“Lisa Marie,” the Convair 880 jetliner operated by Elvis Presley, awaits the return of The King.

Photo by Ed Booth, Jr.
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On the Cover
Thirty years after his death on August 16, 1977, the Convair 880 jetliner operated by Elvis Presley is on display across the street from his Graceland mansion in Memphis, Tennessee. N880EP was delivered to Delta Airlines in 1961, and retired in the early 1970’s. Elvis converted the big Convair into a “Flying Graceland,” and named it after his only child “Lisa Marie.” The tail displays the gold “TCB” motto, short for “Taking Care of Business, in a Flash.” The 615 mph Convair allowed Elvis to do just that.

See page 22 for a photo of the plane’s tail.
In 1987 I attended my first LPBA meeting. The first person I met was Karen Griggs, our Executive Director. Now, twenty years later, as I write this last President’s Message, Karen is also the first person I must thank. Her tireless efforts, her loyalty, and the simple fact that she’s very good at what she does, keep this organization running smoothly. Her friendship will always be treasured.

It was the fact that the summer 1987 meeting was held in Wisconsin in connection with the EAA Air show at Oshkosh that provided the extra incentive for me to attend my first meeting. Our President-Elect, Ed Booth, has arranged for the summer 2008 meeting to again be held in connection with the Oshkosh AirVenture, so I hope that those of you who haven’t yet attended a convention will use that as the incentive to see what you’ve been missing. My wife, Vicky, remembers that first Oshkosh experience more for my reaction upon discovering, after having taken 30-40 priceless photographs of classic airplanes and warbirds, that the camera didn’t have any film in it. The resulting discussion was similar to that of whether one should top the tanks immediately after flying or wait until ready to fly again. Fortunately, we now have a digital camera for the 2008 meeting.

Twenty years of meetings have gone by fast and provided many memories. That first Oshkosh meeting was followed a couple of years later by a very memorable meeting at the Grand Hotel on Mackinac Island. We recall bicycling around the island with our then-5-year-old daughter and 3-year-old son on the back of the bicycles (which was not much fun going uphill). That meeting does not seem that long ago. But in the past 48 hours, we’ve seen that daughter graduate from college with a degree in architecture and seen that son pitch in a college regional baseball tournament. Flying back at 2 a.m. last night from the ball game we had a mid-air with what may have been a goose (judging from the black and grey feathers plastered to the base of the windshield) while descending through 5200 feet. The goose fared about as well as I did in the discussion of whose responsibility it is to load film in the camera. In any event, both kids still talk about that meeting, especially landing on Mackinac Island and taking a horse-drawn wagon to the hotel. Well, mostly they remember sitting in the front row of the horse-drawn wagon behind a horse with intestinal gas problems.

Past meetings memories include the pre-meeting side trip to Yellowstone with the Alpers and then the “flight of two” over the Tetons from Jackson Hole to Sun Valley. There was a dance contest at the Palm Springs banquet between my daughter and Tamara Pokorny — both claim to have won. In the Bahamas, a number of us discovered that one brand of Bahamian beer at the beach bar had a little more octane than we anticipated. In Cancun, we witnessed Judge Mullins perform a mock wedding ceremony on the dance floor of a local bar and pronounce two of our attendees “coupled for the evening.” I also learned at the top of the pyramid at Chichen Itza that pilots can be scared of heights. In our LPBA Golf tournament in Puerto Rico, we played with nearby iguanas the size of alligators. In Tucson, I learned the hazard of reaching for a golf ball located between several cacti. At the New Orleans Mardi Gras meeting, the value of beads became apparent. My kids remember touring the aircraft carrier and going to the haunted house at Virginia Beach. In fact, my daughter remembers going to the hospitality suite at various meetings. She says “it was a party that was usually fun even for the kids.”

The point is that LPBA meetings are fun. For those of you who didn’t make the San Diego meeting in February, you missed a good meeting. I learned from one of our members, who shall remain nameless, but Lloyd you know who you are, that it is possible to hit a golf ball through an open door into the spa building. If you didn’t make San Diego, we hope to see you at Park City, Miami or next summer’s Oshkosh meeting. The CLE is good. The memories and friendships are priceless.

This last year has gone by just as fast as the last twenty years. I would like to thank our incoming president, Ed Booth, for arranging a fantastic CLE program, and Karen Griggs and John Yodice for their usual great work in handling the convention details. We all owe a debt of gratitude to Gary Allen and Ellen Riddle for making the Lawyer Pilots Bar Association Journal the flagship of our organization; to Ed Booth, who continues to keep us up-to-date with the outstanding LPBA website; and to the members of the Board of Directors and the Executive Committee, who keep this organization headed in the right direction. Finally, I would like to thank my wife, Vicky, and Kara, Kyle and Trevor for their enthusiastic support of the LPBA. It has been my honor and privilege to serve as president this year.

— Tim Frets
FROM THE COCKPIT

Greetings from the sweet-tea end of Flagship LPBA as once again we prepare to embark upon our flight together. First Officer Riddle, ever attentive to keeping Your Captain occupied and distracted so she can accomplish the real work up here free of my well-meaning interference, has produced a dewy tumbler of the aforementioned summer treat for me and I revel in each sip as I gaze out the cockpit side-windows at the full bloom of Summertime in the good ol’ USA. You can sense the collective national relaxation as friends and family everywhere escape the routines of home and office and head out for Vacation Adventures. Perhaps some of you are so engaged as you step aboard.

Aviating is always a special treat, of course, but in the summer even those of us flying humble sky-steeds can enjoy free air conditioning courtesy of Mother Nature and her adiabatic lapse rate, the summer airperson’s friend. Rising above the skim-milk layer into the clear air above the haze is usually just a few gallons of avgas away, and I for one am hard-pressed to think of a more agreeable way to spend recreational resources this time of year. I believe I just heard a chorus of “amens” from the tie-down crew at your airport; your favorite winged friend is rested and ready.

While it’s always a treat to gaze down upon the lush landscapes of summer, it’s also true that after a month or so, those of us coopered in the warmer sections of the country long for some seasonal relief. And of course, our summer gathering in Park City will be just what the meteorologist ordered: low humidity, high altitude, useful CLE, and of course the fine food, fellowship and fun that always characterizes the gatherings of this line. Why not stretch your wings and come join us? We’ll be there, albeit with our 12-ton, ground-pounding A/Bus, trailing diesel fumes from Tidewater via Oshkosh to the Great American West. I can’t wait. We’ll see you there, right?

History Happens

Since retiring and relocating our family base-ops from the bustling DC metroplex to Virginia’s Middle Peninsula, Marie and I have found ourselves happily enveloped by history. After all, when the Queen and the President came to celebrate the 400th anniversary of the founding of Jamestown in May, they were but a 20-minute bicycle ride from Greystone, and when we amble down to our Two Rivers Country Club, located at the confluence of the James and Chickahominy Rivers here in The Governor’s Land, we’re at the site of a Powhatan Indian village doubtless visited by John Smith and Pocahontas. Then there’s Colonial Williamsburg, which we locals can visit at will for the princely sum of ten dollars per year, and Yorktown, reachable by a gorgeous ride on BluZu up the Colonial Parkway. And there’s the rich Civil War history, often overlooked in our regional emphasis on Things Colonial.

Doubtless your area has its own rich history as well. Of course our notions of history are laughingly shallow by European standards, where buildings and sites from our colonial period seem so recent you can almost smell the paint drying. What, then, of the history of American aviation? Through the long lens of time, it is very recent indeed.

That makes it no less consequential, of course, especially for those of us who like to think of the sky as our second home. And we can be reassured that on a national level, institutions such as the magnificent Smithsonian Air & Space Museum and Udvar-Hazy Center have meticulously documented and preserved our national aviation roots. But there’s more to it than that, of course, for if (as Tip O’Neill famously observed) all politics is local, how much more so aviation history? Is the airfield where you learned to fly still active? Where was the first airline service in your state? Any WWII training fields nearby? What about local aircraft designers and manufacturers and other pioneers lost in the mists of time? Who’s preserving their inspiration and accomplishments for posterity?

In Virginia, one answer is the Virginia Aeronautical Historical Society. When we arrived in The Burg it came to my attention — courtesy of LPBA’s very own Al Orgain, currently serving as its Chairman of the Board — that there was a local chapter of VAHS meeting monthly at JGG for the purpose of making and maintaining friendships, drinking coffee, swapping lies, and celebrating the events unique to our state and its airpersons. I hied myself over there and was treated to the reminiscences of a retired aeronautical engineer and test pilot heavily involved in the development and deployment of several significant military fighters.

VAHS was formed in 1977 by a group of aviation-minded citizens of the Commonwealth who came together to “study, research, interpret, preserve and disseminate Virginia’s aviation and aeronautical heritage, and to preserve, acquire and display those items pertaining to Virginia’s aviation and aeronautical heritage.” One of its first acquisitions was the collection of historical aircraft maintained in a private collection at Shannon Field in Fredericksburg. That became the heart of the Virginia Aviation Museum located at RIC which the Association supports. It is well worthy of your visit next time you’re passing through or over the Old Dominion, and it also serves as the Association’s headquarters.

I attended the Association’s annual fundraiser at the Museum, which featured heavy hors d’oeuvres and an open bar located amongst the historic aircraft. What’s not to like?? Chairman Al even turned over the controls of an R/C indoor blimp to me, which I managed to crash into various overhead HVAC components and the odd Museum patron before it was turned over to someone more
capable (a broad category indeed). Featured were both a silent and regular auction conducted by Our Man Orgain, the latter proving quite amusing for everyone but him when his wife out-bid everyone for some very nice and very expensive warbird flights. When those checkbook entries become logbook entries he’ll feel (even) better about it. I managed to win the silent auction for an aircraft fuel gauge with a $5 bid, and lacking an aircraft, perhaps I’ll install it on our 1966 Wheel Horse tractor. If you need it, why, make me an offer. Notwithstanding my miserly contribution and my induced drag on the buffet and bar, the evening appeared to be a big success.

The Association has sponsored many state historical markers which commemorate key locations and events in Virginia aviation history. It reaches out to kids with local presentations at schools, Scout troops and similar venues. Another ongoing VAHS project is the collection of written and oral histories of Virginia-based pilots, engineers, support personnel, and officials, a project that warms the heart of my archivist/historian bride. Recognizing that the Greatest Generation is flying into the sunset, the Association is making a determined effort to see that their accomplishments and memories are duly recorded, preserved and honored.

As well they should be. While aviation will always be an exciting and adventurous endeavor, it once was also genuinely dangerous and demanding. That is well worth remembering, and the remembrance honors those fellow citizens in whose propwash we fly. Check out your locale and you’ll probably find an organization like the VAHS which deserves your membership and support.

As for me, I’m waiting for another shot at that R/C blimp at the next fundraiser. If one were auctioned, there’d be a bidding frenzy to keep it out of my hands.

Loved Ones Aloft . . .

The call from my daughter Caroline was typically cheerful. “Hey Dad, guess what? I’m going flying!” At Dartmouth/Tuck where she was finishing her MBA, her usual routines of heavy studying intermingled with adventuresome leisure pursuits — soccer, advanced hiking, adventure travel — made this relatively exceptional news. Yet, I found my reaction to it surprising.

I’ve never been the stereotypical over-protective father with our two sons or our daughter. This may be due in part to parents who gave me a lot of rope as I grew up, gravitating to youthful activities like riding scooters, Whizzer motorized bicycles, and eventually motorcycles, utterly devoid of any protective gear, and driving cars hard and fast. In fact, my folks arranged for my first flying lesson on my fourteenth birthday though neither of them had any background or interest in it. They had some appreciation for the risks involved in my various endeavors, but recognized that they played the same role for me that athletics did for many of my peers. And I was careful, relatively speaking, adopting the use of seatbelts and protective riderwear once I understood their benefits and avoiding most of the stupid things a teenager can do with a little airplane.

Thus when I achieved the honorable status of Dad, I took my kids flying with me and, when I resumed motorcycling after a self-imposed Safety Hiatus during child-rearing years, for motorcycle rides. Had any of them chosen to undertake these activities for themselves, I might’ve squirmed a bit, but would have acquiesced. I didn’t face those precise issues, though, because they found their own risk-laden pursuits: Brady (now an ER doctor, appropriately enough) was an avid rollerblader who liked nothing better than 30-40mph downhill runs, and Caroline’s first love was horses. I had to put the horse sequence in “Gone with the Wind” out of my mind as she owned and rode a hunter-jumper from adolescence through college. (Andrew, our Bonus Baby, thankfully finds fulfillment in the creative arts, where the primary risk is starvation.) Through good fortune and the good Lord’s protection, they, like their father before them, emerged into adulthood unscathed from their favored pursuits.

So why did I find myself so unexpectedly anxious at Caroline’s offhand revelation? Out came a torrent of questions: who’s the pilot?
frenetic schedule of year’s-end and graduation approached, I figured the flight had been overtaken by events. Then one day my BerryFone buzzed. “Hey Dad, what kind of Mooneys were those we used to go flying in?” she asked. Well, a couple M20F Executives and an M20J 201, I said, why do you ask? “Well, I’m out here on the ramp next to Barack Obama’s campaign jet and Bryan is preflighting our Cessna. He wanted to know.” Ahhhh, the Flight was about to occur. I told her to enjoy it and determinedly began thinking about something else.

A day or so later came the link to the pictures and video clips she had web-posted from their flight. They showed the beautiful, sun-splashed New England topography, the crisscross patterns of the Tuck and Dartmouth campus, and the spine of the mountain ridges along which she had hiked. Her self-portrait shot at arm’s length in the right seat showed the same glow of enjoyment and excitement I’ve felt so often as I enjoyed the beauties of God’s green earth from the angels’ perspective.

I was so glad that she’d gone. A life spent hiding from life’s risks would be a poor one indeed, and she didn’t need me to manage them for her; she could do that, like everything else, for herself.

My part was to sit back, relax, and be glad that I’d been a part of having a loved one aloft.

Our Route of Flight

I think you’ll find today’s flight takes in some pretty interesting territory. NTSB General Counsel (and member) Gary Halbert gives a useful overview of the functions of the Board and his office, and promises future contributions concerning matters of interest to us all. Cecile Hatfield keeps us all updated on the latest caselaw developments, and Ken Stein aims to keep us on the taxiway even when we’re not flying through his look at off-duty conduct. Incoming President Ed Booth shares a memorable Fourth of July at Amelia Earhart’s house, and Steve Kirsch mounts up for a horseback look at low-flying government aircraft. There’s the Summer Meeting particulars to whet your appetite, and a look at the flight plan from disbarment or suspension back to the flight line.

As always, it’s an honor to serve as Your Captain on these flights. So now, sit back, relax and . . . lemme see if I can get this baby into the air.

— Gary W. Allen
Longtime LPBA member Eilon Krugman-Kadi died on March 16th while flying his L-39 Albatross military jet at the TICO Warbird air exhibition in Titusville, Florida. Born in Israel in 1948, Eilon began flying gliders there at the age of 15 and learned to fly in the Israeli military. He came to the US to attend Embry-Riddle Aeronautical University, from which he graduated summa cum laude, and then the University of Florida School of Law, from which he obtained his JD, and began a long and successful legal career as head of his own firm in Gainesville. He obtained numerous airman’s certificates including an ATP and CFI and flew many types of aircraft, culminating in the L-39 in which he took such pride and pleasure. Eilon, a man of broad interests and possessed of a great enthusiasm for life, was a long-time member of LPBA and brought his L-39 to the Amelia Island Winter Meeting in 2006. A message of condolence from LPBA was delivered at his memorial service, held March 19 in a hangar at the Gainesville Airport; burial was in Jerusalem. He survived by Shane Krugman-Kadi, his son, Talia Krugman-Kadi, his daughter, their mother, Susan Krugman-Kadi; Hana McMullen-Kadi, his daughter, and his long-time companion, Lynda McMullen, all of Gainesville, Florida.

Memorial contributions may be made to:
The Eilon Krugman-Kadi Memorial Education Fund
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Jewish Student & Community Center at the University of Florida
2021 NW 5th Avenue
Gainesville, FL 32603
LPBA JOURNAL SUMMER 2007

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The Chateaux at Silver Lake, Park City, Utah

The Chateaux at Silver Lake, Utah is an elegant condominium hotel property located in the heart of Deer Valley Resort's mid-mountain Silver Lake Village. The Chateaux offers gracious living, focused personal guest services and outstanding luxury accommodations.

The Chateaux at Silver Lake, which opened in January of 2000, offers outstanding luxury accommodations within steps of Deer Valley Resort’s Silver Lake Village and is three miles from Park City’s Historic Main Street. Embellished with Old World French décor, The Chateaux features a variety of lodging options including 95 hotel rooms, 35 studio rooms and 5 one-bedroom suites. Spacious two and three bedroom suites are also available. The Impressionist Ballroom offers 6,627 square feet with state-of-the-art audio/visual services and can accommodate groups up to 440 people classroom style or can be divided into three independent sections. Two smaller meeting rooms and a distinguished boardroom are also available for more intimate gatherings.

The Chateaux’s amenities include a 24-hour front desk, bell/valet and concierge services, complimentary heated underground parking, complimentary in-town shuttle, complimentary fitness center, four-season outdoor heated pool and hot tub, business center and Marc Raymond’s Tranquility Spa/Salon. Additional amenities include wireless Internet access in all meeting rooms and guest rooms, nightly turndown service, plush terry robes, pillow top mattresses and feather beds, specialty shops and recreational equipment rental/sales at Stein Eriksen Sport. The Chateaux consists of two buildings, which are connected by a central courtyard with a heated walkway.

Serving breakfast, lunch and dinner in winter months and dinner only in summer months, Bistro Toujours, an elegant gourmet restaurant located in The Chateaux, has been named “Top 50 Best New Restaurants in the World” by Conde Nast Traveler and “Award Winner of Excellence” by Wine Spectator. Also located in The Chateaux, Club Buvez! provides a relaxing environment for enjoying libations.
INDIVIDUAL RESERVATION FORM
THE CHATEAUX AT SILVER LAKE

The Chateaux at Silver Lake, which opened in January of 2000, offers outstanding luxury accommodations within steps of Deer Valley Resort’s Silver Lake Village and is three miles from Park City’s Historic Main Street. Embellished with Old World French décor, The Chateaux features a variety of lodging options including 95 hotel rooms, 35 studio rooms and 5 one-bedroom suites. Spacious two and three bedroom suites are also available. The Impressionist Ballroom offers 6,627 square feet with state-of-the-art audio/visual services and can accommodate groups up to 440 people classroom style or can be divided into three independent sections. Two smaller meeting rooms and a distinguished boardroom are also available for more intimate gatherings.

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The Chateaux at Silver Lake is pleased to offer guests attending the Lawyer-Pilots Bar Association on 8/1/2007 to8/5/2007, the following lodging options.

Hotel Rooms – Each room features one or two queen beds, private bath, high-speed wireless Internet, cable television, small refrigerator, toaster, coffee maker and fireplace. Approximately 400 square feet.

**Nightly Rate: $149**

The following units are not part of the group block but can be reserved on a space available basis:

Studio Units – Each room features a queen Murphy bed, fully equipped kitchen, private bath, high-speed wireless Internet, cable television, living room and fireplace. Approximately 500 square feet.

**Nightly Rate: $149**

One-Bedroom Suites – Each suite offers the combined features of a hotel room and a studio unit. A queen Murphy bed is available in most living areas. Approximately 900 square feet.

**Nightly Rate: $194**

Two-Bedroom Suites – Feature two bedrooms with fireplace, three baths, fully equipped kitchen, living area with fireplace, cable television in each bedroom and living area and washer/dryer. Approximately 1,300 square feet.

**Nightly Rate: $299**

Three-Bedroom Suites – Features the same design configurations as the two-bedrooms, with an additional bedroom and bath. Approximately 1,700 square feet.

**Nightly Rate: $399**

The above rates do not include Utah State Lodging Tax (currently 10.35%), Resort Lodging Fee of 2.85% and Daily Service Charge of $5 per bedroom.

Please complete and sign the second page of this Reservation Form. Once we have received your signed Reservation Form, either by fax or mail, a confirmation will be forwarded to you. Forms may be sent to:

Deer Valley Lodging
Attn: Group Sales Department
P.O. Box 3000
Park City, Utah 84060
Fax Number: (435) 655-4941
Lawyer-Pilots Bar Association
8/1/2007 to 8/5/2007

Arrival Date: _______________ Departure Date: _______________ Room Type: _____________

Guest Name: _______________________________________________________________________

Address: __________________________________________________________________________

Phone: _______________________ Fax: ______________________ Adults: _______ Children: _______

Additional Guest Names: _______________________________________________________________

Credit Card Number: _______________________________ Expiration Date: _____________________

Authorized Signature: _________________________ Name on Credit Card: _____________________

** Signature acknowledges agreement to policies as outlined below.

Deposit/Cancellation Policies:

- An initial deposit of one night’s room and tax is due at the time of reservation by the individual guest.
- Each reservation is subject to the Utah State Lodging Tax of 10.35%, Resort Lodging Fee of 2.85%, and Daily Service Charge of $5 per bedroom.
- Final payment is due upon arrival.
- Individual cancellations made more that 7 days prior to arrival will forfeit a $50 processing fee.
- Cancellations made within 7 days of arrival will forfeit total lodging cost.
- NO SHOWS, EARLY DEPARTURES, LATE ARRIVALS, OR DOWNGRADES ARE SUBJECT TO FULL PAYMENT OF CONFIRMED RESERVATION UPON DEPARTURE.

In order to avoid cancellation charges, we highly recommend the purchase of Trip Insurance.

Yes, please send me information on Trip Insurance ________________
No, I am not interested in Trip Insurance ________________

GROUND TRANSPORTATION – The Salt Lake City International Airport is located 40 minutes from Deer Valley. Park City Transportation offers a variety of services including Private Cadillac Escalade, Private Van, or Shared Van service. Payment for this service will be added to your final bill. Gratuity is not included. Cancellations made within 24 hours of arrival will forfeit full prepayment of transfer cost.

______ Yes, transportation will be needed. Airline information is provided below.
______ No, transportation is not needed.

Arrival Date: ___________ Airline & Flight #: ______________ Arrives Salt Lake City: ___________

Departure Date: ___________ Flight Time: ______________ Number of Passengers: ______________

AIRLINE ARRANGEMENTS – Deer Valley Lodging’s in-house travel department is pleased to offer special package fares with DELTA AIRLINES that do not require a Saturday stay. If you are in need of additional information, please contact Premier Travel at (800) 677-2047.

A confirmation will be forwarded to you. Please contact our reservations staff with any questions at (800) 782-4813, or visit our website at [www.deervalleylodging.com](http://www.deervalleylodging.com). We look forward to your visit!
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Name: ____________________________________________________________

Address: ____________________________________________________________

Tel: __________________________ Fax: __________________________ Email: _________________________________

Arrival: August:________, via _____________________________, at ___________am/pm  Departing: August: _______

Accompanying me will be my spouse/guest: _________________________________________________________________

and children (names and ages): ____________________________________________________________________

Please check here if you are a first-time attendee: ________________

Registration may be paid by check, payable to "LPBA", or by Master Card/Visa/American Express.

Card Number: __________________________________________   Exp. Date: ___________

Name as it appears on card: _____________________________________________________

Member Registration……………………………$385.00
Accompanying Spouse/Adult Guest…………….$225.00
Child, age 10-17 ………………………………… $55.00
Child, age 3-9 …………………….……………..  $20.00

HOTEL RESERVATION DEADLINE

JULY 11, 2007

Hotel Information and Reservation
Rooms are reserved at The Chateaux at Silver Lake for $149.00 per night, plus Utah Tax of 10.35%, Resort Lodging Fee of 2.85%, and Daily Service Charge of $5 per bedroom. Room reservations may be made by using the hotel’s reservation form. All reservations need to be guaranteed with a one-night deposit. Cancellations made more than 7 days prior to arrival will forfeit a $50 processing fee, and cancellations made within 7 days of arrival will forfeit the total lodging cost. No shows, early departures, late arrivals, or downgrades, are subject to full payment of confirmed reservation upon departure.

Airport Information
Commercially, Salt Lake City Airport is about 50 minutes from the hotel. Rental cars are available, or transportation can be arranged with Park City Transportation (either shared or private service) by calling 800-637-3803 or 435-649-8567.

For general aviation, Heber City Airport (36U) is about 20 minutes from the hotel, and has a 6900 foot runway. The FBO is OK3 Air (435-654-3962). Tie downs are available for $20 a night, or over 5 days a maximum of $75. Currently, Avgas is $5.55 and self serve is $5.15. Enterprise rental cars are available with advance reservations through the FBO, or transportation to the hotel can be arranged with Part City Transportation by calling 800-637-3803 or 435-649-8567.

ADDITIONAL INFORMATION AVAILABLE ON LPBA'S WEBSITE: www.lpba.org
LAWYER-PILOTS BAR ASSOCIATION
THE CHATEAUX AT SILVER LAKE, PARK CITY, UTAH
PROGRAM
AUGUST 1 – 5, 2007

Wednesday, August 1

3:00pm Board of Directors Meeting
6:30-8:00pm Welcome Cocktail Reception

Thursday, August 2

8:00-9:00am Breakfast
9:00-9:10am “Welcome and Opening Remarks by the President”
   Timothy S. Frets; President, LPBA and Attorney at Law, Douthit, Frets & Rouse, Kansas City, MO
9:10-10:00am “Mediation Issues in Aviation Cases”
   David Hunter; Lane Powell, P.C., Seattle, WA
10:00-11:00am “Don’t Worry, We’ll Troubleshoot it in the Air” – 10 Tips on How You Can Prevent Committing Legal Malpractice
   Donald M. Maciejewski; Zisser, Robison, Brown, Nowlis & Maciejewski, P.A., Jacksonville, FL
11:00-11:15am Coffee Break
11:15-12Noon “Impact of Automation on General Aviation Safety”
   Christopher Hart; Acting Administrator, NHTSA, FAA, Washington, DC
12:30pm Golf Outing

Friday, August 3

8:00-Noon Registration
8:00-9:00am Breakfast
9:00-10:00am “Legal Aspects of a Major Airline Bankruptcy: A Captain’s Perspective”
   C. Glenn Cook, Jr.; Airline Captain and Attorney at Law, Atlanta, GA
10:00-11:00am “Navigating the Skies of International Aviation Accident Litigation”
   Charles M. Finkel; Magana, Catchart & McCarthy, Los Angeles, CA
11:00-11:15am Coffee Break
11:15-12Noon “Taxes and Other Related Matters”
   William R. Blackard, Jr.; Attorney & Counselor at Law, Jacksonville, FL
1:00pm Trap Shooting Event

Saturday, August 4

7:00am Fun/Run and Walk/Talk
8:00-Noon Registration
8:00-9:00am Breakfast
9:00-10:00am “Electronic Discovery”
   Mark J. Kolber; Jones & Keller, P.C., Denver, CO
10:00-11:00am “Ethics: Circumnavigating the Buildups”
   Gary W. Allen; Attorney at Law, Williamsburg, VA
11:00-11:15am Coffee Break
11:15-12:00pm LPBA Membership Meeting and Regional VP Reports
1:00pm Spot Landing Event
6:00-7:00pm Cocktail Reception
7:00pm Banquet - Cocktails, Dinner, Dancing and Awards Presentations

Sunday, August 5 - Checkout
RECENT DEVELOPMENTS IN AVIATION LAW

Cecile Hatfield, Esq.

Cecile Hatfield has her own aviation trial practice in Miami, Florida. She has previously served as Associate General Counsel for Piper Aircraft Corporation. Ms. Hatfield was with the United States Department of Justice for nine years as an aviation trial lawyer. She graduated from the University of Florida where she was elected to the Hall of Fame and Mortar Board and received her law degree from the University of Miami. She is a licensed pilot and ground school instructor. Ms. Hatfield is General Counsel to The Ninety-Nines, an International Organization of over 6,000 women pilots. She is a member of the International Aviation Women’s Association where she is on the Board of Directors. She is the Program Chair of the 18th Annual Aviation Law and Insurance Symposium sponsored by Embry-Riddle Aeronautical University. Ms. Hatfield is Past President and member of the Board of Directors and Contributing Editor for the Lawyer-Pilots Bar Association.

I. GOVERNMENT LITIGATION:

A. Federal Tort Claims Act

1. Crash of Civil Air Patrol Plane

Ashley v. United States, No. 2:07-cv-00004-FL, complaint filed (E.D.N.C. Feb. 27, 2007)

The widow of a North Carolina deputy sheriff has lodged a $6 million suit against the U.S. government, claiming that pilots employed by a federally chartered company caused the crash that killed her husband.

The pilots failed to maintain proper power, altitude and airspeed, according to the complaint filed in the U.S. District Court for the Eastern District of North Carolina under the Federal Tort Claims Act, 28 U.S.C. § 2680.

At issue in the lawsuit brought by May Ashley is North Carolina’s Civil Air Patrol, (CAP), a federally chartered corporation that performs search and rescue operations, aerial reconnaissance, disaster relief, and other missions, according to its Web site.

The plaintiff’s 35-year-old husband, Richard, was a passenger in a CAP Cessna in July 2002, when it crashed in Chowan County, N.C. She says the plane had been flying at less than 500 feet above the ground. The widow specifically claims the pilots’ actions caused the engine to stall and that they failed to take proper action to restart it, land or return to an airfield.

In her action, the plaintiff contends that the CAP was negligent by failing to train its members about safe operation procedures and regulations. The company also failed to properly examine and maintain the aircraft, she adds.

The majority of the complaint focuses on pilots Anthony Futrell and Robert Kennedy. The plaintiff alleges they flew the CAP plane below minimum safe altitudes and in a way that exceeded the capabilities of the aircraft. The pilots also failed to prepare for, anticipate, and recover from a foreseeable change in the path, altitude, flight or operation of the CAP plane, according to the complaint.

2. Administrative Claims

Wojciechowicz et al. v. United States, Nos. 04-1846 (RLA), 04-1856 (RLA) and 04-2342 (RLA), 2007 WL 512783 (D.P.R. Feb. 20, 2007)

Administrative claims filed with the Federal Aviation Administration over a plane crash were sufficient to provide the U.S. government with notice of allegations made by plaintiffs who were not named in the claims, a Puerto Rico federal court has ruled.

The U.S. District Court for the District of Puerto Rico held that the separate administrative claims filed by Carol Wojciechowicz and her son Michael satisfied the notice-of-claim requirement under the Federal Tort Claims Act, 28 U.S.C. § 2675 (a).

The suit stems from a January 2002, plane crash near El Yunque, Puerto Rico. The plaintiffs blame negligence by federal air traffic controllers for the accident. Pilot Alexander Wojciechowicz was carrying his daughter Katherine Angrick; her husband Mark; their son Heath; and Mark’s mother, Lois Angrick.

Within two years of the accident Carol Wojciechowicz, the pilot’s widow, filed a Standard Form 95 claim for damage, injury or death with the Federal Aviation Administration. She sought both economic and noneconomic damages for the death of her husband. The same day her son Michael filed his Standard Form 95 with the FAA, seeking damages for the death of his sister Katherine.

Plaintiffs are required to submit such forms and exhaust all administrative remedies before suing the government under the Federal Tort Claims Act. Subsequently, Carol, Michael and the other surviving child, Susan, sued the United States, seeking damages for the deaths of Alexander and Katherine.

The government sought dismissal of the wrongful-death claim, arguing that the adult plaintiffs who were not specifically identified in the administrative claims and did not file independent claims may not pursue judicial relief.

U.S. District Judge Raymond L. Acosta denied the government’s dismissal motion. In doing so, the judge noted that, under Puerto Rico law, the fact that Carol and Michael were acting on behalf of the estates did not necessarily translate into notice of the individual claims of the members of the two estates.

However, Judge Acosta found the evidence presented to the FAA by the plaintiffs was sufficient to alert the government as to the identity of the decedents’ survivors: the members of
each of the estates. The court held that the claims for the two estates were filed the same day through the same counsel, all bore the same last name and the FAA denied all the claims via a single letter. Further, the government had available a mechanism to further explore the identity of the members of the estate in case of doubt.

3. Helicopter Crash: Bench Trial


A Michigan federal judge is now considering whether the crash of a helicopter into a light pole on airport property was caused by the federal government’s negligent provision of air traffic control services. U.S. District Judge Avern Cohn of the Eastern District of Michigan recently concluded a five-day bench trial in the suit brought by McMahon Helicopter Services, Inc. against the U.S. government.

McMahon and its insurer, U.S. Specialty Insurance Co., sued the federal government, the Wayne County Airport Authority, the Willow Run Airport and its director after one of McMahon’s helicopters struck a light pole on the airport authority’s property. McMahon put forth various negligence claims as well as a claim for breach of contract.

In the mid-1980s the airport installed the light poles adjacent to its south cargo ramp as part of a federally funded capital improvement project. The poles lit the ramp only and were shrouded, so they were not visible to pilots, who might confuse them with navigational lights.

The poles became inoperative in the 1990s. In October 2003, the Federal Aviation Administration approved the airport’s grant application to replace them. About two months later the McMahon helicopter was attempting to land at the airport. While descending it struck one of the inoperative light poles, severing the aircraft’s main rotor system, which caused it to nosedive and crash.

The accident destroyed the helicopter and injured crew members. U.S. Specialty settled with the defendants, leaving only McMahon’s claims against the United States, the airport authority and the director. In July 2006, the court granted judgment to the defendants on all but one of the negligence claims against the government.

McMahon contends in its trial brief that the FAA controllers failed to warn it of the existence of unlit poles or defective lighting at the airport and placed the helicopter on a flight path where there was a likelihood that it would come near the poles.

The controllers failed to act as a “collective team” and exchange information to ensure the safety of the aircraft, and left the helicopter traveling in the dark in the path and in the vicinity of the unlit poles, McMahon alleges.

The government countered that the controllers did not breach any duty to McMahon and that their actions were not the sole proximate cause of the accident. Rather, the defendant asserts, the crash was caused by the pilot’s negligent decision to turn left toward the south ramp instead of following air traffic control instructions to proceed to another ramp.

B. Preemption

1. Federal Aviation Act Preempts Homeowners’ Crash Claims


The Federal Aviation Act preempts portions of the negligence claims lodged by homeowners whose residences were hit by a plane attempting to land at a nearby airport, a Connecticut federal judge has ruled. U.S. District Judge Janet Bond Arterton of the District of Connecticut held that the plaintiffs’ claims essentially mirror the federal regulations.

According to the opinion, in the early morning of August 4, 2003, a chartered Learjet owned and operated by Air East Airways, Inc. was attempting to land at the Groton/New London Airport in Connecticut when it encountered a patch of poor visibility and began to circle the landing area.

While circling, the pilots used an excessive bank angle, causing a stall that propelled the plane into the homes of Glory Aldana and Rose Peret. The impact set the houses ablaze and woke the residents, who sustained emotional and physical injuries while fleeing, the plaintiffs assert. The accident killed the two pilots. Two years later Aldana and Peret filed a negligence action against Air East Airways, Air East Management Ltd. and the estates of the deceased pilots.

The defendants asked Judge Arterton for partial dismissal, claiming the plaintiffs’ common-law negligence claims were preempted by the Federal Aviation Act of 1958. The defendants specifically took issue with certain subparagraphs in six of the 12 counts put forth in the plaintiffs’ complaint. Those subparagraphs claimed negligent conduct and cited Federal Aviation Administration regulations.

Judge Arterton held that the Federal Aviation Act provides no federal remedy for personal injury or death caused by the operation or maintenance of aircraft.

The court held that the plaintiffs’ common-law negligence claims basically tracked those articulated under the act’s regulations. “Thus, while the court holds that common-law negligence standards are preempted by the FAA, under the act’s savings clause, the plaintiffs’ right to pursue their negligence claims (applying FAA standards) against the defendants is not.”

If the plaintiffs prove that the defendants’ allegedly negligent acts and omissions measured by FAA standards caused their injuries, they will be entitled to pursue all common-law remedies available under Connecticut law, according to the opinion.

II. AVIATION INSURANCE CASES:

A. Insurance Coverage

1. Policy Exclusion


An Indiana trial court correctly held that an exclusion in an insurance policy barred coverage for injuries a passenger suffered in a plane crash, a state appellate court has ruled. There
were no issues of material fact that the policy barred coverage, the Indiana Court of Appeals found in upholding summary judgment for the Acuity insurance company in a declaratory judgment action brought by the passenger Jack Runion.

Gene Lane and Dan Nicksic were partners in Turbo Flite, which they formed for the express purpose of purchasing an aircraft. In 2000 the company bought a single-engine Piper.

Indiana Climate Control, of which Lane was president, had an oral agreement with Turbo Flite allowing ICC to use the aircraft. In exchange, ICC paid half the fixed expenses and all the variable expenses associated with its use of the aircraft in addition to a specified hourly rate.

In April 2002 Lane was piloting the aircraft in his capacity as an ICC employee and Runion was a passenger in the plane. The aircraft crashed shortly after taking off from an Indiana airport, causing Runion to suffer multiple injuries.

Runion sued ICC Turbo Flite and Lane two years later, claiming that Lane negligently piloted the aircraft. On the same day, he filed a complaint seeking a declaratory judgment that Acuity, ICC's insurance carrier, had to defend and indemnify ICC in Runion's tort suit.

Acuity claimed there was no coverage because the policy specifically excluded coverage for bodily injuries sustained as a result of an aircraft crash. The trial court agreed and granted Acuity summary judgment, prompting Runion to appeal.

The Indiana Court of Appeals rejected Runion's claim that the Acuity policy provided coverage because ICC had a contract with Turbo Flite and, as a result, Lane and Nicksic assumed any liability for Runions' injuries.

The panel also determined that the record did not support the plaintiff's claims. The evidence showed that Lane and Nicksic did not discuss the assumption of risks tied to the use of the aircraft or whether ICC would indemnify Turbo Flite for losses arising from ICC's use of the plane.

Based on the contract language, a reasonable inference could be made that ICC and Turbo Flite had an agreement concerning how costs would be shared for the use of the aircraft, the appellate court noted. However, the court held it could not reach the same conclusion about whether ICC agreed to assume the tort liability of Turbo Flite.

The "insured contract" exception to the aircraft exclusion does not apply, and Acuity was entitled to summary judgment, according to the appellate court. Runion had claimed the exception would have provided coverage for his bodily injuries based on the contract between Turbo Flite and ICC for the ownership, maintenance and use of the aircraft.

2. Coverage for Lessee of Helicopter


An Arizona federal judge must determine whether an insurance company that provided coverage to the lessee of a helicopter involved in a 2003 crash has a right to recover for aircraft damage.

Helicopter manufacturer Eurocopter S.A.S. filed a motion for summary judgment in the U.S. District Court for the District of Arizona, arguing that damage claims United States Aviation Underwriters, Inc. (USAU) put forth were derivative of the rights of the helicopter's owner. Eurocopter argued the claims were subject to limitations provisions in the purchase agreement for the aircraft. USAU disputed the assertion that its claims were derivative and contends they were not barred.

The dispute stems from the November 2003 crash of a Eurocopter-manufactured helicopter. The crash injured the pilot, flight paramedic and flight nurse. The plaintiffs have attributed the cause of the accident to a loss of hydraulics.

Eurocopter sold the aircraft to Texas-based American Eurocopter Corp in 2002, according to court records. Wyoming-based Roberts Aircraft Co. later bought the helicopter from American Eurocopter. Roberts leased the helicopter to Native American Air Services, Inc., (NAAS) which does business in Arizona. NAAS insured the aircraft through USAU.

After the crash USAU paid Roberts more than $1.5 million for the loss of the helicopter and, along with Employers Insurance of Wausau, lodged a subrogation action against Eurocopter for strict liability, product liability and negligence. Employers paid workers' compensation benefits for those injured in the crash.

Seeking summary judgment, Eurocopter alleged USAU has no greater rights than Roberts regarding whether it pursues its alleged damages as NAAS' or as Roberts' subrogee. Any claim that NAAS could bring would be derivative of Roberts' right, the defendant contends, adding that the purchase agreement bars any claim for the damage to Roberts' helicopter.

USAU's claims are also barred under the economic-loss doctrine, which Eurocopter says provides that damage to a product can only be pursued under a contract claim, not as a tort claim.

Eurocopter also asked the District Court for partial summary judgment on the plaintiffs' failure-to-warn claims, asserting that the plaintiffs cannot establish that the helicopter's flight manual was defective or that any such alleged defects played a role in the crash. The issues with respect to the manual concern sections allegedly addressing the helicopter's performance at low speeds after the loss of hydraulic power.

The plaintiffs counter that they are not bound by the disclaimers in the purchase agreement between Roberts and American Eurocopter, and dispute the applicability of the economic-loss rule to their action.

Because NAAS, not Roberts, agreed to bear the risk of loss if the helicopter were destroyed, NAAS has an independent non-derivative right to sue Eurocopter, USAU contends.

USAU and Employers further assert that their failure-to-warn claims cannot be summarily decided because the evidence proves that the warnings and instructions provided by Eurocopter were "woefully inadequate and defective." Those defects were a substantial cause of the accident, according to the insurers.
B. Runway Crash

United States Aviation Underwriters Inc. et al. v. City of Chicago, No. 06 C 6769, answer filed (N.D. Ill. Jan. 16, 2007)

An Illinois judge has been asked to decide whether the city of Chicago should pay for damage to the Southwest aircraft that skidded off a runway in wintry weather.

United States Aviation Underwriters Inc., (USAU) one of the airline’s insurers, filed a property damage complaint in the U.S. District Court for the Northern District of Illinois against the city, which owns, operates and maintains Midway International Airport, where Southwest Flight 1248 went off the runway in December 2005.

The accident occurred as the pilot attempted to land the Boeing 737-700 during adverse weather conditions that included snow, low cloud ceilings and a tailwind. The plane failed to stop on the runway and crashed through a blast fence and a perimeter fence before colliding with several vehicles on a city street.

No one on board died, but a 6-year-old boy in one of the cars was killed. Several personal-injury suits were filed in Illinois state court after the accident, with the plaintiffs claiming negligence, conscious disregard for safety and product liability against Southwest, Boeing Co. and the city of Chicago. The defendants removed the suits to federal court, where they were later consolidated.

In the property damage complaint, USAU claims the city should pay the bill for aircraft repairs because it failed to monitor the runway at Midway Airport and clear it of ice and snow or close it.

The city takes a different stance, citing the indemnification and insurance provisions in an airport use and facilities lease agreement with Southwest. That agreement, according to Chicago, provides that the carrier would indemnify and hold the city harmless from any losses and liability stemming from the airline’s actions or use of the airport.

The city also claims it is named as an additional insured under an insurance policy held by Southwest but that it has not been successful in its attempts to obtain a copy of the policy from USAU.

Further, any damages sustained by Southwest were caused by its failure to properly train its pilots, properly use runway condition and wind conditions reports, and properly use the plane’s thrust reversers. USAU’s allegations, Chicago adds in its affirmative defenses, call into question the operation and maintenance of the airport, which are protected discretionary functions.

Finally, the city cites lack of proximate cause, preemption, compliance with applicable statutes and regulations, and the effects of “acts of God” such as weather conditions.

III. AIR CARRIER CASES:

A. Montreal Convention

1. Widow Sues Over Husband’s Death In Airplane Bathroom


The widow of a man who had a fatal heart attack in the lavatory during an American Airlines flight has sued the carrier, alleging her husband was not discovered until more than two hours after the flight landed.

Carolyn Watts filed suit in the U.S. District Court for the Southern District of Indiana, alleging the actions of the carrier and parent AMR Corp. constituted an “accident” under the Montreal Convention on international air travel. The Montreal Convention replaced the similar Warsaw Convention, amending provisions related to compensating the victims of air disasters.

In April 2005, Watts’ Husband, Taisuke Matsuo, was returning to Chicago after a round-trip flight to Japan on American Flight 154 when he went to the aircraft’s lavatory, according to the complaint.

While inside, he had a heart attack and died. The flight went on to land in Chicago around 4 p.m. Matsuo was found more than two hours later by an aircraft cleaning crew. The plaintiff, an Indiana resident, claims the defendants failed to recognize that her husband was not in his seat and was locked in a lavatory for a significant period of time.

The airline and its parent also disregarded industry standards and its own policies and procedures by landing and deplaning with Matsuo locked in the lavatory, the plaintiff argues, while failing to attend to Matsuo’s medical emergency.

The plaintiff contends that under Article 17 of the Montreal Convention, American Airlines’ conduct amounted to an accident because it was an unexpected or unusual event that was a causal link to Matsuo’s death.

B. Preemption Under Airline Deregulation Act

1. Federal Court Sends Suits Against Comair Back To State Court


Thirteen wrongful-death cases filed against Comair in the wake of an August 2006 crash in Lexington, Ky., are heading back to state court after a federal judge found that the plaintiffs allege only state law causes of action.

U.S. Senior Judge Karl S. Forester of the Eastern District of Kentucky rejected Comair’s contention that federal law preempted the state law claims of the plaintiffs, whose family members died in the crash of Flight 5191.

The accident occurred when the aircraft attempted takeoff from Runway 26 rather than Runway 22 at Lexington’s Blue Grass Airport. Everyone on board the 50-seat commuter jet bound for Atlanta was killed, with the exception of the copilot, who was seriously injured.

Runway 26 is 3,500 feet long, half the length of Runway 22, according to published reports. Unable to gain altitude because of the shorter runway, the plane hit several trees and other obstacles before bursting into flames at the end of the runway.

The plaintiffs originally filed their wrongful-death suits in Kentucky state court, but Comair removed them to federal court, claiming they
raised federal issues and are thus preempted. The cases were consolidated before the Eastern District of Kentucky for pretrial purposes.

Seeking remand, the plaintiffs said Comair failed to meet its burden of proving that federal jurisdiction existed. They noted that their causes of action were created by state law and they relied only on state law for relief.

In addition Comair’s claim of preemption did not support jurisdiction in federal court, the plaintiffs argued, and the airline failed to demonstrate Congressional intent to preempt all state law causes of action in aviation cases.

Judge Forester agreed and sent the cases back to state court after finding a lack of original federal question jurisdiction. The court found that the fact that federal law might provide a “federal answer” or defense to the plaintiffs’ claims does not create a federal question sufficient to support jurisdiction exclusively in federal court.

The Federal Aviation Act does not completely preempt state law causes of action for wrongful-death or survivor benefits in aviation cases. To the extent Comair relied on FAA preemption as a basis for removal, its reliance was misplaced, Judge Forester said. This court does not have subject matter jurisdiction based on complete preemption of wrongful-death claims by the FAA.

C. Seaplane Crash

1. $51 Million Settlement
   Ends 12 Suits Over Miami Seaplane Crash
   *Ellis v. Flying Boat Inc. et al., No. 06-20066, settlements approved (S.D. Fla. Jan 26, 2007)*

The families of several passengers killed when a seaplane crashed off the coast of Miami have entered into a $50 million settlement with the company that leased the aircraft.

The U.S. District Court for the Southern District of Florida approved the settlements in late January, ending the litigation stemming from the December 2005 crash of the vintage seaplane. The defendant’s insurers will pay the settlement funds, according to the agreement.

At the time of the crash the airplane was on its way from Miami to Bimini, Bahamas. According to published reports, the accident, which killed all 20 people on board, occurred when the right wing of the vintage plane allegedly separated from the fuselage as a result of cracking and corrosion.

The victims’ families sued Flying Boat Inc., which does business as Chalk’s International Airlines and Chalk’s Ocean Airways; Seaplane Adventures LLC, which owns the aircraft and leased it to Flying Boat; and Frakes Aviation Inc., which performed maintenance on the subject airplane.

The settlement affects lawsuits brought by Felix Ellis, Freddie Rolle, Kendrick Sherman, Maureen Smith, Amill Levart, Richard Tutecky, Jr., Genevieve Dean, Kim Wilson, Granville Romer and three actions brought by Rosethal Stuart.

D. New Actions Filed Over Midair Collision In Brazil

*DaSilva et al. v. Lepore et al., No. 07-20846, complaint filed (S.D. Fla. Mar. 30, 2007)*

An executive jet crew’s failure to maintain proper altitude and communication with air traffic controllers was among the causes of a midair collision with a Brazilian airliner over the Amazon rainforest, according to the families of passengers killed in the crash.

Plaintiff Jorge Feliciano Oliverira DaSilva’s suit is one of 19 actions involving some of the 154 passengers killed in the September 2006 accident, according to a press release issued by plaintiff attorneys from Podhurst Orseck PA in Miami.

DaSilva’s son was one of the crash victims. According to DaSilva’s complaint, filed in the U.S. District Court for the Southern District of Florida, his son was on board Gol Transporters Aeros Flight 1907 when it collided with an ExcelAire Embraer Legacy 600 business jet.

The Legacy was on its maiden voyage heading north from Sao Jose’ dos Campos to the United States. The plaintiff says the plane was flying at 37,000 feet, an altitude that did not correspond to the flight plan and contradicted established norms that reserved odd-number altitudes for southbound flights.

Gol Flight 1907, Da Silva continues, was flying south from Manaus, Brazil, to Brasilia at 37,000 feet, which was a proper altitude for that direction of flight. The aircraft collided, causing the Gol aircraft to crash in the rainforest, killing all 154 passengers and crew. The ExcelAire jet was able to land safely with it seven occupants uninjured.

The plaintiffs, who are citizens of Brazil, contend that the ExcelAire jet’s transponder was not operating at the time of the crash. The transponder is a critical part of an aircraft’s “traffic collision avoidance system,” a computerized avionics device designed to avoid midair collisions by transmitting the position, altitude and direction of travel to other planes and ground radar. The system identifies potential midair collisions and affords the crews of converging aircraft the information needed to avoid a potential collision.

When the ExcelAire jet’s transponder stopped functioning, it rendered the collision avoidance system inoperable. In addition the plaintiffs contend that the air traffic control system, which was supposed to provide radio and radar communications with the ExcelAire jet and Gol aircraft, was not operating properly at the time of the collision.

The defendants include ExcelAire Service Inc., the Legacy’s owner, and pilots Joseph Lepore and Jan Paul Paladin. Other defendants include transponder maker Honeywell International Inc., Honeywell agent Corporation Service Co., and Florida-based aircraft manufacturer Embraer Aircraft Customer Services, Inc. Lockheed Martin Corp., Raytheon Co. and Amazon Technologies Co., which made the air traffic control system used at the time of the accident, are also defendants.

IV. PRODUCTS LIABILITY:

A. General Aviation Revitalization Act


The Pennsylvania Supreme Court has reaffirmed that the General Aviation Revitalization Act’s rolling provision protected aircraft parts manufacturers from liability stemming
from the crash of a Piper airplane because the companies did not supply the components that allegedly cause the crash.

The court issued the decision after a request for reargument lodged by the representatives of several victims of the August 1999 crash, which occurred as the 31-year-old Piper was departing from an airport in North Lima, Ohio.

Several on board were killed or suffered serious injury. Karen Pridgen and other plaintiffs representing the crash victims and their estates asserted claims of negligence, strict liability, and breach of express and implied warranties against Parker Hannifin Corp., Textron Inc. and AVCO Corp., among others.

The three companies designed, manufactured and sold the original engine and fuel system components. The plaintiffs claim that faulty replacements for these components caused the crash. They contend that these parts were replaced and overhauled within 18 years of the accident date.

The defendants sought summary judgment based on GARA, 49 U.S.C. § 40101, which immunizes airplane manufacturers from liability if a plane or its parts are at least 18 years old. The act's rolling provision applies the 18-year period to new systems or other parts added to an aircraft.

The plaintiffs challenged the contention because the defendants held the Federal Aviation Administration type certificate for the crashed Piper. They further asserted that GARA's rolling provision did not apply, meaning the companies could not reap the benefit of the statute's 18-year limitation relative to replacement parts specified in the type certificate.

A Pennsylvania trial court denied the defendants' motions. The court found that because the defendants designed the engine and held the type certificate for it, GARA's rolling provision could apply. A state appeals court said the orders were not subject to appellate review.

After a series of subsequent rulings, remands and appeals, the Pennsylvania Supreme Court in 2005 agreed with the defendants that the denial of the motions grounded on GARA met all the elements of the "collateral order" doctrine, which allows the appeal of a final order based on an issue separate from the merits of the case.

The justices reviewed the trial court's decision on the merits. The Supreme Court held that drawing a distinction between manufacturing and design processes for the purposes of GARA would undermine the federal scheme to relieve the aviation industry of the burden of long-term liability.

The Pennsylvania Supreme Court found that the trial court erred when it determined that status as a type-certificate holder or designer was sufficient to implicate GARA's rolling provision, even in instances in which the defendants do not actually manufacture the relevant replacement parts.

The plaintiffs sought reargument, claiming that the Supreme Court's opinion adopted a too-narrow approach to GARA's rolling provision. They asserted that GARA contains no language limiting the application of the rolling provision exclusively to the physical manufacturer or seller of a particular replacement part.

The plaintiffs argued that although the defendants did not actually supply the replacement parts, they put the components out as their own, and those parts that allegedly caused the accident were installed according to the manufacturers' requirements.

The Pennsylvania Supreme Court was not persuaded and reaffirmed its prior decision. The court said the proponents of the GARA legislation recognized the essential role of preventative maintenance in the aviation industry. In the absence of GARA, the defendants may be liable for design defects in replacement parts or the aircraft systems in which those components function.

However, the justices added, the law's purpose would be undermined if the rolling provision were triggered by the status of original aircraft manufacturer, type-certificate holder or original designer.

B. Jurisdiction

1. Cessna Lacks Sufficient Contacts to Remain in Illinois Crash Suite


Cessna Aircraft Co. has been dismissed from a wrongful-death and survival action stemming from the crash of one of its planes. An Illinois federal judge has determined that the court lacks jurisdiction over the company.

U.S. District Judge James B. Zagel of the Northern District of Illinois held that the aircraft manufacturer lacked sufficient contacts with the state to justify jurisdiction. The court determined that to maintain jurisdiction, Cessna's contacts with Illinois must be related to the airplane crash at issue.

The court issued the decision in the suit by Nina Winston, whose husband was a passenger on the Cessna Citation 560 plane and died when it crashed while attempting to land at Pueblo Memorial Airport in Pueblo City, Colorado. The flight departed from Virginia and was headed to California.

Winston filed her action in state court against aircraft manufacturers Cessna and parent Textron Inc., deicing system maker Goodrich Corp. and the plane's owner and operators Martinair Inc. and Circuit City Stores Inc.

Martinair and Circuit City failed to execute a proper landing maneuver and did not maintain sufficient airspeed to prevent the crash, she alleged, also claiming that the companies failed to appropriately monitor the existing weather and icing conditions at the time of the accident.

Winston further contended that Cessna designed and manufactured the aircraft with an insufficient deicing system and inadequate warning system to alert the pilot about the accumulation of ice on the plane. The aircraft was designed and manufactured "without adequate engineering coordination," Winston argued, also taking issue with the manuals that accompanied the plane. Winston asserted that Cessna had sufficient contacts with Illinois through its Cessna Pilot Centers and an agreement with Elliot Aviation, an aircraft refurbisher and seller.

Judge Zagel determined those contacts were not directly related to the controversy because the plaintiff did not claim the aircraft was sold at Elliot Aviation or that the pilot was trained at one of the Cessna pilot
improperly returned the aircraft to service.

Teledyne and engine maker Precision Airmotive Corp. removed the suit to the Eastern District of Pennsylvania, on the basis that the plaintiffs’ claim regarding the fuel injectors’ defects rendered the Textron engines not airworthy implicated a significant federal interest.

Seeking remand, the plaintiffs argued that neither the accident nor their state law claims implicated federal jurisdiction. They challenged the defendants’ contention that jurisdiction was appropriate because their claims involve Federal Aviation Administrations regulations.

The court sided with the plaintiffs and remanded the action after concluding that the claims did not present a federal question under Grable & Sons Metal Products Inc. v. Darue Engineering & Manufacturing, 545 U.S. 308 (2005).

In Grable the U.S. Supreme Court held that a state law claim might contain a federal question of sufficient importance to confer jurisdiction on a district court. However, to pass the Grable test and permanently land in federal court, the claim must raise a federal issue. In addition, the issue must be substantial and in dispute and must not interfere with a congressionally approved balance of federal and state responsibilities.

Grable is one of a “special and small category” of cases involving a nearly pure issue of law rather than the factbound inquiry that exists in aviation litigation, according to the court.

The court stated that exercising jurisdiction over this case essentially would open the floodgates for attracting lawsuits for the removal of cases raising state law claims with embedded federal issues. This risk is present not only in the aviation context, but also in other areas of extensive federal regulation, such as food and drug law.

The court noted that the U.S. Supreme Court has declined to allow alleged branding violations of the Food, Drug and Cosmetic Act to create federal question jurisdiction.

If the federal labeling standard without a federal cause of action could get a state claim into federal court, so could any other federal standard without a federal cause of action, the court determined, citing Grable.

V. MISCELLANEOUS:

A. Inverse Condemnation

1. U.S. Supreme Court Upholds $16 Million Award To Nevada Landowner

McCarran International Airport et al. v. Sisolak, No. 06-658, cert. denied (U.S. Feb. 20, 2007)

The U.S. Supreme Court has refused to review a Nevada state court’s decision that height restrictions within the approach zone of a Las Vegas airport constituted a “taking” of airspace above private land, upholding a $16.6 million verdict for a landowner who said the restrictions affected the development of the site.

The Superior Court refused to review the petition for writ of certiorari filed by McCarran International Airport and its owner, Clark County, Nevada.

McCarran and the county lost a suit brought by Steve Sisolak, who claimed various height-restriction ordinances issued by the county limited the development of his 10 vacant acres and impeded his ability to sell the land.

In addition to challenging the height restrictions, Sisolak said low and frequent flights over his land from McCarran devalued the property by subjecting it to noise, dust and fumes, which constituted a compensable taking.

A state court jury awarded him $6.5 million for inverse condemnation, and the trial court added costs, attorney fees and interest, bringing the total award to more than $16.6 million.

In an inverse condemnation the landowner seeks to force a government agency to exercise eminent domain and give him fair compensation for land rendered less valuable through the agency’s actions.

A divided Nevada Supreme Court upheld the verdict, concluding that Sisolak had a valid property interest in the airspace above his land and that the county ordinances authorized the

(Continued on Page 25)
The disappearance of Amelia Earhart is one of the longest running mysteries in the history of aviation. She vanished on the next-to-last leg of her 1937 global flight, a 2,556 mile trip from New Guinea to Howland Island. Relying on celestial navigation under an overcast sky, it is not surprising that she failed to find her destination before fuel ran out. Keep in mind that Howland Island was nothing more than a sand bar two miles long and three-quarters of a mile wide, with a maximum elevation of 35 feet.

Most historians agree she ran out of fuel, but her ultimate fate has been a topic of discussion for generations. One theory is that she ditched the aircraft, and it remains in deep water. A second theory is a ditching close enough to land for Amelia to have survived. The ending of this theory usually has Amelia dying in captivity, although an alternate version features her secret return to the United States and spending the rest of her days as a housewife in New Jersey.

Generations have searched for Amelia, and another expedition to the South Pacific is getting under way as of this writing. The label of being on the top on everyone’s missing persons list unfortunately overshadows what Amelia Earhart accomplished. She was an explorer, adventurer and an important champion for women’s rights. To understand Amelia, it helps to explore where she came from.

I never planned to search for Amelia, but here is how I happened to find her. In planning our aerial cross country from our home in Florida to the LPBA 2004 summer meeting in Sun River, Oregon we calculated that we would spend the night of July 4th somewhere in the middle of the United States. My wife Bridget learned of a major July 4th celebration taking place in Atchison, Kansas.

Consulting an airport directory, I found that Atchison had an airport (K59) named “Amelia Earhart Field.” Atchison was Amelia’s hometown.

The 2004 Fourth of July celebration in Atchison had nothing to do with Amelia Earhart. 2004 was the bicentennial of the Lewis & Clark expedition, and major celebrations were planned to coincide with their trek from St. Louis to the Pacific. Lewis & Clark celebrated Independence Day 1804 on the banks of the Missouri River in Atchison, Kansas, and a major commemoration was planned.

Our July 4, 2004 flying adventure begins in Atlanta, Georgia. My family and I take part in the Peachtree 10K race every year, a challenging run down Peachtree Street in 90+ degree weather. We then boarded our airplane and headed for St. Louis. The controllers at Lambert Field gave us an up close look at the Gateway Arch enroute to landing, our first clue that we were joining the Lewis & Clark trail westbound. A quick refueling, and we headed west to Atchison, Kansas. Lewis & Clark needed 52 days to cover the distance, the miracle of aviation allowed us to make it in 2 hours.

Amelia Earhart field is a narrow 3,000 foot asphalt runway in the middle of a large corn field looking out on the rolling Midwest plains. Touching down on Runway 16, it was clear we had arrived in the heart of America. This is what a small town airport in the late 1930’s looked like; this was a journey back in time.

A short cab ride and we were in the middle of the Fourth of July celebration. The banks of the Missouri River were crowded with thousands celebrating the Lewis & Clark bicentennial. The Atchison, Kansas downtown historic district appears much as it did when its most famous daughter was born in 1897. The
celebration that day was to honor a pair of explorers who stopped by Atchison 93 years before the birth of Amelia Earhart.

As night fell, we headed up the bluff overlooking the Missouri River. We found ourselves on North Terrace Street, and looked for a good vantage point to watch the fireworks display. Finding a spot, we sat down in the front yard of a large Victorian home. Only then did I realize I was in Amelia Earhart’s front yard! I recognized it from photographs I had seen, and it was pure magic being there as the Fourth of July fireworks began exploding overhead.

The home at 223 North Terrace Street in Atchison was built in the 1860’s by Amelia Earhart’s maternal grandfather. It sits on a 300-foot high bluff, overlooking the Missouri River. Amelia was born in the home on July 24, 1897, and spent much of her childhood there. Amelia and her younger sister Muriel played on the surrounding streets, and her spirit of adventure took hold in this community. As a child she must have heard tales of Lewis & Clark passing through Atchison on their great adventure.

Amelia’s birthplace was acquired by the Ninety-Nines in 1984, and has been restored to its condition at the time of Amelia’s birth. It is open to the public, and houses a museum and gift shop.

Departing Atchison the next morning, we flew over the Amelia Earhart Earthwork, a one acre portrait of Amelia located on the edge of town.

If you want to search for Amelia, may I suggest you look not in the South Pacific, but in the town of Atchison, Kansas. By walking the streets of her town and neighborhood, you begin to understand what shaped her life. She died just prior to her fortieth birthday, yet seventy years after her disappearance, her legacy looms large over aviation and American culture. The seventieth anniversary of her disappearance will be as well publicized as any current aviation event.

I know I will never forget the experience of, after a long day of cross country flying, watching Fourth of July fireworks from Amelia Earhart’s front yard.

Taking Care of Business

The tail of Elvis Presley’s Convair 880.
The story of the Tuskegee Airmen, African-American aviation heroes of World War II, is well-known and worthy of recognition by the modern U.S. military. To that end, the Air Force hosted a special reception honoring the Tuskegee Airmen at the Handelman Sky Ranch, a private airport in Michigan, on July 24, 2003. The reception was the kick-off event of an air show at the Selfridge Air National Guard Base, which was to begin the next day with a performance by the Air Force Thunderbirds. The Selfridge Coast Guard Air Station, located 25 miles southeast of Handelman Sky Ranch, used two of its HH-65A Dolphin helicopters to transport Thunderbird personnel to the reception and back. The HH-65A is a twin turbine-engine helicopter with a maximum gross weight of 9,200 pounds and main rotor diameter of 39 feet. Well-suited for search and rescue and law enforcement missions, it is not a quiet aircraft.

At 7:00 p.m., while the reception at Handelman Sky Ranch was underway, Mary Mikalich and her husband Albert arrived at the Rochester Hills Stables (RHS), six miles to the southeast, for Mary Rochester’s riding lesson. Mrs. Mikalich’s lesson began at 8:00 p.m. in one of the riding rings. Twenty people were present, either watching or participating in the riding lessons. Mr. Mikalich watched his wife from a nearby picnic table. The lesson began uneventfully, but ended with a call to 911 to summon an ambulance.

At approximately 8:38 p.m., Lt. Cdr. Baravik, the Coast Guard pilot of the HH-65A designated CG 6506, prepared to depart Handelman Sky Ranch for the Air Station with four Thunderbird personnel on board. Around 8:38 p.m., he took off into the wind (which was from the north), executed a climbing left-hand turn, and then conducted a fly-by over the ranch at an altitude of 150 feet above ground level (AGL). After completing the fly-by, he climbed to a cruising altitude of 1,500 feet above mean sea level (MSL) while proceeding toward the Air Station. RHS was directly beneath his flight path.

At 8:40 p.m., Mr. Mikalich and other witnesses heard a helicopter approaching and then saw it fly overhead, straight and level, northwest to southeast. As this helicopter, which happened to be CG 6506, passed over the stables, Mrs. Mikalich’s horse became spooked and bolted toward a group of horses standing at the other end of the ring. Mrs. Mikalich tried, unsuccessfully, to turn her horse away from the others. But the next moment, the horse gave a kick, bucked up and threw its hind quarters in the air. She fell off of her horse and hit the ground, first on her feet, then on her side, and finally on her head. By this time, the helicopter was gone. Fifteen minutes after Mrs. Mikalich was thrown from her horse, CG 6506 landed at the Air Station.

Plaintiffs Mary and Albert Mikalich determined that the Coast Guard operated the helicopter that spooked her horse and filed a Federal Tort Claims Act (FTCA) lawsuit against the United States. Mary Mikalich sought reimbursement for medical costs incurred as well as non-economic damages. Her husband sought damages for loss of consortium and negligent infliction of emotional distress. The United States denied liability. In December 2006, the parties tried the case in the United States District Court for the Eastern District of Michigan before Judge Marianne O. Battani.

Minimum Safe Altitude

Plaintiffs’ primary argument was that the Coast Guard pilot breached a duty of care established by 14 C.F.R. § 91.119, the Federal Aviation Regulation (FAR) setting forth minimum safe altitudes for cruising flight, by flying low over RHS. This regulation provides:

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.
(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.
(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.
(d) Helicopters. Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section if the operation is conducted without hazard to persons or property on the surface.

In addition, each person operating a helicopter shall comply with any routes or altitudes specifically prescribed for helicopters by the Administrator.

The parties disputed whether the court should evaluate the flight under subsection (b) or (c). Plaintiffs contended that subsection (b) applied,
which establishes a minimum safe altitude of 1,000 feet AGL over “congested areas” of cities, towns or settlements. The court quickly rejected Plaintiffs’ description of RHS as “congested,” in light of evidence that the stables were located on a 10-acre site nestled among trees, with houses on large lots in the surrounding area. Contrary to Plaintiffs’ contention, the presence of a trailer park across the nearest road to the north of RHS did not, in the court’s view, convert the semi-pastoral environs of RHS into a “congested” area.

Having lost the “congested area” argument, Plaintiffs next asserted that the proper minimum safe altitude was nonetheless 1,000 feet AGL because RHS, with a total of 20 riders and spectators on a ten-acre site, constituted an “open air assembly of persons.” The court found this position unpersuasive, reasoning that this regulatory phrase must be construed in light of its placement in a subsection dealing with “congested areas.” The presence of 20 people on a 10-acre site simply could not be equated with a congested area of a city, town or settlement that would justify the highest minimum safe altitude. The court instead accepted the interpretation of the United States’ pilot expert, Smith Kalita, that the phrase “open air assembly of persons” refers to crowds at stadiums, outdoor concerts and the like. Judge Battani further noted that if Plaintiffs’ construction of the regulation were correct, a pilot would violate the regulation by flying below 1,000 feet AGL over a backyard barbeque.

The United States contended that subsection (c), which establishes a minimum safe altitude of 500 feet AGL, applied to the RHS environs. Mr. Kalita, and the three Coast Guard helicopter pilots who also were called as witnesses, testified that this subsection governed because RHS fell into the middle-ground between “sparsely populated” and “congested areas,” which is defined by the regulation as “other than congested areas.” The court agreed, and determined that it would evaluate the overflight based upon whether it was conducted at or above 500 feet AGL.

The court then turned to determining the altitude at which CG 6506 flew over RHS. Plaintiff Albert Mikalich, a student pilot of fixed-wing aircraft and owner of a surveying business, testified that at his deposition that in his opinion, the helicopter flew over RHS at 500 feet AGL. At trial, however, he discredited his prior observation in favor of that of his wife’s riding instructor, who claimed to have the “best seat in the house.” She testified on the stand that the helicopter flew over RHS at 400 feet AGL. Several eyewitnesses at the stables also testified that this particular helicopter flew much lower than the Coast Guard helicopter flights that had passed nearby earlier in the day.

Plaintiffs also relied upon a contemporaneous written statement made by the pilot of the second Coast Guard HH-65A that had been shuttling Thunderbird personnel to the reception. That pilot wrote that he flew each mission at 400 feet AGL using the autopilot’s altitude hold mode.

The United States disputed Plaintiffs’ evidence and provided a solid basis for its contention that CG 6506 flew over RHS at or above 500 feet AGL. The pilot of the incident helicopter, Lt. Cdr. Bavariak, testified that CG 6506 reached its cruising altitude of 1,500 feet MSL less than one mile from Handleman Sky Ranch and within one minute of the fly-by, and remained at that altitude until descent for landing at the Air Station. He further stated that while frequently scanning his flight instruments, he never observed his barometric altimeter reading below 1,500 feet MSL during the cruise portion of the flight. Supporting the pilot’s testimony, the petty officer seated in the back of CG 6506 told the court that the helicopter was at a safe altitude of at least 500 feet AGL during cruising flight. Although not a pilot, he based his testimony on years of experience flying in helicopters. Had the altitude of this flight deviated from the norm, he would have noticed. The court found the pilot and the petty officer to be credible witnesses.

In order to determine the helicopter’s altitude above the ground as it passed over RHS, the court had to consider the elevation of the terrain above mean sea level. As the helicopter flew southeast from Handleman Sky Ranch to the Air Station, the terrain continuously sloped downward. The elevation at Handleman Sky Ranch was 1,162 feet MSL, while the elevation at the Air Station was 579 feet MSL. Thus, a flight at 1,500 feet MSL in the vicinity of Handleman Sky Ranch would only be at 333 feet AGL there, but rise to 921 feet AGL by the time it reached the Air Station. The elevation of RHS is not depicted on aeronautical charts. Fortunately, during the discovery phase of the litigation, Plaintiffs conducted a survey of RHS and determined its elevation to be 953 feet MSL. Thus, if the helicopter overflew RHS at 1,500 feet MSL, this would equate to 547 feet AGL, which was in compliance with 14 C.F.R. § 91.119(c).

Helicopter pilot expert Smith Kalita enhanced the Government’s case with technical testimony concerning altimeters and air pressure. He told the court that the type of barometric altimeter in the Coast Guard helicopter has a tolerance of plus or minus 20 feet, which meant that if it read 1,500 feet MSL as the aircraft overflew RHS, the helicopter would have been between 1,480 - 1,520 feet MSL or 527 - 567 feet AGL. He also noted that atmospheric pressure had actually increased in the few hours between the time when the pilot last adjusted his barometric altimeter and the time of the incident. As a result, the barometric altimeter read lower than the helicopter’s actual MSL altitude. In other words, the altitude of overflight was higher than that actually shown on the instrument.

Plaintiffs could not overcome the Government’s presentation. Judge Battani was not persuaded by the testimony of Mrs. Mikalich’s riding instructor, as she observed the helicopter only for a few seconds while it was approaching and did not look up at it again. Her attention was focused on her students. The eyewitness testimony of other persons at the stables supporting Plaintiffs’ case did not convince the court either. The court determined that because the earlier flights were further away from RHS laterally than the incident helicopter, those helicopters appeared higher. Finally, the trial testimony of the other Coast Guard pilot demonstrated that his written claim that he flew each leg at 400 feet AGL using the autopilot’s altitude hold mode simply was not possible. He admitted that the alti-
tude hold function is tied to the barometric altimeter, which only measures altitude above mean sea level. When a flight is conducted over sloping terrain at a constant MSL altitude, its altitude AGL will be constantly changing. The court noted that had he set his altitude hold function to maintain 400 feet MSL, which was the only reasonable interpretation of his written statement, he would have crashed into rising terrain while flying northwest from the Air Station toward Handleman Sky Ranch.

Based on all of the evidence, the court found that CG 6506 overflew RHS above 500 feet AGL, which placed it in compliance with FAR 91.119(c), the minimum safe altitude for “other than congested areas.” Accordingly, the court did not need to consider whether the flight complied with subsection (d), which allows helicopters to fly at even lower altitudes “if the operation is conducted without hazard to persons or property on the surface.”

**Application of the Coast Guard Air Operations Manual**

After losing the argument that the Coast Guard violated the federal minimum safe altitude regulation, Plaintiffs contended that the United States nonetheless should be held liable because the pilot breached the following provision of the Coast Guard Air Operations Manual:

**Flights of Coast Guard Aircraft shall cause a minimum of annoyance to persons and activities on the ground. It is not sufficient that the pilot is satisfied that no person is actually endangered. The pilot must exercise enough caution to be assured that no person on the ground could reasonably believe that they or their property is endangered.**

The court did not accept Plaintiffs’ fallback position for a number of reasons. First, Plaintiffs cited no authority for their proposition that this internal agency manual constituted a federal regulation. Second, the cited provision of the manual was not even applicable to the flight. The uncontroverted testimony of the Coast Guard pilot and the United States’ helicopter pilot expert was that this provision applies to Coast Guard pilots only when they are operating below the minimum safe altitudes established by the FARs. When flying at or above the mandated minimum altitude, as CG 6506 was, this provision is not triggered.

Third, the court determined that the manual provision could not establish liability because the FTCA provides that the United States “shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances. 28 U.S.C. § 2674. Private helicopter pilots are not required to follow a military manual, and therefore this provision could not establish the standard of care of the Government’s pilots in a tort suit.

Finally, unlike the federal minimum safe altitude regulation, which actually sets forth discernable standards of care, such as 500 feet AGL, the Coast Guard manual provision has no discernable standard. Plaintiffs contended that this provision contained an implicit standard that is violated whenever persons or property on the ground are injured by a Coast Guard helicopter. The court swiftly rejected this argument, reasoning that if Plaintiffs were correct, the provision would subject the United States to strict liability rather than liability in negligence. This would not be an acceptable result because the Supreme Court has held that the Government cannot be held strictly liable for torts under the FTCA. Laird v. Nelms, 406 U.S. 797, 797-99 (1972) (Air Force not liable for property damage from sonic booms caused by military overflights because the FTCA “precludes the imposition of liability if there has been no negligence or other form of misfeasance or nonfeasance”). The court also noted that under Michigan’s Equine Liability Act, a person cannot be held strictly liable for the injury of anyone riding a horse, when the injury stems from an “inherent risk of equine activity,” such as a horse’s unpredictable and unfavorable reaction to noise. See Mich. Stat. Ann. §§ 691.1661-667 (Michie 2000). As a result of Plaintiffs’ inability to prove an actual breach of duty, the claims of both Mr. and Mrs. Mikalich failed.

**Last Words**

As illustrated by Mikalich v. United States, No. 05-72276 (E.D. Mich., April 5, 2007), Congress has not provided a remedy for every governmental activity that leads to an injury. Recovery is only available under the FTCA for negligence, requiring proof that a breach of duty applicable to a private person performing the same activity proximately caused an injury. Although it is beyond doubt that the overflying HH-65A actually frightened Mrs. Mikalich’s horse, causing it to throw her out of her saddle and onto the ground, the Government won the case because the pilot nonetheless overflew RHS at an altitude of at least 500 feet AGL, as required by the applicable regulation. Like aviation, horseback riding, it seems, is not an activity free of inherent risk to its participants.
Motivation for the Trip

The Sun ‘n Fun Fly-In and Air Show is one of the premier aviation events in America attracting exotic, classic, warbird, and active duty military aircraft from the eastern United States and Canada. The expansive airfield at Lakeland, Florida is a great location to showcase premier aircraft and the pilots who fly them. I had flown to Sun ‘n Fun a few years ago. However, in recent years, the demands of my law practice took priority over a visit to this fascinating air show. Friends and family members encouraged me to take a break this year and pay a visit to Lakeland.

In between preparing for an upcoming mediation and taking calls at the office, I jumped on the Internet and downloaded the Sun ‘n Fun NOTAM, including arrival and departure procedures — a mere 36 pages. It took me about one hour to digest the material. Then, I had to work up a flight plan, get an IFR arrival reservation, get a briefing and file my flight plan. I got a reservation for an arrival at 12:00 noon on April 20, and reasoned that with the potential for a delay of up to thirty minutes, if I departed at 9:00 a.m., the two and a half hour flight would put me in my arrival window. A call to “Missy” at Columbia Air Center revealed that a hotel room could be obtained at the Imperial Swan Hotel. So, the stage was set for my trek to Sun ‘n Fun.

Awakening at 6:00 a.m., I grabbed a bowl of cereal, called Flight Service for an updated weather briefing and got a few clothes together. There were IFR conditions in southwest Georgia and Northern Florida that were supposed to burn off by noon. With a short drive to the airport and a brief preflight, I was airborne shortly after 9:00 a.m. Flying over a solid undercast until reaching Crystal River, the flight was uneventful. The ATC personnel did a good job of marshalling the traffic on the arrival. Turning final, I was perhaps one-half mile behind a highwinged Cessna in front of me. We essentially “air taxied” half the length of Runway 27 Right, touching down about 4,000 feet down the 8,000 feet “runway.” In ordinary times, Runway 27 Right is a taxiway. After landing and clearing the active, the taxi to parking was a virtual odyssey as I was first directed to parking for camping and later for tie down in the grass adjacent to taxiway Echo on the southeast side of the airport.

After shutdown, I was promptly met by Chris of Columbia Air Center who serviced the Bonanza with 34 gallons of fuel. Chris helped me screw the spiral stakes into the ground to secure my tie down ropes and helped me place the canopy cover on the Bonanza. Before I knew it, the shuttle car had arrived and I was on my way to Columbia Air Service to get a rental car. My good friend, Chris Rounds, had a wrist band waiting for me that would give me access to the flightline and exhibits.

The Flightline and Exhibits

A drive around the perimeter of the airfield led me to a gravel parking area about a half mile from an entrance gate. If you don't like walking, you won't like Sun ‘n Fun, since the flightline and exhibits occupy many acres. In fairness, people were being shuttled about in trams that were pulled by John Deere tractors. People who did not care to walk could be seen shuttling about the flightline and exhibits aboard electric scooters that were apparently available for rental.

The Aircraft

After paying a visit to the Flight Service Station on the field and filing my departure flight plan, I wandered outside to see simulated bombing runs and pyrotechnics, not unlike the kind of flying I do in the replica Nakajima Kata bomber. As the bombing attacks were underway, formations of North American AT-6/SNT Texans flew overhead. In time, the Second World War era P-51 Mustangs, Spitfires and similar aircraft gave way to an O-2 Skymaster and a T-28 Trojan as representatives to the Vietnam War. They, in turn, were followed by jet aircraft such as the red T-33 flown by Chris Rounds.

As I wandered about the flightline, a Curtiss P-40 Warhawk caught my eye. It was painted in a camouflage pattern reminiscent of the American Volunteer Group and had the Walt
Disney leaping tiger or Flying Tiger emblem behind and below the cockpit. It, of course, featured the tiger shark teeth and eyes on the nose. However, rather than displaying the Chinese Air Force twelve pointed star in a blue disk, it bore American insignia. It could be theorized to depict an AVG/Flying Tiger P-40 taken over the China Air Task Force in the summer of 1942 when the AVG was officially disbanded. In time, the P-40 would fly in the air show with an active duty Air Force A-10 Thunderbolt (a/k/a “Warthog”) as part of the United States Air Force “Heritage Flight.”

There were acres and acres of warbirds, classic jets, military aircraft and antique - classic airplanes. A particularly attractive Lockheed Model 10 Electra like the one flown by Amelia Earhart on her attempted around-the-world flight caught my eye. The unpainted aluminum skin was so highly polished, it looked like a mirror.

For years I have corresponded with Corky Fornoff. I got to meet Corky who is the demonstration pilot for the LoPresti Fury, a high performance, low wing monoplane developed from the Globe Swift. I also met Curt LoPresti, the CEO of the LoPresti Fury. Curt is an aeronautical engineer, and his father, Roy LoPresti, was a very accomplished aircraft designer at Grumman, Beechcraft, Mooney and Piper.

Interesting People

In time, I got to say hello to Chris Rounds and spend time with his parents and friends at his motor home. Among his friends was Carols Gann, a superb aircraft engine builder in Lafayette, Georgia. Gann flies a Bonanza powered by a powerful Lycoming engine that reportedly has a true airspeed at altitude of 200 knots. This performance comes at a cost, since it burns about 24 gallons per hour while a stock Bonanza with a Continental IO-520 burns about 14 gallons per hour at about 160 knots.

Lynne Birmingham is a good friend who represents the interests of Tecnam Aircraft, an aircraft of Italian design. I spent some time with her to learn about her plans for growing her company. It was then time to drop by the gift shop and purchase some items to take home to my wife and daughter.

The Trip Home

After having breakfast Saturday morning, I drove to Columbia Aviation to return my rental car. Standing in front of me was Martha King who, together with her husband, Steve, is a remarkable aviation educator and entrepreneur. She declared she was departing in her jet aircraft, perhaps for her home in California.

The courtesy van dropped me off near my Bonanza which was sitting in a grassy field that was nearly empty when I arrived. After a pre-flight and engine start, the departure information declared IFR aircraft should depart VFR and remain clear of the Tampa Class B Airspace. I altered my GPS flight plan to fly northwest on Victor 157 to the HYZER Intersection, since I planned to climb to 6,500 feet. If I had proceeded on my original course, a 6500 foot altitude would have put me inside Tampa’s Class B Airspace.

I followed the conga line to the departure intersection and was eventually directed to the departure intersection of Runway 9 Right with a Cessna lined up on my right wing. The flagman gave the Cessna a signal to depart and seconds later I received the same signal. As I climbed out on
where my daughter attends Oxford College of Emory University and then flew near Stone Mountain. The descent and landing at PDK was uneventful and I was glad to have been afforded the opportunity to visit one of the world’s premier aviation events.

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AIRLINE COULD BE SUED FOR RACIAL DISCRIMINATION WHERE PASSENGER WAS REQUESTED TO PURCHASE A SECOND TICKET

The plaintiff was an African American and was also overweight. She bought a Southwest Airlines ticket and was allowed to board the aircraft. Once in her seat, she was approached by a Southwest employee who requested that she purchase a second ticket. The employee, allegedly, did not explain to the passenger that the request was due to a Southwest policy requiring that customer of size (i.e., who cannot put their armrest fully down) buy a second ticket.

The passenger declined to purchase a second ticket and left the aircraft. She then sued Southwest Airlines under 42 U.S.C. §1981, and the airline brought a motion for summary judgment. The trial court determined that (1) the plaintiff was the member of a protected class, (2) to attempt to make or enforce a contract for services the defendant ordinarily provided, and (3) was denied the benefits of the contract when similarly situated persons outside the protected class were not, or that the passengers received services in a “markedly hostile manner.”

The trial court found that the passenger had a standard of a prima facie case of discrimination in that she is a member of a protected class who attempted to enforce a contractual relationship and the benefits were denied her. Although the pleadings did not specifically allege that similarly situated persons outside the class were treated differently, the trial court found that there was a sufficient number of disturbing factors suggesting hostility directed toward the passenger in the encounter. Also, it appeared that the passenger was not so large that the armrest could be placed in the fully down position. The trial court reasoned that the plaintiff had met her burden and the allegations contained in her pleadings and denied the motion for summary judgment.


Submitted by Alan Armstrong.
THE ENFORCEMENT DOCKET

Gary Halbert

Many of us have had the pleasure of meeting the NTSB’s General Counsel, Gary Halbert, who joined the Board in 2005 as the next step in a career which has included distinguished accomplishments as both military aviator and lawyer. In his first article here, GC Halbert reviews the basics of the Board, its functions and those of its General Counsel, and includes some practice tips to keep in mind. I know you join Your Editor in welcoming Gary to the pages of the Journal.

This year marks the fortieth anniversary of the National Transportation Safety Board (NTSB), and constitutes my second year as the Safety Board’s General Counsel. After more than a year with the organization, I can attest to the pleasure I have being a member of this wonderful NTSB staff. The people of the NTSB take great pride in fulfilling their duties, as they work tirelessly to prevent deaths and injuries by making United States transportation systems safer for all.

The National Transportation Safety Board: Dedicated to Excellence

As most of you know, the NTSB opened its doors on April 1, 1967. Although Congress deemed the NTSB independent when it created the NTSB, the agency relied on the U.S. Department of Transportation (DOT) for funding and administrative support. In 1975, under the Independent Safety Board Act, Congress severed all organizational ties to DOT to ensure an unbiased, completely impartial investigation of accidents, including those in which a regulatory agency within DOT provided oversight of the transportation mode involved in an accident. Today, the NTSB is not part of DOT and is not affiliated with any of its modal organizations. Such independence instills additional confidence in the findings of the NTSB, in the eyes of the public, the transportation industry, and Congress.

Since its inception in 1967, the NTSB has investigated approximately 130,000 aviation accidents and over 11,000 surface transportation accidents. In so doing, it has become one of the world’s premier accident investigation agencies. On call 24 hours a day, 365 days a year, NTSB investigators travel throughout the country and the far reaches of the globe to investigate significant accidents and develop factual records to support the recommendations it makes for safety improvements to the transportation system. Industry operators, regulatory agencies, and other entities such as States, municipalities, and manufacturers have adopted over 82 percent of NTSB safety recommendations. Many safety features currently incorporated into airplanes, automobiles, trains, pipelines and marine vessels had their genesis in an NTSB recommendation.

The Safety Board’s Office of General Counsel

I am delighted to address the Lawyer Pilots Bar Association for the first time since joining the NTSB. As General Counsel of the agency, I oversee the office that is responsible for aiding investigators in obtaining the information they need to complete their investigations, providing advice regarding information that the NTSB supplies to the public, assisting Board Members regarding cases in which the Federal Aviation Administration (FAA) or United States Coast Guard is pursuing certificate or license actions against certificate and license-holders, defending the agency in lawsuits, and a variety of other responsibilities. As you know, my office regularly interacts with many of you, in your capacities as representatives of party participants to investigations, parties to hearings, and others, such as victims of a transportation accident or their surviving family members. Given your representative roles and the responsibilities of my office, I wish to provide you with information that may benefit you in your interactions with the Safety Board.

Obtaining Accident Investigation Information

The Safety Board’s Office of General Counsel handles numerous requests for deposition testimony of NTSB investigators and employees. The NTSB understands your desire to obtain such testimony, as you represent litigants in civil actions related to aircraft accidents. The NTSB, however, cannot routinely make NTSB investigators available for such depositions without a strong factual showing of a need for their testimony. As you may know, Congress has directed the NTSB to avoid unnecessarily diverting its resources from the core investigative mission of the agency. If the NTSB liberally granted requests for deposition testimony or informational interviews, such occurrences would divert a large percentage of NTSB employees’ time from their work—the NTSB is a small agency that cannot function in the absence of committed employees with adequate time to fulfill their duties. In addition, allowing NTSB investigators to supply expert opinions or analyses to litigants would impugn investigators’ credibility, independence, and effectiveness. In general, deposition testimony by our investigators is not deemed necessary when the only information about which an attorney will inquire is contained in a factual report, as defined by NTSB regulations; therefore, litigants should be mindful of the requirements of 49 C.F.R. part 835, in requesting the deposition testimony of an NTSB employee, and in participating in depositions.
In addition, counsel in all types of civil litigation actions involving a transportation accident that the NTSB has investigated frequently seek as much information as they can possibly obtain from the NTSB. In this regard, the NTSB opens a “public docket” of information from each investigation, and provides at least one factual report regarding each investigation. Counsel should search for the factual report regarding the accident with which they are concerned in the Safety Board’s Aviation Accident Database, available on the Safety Board’s website at www.ntsb.gov. Counsel should also obtain the public docket of information from the Safety Board’s record-keeping facility, General Microfilm, Inc. (GMI). If the accident investigation from which counsel seeks information is ongoing, then counsel should contact GMI and ask GMI to send them the public docket of information once the NTSB has released the public docket. In addition, the Safety Board’s public website contains other resources that counsel can use to obtain information in a timely manner, such as e-mail subscription services both for press releases on specific modes of transportation, and for safety recommendations. Unfortunately, attorneys involved in cases regarding a particular investigation often submit broad Freedom of Information Act (FOIA) requests for such information. As the Safety Board’s public web page regarding the NTSB FOIA program explains, submitting such requests are rarely helpful in obtaining useful information from a particular investigation.

In conclusion, the Safety Board’s Office of General Counsel encourages all litigants and attorneys who seek information regarding a specific investigation, either through requests for deposition testimony or requests for records, to familiarize themselves with the Safety Board’s regulatory provisions regarding such requests, and remain mindful of the various options for obtaining information from a specific investigation.

Pursuing Appeals of Regulatory Enforcement Actions

In addition, as you know, the NTSB issues decisions on the first two levels of appeal for certificate- and license-holders in challenging revocation and suspension actions that the FAA and Coast Guard bring against airmen, mechanics, operators, and mariners. In particular, the Safety Board’s Administrative Law Judges provide initial decisions on these cases, and the Office of General Counsel becomes involved when a party appeals a law judge’s decision to the full Board. In this capacity, my office serves as the equivalent of law clerks to an appellate court.

The NTSB observes specific rules of practice regarding all regulatory enforcement cases, located at 49 C.F.R. parts 821, 825, and 826. Parties’ failure to observe many of those rules, particularly regarding filing deadlines, can result in dismissal of an appeal. It is therefore incumbent upon practitioners to understand these rules, and the methods by which the Board computes due dates, in their practice before the Board. Practitioners need to familiarize themselves with the Board’s procedural rules, in the interest of ensuring that a procedural error does not result in the dismissal of an appeal.

And finally, let me offer a few brief comments regarding proof analysis.

Early in my legal career, as I practiced in criminal cases, I learned the importance of proof analysis and proving all elements of an offense in presenting my cases. Since coming to the Board, I have now seen a case or two where counsel before the Board failed to provide sufficient evidence to establish each element of their argument. Therefore, if you are mentoring a beginning practitioner, I encourage you to add this to your list of topics, and remain mindful of the necessity of providing an evidentiary foundation to support your arguments.

Conclusion

I hope that counsel will find the tips provided in this article helpful in representing their clients in cases in which the NTSB has been involved. The Safety Board’s Office of General Counsel understands that each party has an interest in the outcome of their particular case, and is committed to evaluating every request for information and each case in an even-handed, unbiased manner, while remaining compliant with the Safety Board’s regulatory provisions.
After the Fall: Regaining the Left Seat

All pilots know that the best way to get out of trouble is not to get into it in the first place. However, practitioners who get well off the moral localizer may be given a mandatory vacation from duty by their licensing authority.

But both pilots and practitioners may arrive at the point where they’ve done their time, criminally or administratively, and seek readmission to the cockpit. Like Marley’s ghost, those with a past may find that the chains formed by their misdeeds clatter behind them and, in these cases, may get caught on the frame of the cockpit door.

Florida Board of Bar Examiners Re: Fred C. McMahan, No. SC06-795 (Nov. 22, 2006)

A Florida attorney, McMahan, was admitted to the Florida Bar in 1991 and in 1997 petitioned for disciplinary resignation after he pled guilty to two felony conspiracy counts of money laundering and obstruction of justice. He was sentenced to 24 months’ imprisonment, later reduced to 17 months, and a period of supervised release. After working for several years as a paralegal he reapplied for admission to the Florida Bar in 2002.

The Florida Bar conducted a background investigation as a result, published Specifications concerning its findings — all of which were disqualifying and all of which McMahan admitted — and held a hearing. At the hearing, McMahan presented the testimony of three witnesses concerning his rehabilitation, and the Board of Bar Examiners concluded that he had demonstrated by clear and convincing evidence that he was rehabilitated. The Board recommended his reinstatement.

Upon review, the Florida Supreme Court took a decidedly frostier view of the matter, stating it “strongly disagree(d)” with the Board’s recommendation. First, it noted that McMahan’s “extremely serious illegal conduct” extended over a “lengthy period of time.” It was undisputed on the administrative record that he had willingly assisted his brother, who directed a vast multi-state drug cultivation and distribution network, in a wide variety of ways from the 1980’s into the 1990’s, when he was finally indicted. “In short,” the Court observed, “McMahan was an illegal drug dealer.” McMahan cultivated and harvested marijuana on a Kentucky farm; purchased another farm in his own name with his brother’s drug proceeds; accepted support money from his brother while he was attending law school; and assisted others in asserting fraudulent claims of ownership in properties forfeited to the government. Furthermore, McMahan continued (and concealed) these activities when applying for and while attending law school. He stayed in the family business after becoming a lawyer and even while working in the criminal justice system as a public defender.

The Court noted its own pronouncements in previous cases to the effect that attorneys with drug-trafficking infractions have committed acts with serious and debilitating social and criminal consequences which consume extraordinary legal and judicial resources. Citing Florida Bar v. Hecker, 475 So.2d 1240, 1243 (Fla. 1985), the Court stated it “cannot emphasize enough that Bar members or applicants who participate in such activities will and must be accountable and dealt with severely.” Additionally, the Court noted that the conspiracy counts to which McMahan had pled were rooted in “intentional and dishonest acts that undermine our system of justice.” No qualification for membership in the Bar is more important than “truthfulness and candor,” the Court emphasized (Slip Op. at 7).

In light of this, the Court exercised its right to conduct its own independent review of the record developed at the proceedings below to determine the underpinnings of the Board’s recommendation. Given the seriousness of the undisputed activities in which he had engaged over so long a period, the Court was looking for what it termed “an extraordinary showing of evidence of rehabilitation” (Slip Op. at 7).

Three witnesses had testified on McMahan’s behalf. One was an attorney in the state prosecutor’s office who had worked on the other side of cases against McMahan for eight to ten months in the early 1990’s. He testified he found him to be a “dedicated” lawyer who had probably been misled into criminality by an overbearing family and who now...
recognized the need to accept responsibility for his actions. The Court found little concrete evidence in this testimony of the extraordinary rehabilitation it required.

Next was the testimony of a lawyer who gave general testimony about the quality of McMahan’s legal work and stated that he “is trying to move on with his life,” more focused and dedicated than he was before his legal forced landing. The lawyer found McMahan to be “honest and trustworthy” and forthright about his previous mistakes. But, the Court observed, there was no specific evidence of McMahan’s rehabilitation.

Another attorney who had known McMahan for 11 years testified that McMahan had worked for him as a paralegal for the past two years; he found McMahan to be an excellent paralegal who followed the rules and who he would hire as an attorney upon his reinstatement to the Bar. He noted that McMahan had taken a number of professional courses, volunteered time with the Teen Court and taught reading skills to the underprivileged.

McMahan himself testified that he had devoted over 700 hours of volunteer time to the Teen Court, the Volusia County Literacy Society, and donating blood. Also, he noted that he had worked two jobs for several years to meet his financial obligations.

While finding these activities commendable, the Supreme Court found that:

Most of the evidence McMahan submitted as proof of rehabilitation relates to activities that are expected generally from any typically responsible citizen. For example, countless people maintain their financial affairs by holding more than one job. To suggest that this status is important and constitutes rehabilitation is misdirected. Numerous responsible citizens donate blood. People are expected to conduct themselves in an honest and trustworthy manner and to accept responsibility for their past misdeeds.

Further, it is not a sign of rehabilitation that McMahan complied with the requirements of the Rules Regulating the Florida Bar regarding disbarred attorneys who work as paralegals. He had no choice and would have been in further violation had he not complied with the rules.

Slip op. At 7 - 8.

The Court was also unimpressed with McMahan’s voluntary activities, noting that when his 700 hours were divided out over the term of his disbarment, “he has volunteered less than two hours per week . . . again far less than a convincing demonstration” Furthermore, “compared to his lengthy criminal activities involving the distribution of illegal drugs, he falls far short of showing that he has been rehabilitated” (Slip Op.at 8 - 9).

The Court thus found that McMahan had failed to demonstrate rehabilitation with evidence sufficient to overcome the lengthy period of his serious criminality. The Court disapproved the Board’s recommendation of reinstatement and stated that he could reapply for admission two years hence.

If this airman found the certifying agency to be in an unaccommodating mood, another had a different experience with his. While the circumstances were clearly different, so was the applicant – a former state governor and U.S. Congressman.

In the Matter of the Discipline of William J. Janklow, No. 2374, 2006 SD 3 (Jan. 3, 2006)

William J. Janklow, former Attorney General and Governor of South Dakota and then its Congressman, barreled through a rural stop sign at high speed in his Cadillac and killed a motorcyclist unfortunate enough to be in his path. This was the most egregious of a long string of motor vehicle violations committed by Janklow which were introduced at his trial, where he was convicted of second-degree manslaughter and sentenced to jail time. See 693 NW2d 685 (SD 2005). Following its own investigation and hearing, the Disciplinary Board recommended that Janklow be suspended from the practice of law for a total of 26 months, commencing in December 2003 and ending with reinstatement in February 2006, subject to various conditions including exemplary vehicular behavior.

The Supreme Court of South Dakota considered the matter and noted that while many states have made a felony conviction grounds for an automatic disbarment, South Dakota has not (citing Discipline of Ortner, 699 NW2d 865, 877 (SD 2005) and cases cited therein). Key to the determination of an appropriate sanction in the state were two factors: 1) the protection of the public from further fraudulent, unethical or incompetent activities involving this attorney; and 2) the preservation of the image and integrity of the attorneys, the bar association and the legal profession as a whole” (citing Discipline of Simpson, 467 NW2d 921, 921-22 (SD 1991)).

Concerning the first element, the Court noted Janklow’s crime was one of recklessness, a lower level of culpability than intentional acts, and did not involve moral turpitude or the dishonesty, fraud or deceit associated with harm to the general public. Nor was Janklow impaired by drugs or alcohol at the time of the offense. Further, the Court observed, Janklow’s felony conviction is unrelated to the practice of law. While there are public concerns regarding Janklow’s driving, there was no evidence presented to suggest that the public needs protection from Janklow’s conduct as an attorney. . . There is no evidence to suggest that he would be a threat to his clients or to the public if allowed to return to the practice of law.


Turning to the second element regarding upholding the preservation of the image and integrity of the attorneys, the Court acknowledged that Janklow’s action had resulted in the death of an innocent person and had

(Continued on Page 38)
WHEN AN EMPLOYEE’S OFF-DUTY CONDUCT IMPACTS THE WORKPLACE . . .

Kenneth D. Stein, Elana Gilaad, and Yoon Kim

YOUR EMPLOYEE HAS JUST POSTED DEROGATORY COMMENTS ABOUT WORKING AT YOUR COMPANY ON HER PERSONAL WEBSITE. WHAT CAN YOU DO? WHAT LIMITATIONS EXIST TO DISCIPLINE EMPLOYEES FOR OFF-DUTY CONDUCT?

What is a “blog?”
A blog, or weblog, is a regularly updated journal published on the Internet which provides the writer with a forum to express and share thoughts or comments on any number of issues. There are presently 79.2 million blogs on the web. Many blogs are interactive, and invite visitors to post responsive comments, or link to related websites, blogs or photographs. Blogs allow the author to publish virtually anything, e.g., politics, gripes, gossip, trivia, etc., and many bloggers choose to remain anonymous, and adopt a blog name.

Blogging by employees is on the rise. Blog content often contains work-related issues such as compensation, annoying co-workers and demanding bosses. Due to the interactive and often anonymous nature of a blog, bloggers will express unsavory opinions, and post entries embarrassing to the employer or to co-workers, and sometimes publicize confidential information which may expose the employer to legal liability. In fact, while many work-related blogs are authored anonymously, often the blogger will intentionally name his or her employer, or reveal enough information that a savvy co-worker or human resources department or even the general public can discern the blogger’s true identity or the identity of the employer.

Although bloggers often write on non-work time using their own computers, some employers are nevertheless taking disciplinary action for undesirable blog content that embarrasses, disparages, and exposes them. An employer’s ability to reach into its employees’ private lives and take action as a result of their off-duty conduct may present new challenges for employers.

Notorious Bloggers
Perhaps the most famous of bloggers terminated by her employer is Heather Armstrong. Armstrong created a blogging website called dooce.com, where she blogged about her personal life, relationships and her employment as a web designer. In February 2002, Armstrong’s employment was terminated because of comments she wrote about her employer and her co-workers. As a result, the word “dooce” has been coined to describe an individual who was terminated by an employer because of blogging.

Similarly, newspaper writer Rachel Mosteller blogged under the pen name “Sarcastic Journalist” to maintain anonymity for herself, her employer and her co-workers. In one blog she wrote:

I really hate my place of employment. Seriously. Okay, first off. They have these stupid little awards that are supposed to boost company morale. So you go and do something “spectacular” (most likely, you’re doing your JOB) and then someone says “Why golly, that was spectacular.” then they sign your name on some paper, they bring you chocolate and some balloons. Okay two people in the newsroom just got it. FOR DOING THEIR JOB.

Even though Mosteller did not identify her employer by name or location, her identity became known by her employer, and she was terminated the day after her posting.

Another well-known example of an employee who faced consequences
for postings on a personal blog is Michael Hanscom. Hanscom worked as a Xerox temporary employee and was assigned to the Microsoft headquarters offices. Hanscom posted a photograph on his personal blog of a shipment of Apple computers (a software rival) being delivered to Microsoft, which Microsoft found offensive, and as a result, Hanscom was reassigned from his post at Microsoft.8

**Why Do Companies Regulate Off-Duty Conduct?**

Companies have an interest in regulating the off-duty conduct of their employees because the effects of off-duty conduct may sometimes spill into the workplace. For example, employees may post information on their blog which can purposefully or inadvertently expose the company to liability by disclosing confidential and proprietary information or trade secrets; defaming the company or fellow employees; violating the company’s anti-harassment or other employment policies by making inappropriate comments about co-workers, or generally portraying the company’s image in a negative public light. Particularly where blog authorship is anonymous, a blogger may be inclined to post messages with a false sense of security that there will be no consequences for the posting. For example, one caller sought advice from Washington Post columnist Amy Joyce with this problem:9

Although my very large company has a policy that says employees must get approval from a supervisor if they’re going to maintain a blog, one of my co-workers spends a good portion of the day working on his anonymous blog that the bosses don’t know about. No big deal in and of itself, but the blog, which he has sent me the link to, is horribly offensive, sexist, and homophobic on a daily basis, and it makes me uncomfortable. I don’t want to rat him out, but I’ve mentioned to him before that I find the blog offensive and he has blown me off. I don’t really feel comfortable working around him knowing this is the stuff he writes, and neither do a couple of other coworkers. Anything we can do, or should we just get over it?

Here, the blogger’s statements are akin to those of the harasser who makes inappropriate comments in the workplace, and courts have begun to recognize that the workplace may extend beyond the physical work area, and into cyberspace.10 The company would have an obligation to discipline the employee who creates a hostile work environment via the Internet in the same manner as it would discipline an employee who harasses in the conventional workplace.

Companies, however, are not limiting disciplinary action to such situations that are a clear violation of company policy. In fact, companies are taking action against employees who maintain blogs with content that their employers deem to be either embarrassing or inappropriate. The “Sarcastic Journalist” allegedly was terminated after she griped about petty office rituals, even though her employer was never named in the postings. Similarly, Microsoft allegedly requested the reassignment of Michael Hanscom after photographs appeared on Hanscom’s blog which may have reflected the company in a negative light. Perhaps companies fear unsanctioned information about them being published on the web. Or perhaps companies believe that taking a tough line against even innocuous postings will discourage more troublesome postings. Whatever the motivation, the current state of the law recognizes the employer’s ability to take disciplinary action for employee blog content.

Some employers have opted to take a different approach concerning employee blogging, and have developed policies to encourage employee blogging on the company’s own website. For example, Sun Microsystems has a web-page dedicated solely to employee-authored blogs, and developed a comprehensive policy to monitor blog content and format.11 Even Sun Microystem’s CEO and President, Jonathan Schwartz, is a blogger on his corporate website, and has expressed his view that corporate blogging provides a “competitive advantage.”12 Google Inc., Yahoo, and Microsoft have also established employee blogging policies. Clearly, where blogs are employer-hosted, and governed by specific policies, it is much easier for a company to monitor blog content, and take disciplinary action against an employee who engages in practices that are in violation of the blogging policy.

**Protection for Employees**

**Common Law Claims**

As “dooced” blogger Armstrong cautions “BE YE NOT SO STUPID” and to “Never write about work on the Internet unless your boss knows and sanctions the fact that YOU ARE WRITING ABOUT WORK ON THE INTERNET.”13 Employees should heed Armstrong’s advice because the at-will nature of most employment relationships permits employers to “discharge or retain employees at-will for good cause or for no cause, or for even bad cause without thereby being guilty of an unlawful act.”14

Limited exceptions to the at-will doctrine have been carved out, principally, breach of express or implied contract and wrongful discharge in violation of public policy. These exceptions provide some protection for employees discharged for off-duty activities involving the expression of political views, personal relationships, and other non-work related behavior, and may also protect blogging by employees, in some circumstances.

A cause of action for breach of an express or implied contract of employment is based upon written or oral statements, often in an employment agreement or handbook, that arguably promise continued employment, or provide specific and limited reasons for which an employer can terminate employment.15 In these cases, the courts will have to determine whether the nature of the off-duty conduct, such as the content of the blog, provides a basis for the employer to terminate the employment relationship. Additionally, some
employers enact a “Code of Conduct” for employees, which may provide an additional basis for terminating an employee’s employment for off-duty conduct.

A terminated blogger may also be able to assert a claim for wrongful termination where s/he can prove the termination contravened a well-established public policy. “To support a tort claim of wrongful discharge in violation of public policy, the policy in question must be: (1) delineated in either constitutional or statutory provisions; (2) “public” in the sense that it “inures to the benefit of the ‘public’” rather than serving merely the interests of the individual; (3) well established at the time of the discharge; and (4) substantial and fundamental.” In short, such a claim focuses on protecting employees who were discharged for conduct which benefited the public interest, e.g., for refusing to violate law or for whistleblowing. The Pennsylvania Supreme Court in Geary v. U.S. Steel Corp. stated:

It may be granted that there are areas of an employee’s life in which his employer has no legitimate interest. An intrusion into one of these areas by virtue of the employer’s power of discharge might plausibly give rise to a cause of action, particularly where some recognized facet of public policy is threatened. The notion that substantive due process elevates an employer’s privilege of hiring and discharging his employees to an absolute constitutional right has long since been discredited.

A federal district court in Pennsylvania rejected a claim that the plaintiff’s discharge for bringing a non-spouse to a company banquet violated his freedom of association. The plaintiff asserted there was no written policy prohibiting extramarital relationships and “the conduct of many of its top officers and employees fostered an atmosphere of permissiveness, allowing its general agents, officers, life agents, and employees to engage in open extramarital relationships with impunity.”

In rejecting the argument, the court held:

Though freedom of association is an important social right, and one that ordinarily should not dictate employment decisions, this Court finds that the right to ‘associate with’ a non-spouse at an employer’s convention without fear of termination is hardly the kind of threat to ‘some recognized facet of public policy’ that the Pennsylvania Supreme Court envisioned. . .

In Wiegand v. Motiva Enterprises, LLC, a New Jersey federal court also examined the issue of wrongful termination in violation of public policy. Wiegand was terminated for selling neo-Nazi paraphernalia on his website even though “the views expressed on [his] website did not infect the workplace in any way.” The court held that the “mandate of public policy” that is necessary to support a wrongful termination claim had to be “clearly identified and firmly grounded,” and not “vague, controversial, unsettled, [or] otherwise problematic.”

In support of his position, the plaintiff argued:

[An] employee, whether public or private, ‘should not have to be fearful about expressing his personal views in his own home, on his own time. He should not have to worry about losing his job because of his exercise of his first amendment rights in such a private manner that does not affect his employer.’

The Court found that Wiegand’s statements were unprotected commercial hate speech, and were not protected by the United States or New Jersey Constitution. As such, the court held that plaintiff’s wrongful termination claim failed as a matter of law as there was no question that the employer did not violate a “clear mandate of public policy” when they determined that plaintiff’s continued employment, which required constant interaction with the public, could not continue based on his dissemination of racist music. It should also be noted that the Wiegand Court dismissed plaintiff’s claim for breach of contract claim, based upon properly worded policies in the handbook which expressly stated that his employment was at-will, and that he was bound to follow a Code of Conduct.

Although there are presently no reported decisions, it is possible that under certain circumstances, a terminated blogger also may be able assert a claim for wrongful termination in violation of public policy.

Statutory Claims

Although there are no reported decisions with regard to blogging, state and federal anti-retaliation law should be considered by employers before terminating or disciplining an employee as a result of blog content. For example, if an employee uses his or her blog to complain about harassment or discrimination in the workplace, courts may view such conduct as protected activity under Title VII (the federal discrimination law) or a state discrimination law. If the employee is determined to have engaged in protected activity, an employer would violate the discrimination laws if the employee suffered any adverse actions as a result of the blog posting.

Similarly, employees who use their blogs to engage in “whistleblowing” activities may also be protected from adverse employment actions as a result of their blog content. Section 806 of the federal Sarbanes-Oxley Act of 2002, which applies to publicly traded companies, protects employees in certain circumstances who report conduct by the employer that the employee reasonably believes constitutes a violation of §§ 1341, 1343, 1344 or 1348, or any rule or regulation of the Securities or Exchange Commission, or any provision of federal law relating to corporate fraud against shareholders. Several states, including New York, New Jersey and Connecticut, have adopted similar whistleblower protection laws for employees of private employers. Although these various state and federal laws have
specific definitions and requirements for triggering a “report” or “complaint” of unlawful or fraudulent activities by an employee, it is possible that courts will recognize that blog postings are sufficient to trigger employee protection under these statutes.

State Legal Activities Laws

Over half of the states have enacted laws prohibiting employers from disciplining or terminating employees because of the employee's off-duty conduct in some respect. Although these laws were originally intended to protect employees from termination because of their off-duty use of lawful products such as tobacco and alcohol, several states have expanded the concept of the “off-duty conduct law” to protect employees who engage in a broad array of lawful activities off the employer’s premises.

For example, the New York legal activities law provides, inter alia, that it shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of:

a. an individual’s political activities outside of working hours, off of the employer’s premises and without use of the employer's equipment or other property, if such activities are legal...;

b. an individual’s legal use of consumable products prior to the beginning or after the conclusion of the employee’s work hours, and off of the employer’s premises and without use of the employer’s equipment or other property;

c. an individual’s legal recreational activities outside work hours, off of the employer’s premises and without use of the employer's equipment or other property; or

d. an individual's membership in a union.

The New York law defines “recreational activities” as “lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material.”

Similarly, other states also protect employees engaged in legal recreational activities or lawful activities, e.g., California (prohibits “demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises”), Colorado (“to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours unless such a restriction relates to a job-related requirement or is necessary to avoid a conflict of interest”), North Dakota (adverse employment actions against employees who “participat[e] in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer”).

Although there are no reported decisions interpreting “recreational activities” or “off duty conduct” to apply to using the Internet or blogging, it is possible that an employee could raise such a claim if terminated or disciplined because of blogging activities.

Unfair Labor Practice Charges

Although the National Labor Relations Act (“NLRA”) principally governs the right of employees to join and assist labor unions, it also protects the right of covered employees, regardless of their union status, to engage in “concerted activities” for “mutual aid or protection.” Employers may not interfere, restrain, or coerce employees — i.e., discipline, terminate or take adverse actions — in the free exercise of rights protected by the NLRA.

Both the National Labor Relations Board, which enforces the NLRA, and courts have found that employees’ talk of matters of common concern, such as wages, of dissatisfaction with the employer constitutes protected concerted activity where it is intended to spur group action (even though it does not actually result in organized action or collective bargaining). However, the lower the correlation between employees’ concerns and the concerted activity, the lower the likelihood that the activity will be considered to be for mutual aid or protection.

An employee’s actions to improve employment conditions is protected even if s/he uses “channels outside the immediate employee-employer relationship.” In fact, the use of the Internet, and e-mail, is becoming a critical tool for union organizers seeking to organize workplaces, and for employees who work on different shifts and locations to communicate about work-related matters. Significantly, electronic communications, such as email messages and website publications, have been recognized under the NLRA as protected forms of communication.

It is reasonable to suppose that certain blogging activities may also find protection under the NLRA because even a lone employee’s actions may constitute “concerted activity” if s/he acts in a representative capacity or with the intent to induce group action. Personal “gripping,” however, is unprotected.
because “at some point an individual employee’s actions may become so remotely related to the activities of fellow employees that it cannot reasonably be said that the employee is engaged in concerted activity.” Moreover, even if the employee’s action does not meet the test of concerted activity, his/her termination still may be an unfair labor practice if it restrains or interferes with concerted activity by others.

What Can Companies Do

According to a survey conducted by the Society for Human Resource Management, 85% of companies have not adopted policies respecting employee blogging. Employers should develop such policies which may:

- prohibit the use of company time and equipment for personal blogging activities;
- prohibit the disclosure of the company’s confidential, proprietary, or trade secret information;
- require employees to seek company clarification about certain information has been publicly disclosed before they discuss it in a posting;
- educate employees about the possible criminal and civil liability for copyright infringement;
- educate employees about their personal liability for defamation;
- encourage employees to be respectful to their coworkers and their privacy;
- extend employment policies such as anti-harassment policies and Codes of Conduct to blogging activities;
- ask employees to include a disclaimer on their blog noting that the opinions expressed are only those of the blog’s author.

In preparing its policies, a company should remember that an overly restrictive policy that prevents or deters employees from discussing workplace terms or conditions or restricts employees from engaging in otherwise lawful off-duty conduct may violate the NLRA or other state laws.

Conclusion

With the Internet becoming more and more a part of our daily lives, there will be a larger segment of the workforce adding to the content of the world wide web through blogs, and employers should consider developing policies that regulate blogging content. Also, prior to taking any adverse employment action against employees for blog content, employers should be mindful of legal claims that employees could raise, such as unlawful retaliation, discrimination, or wrongful termination. Employers should also be aware that many terminated bloggers, such as Heather Armstrong, have become celebrities in their own right, which may cause additional and unwanted publicity for their employer.

ENDNOTES

1 Merriam-Webster’s Online Dictionary: www.m-w.com/dictionary/blog.
2 Technocrati, a blog search engine: www.technocrati.com/about/.
3 This article is principally written for private employees: public employers may have additional limitations on their ability to take action against employees, including the First Amendment and due process considerations.
4 www.dooce.com/about.html.
5 www.blogossary.com/define/dooce/.
10 Blakely v. Cont’l Airlines, 164 N.J. 38 (2000) (A female pilot of Continental Airlines asserted a hostile work environment claim based, in part, on statements made on an electronic bulletin board maintained by the airline. The New Jersey Supreme Court recognized that “although the electronic bulletin board may not have a physical bulletin board, and the oral assurances continued that it could not be discharged without the four-step process.”)
13 www.dooce.com/about.html
14 Payne v. Western & At. R.R. Co., 81 Tenn. 507., 518-19 (1884), overruled on other grounds.
15 Toussaint v. Cross & Blue Shield of Michigan 292 N.W.2d 880, 897 (Mich. 1980) (“An employer who agrees to discharge only for cause need not lower its standard of performance. The employer has promised employment only so long as the employee does the job required by the employment contract”); Small v. Spring Indus., Inc., 357 S.E.2d 452, 454-55 (S.C. 1987) (“It was for the jury to decide whether the handbook, the bulletin, and the oral assurances constituted an employment contract. If the jury found that they did, then it had to decide [the plaintiff’s] actions constituted a serious offense which could result in discharge without the four-step process.”)
16 See e.g., Nees v. Hocks, 536 P2d 512 (Or. 1975) (violation of public policy where employee was discharged for jury service).
17 Hart v. Sony Elec. Broad. & Prof'l Co., 69 F.App'x 889, 890 (9th Cir. 2003) (no public policy against discharging an employee for moonlighting) (citing Stevenson v. Superior Court, 66 Cal. Rptr. 2d 886, 941 P2d 1157 (Cal. 1997)). See also Mont. Code Ann. §§ 39-2-903(7) (2006) (“Public policy” means a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule.”); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72, 417 A.2d 505 (1980) (at-will employee may have claim for wrongful discharge by showing that termination was “contrary to a clear mandate of public policy”); MacDougall v. Weichert, 144 N.J. 380, 391, 677 A.2d 162 (1996) (“Sources of public policy include the United States and New Jersey Constitutions; federal and state laws and administrative rules, regulations and decisions; the common law and specific judicial decisions; and in certain cases, professional codes of ethics.”) (citing Hennessey v. Coastal Eagle Point Oil Co., 129 N.J. 81, 92-93, 609 A.2d 11 (1992)).
28 18 U.S.C. § 1514A.
29 See N.J.S.A. 34:19-1 et seq. (New Jersey’s Conscientious Employee Protection Act); N.Y. Lab. Law § 740 (New York whistleblower protection law); Conn. Gen Stat. § 31-51m (Connecticut whistleblower protection law).
occurred while he flagrantly violated traffic laws. The egregious nature of the offense had caused his resignation from the U.S. House of Representatives and considerable public approbation. Nonetheless, the Court noted that adverse publicity and personal grief or remorse were not factors in the determination of appropriateness. Nor, it noted, were factors such as criminal punishment the true objective of attorney discipline, but rather to protect the public from a reoccurrence of conduct which does not rise to the high standards to be expected from members of the bar.

Applying all of this to the facts of the case and the discipline meted out by other courts in arguably similar cases, the Court found that the proposed 26-month suspension was appropriate under all the circumstances and would terminate without further proceedings when it ran out in February, 2006, so long as Janklow continued to comply with the terms of his probation, especially as they related to his driving.

The opinion drew a dissent which argued Janklow should not be reinstated in the bar until he had satisfactorily completed his three-year criminal probationary period. The dissent agreed with the majority’s analysis of the first element but as to the second, argued that

Janklow’s case is different because he is the most well-known attorney in the State of South Dakota as a result of his service a Attorney General . . . as Governor . . . and as a member of the U.S. House of Representatives from 2004 until his resignation following the events leading to this disciplinary action. Because of his prominence, his arrest and convictions have caused more harm to the public image and view of the integrity of attorneys, the bar association, and the legal profession than similar conduct by a lawyer of lesser renown . . . Janklow’s acknowledged violations of the traffic laws and these convictions, while he was an elected public official, have tarnished the image and integrity of the legal profession as a whole.


These two cases demonstrate that the deleterious effects of flying too close to the buildups can do structural damage which still evidences itself years after the flight. Prudent pilots stay within the FARs and avoid the long-lasting consequences of losing flight privileges.

In sum, then, the same attributes which make for safe piloting — careful planning, knowledge of regulatory requirements, awareness of one’s environment, recognition of developing hazards — are key to avoiding ethical difficulties in the practice of law. Circumnavigating the buildups is not difficult if these are applied to both aviation and litigation.
LPBA Welcomes New Members

This column is a regular feature of the Journal and its purpose is twofold: to introduce our new members and to update our annual membership roster. To the new members listed below and hereafter, we welcome you to our membership and hope for many fruitful years of association.

David H. Abrams
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Mr. Abrams practices aviation, general business and family law. He is an ME instrument rated commercial pilot and owns a C310K.

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Mr. Allen practices business and aviation law. He is rated as a T-38 IP.

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Mr. Avery specializes in litigation and finance and operates a Cessna 182.

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Mr. Conner specializes in tax, estate planning and business law and holds a private pilot SEL.

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Mr. Cozzens holds a private pilot single engine land rated and specializes in judiciary and civil law.

Mary Abigail Edwards
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Mrs. Edwards is the Dean of Students at Charleston School of Law and owns a Cessna 172.

Kenneth C. Gregory
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Mr. Gregory specializes in criminal defense, aviation law and employment law. He is COM MEL and instrument and COM helicopter rated and operates a Cessna 182.

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Mr. Haley is a student at SMU Dedman School of Law.

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Mr. Rose specializes in tax and civil litigation. He holds a commercial MEL and owns a Cessna 3100.

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Mr. Williams holds an ATP and CFI and operates a C-172.
I hereby submit my application for membership in the LAWYER-PILOTS BAR ASSOCIATION and enclose herewith my check in the sum of $99.00* to cover the payment of dues to June 30th next**, which includes a subscription to the LPBA Journal. I do agree to abide by the by-laws and rules of the association.

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