaintiff's common law negligence claims against the Wayne County Airport Authority.

Alternatively, the Court also dismissed Plaintiff's claims against Wayne County Airport Authority, which asserted liability against a governmental entity for a defective public building. Plaintiff asserted that the unlit light poles were a "building" and/or "fixture" for purposes of establishing exceptions to Michigan's Governmental Immunity statute, MCLA 691.1406.

The Court declined to accept Plaintiff's argument that the light poles were either a fixture or physically connected to the airport "realty." The Court likened the light pole more akin to the public sidewalk cited in *Horace v. Pontiac*, 456 Mich 744 (1988) and declined to find that Plaintiff had demonstrated a viable "public building" exception to governmental immunity.

The Court also found that Plaintiff's claims against the Airport Director failed to establish any basis for assertion of gross negligence, and that the Michigan Aeronautics Code expressly provided both indemnity and immunity to employees of municipal airports.

Similarly, in *Isaacs v. Bishop International Airport Authority*, UNPUBLISHED Per Curiam Opinion of the Court of Appeals, Docket #272539 (issued February 15, 2007), a Panel reversed the trial judge's denial of Bishop

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Airport's Motion for Summary Disposition asserting governmental immunity for a slip-and-fall which occurred in the airport parking lot in December 2003.

The Panel found that the fall in the Airport parking lot did not create facts to come within the Public Highway Exception [MCLA 691.1402(1)]. The Panel also went on to find that a governmental entity operating an airport (and charging patrons to park in their parking lots) does not constitute a proprietary function, citing *General Aviation, Inc. v. Capital Region Airport Authority*, 224 Mich App 710 (1997). Hence, Plaintiff's assertion that the parking lot fit within the "proprietary function" exception was also rejected.

General Aviation Revitalization Act of 1994

In *Hinkle v. Cessna*, UNPUBLISHED Per Curiam Opinion of the Court of Appeals, Docket #247099 (issued October 28, 2004), a Panel issued a comprehensive Opinion regarding various aspects of the General Aviation Revitalization Act as it applied to the particular facts involving the crash of a 1973 Cessna, Model 421B, on September 21, 1995 in Coldwater, Michigan.

While the result of the Panel's Opinion was to reverse the trial court's granting of summary disposition to Defendant Cessna on a fact issue regarding one of the GARA exceptions dealing with knowing misrepresentations, the Opinion goes to some length to find:

1. that GARA is constitutional and not a violation of either the 10th Amendment or the Commerce Clause of the U.S. Constitution, citing *Robinson v. Hartzel Propellers*, 326 F Supp 2d 631 (EDPA, 2004), or the Equal Protection Clause. *Robinson, supra*, *Lyon v. Agusta Spa*, 252 F 3d 1078 (CA9, 2001).
2. GARA does not hold that an overhaul of an existing part restarts the GARA time limit, citing *Robinson, supra*.
3. 1985 Cessna Pilot Supplemental Manual was not a new "part" of this specific aircraft and thus did not reset the GARA 18-year time period of repose, despite the assertion that Cessna assigned a "part number" to the Supplement, absent evidence the supplement related to the specific airplane or that it provided specific instructions for the specific accident aircraft. (Citing *Robinson, supra*).

Federal Tort Claims Act

In *Srock v. United States of America*, 462 F Supp 2d 812 (ED Mich, 2006), Plaintiffs filed a wrongful death claim pursuant to the Federal Tort Claims Act against the United States of America alleging negligence on the part

of certain Air Traffic Controllers for failing to timely pass on accurate weather briefings and weather information to the pilot of an experimental aircraft, which crashed in the Cumberland National Forest (Virginia) in inclement (IFR) weather while returning from Florida to Michigan in February 2000.

After a bench trial pursuant to FTCA procedures, the District Court issued its ruling in November 2006, finding the Air Traffic Controllers and weather briefers had complied with their duties according to law and provided an appropriate standard briefing with accurate information regarding the routes and weather up until the pilot terminated the briefing. The Court relied on the duties of care to both pilots and controllers and briefers as set forth in the Aeronautical (sic) Information Manual (AIM) regarding the standard of care for pilots in VFR flying conditions – finding the VFR rated pilot knowingly flew into IFR conditions. The Court dismissed the Plaintiffs claims against the United States of America.

Similarly, *McMahon v. United States of America*, Docket #04-74133, Opinion issued May 29, 2007 (ED Mich, 2007), deals with the other half of Plaintiff's claims involving the December 2003 crash of an S58DT Sikorsky helicopter on approach at Willow Run Airport which struck one of six unlit 65-foot light poles adjacent to the south cargo ramp while approaching Willow Run from due east and being instructed to proceed direct to the customs circle located adjacent to the west cargo ramp, almost a mile from the unfortunate light poles located near the south cargo ramp.

In the Plaintiff's Federal tort claims action, which proceeded to a bench trial, the District Court issued its Opinion in May 2007 finding the controllers were not negligent in providing the instructions to the pilot to "fly direct" to the pilot's stated intended destination at the customs circle located adjacent to the west ramp, where the pilot did not announce a planned deviation from the "fly direct" instruction. The Court specifically held that the controllers were not negligent where they had no duty to anticipate that the pilot would deviate from his announced route to fly direct to the customs circle, nor that the pilot would deviate from the instruction and fly across the airfield to the south cargo ramp.

Air Taxi/Air Freight

In *AirTaxi – Rockford, et al v. General Motors Corporation, et al*, UNPUBLISHED Per Curiam, dated May 30, 2006 (Docket #259565), the Michigan Court of Appeals reversed a trial court Order dismissing Plaintiff AirTaxi/Cargo Air Operator's lawsuit against General Motors prompted when General Motors Air Charter Manager, Kitty Hawk Charters, filed for Chapter 11 Bankruptcy in May 2000.

The Opinion, although unpublished, makes interest-

ing reading as the Court of Appeals' Panel discusses Plaintiff's various legal theories and determines that a question of fact existed as to whether General Motors, by their employees, had created an agency relationship between General Motors and the air cargo operators despite the fact that no written agreement existed between GM and Plaintiffs, rather that the Plaintiff's written master agreement was with Kitty Hawk Charter, which provided notice that Kitty Hawk Charter was an independent contractor.

The Panel majority found that there was sufficient evidence submitted to create a question of fact that Kitty

Hawk Charters had become an agent of General Motors during the period of the agreement such as to be able to support Plaintiff's belief that Kitty Hawk Charters was acting as General Motors' agent, and thus contracts for transport service with Kitty Hawk Charters were arguably contracts for transport service with General Motors, in turn contractually obligating General Motors to see that the Plaintiffs were paid after Kitty Hawk Charters went bankrupt.

The Opinion discusses multiple theories in detail and makes for interesting reading. ■

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