



INNERMARKER

Newsletter of the Aviation Law Section

State Bar of Michigan
Donald C. Frank, Editor

VOLUME 7, NO. 1

MAY 2000

I. PRESIDENT'S LETTER

By: Myron F. Poe, Chairperson

With great expectations for the Millennium Council of the Aviation Section of the State Bar of Michigan, I extend a clearance to all past, present and new Section members to taxi to depart the runway of their choice in a flight which I hope will provide each of us with an increased awareness of our responsibilities as lawyers having a mutual interest in aviation and, in many cases, as pilots and the captains of the ship.

Susan Hofer skillfully guided and piloted the Section as Chair during the past year. She now moves into the right seat as Chairperson Emeritus, along with co-pilot and Chairperson elect Eric Richards.

During this coming year the Council will rely on all its past Chairpersons to assist in the seminars and educational events which have proven to be of great service to the aviation community in the State of Michigan. We look forward to an increased social

calendar and events which will bring Section members closer in their exchange of legal and aviation-related information.

I am hopeful the Council will stimulate a dialogue in which all Section members will participate focused upon aviation law and aviation topics for general and specialized practitioners.

I believe the Council recognizes that many Section members do not specialize in the practice of aviation law, but look to the Section for general aviation practice information and for a dialogue between lawyers regarding topics of interest to attorneys who are aviation-oriented.

The Council welcomes suggestions and proposals from all Section members as to how the Aviation Section can provide worthwhile information and service to the State Bar, to the aviation community and to the membership.

A schedule of Council meetings is included on the back page of this *Innermarker* and may be provided in a separate communication. Additionally, Officers and Council members welcome calls from Section members and the aviation community about any legal or aviation topic or suggestion. Don't hesitate to call or write. Officers and Council members may be reached at the phone numbers and addresses appearing in this issue of the *Innermarker*. ■

TABLE OF CONTENTS

I. President's Letter	1
II. 2000 Section Council	1
III. What To Do in the Event of an Accident, an Aviation Lawyer's Perspective	3
IV. The Contract Dilemma	4
V. Aeronautical Laws – Revisited	6
VI. Developments in Aviation Law	8
VII. Web Sites for the Legal Aviator – Flying the Web	12
VIII. Warbirds Over Kalamazoo 2000	14
IX. Public Seminars: "Your Medical Certificate – Everything You Always Wanted to Ask"	15
X. Michigan Law Legislative Update	16
XI. Use Tax Planning?	16
XII. Lessors Not Deemed To Use Property In State of Michigan Based on Lessee Flight's In Leased Aircraft	17
XIII. Aviation Law Calendar	20

II. 2000 SECTION COUNCIL

New Section Council Members were elected at the September 19, 1999 Annual Meeting. The new Members joined Chairperson Myron F. Poe, Chairperson Emeritus Susan L. Hofer, and Council

continued on page 2

OFFICERS/COUNCIL

Chairperson	Myron F. Poe Royal Oak • (248) 544-4200
Chairperson Emeritus	Susan L. Hofer Bloomfield Hills • (248) 642-5770
Chairperson Elect	Eric S. Richards Grand Rapids • (616) 459-3200
Secretary	Gerald V. Padilla Southfield • (248) 357-1400
Treasurer	Clifford G. Maine Grand Rapids • (616) 831-1728
Council Member	Robert A. Buchanan Grand Rapids • (616) 459-1171
Council Member	Donald C. Frank Okemos • (517) 349-0000
Council Member	Karl W. Randall Waterford • (248) 666-3900
Council Member	Elmer L. Roller Bloomfield Hills • (248) 335-5000

OPERATING COMMITTEES

Publications	Donald C. Frank (517) 349-0000
Annual Meetings, Programs and Public Awareness	Susan L. Hofer (248) 642-5770
Charitable Activities	Gary S. Gondek (248) 666-2200

SUBSTANTIVE COMMITTEES

Aviation Liabilities	David R. Baxter (313) 964-2040
Aircraft Transactions and Taxation	Clifford G. Maine (616) 831-1728
Labor Law	Barry R. Smith (616) 388-7600
Relations with Aviation Entities	Myron F. Poe (248) 544-4200
Aviation Legislation and Regulations	Steven M. Chait (248) 666-1100
Airport Operations and Land Use	Karl W. Randall (248) 666-3900
Regulation, Enforcement and Administrative Law	Donald C. Frank (517) 349-0000
Military Aviation Law	Dennis J. Veara ~~~~~
Innermarker Editor	Donald C. Frank (517) 349-0000

2000 SECTION COUNCIL –

Continued from page 3

Members Donald C. Frank and Elmer L. Roller on the Aviation Law Section's Governing Section Council. The Members and the new positions to which they were elected are:

Eric S. Richards, Chairperson Elect. Mr. Richards practices with the Grand Rapids, Michigan firm of Mika, Meyers, Beckett & Jones, PLC and most recently served as the Secretary of the Section. In fact, Mr. Richards also previously served as the Section's first Secretary, served on the Section's Formation Committee, and was the drafter of the Section's Bylaws. Mr. Richards graduated *magna cum laude* from Wayne State University Law School. He has served as a judicial clerk in both the United States Court of Appeals for the Sixth Circuit and the United States Bankruptcy Court for the Western District of Michigan. His practice includes the areas of commercial litigation, securities law, and aviation law. He is a pilot and lives in a fly-in community with a hangar awaiting an airplane.

Gerald V. Padilla, Secretary. Mr. Padilla practices law in Southfield, Michigan with the firm of Siemion, Huckabay, Bodary, Padilla, Morganti, and Bowerman, P.C. Mr. Padilla has been in practice for twenty-four years, the last eighteen of which has been with his present law firm. His practice is focused on personal injury litigation. Mr. Padilla owns a 1981 Mooney 231. He obtained his pilot license in 1985 and has single engine land and instrument ratings with over 2,300 hours.

Clifford G. Maine, Treasurer. Mr. Maine is a member of the law firm of Miller, Johnson, Snell, and Cumiskey, PLC, and concentrates his practice in the areas of business, corporate, aviation, and international law. In addition to his legal credentials, Mr. Maine is a certified public accountant. Mr. Maine has previously served as a Treasurer for the Section and was a founding member of the Aviation Law Section. He is also a member of the National Business Aircraft Association (NBAA) Tax Committee, and he is a frequent speaker at NBAA seminars. He has published numerous articles on aviation transactions and tax planning. Mr. Maine holds single engine land, sea, and instrument ratings.

Karl W. Randall, Council Member. Mr. Randall was elected to a two-year term on the Section Council. He is a 1981 graduate of the Wayne State University Law School and was admitted to practice in the State of Michigan in 1981. Mr. Randall has been Manager of Aviation for Oakland County, Michigan since 1993, and his offices are located at Oakland County International Airport in Waterford, Michigan. For the ten years prior to 1993, Mr. Randall was Senior Assistant Corporation

Counsel for Oakland County. Mr. Randall has been a member of the Aviation Law Section since its inception and also belongs to the Michigan Association of Airport Executives and the Great Lakes Chapter of the American Association of Airport Executives. Mr. Randall is student hot air balloon pilot and continues his active aviation interests by observing arriving and departing aircraft on a daily basis at one of Michigan's busiest general aviation airports.

Robert A. Buchanan, Council Member. Mr. Buchanan was elected to a two-year term on the Section Council Board. He received his Juris Doctorate in 1975 from Vanderbilt University School of Law and was admitted to the State Bar of Michigan in 1975. He practices law with the firm of Law, Weathers, and Richardson, P.C. in Grand Rapids, Michigan, specializing in aviation law, municipal litigation, eminent domain issues, zoning, and commercial and contract litigation. Mr. Buchanan's aviation interests include representing Kent County International Airport as its attorney. He is also an associate member of the American Association of Airport Executives and the Michigan Association of Airport Executives.

All Council Members have expressed the desire to meet more of our Section Members and they would like to remind the Members that Members are welcome at all Section Council Meetings. ■

LPBA TAPS SECTION MEMBERS

The Lawyer-Pilots Bar Association (LPBA) has selected our Aviation Law Section's Chairperson Emeritus, Susan L. Hofer, to be LPBA's regional Vice President for the Great Lakes Region. In addition to the work and expertise that she has dedicated to our Section, Ms. Hofer has been active in the LPBA for many years. Susan and her husband, Ronald Hofer, (also an Aviation Law Section Member) regularly fly their Mooney to LPBA meetings ranging from Montreal to Santa Rosa, California.

The LPBA has also appointed Donald C. Frank, our *Innermarker* Editor and a Section Council Member, as LPBA representative for the State of Michigan. Although he has not been nearly as active with the LPBA as Susan Hofer, Don has been a member of the LPBA for about eighteen years and has attended many of its meetings.

Any Section Members interested in joining the LPBA or that have any questions or comments about the LPBA or its meetings are invited to call either Susan Hofer (248/642-5770) or Don Frank (517/349-0000).

III. WHAT TO DO IN THE EVENT OF AN ACCIDENT, AN AVIATION LAWYER'S PERSPECTIVE

**By: Steven M. Chait
Chait & Schwartz, P.L.C.
Waterford, MI**

As an attorney having concentrated my practice over almost 20 years in Aviation Accident law, (known by some as a "crash & burn" lawyer), I have frequently been contacted by pilots and aircraft owners who have just had the misfortune of being involved in an aircraft accident or incident.

Although aviation always involves some element of risk management, flying in general aviation or business aircraft can and should be a very safe activity (after all, we've never left one up there yet!) Nevertheless, I have often found myself on the telephone with clients who are standing in a field (thanks to the advent of cellular phones) next to their smoldering, bent aeronautical pride and joy, wondering what they should do next?

While there are certainly a number of legal reporting requirements, the obvious first concern is to assist any persons trapped in the aircraft, and get immediate medical care for anyone who may have sustained injuries. Depending upon where the accident occurs, police, fire and medical assistance may materialize very quickly, with no action on your part.

Once those issues have been resolved, probably the next most important question is "who do I call next, my aviation attorney or my aviation insurance representative!?" The true answer is the attorney. While we never truly believe our flights are going to terminate in an accident, the pilot should be prepared by knowing in advance exactly who to contact, and should have their agent's after hours and holiday telephone numbers. In addition, these professionals can often be of invaluable assistance in taking much of the burden off of the pilot or aircraft owner during this stressful time.

Most aviation attorneys will be happy to provide you with an initial consultation at no charge, and can often prevent numerous problems from materializing down the road. First, from an insurance perspective, they can help to assure that you ultimately receive full value on your insurance coverage. Second, they can provide counsel and guidance regarding any statements

concluded on page 4

LAWYER'S PERSPECTIVE –

Concluded from page 3

you may be asked to make, which may impact any potential Federal Aviation Administration (FAA) certificate enforcement action against you. Third, and potentially of the most financial significance, they can counsel you what to say and do to protect you from possible liability if lawsuits are later filed.

The investigation of aviation accidents is the responsibility of the National Transportation Safety Board (NTSB). The mission of the NTSB is solely to determine the probable cause to help prevent future accidents. They have no interest in violating or punishing pilots. However, the mission of the FAA in accident investigations is to (1) insure safety, and (2) to investigate and remedy violations of the Federal Aviation Regulations, through retraining and/or fines, certificate suspensions and revocations.

The NTSB only has a small number of regional offices and investigators. Therefore, they sometimes ask the nearest FAA office to send an Aviation Safety Inspector to the scene, and conduct the NTSB's investigation in their place. You should be aware that if you give a statement to an FAA Inspector who is wearing the "dual hat" of an NTSB Investigator, your statement may very well be used against you by the FAA once they finish filling out the report for the NTSB. If an FAA Inspector asks you any questions regarding your flying, it is wise to assure the Inspector that you fully intend to cooperate in every way, but that to avoid any later misunderstandings, ask that the Inspector put the questions in writing, and that you will promptly respond with a letter. This gives you the opportunity to consult with your attorney or other advisor before making any important statements.

Part 830 of the NTSB Regulations contains the mandatory procedures for what constitutes an "accident" which must be reported to the NTSB, who must report it and when. Interestingly, one could practically wrap an aircraft around a tree, and still not be required to report the accident to any governmental agency!

Section 830 requires "Substantial Damage" to be reported. Section 830.2 states "substantial damage" is damage or failure which adversely affects the structural strength, performance or flight characteristics. However, engine failure, bent fairings or cowling, dented skin, small punctured holes, ground damage to rotor or propeller blades, and damage to landing gear, wheels, tires, flaps, engine accessories, brakes, or wingtips are not reportable! If it is reportable, the owner or operator must notify the NTSB immediately for an

accident or certain incidents, and file a report with the NTSB within ten days.

If you have a hard landing, and you bend some landing gear and sheet metal, it is probably not necessary to report. But if it puts a bend in the wing spar, it probably is. Calling for advice as to whether your occurrence is even reportable can save a lot of problems down the road. Sometimes the answer can be surprising!

MEMBERSHIP DIRECTORY

By now, all Section Members as well as FBOs and others should have received a copy of the new Section Membership Directory. If you have not received your directory, please contact Don Frank by telephone at (517) 349-0000 or by fax at (517) 349-2941.

A Directory Update/Change Form was previously mailed to all members. The members' immediate response, despite the very short deadline, was greatly appreciated. We know the short deadline was irritating to some of our members, but it was necessitated by the desire to have the Directory ready for distribution to the public at our public Aviation Law Seminars in Battle Creek, Michigan and Pontiac, Michigan. Our members' immediate reply helped make distribution possible.

IV. THE CONTRACT DILEMMA

By: Brian M. Jacobson

Mr. Jacobson is a certified Member of the National Aircraft Appraisers Association and was a speaker at the Aviation Law Section's 1998 Annual Meeting.

A couple of years ago I bought a Cessna Turbo 210 from a Minneapolis lawyer and her husband. I dealt with the husband throughout the purchase process until it came time to close the deal. Then, when I thought all the details had been worked out satisfactorily for both parties the lawyer hands me a three-page contract that she wanted signed on the spot.

It was just after the completion of the pre-purchase inspection, and my client and I were on their turf. My client intended to leave for California, his home, with the airplane the following morning.

The parties had previously signed a very simple purchase agreement that detailed the facts of the

purchase, but the lawyer said that she preferred to use the agreement she drafted as the final document. Michael, my client, and I reviewed the document and there were several problems. Each of us read the agreement thoroughly, and we both marked the same three paragraphs. The problem was that we couldn't understand them.

The lawyer explained the first two paragraphs to us. Then, we insisted that she change some of the wording so it was clear to us that what was written on the paper was exactly what she had told us. She made the changes.

Then she explained the third paragraph to us. When she was through I turned to Michael and said, "did you understand any of that?"

"Nope," was his reply.

She tried twice more to make us understand what she was trying to do, and no matter what she said, it appeared to me that there was nothing useful to either party in that paragraph. Finally, feeling my frustration build, I said to her, "let's just drop this paragraph entirely, sign the contract, and get on with our business."

Perhaps she was just as frustrated with her attempts to educate two neophytes in the meaning of contract law, because she thought about it for all of a second and a half, said "ok," and struck the offending paragraph from the document. Michael went back to the airport to supervise the prepurchase mechanics as they buttoned up the airplane, I headed for the main airport for a flight back to Detroit, and the two sellers went back to work with Michael's money in their pockets.

I thought about that all the way home. In the end the contract that the parties signed had no more meaning than the very simple document that had been agreed to by both parties at the time the deposit was placed on the aircraft the previous week. Perhaps the sellers felt better about the deal because the document was one they drafted, but the loss of time for everyone concerned while we played with words was just that.

A few weeks later I appraised an airplane in Ohio for another long distance client. After reviewing my work he decided to pursue the airplane and asked me to act as his agent. The dealer who was brokering the Baron had his own sales agreement, and when he faxed it to me I had a good idea that we wouldn't be buying the airplane.

My client had already negotiated some issues when he turned to me to finish the deal. I discussed them with the broker before he sent me the contract,

and he agreed that they were all valid. Yet, the only reference to earlier negotiations was a paragraph that said that all verbal agreements made prior to signing of the document were null and void.

The next issue was the airworthiness of the aircraft. When I called him and told him that I would have to insert a paragraph stating that the airplane was to be delivered in an airworthy condition he said he would not agree to that. He said he had no idea if the airplane was airworthy or not and would not represent it as such. He added that the definition of airworthiness was murky and that it meant different things to different people. If that were the case, I asked, why did he insist further down in the agreement that any airplane being traded to him as part of the deal had to be in an airworthy condition? "That doesn't matter," he said, "because there is no trade in this deal."

The agreement was so poorly written that it stated that he didn't have to deliver the aircraft to the purchaser, but the purchaser had to pay him for it in any event. I questioned the legality of that paragraph, and the broker said, that the document was a standard agreement used throughout the industry. It probably was a standard agreement before he got through modifying it to suit his own preferences.

When an aircraft is sold between two non-commercial parties there is no need to draw lengthy documents that the parties themselves cannot understand. They only complicate matters and delay the sale process. In some cases, like the "standard" agreement that the broker wanted to use with my client, the sale is scrubbed altogether. It's a shame the document was so one-sided, because the airplane we wanted to buy appeared to be a very good one.

Generally the threat of liability is what makes one party to a sale draw up a document that is so one-sided that it offers little or no latitude. I'm guessing that the broker had no business insurance, so he tried to protect himself by forcing the purchaser to assume all liability connected with the sale.

For a deal on an aircraft to work well it has to be fair to both sides. If either party tries to take advantage of the other most likely the deal will fall apart at some point. Some may not because the buyer or seller fails to read or fully understand the agreement that he or she is signing.

Read any document you are presented with carefully before signing it. If it is written in legalese and you don't understand it you may need to consult your own attorney before proceeding with the sale.

If you are an attorney who writes purchase and sale agreements do your client a big favor and keep it as

concluded on page 6

CONTRACT DILEMMA –

Concluded from page 5

simple as possible. Not only will a tightly woven agreement that cannot be read and understood by a buyer or seller delay a sale, but it is likely that the buyer or seller who is not sure of the content will simply go find another airplane to buy.

One problem that buyers and sellers must face is what to do if a prepurchase mechanic finds something wrong with the airplane that was not expected. The seller doesn't want to put any more money into the airplane that he or she is selling, and the buyer doesn't want to pay to fix the problem that is over and above the selling price. Generally, if the price of the repair is under \$500 the parties will reach some kind of agreement, because neither wants to lose the sale for that amount of money. But when the price of the repair is higher, if the seller does not agree to make the repair, the deal is likely to fall apart.

That is why it is important to have a basis for the buyer's rejection of the airplane written into the purchase and sale agreement. Usually that basis is the airworthiness of the aircraft. If the airplane is not found to be airworthy the seller must make it so or take it home. The arbiter of airworthiness is usually the prepurchase mechanic, though the seller has the right to call off the sale if he does not agree with the mechanic's finding.

I rejected a Bonanza last year because my prepurchase mechanic reported that it had three cylinders that needed repair work. The compression was low in each. When consulted the seller's mechanic said he knew about the low compression. He contended that it was low because the airplane had not been flown a great deal in recent months, and that it would come back up once my client started flying it more.

Had we bought the airplane on that mechanic's word I have no doubt that we would have had to make the repairs before too much longer, and the possibility that there was more damage inside the engine, because of its lack of use, crossed my mind. But the seller did not want to put any more money into the airplane so he didn't sell it. It was my position that he would have to fix it before he could sell it to someone else, but he didn't want to make the repairs for us.

Another consideration in the purchase and sale agreement is what happens to the buyer's deposit if the sale is rejected. In most cases the deposit is returned to the buyer if he or she rejects the sale, especially if the basis of the rejection is the airworthiness of the airplane. Some agreements will

call for the buyer to pay the costs of positioning the airplane from its home base to the prepurchase inspection site and back. That is not unreasonable if the sale is rejected. But the parties must be sure that they agree beforehand on what will take place should the sale be rejected for any reason. If they deal with this issue after an airplane is rejected, it is likely to lead to grief for the buyer and seller.

The key to the purchase and sale agreement is fairness. The document must be written so it has something in it for both parties. If it is too one-sided the other party will reject it and no sale will take place. The parties must be certain that they fully understand the agreement before it is signed, and that any deficiencies are discussed and corrected. It is better to find that you cannot make an agreement on the terms of the purchase and sale agreement rather than after the aircraft is taken for a prepurchase inspection where a list of discrepancies is discovered. ■

V. AERONAUTICAL LAWS – REVISITED

*By: Leonard E. Nagi, Esq.
Paskin, Nagi & Baxter, P.C.
Detroit, MI*

1927 was a good and interesting year.

The population of the world reached one billion persons.

It is not clear if this number included two French war aces, Charles Nungesser and Francois Coli who took off from Paris's Le Bourget aerodrome in their Levasseur biplane headed for New York in an attempt to win a \$25,000 prize offered in 1919 by Raymond Orteig "as a stimulus to the courageous aviators" who would be the first to fly non-stop across the Atlantic ocean. They were never seen or heard from again.

It is clear that the number did include the prize winner, a former airmail pilot – Charles Lindbergh who accomplished the feat a few days later – traveling in the other direction. Fame came quickly to Mr. Lindbergh. He spent the rest of the year, financed by the Guggenheim Institute, flying the Spirit of St Louis around the United States to promote aviation and advance it as a means of safe travel. The success of Lindbergh's flight heightened the interest in aviation as a practical means of transportation.

As a result of Lindbergh's flight and other aviation improvements, the American Bar Association in

1928 established the “Standing Committee on Aeronautical law” to develop a “Uniform Air Licensing Act”. The work of this 5-person committee is set forth in its 1929 report to the ABA, and offers interesting insight into the beliefs of the day as to the role of Federal vs State governments in Aviation. Today we are accustomed to assume that the Federal Government has sole jurisdiction over the regulation, licensing and enforcement of airmen and aircraft rules and regulations; and that the states play little, if any, role in such endeavors. The report however provides (to me) some startling statements of the concerns back at that time, as to the Constitutional issues of balancing the “obvious” rights of the states to control such matters against the equally “obvious” chaos and safety concerns that would result if each state enacted its own conflicting law affecting the design and operation of aircraft throughout the country.

It also suggested that laws alone should not be relied upon to ensure safety.

Lets go back over seventy years and listen to the safety concerns expressed by the members of the Committee in their 1929 report to the ABA:

The past year has been one of realization of many of the hopes of those interested in the progress of American aviation. The companies transporting the United States mail have solved the problems of operation so successfully that schedules are maintained practically 95% of the time Several long distance passenger services have been inaugurated and, while not yet on a profitable basis, are operating safely and for most of the time on schedule . . .

The greatest deterrent to a very rapid and very large increase in the business is a large list of accidents, due generally to improper equipment, stunt flying and operation by inexperienced pilots. It is possible that by the enactment of proper laws some of these accidents may be avoided, but it is always a mistake to place too great a reliance on the efficacy of mere legislation. The corrective measures will have to be applied by the owners and operators themselves. Informed public opinion can do more to compel the taking of proper precautions than any legislation which your committee might devise or suggest. For several years your committee has been endeavoring to procure uniformity in state legislation. Realizing the difficulty of the task, we have attempted to outline only the minimum of regulation. We are quite certain, however, that air traffic will grow very rapidly and with it there will come an

increasing demand not merely for licensing of planes and pilots but also for constant inspection, particularly of those planes engaged in local or intrastate flying, and for traffic regulation. Believing as we do that in a few years’ time air traffic will take a prominent part in the transportation system of our country, we consider it necessary not merely to deal with the present situation, but to make our system of laws so sound that there will be no danger of confusion that is bound to arise if the statutes are found to be unconstitutional.

The committee, you see, was quite concerned that federal or state aviation laws would be unconstitutional if not carefully drafted. The Federal Air Commerce Act of 1926 had recently been enacted; however was considered to have limited application. The view of the dividing line between state and federal jurisdiction is set forth by the committee in the report:

While the federal government is charged with the responsibility of inspecting and licensing aircraft engaged in interstate and foreign air commerce, and examining and licensing airmen engaged in the operation of such aircraft, there still remains a great field of flying activity that is not reached by federal law or federal regulations. **Purely intrastate flying comes within this class as does interstate flying when the aircraft is used solely for the pleasure or non-commercial purposes, and it is such flying that must be dealt with by state legislation.** (Emphasis added)

The Committee recognized benefits from the “uniformity” of laws to be gained from federal laws on aviation; however expressed great concern of the bureaucratic quagmire that would result. Concern about too much power in the hands of the federal government, and quotes from leaders of the times permeate the report:

“Mr. Coolidge has said:

“The states should not be induced . . . to surrender the management of their own affairs. No method of procedure has ever been devised by which liberty could be divorced from local self-government. No plan of centralization has ever been adopted which did not result in bureaucracy, tyranny, inflexibility and decline.”

“Mr. Hughes has said:

“An unnecessarily centralized government defeats liberty by holding its citizens in a thralldom from which they cannot escape,

concluded on page 8

AERONAUTICAL LAWS –

Concluded from page 7

because they are dominated by an overpowering number of those who are not members of their own communities Undue centralization expands political activity at the seat of the central government without giving a commensurate and enforceable accountability.”

“President Hoover has stated:

“May I remind you that our Government was devised in spirit to sustain a dual purpose – that is, to protect our people among nations by a great national power and to preserve individual freedom by local self government It is a part of the fullness of life that we should live and participate in the government of our local communities – that is, local government that neither wishes its responsibilities onto a centralized bureaucracy nor allows central bureaucracy to dictate to that local government. **Nor do I believe that the people of our communities have yet become so supine or so careless of the fundamental advantages of self-government that they are ready to surrender control of their most intimate concerns to a paternal government at Washington, however wise or powerful it may be.**” (Emphasis added)

The Committee goes on:

“**The states not only for the sake of preserving their own dignity and rights but also to make it possible for the aviation industry to be free of the bureaucratic control of plans and specifications of planes and the operation of transport routes should have their own separate departments of aeronautics. Nothing could be more of a hindrance to the proper development of this business which is still in its infancy, than to have every important factor of plane and motor manufacture dominated by an individual or a set of regulations emanating from Washington . . . we favor at this time the adoption by the State Commissioner of the federal rules and regulations, but the states should preserve their freedom of action to be used if the federal regulations become an embarrassment.**” (Emphasis added)

In the next issue, we will continue with the Committee’s discussion of Federal vs. State roles in aviation; its survey of individual laws enacted by the states; and look at the Michigan laws first enacted in 1923. ■

VI. DEVELOPMENTS IN AVIATION LAW

*By: David R. Baxter, Esq.
Paskin, Nagi & Baxter, P.C.
Detroit, MI*

MICHIGAN CONNECTION

Case Law

A. Preemption

State and federal courts continue to address issues raised by the application of the 1978 Airline Deregulation Act to state law claims regarding age/sex/race/height/weight discrimination.

In *Gilman v Northwest Airlines, Inc.*, 230 Mich App 293 (1998), a panel of the Michigan Court of Appeals affirmed the denial of summary disposition in a claim by a former employee against Defendant alleging (1) wrongful discharge; (2) age discrimination; and (3) sex discrimination. Plaintiff’s claims for age and sex discrimination were brought under Michigan’s Elliot Larsen Civil Rights Act.

Plaintiff was a former employee of Northwest Airlines who was terminated for alleged poor job performance. Defendant filed a motion for summary disposition seeking to strike Plaintiff’s age and sex discrimination claims pursuant to the preemption clause found in the 1978 Airline Deregulation Act which provides:

Except as provided in this sub-section, a state, political subdivision of a state or a political authority of at least two states may not enact or enforce a law, regulation or other provision having the force and effect of law related to a price, route or service of any aircarrier that may provide air transportation under this sub-part. (49 USC Section 41713(B)(1)).

The Court of Appeals rejected Defendant’s argument that the 1978 ADA preempted Plaintiff’s age and sex discrimination claims bought pursuant to Michigan Civil Rights Statutes. The court noted the history of the Airline Deregulation Act and cases from other jurisdictions which have dealt with and interpreted the preemption clause. Citing a New York case, the court found that since the ADA was enacted, there has been clear indication from the courts that the Legislature intended the preemption provision to be broadly interpreted; however, there was nothing in the language of the statute to suggest the Legislature intended, nor does case laws suggest, that the preemption provision

should be interpreted in such a broad and extensive manner as to shelter airlines from a state action by an employee who has allegedly been discriminated against by the airline in no connection whatsoever to the services it provides.

The Court found that the ADA was concerned with the state's attempts to regulate airlines' fares, routes, and services, not employment practices. Citing, *Delta Airlines, Inc v New York State Div of Human Rights*, 652 NYS 2d 253, (1996).

The Court of Appeals noted that a recent Opinion by another panel affirmed a height and weight restriction as being preempted by the Airline Deregulation Act, distinguishing *Fitzpatrick v Simmons Airlines, Inc*, 218 Mich App 689 (1996) and holding that the plaintiff's age and sex discrimination claims were not claims which related to services of an aircarrier and therefore were not preempted by the ADA.

The court went on at length to distinguish between physical characteristics having a connection with and reference to aircarrier services to the claims set forth by the Plaintiff in the instant case.

The **Gilman** Court concluded:

The foregoing cases make it clear that while the ADA has been interpreted to have a broad preemptive sweep over State Civil Rights Acts claims, there must, nonetheless, be an apparent connection or relation to the airline's routes, prices, or services, in order for the ADA's preemptive provision to be applicable.

In a subsequent case, *Wellons v Northwest Airlines Inc*, 165 F 3d 493 (1999), the U.S. 6th Circuit Court of Appeals reiterated and approved the Michigan Court of Appeals Analysis of the preemptive effect of the Airline Deregulation Act on state law discrimination claims. In *Wellons*, the 6th Circuit reversed a motion for summary judgment entered by the U.S. District Court for the Eastern District of Michigan on preemption grounds. The claim involved a race discrimination claim filed by a former employee of Defendant based on Michigan's Elliot Larsen Civil Rights Act.

The 6th Circuit went through a similar analysis as did the Michigan Court of Appeals in *Gilman* by noting prior cases dealing with an individual's "physical characteristics" as they relate to aircarrier employment as it may be related to safety and the quality of aircarrier services. However, the 6th Circuit, noted that three other federal circuits have all held that the Deregulation act does not preempt state law claims against discrimination on the basis of one or another of the following characteristics: (1) age; (2) sex; of (3) perceived disability. Thus, the court held that state law race discrimination claims are not preempted by the 1978 Airline Deregulation Act.

B. Statutory Authority/Exclusive Jurisdiction

In *Capital Region Airport Authority v Dewitt Charter Township*, 236 Mich App 576 (1999), the Capital Region Airport Authority contended the Michigan Aeronautics Code (MCL 259.801, et seq.), provided the airport with exclusive jurisdiction over the airport property and further contended it allowed the airport to develop and lease certain parcels of the airport for non-aeronautical purposes and uses without heed to the local township zoning ordinance (in this case, Dewitt Township Zoning Ordinance).

Reversing the circuit court's ruling, the Court of Appeals relied upon a recent Michigan Supreme Court decision in *Burt Township v Department of Natural Resources*, 459 Mich 669 (1999), and analyzed the Michigan Airport Authority Act, MCLA 259.801, et seq., and held that while the Act does demonstrate a legislative intent to endow the Airport Authority with exclusive jurisdiction over aeronautical activities on its property, the Court was not persuaded that the Act exempted the Airport Authority from local land use ordinances with respect to lease or development of land for non-aeronautical functions.

The Court of Appeals also held that the Airport Authority is not exempt from complying with the Land Division Act (MCL 560.109), regarding the sub-division of tracts into smaller parcels and found the Act applied to the Airport Authority and remanded the case for a determination of whether any proposed subdivision of land would involve a non-aeronautical purpose requiring compliance with the Dewitt Township Zoning Ordinance.

At the present time, the matter remains on appeal to the Michigan Supreme Court.

C. MICHIGAN INCIDENT/ACTIVITY REPORT (1999)

A survey of Aviation Activity in Michigan from January-September, 1999, disclosed 27 incidents/accidents reported to the Federal Aviation Administration. The Michigan Aviation Commission has compiled and correlated the preliminary reports, but joins our disclaimer in not attesting to the accuracy of the data contained therein.

Date:	01/21/99
Location:	Pellston Airport
Aircraft Type:	BE95
Purpose of Flight:	Business
Aircraft Damage:	Destroyed

continued on page 10

DEVELOPMENTS IN AVIATION LAW –

Continued from page 9

Accident Report: Aircraft attempting to land at Pellston Municipal Airport in IMC conditions and crashed into a wooded area while proceeding to intercept the localizer to Runway 32 at Pellston. The three occupants of the aircraft were fatally injured.

Date: 02/01/99
Location: Gaylord, MI
Aircraft Type: C210
Purpose of Flight: Pleasure
Aircraft Damage: Minor
Accident Report: Aircraft slid on ice at end of runway and struck a snowbank.

Date: 02/08/99
Location: Gaylord, MI
Aircraft Type: BE58
Purpose of Flight: Business
Aircraft Damage: Substantial
Accident Report: Aircraft landed 15 to the left of the center line of Runway 9 and slid off runway into a snowbank.

Date: 02/08/99
Location: Oakland/Pontiac, MI
Aircraft Type: BE58
Purpose of Flight: Pleasure
Aircraft Damage: Minor
Accident Report: Aircraft experienced landing gear problems in flight and subsequently landed gear up at Oakland/Pontiac, MI

Date: 02/08/99
Location: Hillman, MI
Aircraft Type: C150
Purpose of Flight: Pleasure
Aircraft Damage: Substantial
Accident Report: Aircraft went into snow on left side of runway after landing, spun to the left and came to rest on its nose.

Date: 02/22/99
Location: Flint, MI
Aircraft Type: PA31
Purpose of Flight: Business
Aircraft Damage: Unknown
Accident Report: Pilot declared an emergency due to an engine fire and requested landing at Flint.

Date: 03/11/99
Location: Detroit, MI
Aircraft Type: BE45
Purpose of Flight: Unknown
Aircraft Damage: Substantial
Accident Report: Aircraft took off from Runway 3 right and was turning left after departure when it crashed approximately 200 feet North of Runway 21C.

Date: 03/16/99
Location: Grand Ledge, MI
Aircraft Type: C170
Purpose of Flight: Training flight
Aircraft Damage: Substantial
Accident Report: Aircraft lost directional control on landing.

Date: 03/22/99
Location: DuPont/Lapeer, MI
Aircraft Type: Experimental
Purpose of Flight: Pleasure
Aircraft Damage: Minor
Accident Report: Aircraft bounced three times on landing. The nose gear, right wing and propeller sustained damage.

Date: 03/22/99
Location: Three Rivers Airport
Aircraft Type: AA5
Purpose of Flight: Pleasure
Aircraft Damage: Substantial
Accident Report: Aircraft made a forced landing in a corn field after attempting a go-around.

Date: 04/08/99
Location: Flint, MI
Aircraft Type: PA28
Purpose of Flight: Training
Aircraft Damage: Substantial
Accident Report: Aircraft engine lost power one mile from the airport.

Date: 04/12/99
Location: Port Huron, MI
Aircraft Type: PA60
Purpose of Flight: Business
Aircraft Damage: Destroyed
Accident Report: Aircraft was reported missing on 04/01/99 on a flight from Pt. Huron, MI to Freemont, Ohio. Aircraft remains unlocated.

Date: 04/19/99
Location: Sebewaing

Aircraft Type: Experimental
Purpose of Flight: Pleasure
Aircraft Damage: Minor
Accident Report: Aircraft made an emergency landing in a field due to engine problems.

Date: 04/27/99
Location: Freemont, MI
Aircraft Type: Experimental
Purpose of Flight: Pleasure
Aircraft Damage: Substantial
Accident Report: Pilot was practicing touch and go landings on Peck Lake when the aircraft lost power and struck trees.

Date: 05/02/99
Location: Curran, MI
Aircraft Type: PA28
Purpose of Flight: Pleasure
Aircraft Damage: Destroyed
Accident Report: Aircraft struck tree tops after departing from private grass strip, crashed in a wooded area.

Date: 05/05/99
Location: Houghton Lake, MI
Aircraft Type: BE23
Purpose of Flight: Pleasure
Aircraft Damage: Destroyed
Accident Report: Aircraft engine failed on take-off, aircraft crashed and was destroyed.

Date: 05/28/99
Location: Kalamazoo/Battle Creek Int'l Airport
Aircraft Type: C210N
Purpose of Flight: Pleasure
Aircraft Damage: Substantial
Accident Report: Aircraft touched down halfway down Runway 27, at which point the pilot elected to perform go around, aircraft overran Runway 27 impacting the airport parameter fence and a vehicle that was Southbound on the North/South road.

Date: 06/07/99
Location: Drummond Island
Aircraft Type: PA28
Purpose of Flight: Pleasure/Instructional
Aircraft Damage: Destroyed
Accident Report: Aircraft departed Runway 26 and impacted trees and train just off

departure end of the runway. Witness stated wind gusts at time of accident were over 20 knots and gusting.

Date: 06/26/99
Location: Kalamazoo/Battle Creek Int'l Airport
Aircraft Type: B75
Purpose of Flight: Pleasure
Aircraft Damage: Substantial
Accident Report: Aircraft spun around after landing, collapsing the main landing gear.

Date: 07/07/99
Location: Hubbard Lake, MI
Aircraft Type: C150
Purpose of Flight: Unknown
Aircraft Damage: Destroyed
Accident Report: Witnesses reported seeing the airplane flying between 50-200 feet above the surface of a lake when it began a steep climb, rolled to the left and descended in a steep nose-down attitude until it collided with the ground West of the lake shoreline.

Date: 07/16/99
Location: Oakland/Troy Airport
Aircraft Type: C411
Purpose of Flight: Business
Aircraft Damage: Substantial
Accident Report: Started left engine normally, then started right engine, which exploded. Aircraft was evacuated without incident.

Date: 07/18/99
Location: Oakland/Troy Airport
Aircraft Type: C310
Purpose of Flight: Pleasure
Aircraft Damage: Substantial
Accident Report: Aircraft landed gear up.

Date: 07/20/99
Location: Greenville, MI
Aircraft Type: C172
Purpose of Flight: Instructional
Aircraft Damage: Substantial
Accident Report: A student pilot lost control of aircraft on landing. Aircraft veered off runway and struck the segmented circle around the wind tee.

concluded on page 12

DEVELOPMENTS IN AVIATION LAW –

Concluded from page 11

Date: 07/31/99
Location: Marine City, MI
Aircraft Type: BE90
Purpose of Flight: Pleasure
Aircraft Damage: Destroyed
Accident Report: Witnesses reported the aircraft climbed to about 150-250 feet about ground level, clearing a 90 foot high power line. The aircraft then went into a steep left bank and impacted the ground in a steep nose-down attitude.

Date: 08/13/99
Location: Paw Paw, MI
Aircraft Type: PA28
Purpose of Flight: Business
Aircraft Damage: Destroyed
Accident Report: The aircraft was destroyed when it experienced an in-flight break-up prior to impacting the ground three miles South of Paw Paw. The outboard section of the Right wing and empennage were located approximately 1/2 mile North of the main wreckage.

Date: 08/17/99
Location: Harsens Island, MI
Aircraft Type: PA28
Purpose of Flight: Pleasure
Aircraft Damage: Substantial
Accident Report: Aircraft reportedly experienced a loss of engine power immediately after take-off. The pilot elected to land on the remaining runway and ran off the end of the runway, striking a levee and coming to rest in a pond.

Date: 09/10/99
Location: Owosso, MI
Aircraft Type: Experimental
Purpose of Flight: Pleasure
Aircraft Damage: Destroyed
Accident Report: Aircraft departed Owosso Community Airport on Runway 28 and was returning to the airport due to engine problems. The aircraft crashed on short final to Runway 10 with witnesses indicating the airplane was trailing whitish/gray smoke prior to impact. ■

VII. WEB SITES FOR THE LEGAL AVIATOR – Flying the Web –

*By: Leonard E. Nagi, Esq.
Paskin, Nagi & Baxter, P.C.
Detroit, MI*

Ordinary people surf the web; aviators fly on the Web.

There are many aviation sites out there waiting to be explored. This article mentions ten or so sites I have landed at and fly back to with some frequency. As with flying, however, don't be satisfied with visiting the same airports over and over; keep searching for new sites when time allows. Every month or so, take off and use a search engine (something like a radar in aviation speak) such as Yahoo, Google, or Excite to search "aviation" or "aviation law" sites that you have never been to. I searched "**aviation**" a few minutes ago using two different search engines and came up with a plethora of sites that I might have spent more time flying to, if I didn't have to write this article. My quick search led to the following paths which I "bookmarked" to look at in the future when time allows. (In aviation terms, I put it in the hanger to pull out later.)

The search results listed the name and description of many paths to aviation sites – on screen each site appears as an underlined name. Clicking on the underlined name takes you to the site. Clicking "[Aviation Careers](#)", for example, took me to a site offering employment services, professional associations, and publications for those in the aviation industry.

Clicking "[Air](#)" which says it is "Aiding aviation professionals by offering interview and counseling services, resume help, seminars and newsletters", leads to what turns out to be a slick site for "members" and "visitors" that holds out the promise of great leads to future employment. Time (and perhaps age) did not allow me to hunt for a job, so I backed up to my original search results, by simply clicking the "back" button on the browser. (Doing a '180' in aviation parlance). This gets me back to the search results and I am free to explore other underlined sites. The trail may lead you to hundreds of sites, some of which may no longer exist (hitting a cumulus granite in pilot terms); but the hunt may produce a result that you find useful.

Searching "aviation law" is more related to our section interests; however this search may also lead you far astray. For example, were you really looking for "Red wing **aviation**, night vision devices for military

and law enforcement? Well the search produced it in response to the inquiry. You can really waste a lot of time searching these sites – just execute a missed approach, check your fuel and if you have the time to keep looking, it may produce a treasure.

What follows are ten or so sites, I've found to be somewhat useful as either an information site itself, or a path to other aviation sites that are useful and interesting. For the most part the site address shown below is the "root" web site. Once you get there and discover some part of the site you find useful, you may want to mark that particular sub-site as your "preference" or "favorite place", or whatever your particular browser's term for such "bookmarks" may be.

"www.avweb.com" – This web site will link you to other aviation sites: weather (leads to many weather sources), Aviation Law (heavy on articles by the site owner, as opposed to actual case law), aeromedical and others. Sign up for the free weekly newsletter, and every Monday and Thursday on your EMAIL you will find a current summary of many aviation happenings with direct links to the underlying articles and information discussed in the summary.

"www.nts.gov/default.htm" gets you to the NTSB web page.

1. Click on the "aviation" box and you get to the site that will lead you to accident synopses, statistics, publications and hearings of the NTSB.

2. Click on the "legal matters" on the left section of the page and you get the source of NTSB opinions, case processing tips, rules of procedures and much more.

"www.faa.gov" – as the name implies is the Federal Aviation Administration site. It leads to many places; so just try what works for you.

"www.mdot.state.mi.us/aero/resource.htm" gets you to the State of Michigan MDOT web site. This site gets better all the time. Try it. It has the aeronautics code, an electronic Michigan Airports directory, Aeronautics employees directory and a list of Michigan Universities and Colleges offering aviation programs among other goodies.

"http://aviation-safety.net" provides aircraft accident statistics, reports, photos, – yes photos of wrecked airplanes – and a gateway to other aviation related sites.

"www.aau.com" is the home page of Associated Aviation Underwriters. As with many of these sites, there is some advertising; however, it also provides a good

gateway to many aviation sites of interest: "Aircraft Registration number search tool"; "Transportation Law Library"; "Virtual Aviation Library" (Takes you to the Embry Riddle web site); "Service Difficulty Reports" and "Aeronautical Information Manual". Try the "Electronic Office" to get to a lot of news, weather, reference and travel sites.

"www.lpba.org" is the web site of the Lawyer Pilot's Bar Association. It will let you view and download a free copy of its Journal in the hope that you will join the organization. Whether you join or not, the site is a gateway to other aviation sites and legal reference material including the United States Code, the IRS home page (YIKES!) and Japanese and comparative law, among other choices.

Getting further away from aviation law and more toward the just interesting sites about aviation:

"www.thespaceplace.com/index.html" takes you from cyberspace to outerspace. Click the **"space links"** name and you can get pictures from the Hubble Space Telescope. Click the **"nine planets"** and go on a multi media tour of them. Any photo that you like you can download to your own computer and print it or look at it anytime. (With your cursor on the photo, right click; choose "save image as" and click it. You can then retrieve it on your computer at any time. – or if you want to see the picture as the background on your computer choose "save as wallpaper" from the menu (instead of "save image as") and you can look at it as the background on your computer screen till you tire of it and change it.)

"www.nasa.gov" is the homepage of NASA and will lead you to many things including the **"multimedia gallery"** of photos. (Again to download or save as wallpaper for your computer). Also information on space launches and other space stuff.

Or to really go creative, try **"http://samadhi.ipl.nasa.gov"**. At this site you can enter a solar system simulator, choose a planet or satellite and a place to stand and the simulator will render a color image for you. For example, select from a menu – show me the "earth" as seen from the "voyager 2 spacecraft" on "September 21, 1999" and the view magically appears on your screen as if you were on the voyager looking at the earth; change the date and the view changes. ("Wow" in Pilot talk).

"www.thehistorynet" has an "aviation and technology" window which takes you to a page with some current articles that they feature. Click on an article that interests you and it takes you to it. At the bottom of the page choose "article search". This leads to

concluded on page 14

WEBSITES FOR LEGAL AVIATORS –

Concluded from page 13

another page that allows you to either search for articles or go to an “article index”. If you go to the complete index, scroll down to the “aviation history” section for a list of articles on aviation. Everything from “ 1st Aero Squadron in pursuit of Poncho Villa” on through “Lady Lindy, the Remarkable life of Amelia Earhart” and ending with “World’s First Winged Airline”.

I cannot leave without mentioning a site I found after much searching. (I have saved the best wine for

last) “<http://ornak.waw.pdi.net/~robertp/aviation.html>”. It says it has been accessed only 38,263 times as of the writing of this article, so do your part to get that count up.

Well, that’s about 10. If you have some sites that you think would be of interest to our section members, EMAIL them to me “nagi@nagbaxsey.com” and if there are enough good ones, we will pass them on in future editions of the *INNERMARKER*. ■

VIII. WARBIRDS OVER KALAMAZOO 2000

**By: Barry R. Smith, Esq.
Lewis & Allen, P.C.
Kalamazoo, MI**

The Aviation Section Council will sponsor an informal social gathering for members, family and friends during the Warbirds Over Kalamazoo flying event at the Air Zoo on July 22, 2000. Mark your calendars now to attend this event and share the day with other members of the Section.

Warbirds Over Kalamazoo is a unique and fun flying event for the entire family. The event was organized three years ago as an informal fly-in for Warbird pilots. It is conducted on the weekend before Oshkosh to make it convenient for pilots from around the country to gather for a fun flying event while en route to the “big convention.” The airport is subject to periodic waivers for aerobatic activity. An aerobatic competency and re-certification clinic is conducted to allow Warbird pilots to re-validate their competency cards before proceeding to Oshkosh. As a result, while there is no formal schedule of events, attendees see a variety of unique airplanes flying in the waived airspace. In addition, the Museum pilots enjoy using the aerobatic box for a traditional carousel of low approaches in front of the crowd.

In the past two years, guest aircraft have included P-51’s, Sea Furys, a Spitfire, Skyraider T-33 - L39 Jets, C-46, C47, B-17, B-24, BT-13, T-6’s, T-34’s and an F4-U. There have been a few unique surprise visits too. Two years ago, Kermit Weeks landed and spent several hours with his one-of-a-kind A-26 Marauder on route to Oshkosh. Last year, Museum friend Patty Wagstaff took advantage of the airspace to practice her routine in advance of her performance at Oshkosh. One just never knows what exciting new or restored airplane will show up at this event.

The real excitement is that when not flying, all of the aircraft around the Museum’s ramp are available for up-close and personal review by the Museum’s guests. The Museum’s Ford Tri-Motor will be giving rides and there may be other such things going on. In addition, the entire Museum is open and the admission charge is only the normal admission fee that one would pay on any other day of the year.

The Section is going to set up a small hospitality tent on the grounds as a gathering place for those that attend. Section Chair Elect, Eric Richards, attended last year and encourages all of our members to come to an exciting and family friendly fly-in event with the Section. ■

IX. PUBLIC SEMINARS –

“Your Medical Certificate, Everything You Always Wanted To Ask”

6/1/99 – Grand Rapids • 6/2/99 – Pontiac



6-1-99 – Grand Rapids: Steven M. Chait speaking on “The Doctor/Patient Relationship and FAA Exams.” Seated Panelists: Eric S. Richards, Myron F. Poe, Susan L. Hofer.



6-1-99 – Grand Rapids: Myron F. Poe, Moderator. Panelists (seated, L to R): Eric S. Richards, J.D., Susan L. Hofer, J.D., Kurt von Maur, M.D.



6-1-99 – Grand Rapids: Susan L. Hofer speaking on “Medical Certification Procedure: Getting Your Certificate and Keeping It.” Panelists (seated L to R): Eric S. Richards, Myron F. Poe, Steven M. Chait.



6-2-99 – Pontiac: Don C. Ross, M.D. speaking on “Medical Certification: an AME’s Perspective.”

6-2-99 – Pontiac: Panelists (L to R): Donald C. Frank, J.D., Steven M. Chait, J.D., Susan L. Hofer, J.D., Eric S. Richards, J.D., Myron F. Poe, J.D., Don C. Ross, M.D. (standing).



X. Michigan Law Legislative Update

By: *Robert H. Hoschner, Esq.*
Corunna, Michigan 48817

The following is a summary of key aviation bills pending as of March 15, 2000, before the Michigan Legislature, both House and Senate.

- HB 5036:** Land use; zoning and growth management; township zoning in the vicinity of airports; provide for coordination with airport zoning and plans. Amends secs. 3, 9, 11a & 40 of 1943 PA 184 (MCL 125.273 et seq.)
- HB 5037:** Land use; zoning and growth management; county zoning in the vicinity of airports; provide for coordination with airport zoning and plans. Amends secs. 3, 9, 11a & 40 of 1943 PA 183 (MCL 125.203 et seq.).
- SB 0509:** Land use; zoning and growth management; Variance in airport zoning; authorize condemning agency to seek. Amends sec. 24 of 1950 (Ex Sess) PA 23 (MCL 259.454).
- SB 0627:** Sales tax; exemptions; aircraft weighting over 6,000 pounds carrying cargo, passengers, or a combination of cargo and passengers; exempt. Amends 1933 PA 167 (MCL 205.51 – 205.94k).
- SB 0630:** Use tax; exemptions, aircraft weighing over 6,000 pounds carrying cargo, passengers, or cargo and passengers; exempt. Amends secs. 4 & 4k of 1937 PA 94 (MCL 205.94 & 204.94k).
- SB 0764:** Land use; zoning and growth management; filing of airport plans with local units; required of airport managers. Amends secs. 9 & 151 of 1945 PA 327 (MCL 259.9 & 259.151).
- SB 0765:** Land use; zoning and growth management; city and village zoning in the vicinity of airports; provide for coordination with airport zoning and plans. Amends secs. 1, 4 & 20 of 1921 PA 207 (MCL 125.581 et seq.). ■

XI. Use Tax Planning?

By: *Donald C. Frank*
Pratt & Frank, P.C.
Okemos, Michigan 48864

Aviation publications sometimes contain advertisements suggesting that forming a Delaware corporation as a vehicle to own an airplane may enable a buyer to avoid taxes such as the Michigan Use Tax. Attorneys with clients interested or involved with such schemes may want to review the recent case of *Czars, Inc. v Michigan Department of Treasury*, 233 Mich App 632, 593 NW2d 209 (1999).

The petitioner in *Czars* had a really bad tax day. *Czars, Inc.* was wholly owned by an individual who also was the sole owner of Grand Aire which was in the air cargo business. *Czars, Inc.* was set up as a Delaware corporation to own aircraft, at least in part, for the purpose of shielding Grand Aire from Michigan Use Tax.

Czars, Inc. purchased an aircraft in Arizona on May 24, 1994. Grand Aire was then allowed to take possession of the aircraft in Arizona and flew the aircraft to Michigan where Grand Aire operated the aircraft in its air cargo operations. However, *Czars, Inc.* did not enter into a formal lease with Grand Aire, received no consideration, and never applied for a Use Tax Registration with the Michigan Department of Treasury.

Ironically, thirteen days after the aircraft was brought into Michigan, the Legislature amended the Michigan Use Tax Act to exempt certain air cargo carriers from the six percent Use Tax (See MCL 205.94(x); MSA 7.555 (4)(x).) Therefore, it was undisputed that if Grand Aire had owned the airplane, its revenues would not have been subject to the Use Tax. Unfortunately for *Czars, Inc.* and its owner, the court found that by creating the Delaware corporation and purchasing the aircraft through that corporation, there was no Use Tax exemption available to *Czars, Inc.* on the facts of this case. ■

XII. Lessors Not Deemed To Use Property In State of Michigan Based On Lessee Flight's In Leased Aircraft

**By: Clifford G. Maine, Esq.
Miller, Johnson, Snell &
Cummiskey, P.C.
Grand Rapids, MI**

M&M Aerotech, Inc. v Department of Treasury (unpublished Court Appeals No. 211460, LC# 97-016575 CM.) In a ruling important to tax advisors as well as Lessees and fractional ownership programs and all aircraft acquisitions, the Michigan Court of Appeals has ruled that a Lessor is not liable for use tax in Michigan because it is not deemed to have used the aircraft in Michigan based on flights made by the Lessee operator of the aircraft.

The Court noted that the fact that the parties had a valid written lease with specific provisions included was important to their determination. The Court also noted that it was important that the facts and circumstances indicated that the Lessor intended and did relinquish total control of the aircraft to the Lessee.

The Michigan Department of Treasury has been aggressively seeking to expand its tax base by enforcement actions. The M&M Aerotech case shows at least our limit on such actions.

Plaintiff-aircraft leasing business is a Michigan corporation. Two of Plaintiff's officers also serve as officers in a North Carolina corporation, Merit Services. Plaintiff purchased the subject aircraft in the state of Washington. Plaintiff leased this aircraft to Merit on the same date. Merit then flew the aircraft to several different states (not including Michigan) before basing it in North Carolina. After several local flights, the aircraft was flown by Lessee to Michigan. "The parties concede that the aircraft was flown into Michigan numerous times within ninety days of the purchase date and numerous times thereafter."

Defendant-Treasury Department billed plaintiff for \$12,715.47 in use tax on the aircraft. Plaintiff paid under protest and filed this action to recover the amount paid. Plaintiff claimed that it was not required to pay use tax on the aircraft because "as Lessor, it did not 'use' the aircraft in Michigan," did not "exercise any rights or powers of ownership in Michigan, that it did not 'store' the aircraft in Michigan, that the aircraft never 'came to rest' in Michigan before becoming an instrumentality of interstate commerce, and that it qualified

for certain exemptions for payment of the use tax under UTA [use tax act]."

The Court of Claims granted plaintiff summary judgment, concluding that the use tax was improperly assessed on the aircraft apparently on the grounds that the aircraft was neither used nor stored in Michigan under the UTA." Defendant appeals.

Defendant sought to impose use tax on the "mere ownership" standard. Defendant argues that plaintiff was required to pay Michigan use tax because plaintiff used the aircraft in Michigan within the meaning of the UTA by exercising rights and powers over the aircraft incident to its ownership. In support of its position, defendant asserts that plaintiff held legal title to the aircraft, plaintiff exercised incidents of ownership by leasing aircraft commercially, plaintiff drafted the lease, the lease only relinquished 'operational control' to Merit, the lease did not prevent plaintiff or its officers from renting the aircraft, plaintiff and Merit are related companies with related officers actively involved in the operation of both companies, and plaintiff had prior knowledge and ultimate control for the aircraft's use in Michigan.

"The UTA defines 'use' as follows: 'Use' means the exercise of a right or power over tangible personal property incident to show ownership of that property including transfer of the property in a transaction where possession is given."

The Court ruled that plaintiff was not required to pay use tax. "[P]laintiff and Merit entered into a lease on the date the aircraft was purchased and before it entered Michigan. The lease was stipulated valid and authentic, and provided that Merit pay plaintiff consideration in the amount of a set monthly rental for the use and possession of the aircraft." Under the lease, "plaintiff relinquished all 'operational control' of the aircraft to Merit during the period of possession including, but not limited to, qualifying the flight crew and assuming operational responsibilities such as flight following dispatch, communications and weather monitoring. The lease further provided that Merit was responsible for paying "all taxes, assessments, and charges imposed by any national, state, municipal or other public or airport authority relating to the use or operation of the Aircraft during the time of use of the Aircraft." Merit was also solely responsible for insurance and storage costs.

The court concluded that plaintiff relinquished control of the aircraft to Merit for the lease term. Moreover, there is no indication that plaintiff "used, hangared, or registered the aircraft in Michigan."

Plaintiff rebutted the presumption of taxation (as provided for in the Use Tax Act), plaintiff was entitled to summary disposition. ■

XIII. 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 or call to our editor, Don Frank (517) 349-0000; Fax (517) 349-2941, so we can let our members know about it in the **Innermarker**.*

- 05/09/00 Section Council Meeting, Aviation Law Section, Embers Restaurant, Mount Pleasant. 5:30 p.m. dinner, meeting immediately after dinner.
Contact: Myron F. Poe (248) 544-4200.
- 06/1/00 ABA Section of Litigation 7th Annual Aviation Litigation Seminar; Marriott Marquee – Times Square, New York, New York.
Contact: Dawn Holiday (312) 988-6256.
- 07/19-23/00 Lawyer Pilot Bar Association Summer Meeting, Sun Valley, Idaho.
Contact: (301) 972-7700; <http://www.lpba.org>
- 08/3-4/00 ABA Forum on Air and Space Law Annual Meeting and Conference – Global Skies: Working Toward an Open Global Aviation System.
Contact: ABA (312) 988-5666; <http://www.abanet.org/forums/airspace.home.html>



Aviation Law Section

State Bar of Michigan
Michael Franck Building
306 Townsend Street
Lansing, Michigan 48933-2089

Non-Profit Org.
U.S. Postage
PAID
Lansing, MI
Permit #191