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I. General Aviation Security in Michigan

By: Thomas Krashen
Michigan Bureau of Aeronautics

The horrific attacks on the United States of September 11, 2001 have had widespread effect on life in this country. Arguably, no profession or industry has been affected as much as aviation in the aftermath of the attacks. The response by federal and state government has resulted in numerous new regulations, procedures, and restrictions that were beyond imagination nine months ago. Indeed, it is not an exaggeration to say that our industry will never be the same.

AIR CARRIER AIRPORTS

Among the first responses to the terrorist attacks, was sweeping new federal legislation directed at the nation's air carrier airports. Known as the *Aviation and Transportation Security Act*, this well-publicized legislation sets forth many requirements for airlines and air carrier airports. It addresses things such as baggage

screening, airport security personnel, flight deck security, and deployment of air marshals. It also establishes an entirely new federal agency, the Transportation Security Administration.

GENERAL AVIATION AIRPORTS – SECURITY PLAN REQUIRED BY MAC

General aviation airports and operators initially were not affected by these new federal security measures. However, many states have adopted a plan to include general aviation airports in security planning. In many cases states taken this action in the hope that additional federal measures would not be forthcoming.

Michigan's approach has been to assist operators of general aviation airports in adopting security plans which are appropriate for their level of activity. It is recognized that airports of varying size will have different security needs.

In November 2001 the Michigan Aeronautics Commission (MAC) adopted a resolution requiring all general-utility airports to prepare an airport security document. The resolution also included language encouraging (but not requiring) basic utility airports to adopt similar plans. Of Michigan's public-use, general aviation airports, approximately 88 are general utility, the remainder are basic utility.

By design, the resolution gives individual operators great latitude in developing their security plans. It does not, for example, mandate any specific elements to be included. Furthermore, the Bureau of Aeronautics will neither approve or disapprove the plans.

BEST PRACTICES

As expected, many airport operators have turned to the Bureau of Aeronautics for guidance in preparing their security plans. To that end, we have developed a suggested list of "best practices" which should be considered.

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GENERAL AVIATION SECURITY IN MICHIGAN –

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- Access to the aircraft operations area, or “air side,” of the airport is controlled. Only individuals with a legitimate need should be able gain access.
- Owners of vehicles parked on the premises (especially for an extended period) are known.
- Gates which provide access to aircraft operating areas are kept closed and locked. The distribution of keys, entry codes, or access cards is controlled.
- The airport perimeter is clearly marked with appropriate signs.
- The identity of charter customers, flight students, and aircraft renters is established.
- Strangers are identified and challenged.
- A log of transient aircraft is kept and retained for a reasonable period of time.
- Hangar tenants and contents are known. This is especially important if the airport allows tenants to sublease hangars.
- Aircraft are locked or otherwise immobilized when not attended. Propeller locks, throttle lock, or locking chocks are effective options.
- Access to aircraft keys is controlled.
- A communication plan is established. This should involve airport management, tenants, renters, and other regular users. The Michigan Bureau of Aeronautics and local law enforcement agencies should have twenty-four hour contact information for the manager, assistant manager, and other designated individuals.
- Procedures for closing the airport are established. This should include a means of closing the airport for departures while still allowing aircraft to land if necessary. It is strongly recommended that the runway not be physically blocked.
- Procedures for notifying tenants and local pilots of airspace closures or other restrictions are established.
- Airport is patrolled by local law enforcement during hours of non-attendance.
- Local law enforcement personnel are involved in developing and implementing the security plan.

Ideally, a mutual letter of understanding should be developed which outlines each party's role in maintaining airport security.

EMERGENCY NOTIFICATION PLAN

For the first time in any of our memories, the events of September 11 prompted the FAA to shut down the National Airspace System. Since that total shut-down, many other localized airspace restrictions have been issued. Some of these (the restricted areas near nuclear powerplants, for instance) have been issued on very short notice. As we are continually reminded, the possibility of new terrorist attacks remains very real. This could mean the closure of the airspace again or other measures to safeguard the air transportation system. In addition to restricting airspace, one possible measure might be the closure of some, or all, airports. We have been asked by the FAA to assist with notification in such an event.

FLIGHT SCHOOLS – BACKGROUND CHECKS

The latest, and perhaps most controversial, regulatory response has been an amendment to the state aeronautics code which will require background checks for all students enrolling in Michigan flight schools. Senate Bills 934 and 1006 were signed by the governor on May 1, 2002. Taking immediate effect, the legislation requires that students enrolling in state-licensed flight schools submit their fingerprints to the state police for the purpose of performing a criminal background check. Individuals with a "violent or other felony" conviction within the preceding seven years may not receive flight training at Michigan flight schools. A felony is defined as a *violation of a penal law of this state, another state, or the United States for which the offender, upon conviction, may be punished by death or imprisonment for more than 1 year or an offense expressly designated by law to be a felony.*

Students may begin flight training pending the results of the background check if they sign a statement certifying they have no violent felony convictions. Additionally, schools may share the results of background checks with other schools, eliminating the need for an additional check if the student transfers.

The Bureau of Aeronautics was not involved in drafting this legislation and did not support it. As expected, however, we have become the focal point for questions and interpretation of the law. We have developed a package which includes detailed instructions and answers to frequently asked questions. Please contact Tom Krashen at 517-335-9977 or krashent@michigan.gov if you desire a copy. ■

II. Also, An Arrow, Pointed Due North

By: Leonard E. Nagi

*Nagi, Baxter & Seymour, P.C.
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NOTE

This is a draft article in support of applications nominating Edsel Ford for membership in the "Michigan Aviation Hall of Fame" and the "National Aviation Hall of Fame" in Ohio. The major source of information for the article and nominations is Timothy O'Callaghan's recent book, "The Aviation Legacy of Henry and Edsel Ford". Anyone with further information supporting Edsel Ford's contributions toward aviation are asked to forward details to the author of this article.*

INTRODUCTION

Edsel B. Ford, the only son of Henry and Clara Ford, has not ever received the praise and credit he is justly due. Not in his lifetime. Not after his untimely and premature death.

He suffered from having to live both under the shadow of Henry Ford, and the guiding and/or misguiding hand of his father, Henry Ford.

Even Edsel's name is clouded by the failure of a car named after him; a truly sad insult, because one of the accomplishments for which he received recognition in his lifetime was as "the designer whose grace and artistic abilities are memorialized in the Lincoln and the Model A".¹ In particular, the 1940 Continental and 1941 Continental Cabriolet are considered to be landmark designs in automobile history bringing a "streamlined look" to upscale cars of the pre-war era.² It was said by Frank Lloyd Wright to be the most beautiful car in the world.³

Edsel Ford's contributions to Aviation have also been hidden under such shadows and clouds. The title of this article is taken from a letter written by Edsel to all Ford dealers in December, 1925:

"It seems that one of the very great difficulties of cross-country flying is in trying to distinguish over what town or city the pilot is traveling. Therefore, will you not paint on the roof of your garage the name of the city or town in which you are located? *Also, an arrow, pointed due north* should be painted immediately following the name of the city or town."⁴

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As of the time of writing the letter, Edsel Ford, age 33, was president of the Ford Motor Company, so one might ask what is a president of an automobile company doing writing a letter gently asking his auto dealers to paint the roofs of their dealerships to aid pilots? To explore the answer, consider the state of aviation back then.

HENRY FORD

As of the time of Edsel's letter, Henry Ford, age 62, had built the Ford Airport on Oakwood Boulevard at Southfield in Dearborn; then moved the Stout Metal Airplane Company from its plant on Beaubien Street; and then purchased all of the stock of the Stout company. During 1925, at the Ford Airport, the following "firsts" were accomplished:

1. 450,000,000 candlepower searchlight visible for 100 miles installed;⁵
2. The finest and only private dirigible mooring mast in the world installed;⁶
3. The Ford Regularly Scheduled Air Transportation Service was launched to carry company freight and mail between the Ford Airport and Chicago, Illinois in April; followed by launch of service between the Ford Airport and Cleveland, Ohio in July.⁷

The following year, Ford Air Service began the first U.S. Airmail service contract to carry mail for the Post Office on regular scheduled routes. The Ford Motor Company, with Edsel as President, designed and built the first Ford Tri-Motor aircraft; designed and patented the first radio navigation beacon allowing for on time scheduling under most weather conditions; and was the first to use concrete runways at airports.⁸

Ford promoted Aviation and Ford Airplanes with major advertisements beginning in 1927. Ford's efforts and the major role he played in convincing a great portion of the public that Aviation is safe are chronicled in detail in O'Callaghan's book.⁹ As to Henry Ford, the point is made at p 79:

"He was literally worshipped by millions of people around the world. The prevailing attitude was that if Henry Ford, a knowledgeable and successful business man, was involved in this aviation game, it must be OK."

EDSEL FORD

With this brief history, consider that at the time Henry Ford purchased the Stout Metal Airplane Company, he himself said:

"...this interest in aviation is largely Edsel's idea and he deserved the credit. Airplanes belong to another generation"¹⁰

Edsel had an interest in aviation from the time he was fifteen and Henry took him to a meeting of the Aero Club of Michigan.¹¹ In 1910 at the age of 17, Edsel and a friend Charles Van Auken built an airplane using a Model T engine; it crashed with Van Auken as the pilot. Edsel was forbidden from ever piloting a plane.¹²

From 1921 to 1923, Edsel became a Director of the Detroit Aviation Society, and a Director of the Aircraft Development Corporation, formed for development of all metal airships. William Stout, then the designer of a single engine all metal airplane asked Edsel for "moral and financial support" to build an airplane factory at a place with a flying field. Edsel convinced his father, Henry, that an airport and factory should be built in Dearborn for the advancement of aviation, and the Ford Airport was built.¹³

In 1923 Edsel, age 31, was elected to the Finance Committee of the National Aeronautic Association, contributed \$10,000 to guarantee the prizes for the Pulitzer Trophy Races held at Selfridge Field, and invested \$2,000 in the Stout Metal Airplane Company (Henry never invested any money in the company).¹⁴

In 1925, the Detroit Aviation Society with Edsel as a Director decided to sponsor an air tour emphasizing the reliability and safety of commercial aviation. The Fords donated \$50,000. Edsel donated a magnificent "Edsel B. Ford" trophy that took silversmiths nine months to create – to be awarded to the first manufacturer to win the tour five times. In addition, the winners of a perfect score each year were awarded a silver medallion inscribed "Edsel B. Ford Reliability Tour For The Development Of Commercial Aviation"¹⁵

The Society also planned, organized and financed the Detroit Arctic Expedition to the North Pole by Australian explorer George Wilkins. Edsel contributed \$5000 toward the exhibition to demonstrate the existence of a short commercial air route over the Pole.

In 1925 and 1926 Edsel was active in supporting Richard Byrd's Expedition to the North Pole. Edsel contributed at least \$20,000 and became actively engaged in Byrd's efforts, including soliciting funds from John D. Rockefeller Jr. A factory fire at the Ford Airport eliminated the planned Ford Tri-Motor as the airplane for the flight, so a Fokker airplane was purchased. A grateful Richard Byrd named the Fokker airplane used for the expedition in honor of Edsel's daughter, Josephine Ford.¹⁶ Byrd wrote to Edsel saying:

"The whole thing would have been impossible without your backing and encouragement. I owe a great deal to a great many people, **but I owe**

more to you than all the rest put together”
(emphasis added)¹⁷

From 1927 to 1929, Edsel Ford actively supported Byrd’s Antarctic Expedition with a contribution of about \$100,000 in money and materials. In addition he solicited funds from others, including a “secret” contribution of \$100,000 from John D. Rockefeller Jr. Admiral Byrd named newly discovered mountains in the Antarctic after Edsel and his daughter, Josephine. The Antarctic Expedition was flown with a Tri-Motor and the airplanes from both Polar trips are displayed at the Henry Ford Museum.¹⁸

Recall that in 1925, Henry Ford bought all the stock of the Stout Metal Airplane Company. Henry Ford had a history of disputes with his co-shareholders in the Ford Motor Company, and eventually purchased all remaining shares in 1919.¹⁹ He would not again go into a business relationship and finance it unless he (and his family) owned all of the stock. Stout needed financing for the building of his airplanes, so was forced to convince his shareholders to sell out to Ford, saying that “Edsel Ford wants to take over the manufacturing end of the work at once ... and is willing to pay \$2000 for every \$1000 put in.” During this time William Mayo wrote a letter to Edsel regarding developing three engine aircraft for safety reasons.²⁰

It is worthy to note that in 1913, Henry Ford, an active preservationist, pressured his auto dealers to assist in passing the Weeks-McLean Migratory Bird Act which at the time was bogged down in Congress.²¹ There is an interesting comparison between this effort and Edsel Ford’s letter in 1925 to his dealers – Henry helping birds in their migration; Edsel helping pilots in their “migration” across the country at a time of few navigational aids.

Another worthy historical note occurred when Lawrence Sperry, the son of the inventor of the gyroscope landed his one-seat biplane he referred to as a “Flivver” at Henry Ford’s Fair Lane Estate in 1923. In a *Detroit News* interview, Sperry said that Edsel was intrigued with the potential of a small plane and quoted Edsel as saying:

“We ought to be able to sell ‘airplane flivvers’ to the same type of individuals – to pioneers who are going to break unbroken ground and fly, despite the obstacles.”

In the same interview Sperry noted that Henry Ford was more interested in the engine than the airplane, estimating he could build a similar engine for \$50.²²

No doubt, while Henry is deserving of credit for risking his reputation and financial might to encourage and advance Aviation, it is fair to conclude that he took

the risk at the behest and encouragement of his son, Edsel. Henry himself stated, “this interest in Aviation is largely Edsel’s idea and he deserves the credit”.

Edsel’s efforts in providing much needed location and direction information for pilots at a time when few navigational aids were available, inspiring Henry to build the first aircraft manufacturing and airport complex, encouraging the development of reliable and safe airplanes and the environment in which they operate; and his efforts in educating the general public as to the safety and benefits of commercial air travel are worthy of recognition.

Henry was enshrined in the National Aviation Hall of Fame in Dayton, Ohio in April 1984.²³ He was enshrined in The Michigan Aviation Hall of Fame in 1990.²⁴ Edsel is enshrined in neither. Edsel Ford’s substantial contributions toward aviation have remained in the shadows too long. Edsel deserves recognition for his substantial role in promoting and advancing the safety of reliable dependable scheduled commercial flight. The recognition is long overdue and well deserved.

ENDNOTES

- * Leonard E. Nagi, Nagi, Baxter & Seymour, P.C. 155 W. Congress #300, Detroit, MI 48226; nagi@nagbaxsey.com. For copy of Tim O’Callaghan’s book, Send \$34.95 plus \$3.50 S & H and \$2.10 Michigan tax to: **T & D Associates c/o Timothy O’Callaghan, P.O. Box 512, Northville, MI 48167**
1. “Henry Ford, A Hearthside Perspective”, Donn Werling (2000), SAE, p 34
 2. “Henry Ford, a pictorial Biography”, Jeanine M. Head & William S. Pretzer, (1990), Henry Ford Museum and Greenfield Village; “The Ford Road”, Lorin Sorensen (1978), Silverado Publishing Company, p 116, 123
 3. “Edsel Ford, Modernist”, Judith Dressel, The Modern Spring 2000 Vol 14 No. 1
 4. “The Aviation Legacy of Henry & Edsel Ford”, Timothy J. O’Callaghan (2000) Proctor Publications, LLC at 87
 5. O’Callaghan at 28
 6. O’Callaghan at 23-28
 7. O’Callaghan at 33-38
 8. O’Callaghan at 20; 38-42; 61; 77,78
 9. See O’Callaghan, Chapter 6 for a more detailed account of the advertising.
 10. See O’Callaghan, at iii
 11. “Clara”, Ford R. Bryan (2001), Ford Books at 121,194
 12. See at “Clara at 121; O’Callaghan at 2,3; AERO FILES.COM, an aviation reference site lists the “Ford-Van Auken” as a “ 1909 ... 28 hp Ford T ... A youthful effort by Edsel and Charles, constructed in a barn ... Somewhat resembling a Bleriot with tricycle gear, and with conventional ailerons controlled by the pilot’s shoulder yoke, it did fly, if only at an altitude of a few feet.”

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13. See Clara at 194, 195; O'Callaghan at 6,30
14. See O'Callaghan at 6,8
15. See O'Callaghan at 84-92. The Trophy is on display at the Henry Ford Museum
16. See O'Callaghan at 100
17. See O'Callaghan at 102
18. See O'Callaghan at 98-103. The author comments at 99,100 "Few people are aware of just how responsible Edsel Ford was for the success of Richard Byrd's Artic and Antarctic Expeditions." Following the success of the Polar flight on May 8, 1926, Ford bought the Fokker airplane for the Henry Ford Museum where it is still displayed along with the Ford Tri-Motor used for Byrd's Antarctic Expedition. Byrd also named newly discovered mountains in the Antarctic after Edsel and his daughter, Josephine.
19. See O'Callaghan at 175; "The Legend of Henry Ford", Keith Sward (1948), Rinehart & Company at 73,74
20. See O'Callaghan at 48, 56
21. See Werling, at 81
22. See O'Callaghan at 124, 125. As a further note, at the time of Sperry's visit, Henry Ford was deeply involved in a secret project in his engineering laboratory right at Fair Lane Estate where Sperry landed, to develop an air cooled engine as the power source for his next car to replace the Model T. A four cylinder air cooled "X engine" developed about thirty-five horsepower. In 1922-1923, a twenty-four cylinder version was tested in Edsel Ford's streamlined racing boat, "Miss Dearborn". See note 1 at 17-18. The "X engine" is on display in the power house at the Henry Ford Estate at Fair Lane.
21. See O'Callaghan at 91; also, www.nationalaviation.org/enshrinee/ford.html
22. www.michiganaviation.org ■

III. Aircraft Buyers and Sellers Beware!

By: Clifford G. Maine, JD/CPA
*Miller, Johnson, Snell
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The following is a summary of a litigation involving a pre-purchase inspection of a business class jet aircraft. Miller, Johnson, Snell & Cummiskey, P.L.C. represented the plaintiff ("Buyer").

There were essentially two defendants. The buyer sued the prior owner of the aircraft for fraudulent misrepresentation, negligent misrepresentation, and breach of warranty for representations that the prior owner made in the aircraft logbook regarding inspections that it had conducted. Several months after the complaint was filed, the case against the prior owner was stayed because that owner filed for bankruptcy protection.

The other defendant is a nationwide aircraft service provider that conducted the pre-purchase inspection of the aircraft. The buyer sued that defendant (the "inspector") for breach of contract, negligent inspection, and negligent provision of information, a claim based on the Restatement (2nd) of Torts, § 552.

In February, 2002 – after a two week jury trial – a Western Michigan jury found that the inspector breached the standard of care, provided false information to the aircraft purchaser, and consequently awarded approximately \$1.9 million to the aircraft purchaser. The key issue at trial was: "Who is responsible for defects discovered in the aircraft after it has been sold?" By its verdict, the jury determined that the aircraft inspector who conducts a pre-purchase inspection is. More specifics follow.

THE PRE-PURCHASE INSPECTION

In July, 1997, the buyer hired an aircraft management company (the "agent") to help it search for and purchase an aircraft that could be placed on a Part 135 certificate and flown for charter. The buyer and agent settled on a 1969 Hawker aircraft. They then hired the inspector to determine whether the aircraft could be made Part 135-ready and to do a pre-purchase inspection. During discovery, the inspector presented several different versions of what it thought it was supposed to do and at trial took the position that it was only supposed to do a Part 135 inspection.

The invoices and work orders of the inspector included phrases such as:

- "research log books and evaluate aircraft"



-
- “perform pre-flight walk-around, ran engines per manual, obtained oil sample”
 - “note of squawks made”
 - “service left/right engine oil tanks”
 - “performed in-depth research of log books, evaluated aircraft, provided list of discrepancies to customer, advise customer of options”

The only written report the buyer received was an informal hand-written document that listed items like these:

- Aircraft not Part 135 ready, but could be made so with a lot of work
- Aircraft has been “well kept”

The informal report said that a formal report was available, if needed, and included a list of 51 squawks and Service Bulletin and AD information.

The buyer accepted this report as a pre-purchase inspection and proceeded to have his own personnel complete the log book review to allow the aircraft to be placed on a Part 135 certificate. The squawks noted by the inspector were repaired. The inspector made no entry in the log book, even though some of the squawks were airworthiness items.

Approximately one year after the buyer took possession of the aircraft, extensive corrosion was found during a 24-month inspection.

At the trial, various experts provided unrefuted testimony that the corrosion had existed at the time of the inspection. An executive from the inspector’s own office testified that a pre-purchase inspector has the duty to explain to the customer what services are available and what services are not available. A representative of the buyer’s agent, a pilot, testified that he had clearly asked for both a Part 135 evaluation and a pre-purchase inspection and had indicated to the inspector that the aircraft was being evaluated for possible purchase. The buyer also presented expert testimony concerning the value of the aircraft if it had been airworthy (corrosion free) versus the value of unairworthy aircraft. Both parties called expert witnesses to testify about what defined a pre-purchase evaluation/inspection and related how it differs from a Part 135 records review.

The inspector vigorously argued that buyer should have known that the report provided was not a pre-purchase inspection and instead was only a Part 135 evaluation. Considerable testimony was heard concerning the experience of the individual who had done the work: his lack of training on a Hawker Aircraft, lack of specific training to supervise a pre-purchase inspection, failure to use his own company’s pre-purchase

evaluation checklist, and the fact that his company’s headquarters sent him a memo during the time the aircraft was being inspected stating that no pre-purchase inspection should be done.

The buyer argued that he had acted in a reasonably, competent way when he took the Hawker to a facility that advertised in national publications that it was the “Hawker expert” and could provide services that were not available anywhere else. He also argued that since he had asked for a pre-purchase inspection it was reasonable to accept what came back from the inspector as just that.

After three and a half hours of deliberation, the jury came back and reported their findings as follows:

- On the contract claim, the jury found that there was no clear agreement on all the necessary terms of the contract for the services to be provided.
- On the negligence claims, the jury found negligence and awarded damages in the total amount of \$1,910,884, allocating the negligence 80 percent to the pre-purchase inspector and 20 percent to the buyer.

The case has been appealed.

The case shows the importance of clearly communicating with your customers on the services you will provide and those you will not. We advise our aircraft maintenance service clients that do pre-purchase work that their maintenance contracts must be drafted very carefully. Here are some of our guidelines:

- The contract must include a list of items that will be checked in order to complete the aircraft pre-purchase survey.
- It should state that the survey only is an indication of the aircraft’s status for the items checked.
- It should state that the survey is **NOT** a statement of airworthiness.
- It should not provide a guarantee or warranty concerning the condition or remaining useful life of the aircraft:

It should explain that if the items listed in the survey do not meet the client’s needs for pre-purchase survey, other work could be performed, including the manufacturer’s inspection programs.

It should contain provisions specifically limiting the liability of the inspector, in order to avoid, as far as possible, the expense and frustration of litigation. ■

IV. The Cape Town Convention – What It Means for Aircraft Owners

By: Clifford G. Maine, JD/CPA
and
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In November, 2001, Unidroit sponsored a conference to address the risks associated with lending in the aircraft industry. Current aircraft financing plans presuppose the ability to repossess planes and other aircraft materials. However, repossession is often impossible since current national laws, especially in developing countries, frequently conflict with the principles of asset-based financing. The conference produced a proposed international treaty, now known as the Cape Town Convention on International Interest and Mobile Equipment, designed to assist manufacturers and lessors involved in international financing transactions with aircraft and aircraft engines. Representatives from 58 nations attended the conference, and 22 countries signed the Cape Town Convention document and the Protocol concerning aircraft financing at the close of the conference. The Treaty, however, will not have any bearing on aircraft transactions until the Convention, a general document addressing a range of mobile assets, receives 3 ratifications, and the Protocol, a document specific to aircraft situations, is ratified by 8 countries. Nonetheless, proponents of the Treaty are hopeful that it will come into effect within a year.

The Cape Town Treaty would create substantive laws favorable to lenders and lessors involved with aviation transactions that supercede conflicting laws in different countries. The focus of the treaty is default situations, remedies for these situations, and bankruptcy. As such, the Cape Town Treaty has the general effect of exporting UCC Article 9 and the Bankruptcy Code to the rest of the world.

The Cape Town Treaty proposes the creation of a central international registry for perfecting encumbrances, filing various international financial interests, and administering lien searches on aircraft and aircraft engines. Cape Town filings would be made through an entirely electronic, computer-based registry. Filings would be similar to current UCC filings, and purely notice based.

The registry would require only minimal information such as make, model, serial number, and name of debtor and secured party. Costs for filings have not yet been established nor has the location for the international registry been decided on, although Singapore, Ireland, Canada, and South Africa are the leading Candidates.

The Cape Town Treaty applies to private and commercial airplanes and helicopters carrying a minimum number of persons or weight of cargo. Under the treaty, several interests would be categorized as “international interests,” that would have to be filed in the international registry. These include the interest of a lessor under a lease, the interest of a seller under a title reservation agreement, the interest of a chargee in an agreement creating security, the interest of a buyer under a sale agreement, and possibly prospective interests and assignments of international interests. The Treaty would enable the individual holding the interest to exercise certain remedies, although the contracting state (country party to the Treaty) could require court approval for the enforcement of these remedies. Also, the registration of an international interest would require the consent of the debtor (any party who has one of the interests listed above).

Adoption of Cape Town Treaty would not affect the present aircraft registration procedures under the United States Transportation Code (Federal Aviation Act). U.S. registered airplanes would still be registered with the Federal Aviation Administration and financial institutions in the U.S. would continue to search the FAA records with regard to ownership and registration of aircraft. Should the U.S. adopt Cape Town, it is possible that the FAA would become the exclusive portal in the U.S. for Cape Town filings in the international registry.

Ratification of the Cape Town Treaty could affect foreign transactions involving American participants even if the United States is not party to the Treaty. Accordingly, it would always be wise to make a Cape Town filing in addition to the FAA filing since certain provisions, including priorities, apply. Under the proposed Cape Town Treaty, a registered interest has priority over any other interests subsequently registered and over an unregistered interest. The first individual to file an interest also has priority over others, and actual notice is not relevant. The Cape Town Treaty applies to a transaction if the aircraft is registered in a contracting state or the debtor is situated in a contracting state. The debtor is situated in a contracting state if it is incorporated or formed in a contracting state, has its registered office or statutory seat in a contracting state, has its center of administration in a contracting state, or has its principle place of business in a contracting state. (The location of the seller, lender or lessor is irrelevant.)

If the United States ratifies the Cape Town Treaty, it would alter financial institutions' policies and procedures on perfecting security interests, filing to perfect interests, searching for liens, drafting and enforcing documents, and dealing with defaults, remedies, and bankruptcies. A contracting state may make a declaration that the Treaty does not apply. However, notwithstanding such a declaration, certain provisions apply, including priority of interests, so again, it would be in an involved party's best interest to make a Cape Town filing.

The aviation community and Congress will begin addressing Cape Town and its implications for other international treaties in the next few months. Currently, there is no proposal to do away with the FAA registration system. Since the conflict between the FAA system and the Cape Town requirements has not yet been determined, U.S. registered aircraft will have to comply with both regulatory regimes. Also yet to be determined is how existing financing structures will be affected should the U.S. adopt the Treaty, as they will need to be prepared to accommodate both FAA and Cape Town filings. Although most people involved in the ratification process do not believe the Cape Town's international aircraft registry will be in place until 2003, the little publicized Cape Town Treaty would likely have major impacts on aircraft operations in the near future. Financial institutions and their advisors are encouraged to stay current on the developments of Cape Town, for when the remaining undecided issues are settled, the Treaty will have significant ramifications for U.S. aircraft owners and financiers.

SOURCES

Polk, Frank. [An Overview of the Cape Town Convention on International Interests in Mobile Equipment](#). Presentation.

Polk, Frank. [Unidroit Convention Ends, Ratification Process Begins](#). www.nbaa.org/taxes/unidroit.htm

Norton Rose
www.nortonrose.com/publications/aviation/html.

Aviation Working Group, International Air Transport Association "Project Summary, Unidroit Security and Leasing Convention" ■

V. War Risk Liability and War Risk Physical Damage Coverages

By: John White, Insurance Agent
*Aviation Insurance Agency
DeWitt, MI*

After the events in the United States on 9/11/01, those insurance carriers who had been providing War Risk Liability and War Risk Physical Damage coverages sent notice of cancellation of these coverages in accordance with the terms of their policies. All carriers providing the coverage had endorsements on their policies which allowed them to cancel the coverages upon seven (7) days notice to the Insureds. To date most carriers have sent out such notices to their insureds.

Prior to September 11, 2001, War Risk Liability and War Risk Physical Damage coverages were offered on a regular basis by most of the major aviation insurers. War Risk Liability coverages at the same limit as the primary liability limit on the policy was Included at no charge, and War Risk Physical Damage coverages were offered at a very nominal, or no, charge. War Risk Physical Damage coverages are normally purchased either because the lienholder for the aircraft requires it, the aircraft is operated on Part 135 and the operator may not know the passengers, or the aircraft operate outside the Continental United States and Canada.

War Risk Physical Damage coverage includes, among other things, confiscation or requisition by any governmental authority. If someone is found on an aircraft to have or be carrying drugs, the DEA can seize the aircraft, and in fact has done this on numerous occasions. Another domestic risk is violence associated with a strike or civil commotion.

As of this date, both War Risk Liability and War Risk Physical Damage coverages can be purchased, but it has become rather expensive. This is because the War Risk market has paid out \$265,000,000 in physical damage claims related to September 11th, and has the potential for several billion dollars for liability coverages. For War Risk Physical Damage coverages, expect to pay a rate of \$.15 per \$100 of insured value, and for War Risk Liability coverages (subject to the \$50,000,000 Aggregate third party bodily injury and property damage limitation) expect to pay a premium of twenty percent (20%) of the regular limited premium. It is possible to purchase more third party liability

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VI. Web Sites for the Legal Aviator

By: Leonard E. Nagi

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We last listed aviation web sites in Volume 7, No. 1 (May 2000) of the *INNERMARKER*, and herein we revisit and update with some new. In addition it is always fun to simply search words like “aviation” or “airplane” and explore new ones when time permits.

www.avweb.com – is still active and much improved. It provides daily updates of what is going on in the Aviation industry and has a nice AVIATION LAW section of current topics. It also links you to many other aviation sites e.g., weather, FAA and NTSB links, calendar of aviation events. Since we last wrote, it has added advertising; however, they are all aviation related and the nuance of them is well worth the information and convenience of the site. Best part is that you can sign up and get a daily “AV FLASH” newsletter update via your email address if you want.

www.nts.gov/default.htm – still gets you to the National Transportation Safety Board site. From this home page you can access the NTSB opinions by clicking on “Legal Matters” on the left side of the page. You can access a lot of information on aviation accident investigations by clicking on the “Aviation” box from the home page. You then have access to current Major investigations and accident “synopses” of over 46,000 investigations, along with other NTSB information and statistics. The Major investigations site has detailed photos from current cases along with details of the investigations. As of this writing for example, detail photos of the engines and tail assembly from American Airlines Flight 587 are online to view or download to your computer. Alaska Airlines Flight 261, Egypt Air Flight 990 and the Paine Stewart, Aberdeen, SD accident are among the current cases.

www.faa.gov – is the Federal Aviation Administration web site. Once you are at the home page, just follow whatever interests you.

www.dot.gov/airconsumer – is the website for the Department of Transportation Office of General Counsel “Aviation Consumer Protection Division”. Provides travel tips and publications, information on complaints, and Safety/Security information.

www.mdot.state.mi.us/aero/resource.htm – gets you to the Michigan Bureau of Aeronautics resource page. You can also get there by starting at the omnibus

www.mich.gov web site and then clicking your way through “state web sites”, “transportation” and then “aeronautics”. A GREAT WEB SITE. ALL MICHIGAN AVIATION STATUTES AND REGULATIONS ARE HERE FOR EASY ACCESS TO VIEW OR DOWNLOAD. In addition, you can view and print the current MDOT Michigan Electronic Airport Directory – with detail maps of Michigan Airports. Much more too.

www.nasa.gov – Back at the Federal level this is the home page of NASA and will lead you to many interesting paths to follow. Plenty of photographs of space missions.

www.seds.org – For those who want to explore outer space, this “Students for the Exploration of Space” site is perfect. The “Best of the Telescope” link has the best Hubble Telescope pictures. Many links to Astronomy, Rocketry, “Nine Planet Solar System Tour”, Search for Extra Terrestrial Intelligence, and other “far out” things.

samadhi.jpl.nasa.gov – is another space exploration site; however this is both real and unreal. Has actual photos of the planets from various space probes such as Viking and Mariner. Or a simulator where you can place yourself almost anywhere in time and space and ask to see something i.e., Show me Jupiter as seen from Neptune on 3/22/2004 at 2:00 AM. Space artwork is also available.

www.aviation-safety.net – Another site for aviation accident reports, statistics and in addition photos of wrecked airplanes.

Having covered these somewhat specific web sites, the final sites are more general and include links to many aviation sites including some of the above.

www.global-aero.com – is the site for Associated Aviation Underwriters now a Global Aerospace company. It includes information on its services and insurance products along with links to the FAA, NTSB and to the Embry Riddle “Aviation Virtual Library” which in turn has many sub-links to aviation sites. You can even apply for a policy of insurance online through the www.aeroinsure.com link

www.airclaims.co.uk/ – is the site for Airclaims which promotes its services and has many links to many aviation sites: The NTSB and FAA sites in the US and other countries; various aviation associations and groups; aviation insurance companies; airframe and powerplant manufacturers to name some.

www.landings.com – Has current news stories along with links. Several “calculators” are available: obtain sun and moon rise and set times for your location; temperature, windchill, humidity, heat index,

and speed unit conversions. Performance database for over 500 aircraft; Aircraft Registration, and Certified Pilots databases; Flight planning data bases for calculating distances between airports and getting frequency, navaid and weather information for flights are among the data bases included.

www.skygod.com – is an off-beat site with something called “Art of Flying ~ Way of Zen” which includes links ranging from Buddhist’s sites to the United States Marine Corp. website. It also includes a section of “Great Aviation Quotes” so I searched for one to end this article and found this attributed to Bill Gates:

“The Wright brothers created the single greatest cultural force since the invention of writing. The Airplane became the first World Wide Web, bringing people, languages, ideas and values together.” ■

VII. Michigan Law Legislative Update

By: Clifford G. Maine, Esq.
and
Danielle Jacques
Miller, Johnson, Snell
& Cummiskey, P.L.C.
Grand Rapids, MI

In the past year the Michigan legislature has passed several laws, altering the state of aviation law in Michigan. The following is a summary of the most recent bills passed by the legislature:

2002 PA 255: Sales tax; exemptions; exemption from paying sales tax on certain items; clarify procedure. Amends sec. 5 of 1937 PA 94 (MCL 205.95).

2002 PA 258: Aeronautics; other; criminal background checks on applicants for flight schools; require and provide for refusal to enroll under certain circumstances. Amends sec. 85 of 1945 PA 327 (MCL 259.85). TIE BAR WITH: SB 0934'01.

2002 PA 318: Aeronautics; other; criminal background checks on applicants for flight schools; require. Amends 1945 PA 327 (MCL 259.1 - 259.208) by adding sec. 85a. TIE BAR WITH: SB 1006'02.

2002 PA 342: Local government; bonds; bonding authority of aeronautics code; modify. Amends sec. 131 of 1945 PA 327 (MCL 259.131).

2002 PA 352: Legislature; auditor general; reference to auditor general in aeronautics statute; eliminate. Amends sec. 35 of 1945 PA 327 (MCL 259.35).

2002 PA 35: Aeronautics; other; general amendments; provide for. Amends secs. 2, 3, 4, 5, 6, 7, 8, 9,

51, 83, 86, 87, 89, 133, 151 & 205 of 1945 PA 327 (MCL 259.2 *et seq.*); adds secs. 80g, 80h, 83a, 83b, 87a, 89a, 205a & 205b & repeals secs. 10, 10a, 11, 14a, 15, 15a, 15b, 16, 17, 23, 24, 24a, 24b, 25, 25a, 25a[1], 25b, 25c, 25d, 25e, 86a, 86b & 86c of 1945 PA 327.

2001 PA 40: Sales tax; exemptions; aircraft used in commercial transport of passengers; exempt sale for lease. Amends sec. 4x of 1933 PA 167 (MCL 205.54x).

2001 PA 39: Use tax; exemptions; aircraft used in commercial transport of passengers; exempt sale for lease. Amends sec. 4 of 1937 PA 94 (MCL 205.94).

Several aviation bills remain pending in the legislature. The following is a list of the bills pending as of June 25, 2002:

SB 437: Sales tax; exemptions; aircraft weighing over 6,000 pounds carrying cargo, passengers, or a combination of cargo and passengers; exempt sale or sale for lease. Amends sec. 4x of 1933 PA 167 (MCL 205.54x).

SB 783: Sales tax; collections; collection of sales tax imposed on sale of certain aircraft and aircraft parts; require a portion to be earmarked into the aeronautics fund. Amends sec. 25 of 1933 PA 167 (MCL 205.75).

SB 769 / HB 4279: Financial institutions; savings banks; predatory lending practices; prohibit. Amends 1996 PA 354 (MCL 487.3101 - 487.3804) by adding sec. 435.

SB 576: Use tax; exemptions; aircraft weighing over 6,000 pounds carrying cargo, passengers, or a combination of cargo and passengers; exempt from sale or sale for lease. Amends sec. 4 of 1937 PA 94 (MCL 205.94).

SB 784: Use tax; collections; collection of use tax imposed on sale of certain aircraft and aircraft parts; require a portion to be earmarked into the aeronautics fund. Amends sec. 21 of 1937 PA 94 (MCL 205.111).

SB 680: Use tax; collections; use tax on the difference between trade-in and purchase price of certain vehicles and equipment; provide for. Amends sec. 2 of 1937 PA 94 (MCL 205.92) & adds secs. 12 & 12a.

HB 4306: Use tax; collections; out-of-state purchases; eliminate use taxes. Amends 1937 PA 94 (MCL 205.91 - 205.111) by adding sec. 4w.

HB 4520: Use tax; exemptions; exemption for sale of vehicles to relatives; include in-laws. Amends sec. 3 of 1937 PA 94 (MCL 205.93).

In the past year, there have been cases addressing aircraft taxation in Michigan. The following is a summary of those cases:

Zantop v Department of Treasury: Use tax applies to parts delivered and installed in Michigan and does not violate the Commerce Clause of the U.S. Constitution.

Department of Treasury v Escanaba: Use tax assessment is conclusive and not subject to further challenge after ninety days after the issuance of the assessment. ■

WAR RISK LIABILITY AND WAR RISK PHYSICAL DAMAGE COVERAGES –

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coverage above the \$50,000,000 with prices starting at \$16,000 per year and exceeding \$43,000 per year.

As you can imagine, the current situation is very fluid and is changing hour by hour. This is the time when insureds need aviation insurance specialists to guide them through this transition period. It should also be noted that all aircraft insurance rates increased very dramatically when the reinsurance treaties renewed last January.

Because War Risk coverage will be on a new endorsement with expanded definitions, it will be a short while before the actual endorsement is issued. ■

VIII. The Liens Return

By: Donald C. Frank

*Meridian Law Center, P.C.
Okemos, MI*

In case you hadn't noticed, when the Garage Keeper's Lien Act was amended in 1998, the provisions pertaining to aircraft liens were repealed. The Legislature has now restored the Garage Keeper's Lien for aircraft and recodified the provisions pertaining to aircraft by placing them in the Aeronautics Code rather than in the Garage Keeper's Lien Act.

2002 PA 35 has fully restored the Garage Keeper's Lien as it pertains to aircraft. MCL 259.205 now, once again, allows the garage keeper to detain an aircraft that is in the garage keeper's possession at any time within ninety days after performing the last labor or furnishing the last supplies for which the lien is claimed and gives the lien priority over other liens. "Garage Keeper" is now defined in MCL 259.4(e) as "any person who, for hire or reward, publically offers to store, maintain, keep, or repair aircraft or any accessory used in the operation of aircraft and to furnish accessories and supplies for aircraft or any accessory used in the operation of aircraft." MCL 259.205 does not require any written contract and authorizes a lien for charges for storage, maintenance, keeping, and repair of the aircraft and for fuel, electric current, or other accessories and supplies provided for the aircraft as well as for labor performed on the aircraft. MCL 259.205a specifies the amount by which the aircraft lien has priority over liens. Interestingly, those amounts appear to be unchanged from the previously repealed amounts specified in the Garage Keeper's Lien Act in 1986.

Finally, MCL 259.205b provides for filing the Garage Keeper's Lien with the FAA and specifies the procedure for foreclosing the lien.

2002 PA 35 also makes other significant changes to the Michigan Aeronautics Code, including substantial changes to the definitions and other provisions. For example, MCL 259.51(1) now provides that the Michigan Aeronautics Commission shall exercise exclusive authority to approve the location and operation of airports, landing fields, and other aeronautical facilities within the state, and MCL 259.4(b) changed the definition of a "flight school," a change which could be significant in view of the new criminal background check requirements. These changes should be carefully reviewed by aviation law practitioners dealing with state law legal issues. ■

IX. Criminal Background Checks Now Required

By: Donald C. Frank

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As of May of this year, Michigan now requires criminal background checks before enrollment for flight training. 2002 PA 318 (Senate Bill 934) adds MCL 259.85a to the Michigan Aeronautics code to require criminal background checks, and 2000 PA 258 (Senate Bill 1006) amends MCL 259.85 primarily by adding a new Section (24) to also require criminal background checks and specify disqualifying criminal histories and by adding a new Section (27) defining a "violent or other felony." The Public Acts were tie barred to each other and became effective 03/22/02. Both acts passed the Legislature with essentially no opposing votes.

As a condition of "enrollment" of a flight training applicant, Michigan flight schools are now required to request that the State Police provide a criminal history check and a criminal records check through the FBI. As part of that process, the flight school is required to have the applicant submit his or her fingerprints to the Department of State Police. The applicant is required to "cooperate" with the flight school in completing the criminal history check and criminal records check and to sign a written consent for the check. Although the flight school is required to receive a report on the criminal checks from the State Police "before enrolling the applicant," MCL 85a(2) allows the flight school to enroll the applicant as a "conditional student" before receiving the report if (a) the flight school requests the report before the conditional enrollment; and (b) the applicant signs a statement identifying all criminal convictions, if any, and agreeing that the enrollment is void if the report does not turn out to be the same as the applicant's statement. The statement for conditional enrollment is also void if it reveals any felony convictions. Under those circumstances, MCL 259.85a(3) provides that the flight school "is not liable for the termination or any money paid toward enrollment."

The new statutes do not contain a definition of "flight school," "enrollment," "applicant," or any of the other terms used except "violent or other felony." However, the Michigan Aeronautics Code contains the following broad definition at MCL 259.4(b):

"Flight School" means any person providing or offering to provide flight training leading to pilot or flight instructors certification, for hire or compensation, and engaged in any of the following:

- (i) Advertising or calling oneself a flight school or anything equivalent to a flight school.
- (ii) Hiring, contracting, or otherwise using one or more flight instructors in an endeavor described in this section.

Also, MCL 259.4(a) defines a "flight instructor" essentially as anyone possessing an FAA flight instructor certificate or other FAA certificate authorizing that individual to instruct in aircraft. The definition of "flight school" appears to be quite broad and, therefore, may not serve as much of a limitation on the application of these new statutes. The requirement for a background check appears to be triggered by "enrollment" of an "applicant" in a flight school pursuant to MCL 259.85a(1) and is required for an "applicant" for "training" at a flight school pursuant to MCL 259.85(24). Therefore, interpretation of those terms may be crucial in determining when a criminal background check is required. For example, the Michigan Bureau of Aeronautics has prepared a memorandum giving the point of view that the background check is not required for a flight review or an instrument proficiency check. If that view point is correct, might the statute be violated if such a check is given by a flight school and also incorporates some "training?"

So, what is the flight school to do with the information contained in the criminal background check? MCL 259.85a(8) prohibits the flight school from using the information for any purpose other than "evaluating an applicant's qualifications for enrollment in the position for which he or she has applied" and for purposes of comparing it to any criminal history statement given by an applicant for purposes of conditional enrollment. The flight school is prohibited from disclosing the report or its contents to anyone that is not "directly involved" in evaluating the applicant's "qualifications." However, the flight school may disclose the contents to another flight school in which the applicant is being considered for enrollment, if the applicant agrees in writing to allow such sharing of the report.

The statute does not define what is meant by "evaluating an applicant's qualifications for enrollment in the position for which he or she has applied." However, MCL 259.85(24) prohibits enrollment and requires termination of enrollment for any applicant if, within the preceding seven years, the applicant: (a) Was convicted of a violent or other felony; (b) Was incarcerated for a violent or other felony conviction; or (c) Was on probation or parole for a violent or other felony conviction. MCL 259.85(27) defines a "violent or other felony" as "a violation of a penal law of this state, another state, or the United States for which the offender, upon conviction

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CRIMINAL BACKGROUND CHECKS NOW REQUIRED –

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tion, may be punished by death or imprisonment for not more than one year or an offense expressly designated by law to be a felony.

Although taking additional flight training has always been considered to increase the safety of flight operations and reduce the likelihood of aviation accidents, the Legislature has now decided to add what may prove to be a significant disincentive for individuals seeking additional flight training to improve their skills and abilities. Only time will tell whether potential new pilots and pilots that would otherwise seek additional training will be dissuaded from seeking training because of the requirement to provide fingerprints and undergo the personal scrutiny of a background check. Further, everyone, even individuals presently employed as airline or other pilots, are now prohibited from enrolling for additional flight training in Michigan if they were convicted of or completed any incarceration, probation, or parole for any felony within seven years before seeking flight training in Michigan. No connection with terrorism or even any violent act is required to bar a person from receiving flight training in Michigan. Even a felony conviction for bouncing a check now results in being barred from enrolling in Michigan for flight training. ■



Clifford G. Maine (left) receives the Section Chairperson's gavel from Chairperson Emeritus Eric S. Richards.

X. Aviation Law Calendar

*Any members aware of any upcoming aviation or aviation law related events which may be of interest to our membership are encouraged to pass it on by a letter, e-mail or call to our editor, Don Frank (517) 349-0000; Fax (517) 349-2941, E-mail Prattfrank@cs.com so we can let our members know about it in the **Innermarker**.*

- 07/17-21/02 Lawyer Pilot Bar Association Summer Meeting, Whistler, BC Canada. Contact: (301) 972-7700; <http://www.lpba.org>.
- 07/25/02 Aviation Administrative Law Practice Seminar, Oshkosh Park Plaza, One North Main Street, Oshkosh, Wisconsin, 9:00 a.m - 4:00 p.m. central; Contact: (920) 235-3007.
- 07/23-29/02 EAA Airventure Fly-in, Oshkosh, Wisconsin; <http://www.eaa.org>
- 08/10/02 ABA Forum on Air and Space Law: Current Competition Issues In the Airline Industry, 9:30 a.m. to 12:00 p.m., Marriott Wardman Park Hotel, Washington, D.C.; Contact: Kristin Crane (312) 988-5580 <http://www.abanet.org/annual/2002>.
- 09/29-10/01/02 4th Annual Defense & Aerospace Investor, Customer, & Supplier Conference, Coronado Island Marriott Resort, Coronado, California. http://www.srinstitute.com/industry_events_page.cfm?gid=13
- 10/24-26/02 AOPA Expo 2002, Palm Springs, California; <http://www.aopa.org/expo/>
- 11/06-08/02 ABA Forum on Air and Space Law, Annual Meeting and Conference, The Westin Diplomat Resort and Spa, Hollywood, Florida; Contact Kristin Crane 312 (988-5580).
- 01/17-19/03 Great Lakes International Aviation Conference, Kellogg Center, East Lansing, Michigan. Contact: Phil Tartalone (517) 335-9880.
- 02/05-06/03 Strategic Research Institute's 10th Annual FAA Aircraft Registration, Lien & Security Interests Conference, New Orleans, Louisiana. (Tentative) Contact: <http://www.srinstitute.com>.
- 07/16-20/03 Lawyer Pilot Bar Association Summer meeting, Branson, Missouri; Contact: <http://www.lpba.org>.



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