INNERMARKER

NEWSLETTER OF THE STATE BAR OF MICHIGAN'S AVIATION LAW SECTION

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News from the Section Chairperson

By Donald C. Frank, Chairperson

Contents

It is great to be back in the left front seat of the Aviation Law Section for the first time since we started the Section some twenty years ago. The officers and counsel members of our Section have come up with some terrific plans for this year. The Section has already provided seminars at the Great Lakes Aviation Conference in Ypsilanti and a seminar in Mason sponsored by EAA Chapter 55. Plans are being made for one more seminar this year, possibly in conjunction with a special admission for our members at the Kalamazoo Air Zoo.

Dean Greenblatt has been working on creating a Facebook presence for our section at www.facebook.com/pages/AviationLawSectionoftheStateBarofMichigan/195521860547337. (Or, like me, you can just Google Michigan Aviation Law Section Facebook.) If you have any photos or other things of interest to section members, get in touch with Dean about having it posted on our Facebook page! Dean is also working on a possible special excursion for our members to the Udvar-Hazey annex to the National Air and Space Museum at the Washington Dulles International Airport. We hope to unveil plans for that soon.

Besides publishing this *Innermarker* issue, we have publically posted our Section's membership directory, including optional practice descriptions on-line on our Section's part of the State Bar of Michigan website, *michbar.org/aviation/* You can now also find all previous issues of the *Innermarker* archived at our website.

A Section activity that I am personally very excited about is a Section membership gathering at Gerald Padilla's house on Mackinac Island. Gerald Padilla is our Section's Secretary and a former Section Chairperson. If you have been to Gerry's house on Mackinac Island before, you know how enjoyable it is to sit on his deck and enjoy the view of the Straits. His house is an easy walk from the airport or a longer walk or horse-drawn taxi ride from the ferry docks. Our gathering at Gerry's house will be on the afternoon of July 21, 2012. Mark the date on your calendars now, and we will send you more details when we are closer to the date. Bring the family or a friend and make a day of it on the Island highlighted by an optional roundtable discussion on aviation law and a fun social meeting at Gerry Padilla's house! Thank you, Gerry, for agreeing to having us back to your wonderful place on Mackinac Island.

Flight Planning With 61.53

By Charles J. Senger
Emeritus Professor, Thomas M. Cooley Law School

A beautiful Spring day pulls pilot and plane out of the hanger. Due to a weather condition called sunshine (rare but possible in Michigan), the pilot takes the protective step of using a new sunscreen containing aloe.

That picturesque scene gets the aviation fuel flowing in our veins but it should also trigger thoughts of 14 C.F.R. 61.53. In other words, would more complete planning and preparation for the flight have resulted in a different decision if 61.53 had been included in the pilot's thought processes?

First, what's the immediate problem? Since this sunscreen is new to the pilot, there is some chance of an allergic reaction. Avoiding it would be as simple as using the sunscreen a few times before using it in the context of a flight.

Second, how does 61.53 come in? In a nutshell, for flight operations requiring a medical certificate, 61.53 provides that a pilot must consider two tests. The first is whether the pilot has a medical condition that makes the pilot unable to meet the requirements of the required medical certificate. The second is whether a treatment for that condition itself prevents compliance with those same requirements. Those same two tests are helpful even for Sport Pilots who cannot act a PIC if the pilot "knows or has reason to know of any medical condition that would make the person unable to operate the aircraft in a safe manner."

Putting the tests together with the sunscreen allergy reaction would lead to an easy decision and have little effect on future flying. The problem is that it's so easy to overlook 61.53 in such run of the mill circumstances.

61.53 of course can be a problem even when we know it's staring us in the face. Chronic chest pain, for example, obviously forces us to evaluate whether we should fly. The same is true for advanced diabetes, chronic depression, or even serious Adult Attention Deficit syndrome. But that still doesn't mean that 61.53 is going to be easy to handle.

We all know the problem. Grounding for a flight strikes at the heart of our love of flying and maybe even our very livelihood. We all know how strong the urge is. When Chuck Yeager broke two ribs, he went to a veterinarian, and then broke the sound barrier two days later on October 14, 1947. He was in so much pain that he had to use a broom handle to help close the hatch. (I'm surprised that the Russians didn't contest the record because he was assisted by a flying broom stick.)

For the big stuff, we know that we have to work it out with our family physician and AME. Especially for difficult situations, a specialist like Dr. Pinnell is invaluable for helping to navigate the bureaucratic maze of the FAA. If we don't take big medical problems seriously, we know that we can die, and that helps to motivate us even if we procrastinate and try to avoid it.

Easier to overlook are the mundane situations where 61.53 could apply. As with the suntan lotion, the general idea is that we should slow down and think about 61.53 any time that our physical condition changes or we use a new treatment or drug, whether prescription or over the counter.

For conditions, a few examples may help. For one, we are likely to be hearing a lot more about fatigue and head cold congestion based on the apparent condition of the co-pilot on Continental Connection Flight 3407 into Buffalo. Under those routine circumstances, how do we ourselves measure up?

As a personal example, I had a thistle scratch my leg. Even though I have hay fever allergies, it seemed minor. Soon, however, I was in the emergency room. I'm glad that I didn't have the reaction at altitude. Even watery eyes, a runny nose, and possible ear problems would not have been good.

For drugs and treatments, think of all that modern science offers us. Skin wrinkles are not a disqualifying condition for flight (thank heavens!) but how many would think of 61.53 if a botox injection is given? For hay fever, do we think about the difference between something like Claritin and another over the counter treatment like Benadryl? If depression or ADD is manageable through cognitive therapy, should we consider that instead of taking a medication that could ground us? What about Accutane for acne, Flomax for an enlarged prostate, Lamisil for toenail fungus, or Cialis or Viagra? If we remember to think of 61.53, our family physician and AME can help us make choices so that we can remain safe and satisfy the regulations.

So where does all this leave us? Even though it is sometimes ignored in practice, 61.53 can help us fly safer. Whether we conduct PIC operations requiring a medical certificate, fly a balloon, soar with a glider, or enjoy sport flying, its two part test is a helpful way to evaluate ourselves before a flight. First, we can evaluate our condition and its effect on the proposed flight. Then we can consider the effect of a given treatment and its alternatives. If we can meet those two tests, we can be more confident of having a safer flight. If we can't, and we are tempted to go anyway, maybe we should consider taking out a broomstick. It might be useful for beating some sense into our head and, if nothing else, it would give General Yeager a smile.

Current Issues Facing VPOs

By Euel W. Kinsey
McKeen & Associates, PC, Detroit, MI

Volunteer Pilot Organizations (VPOs) provide a great service to the public. Whether it is transporting a child and his parents to a distant Medical Center such as St. Jude's or Mayo Clinic for treatment, or transporting supplies or personnel to Haiti or to New Orleans in the aftermath of Hurricane Katrina, these organizations facilitate transportation by pilots who volunteer their time and aircraft for the selfless purpose of helping others who are less fortunate. New challenges have arisen in the last year which may prompt one of these VPOs to come knocking on your door. This article will briefly explore some of the issues facing these organizations.

For the last 18 months, I have had the privilege of serving as Chairman for one of the oldest VPOs – Lifeline Pilots. Lifeline is based in Peoria, Illinois and has been continually operating since 1981 serving the Midwest including Michigan. Since its inception, more than 15,000 people have been transported over one million miles.

VPOs across the United States link pilots who volunteer their time and aircraft with people in need. These organizations are usually Non-Profit Charitable Organizations who employ small staffs or utilize volunteers to connect the pilots and people in need. Typically when a call for help is received by an organization, it is screened by the staff to ensure it fits within the organization's own criteria of need. The staff will then broadcast the trip to their pilot volunteer members. Often, these organizations cooper-

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ate with one another to transport folks over long distances by "linking" with pilots from other VPOs. Most belong to the Air Care Alliance, an organization designed to facilitate communication between the VPOs and to advocate on a national level with Congress and Federal Agencies. Almost all of these flights are operated under Part 91. The decision of whether a particular trip is safe to fly is left to the volunteer pilot. The people being transported are usually asked to sign a Release of Liability which is mailed before the trip. During the flight, the pilot may use a special "Compassion" call sign which offers some preferential treatment by ATC.

In 2008, there were four accidents with fatalities involving flights facilitated by VPOs. These tragedies sent shockwaves throughout the VPO community and have prompted much self analysis and review. In addition, it would seem that these accidents have prompted the NTSB and FAA to focus their attention on the safety of flights facilitated by VPOs. At least two national symposiums have been conducted through the auspices of the Air Care Alliance by the VPOs to discuss safety. As of this writing, no new regulations have been proposed by the FAA for flights facilitated by VPOs. But, as part of the self analysis, the following is a list of considerations for VPOs in this new era.

What is the mission of the organization? - Will it limit trips to non-emergency transportation? What are the criteria for need? Will it facilitate transportation of blood products and/or organs, or organ donor candidates who have only a short window of time to reach the facility where the transplant surgery will take place? What pressures will that place on the pilots to take unnecessary risks to complete the trip?

What are the minimum qualifications to be a volunteer pilot in the organization? There is currently no consensus among the VPOs. The minimum seems to be at least 250 hours. Some require IFR, others do not. Should the pilots be required to obtain annual training or simulator work? Should the organization require that a copilot be present on every mission? Should pilots with prior enforcement actions and/or accidents be permitted to volunteer? Should there be an age limitation? It is important to note that the experience of the pilots did not appear to be an issue in any of the 4 fatal accidents in 2008. These organizations must balance more stringent criteria which limit the number of volunteer pilots with having sufficient members to meet requests for transportation.

What efforts, if any, should the organization take in pilot education and orientation? Some organizations require a safety pilot go along on the first mission or two to insure that they appear to be "safe" pilots. A few require copilots on every flight. Should the pilots be educated/reminded about the regulations concerning seat belts, child restraint and oxygen by the VPO? At what intervals?

What criteria does the organization have for the aircraft that will be used by the volunteer pilot? Will volunteer pilots be allowed to transport people in a home built, experimental or rotorcraft? Should the organization require compliance with the engine TBO or other more stringent requirements than required under Part 91?

What are the minimum liability insurance limits that the volunteer pilot will be required to carry? Most organizations require a minimum of $1,000,000 aggregate with a per seat limitation of $100,000. Of course $1,000,000 smooth (without a per seat limitation) or more is preferable.

What steps should be taken by the organization to credential their volunteer pilots and their planes? A great deal of controversy exists within the VPO community concerning this issue. Some advocate that less is more and worry that taking an active role in requesting and maintaining documentation on all of their volunteer pilot members and their aircraft. (e.g. medicals, pilot currency, annual inspections, etc) invites liability. Some rely upon the volunteer pilots to self certify for each flight (usually in the Liability Release Form) that they meet the minimum requirements set forth by the organization while others require providing documentation as a condition of continued membership.

What is the amount of liability insurance that the organization should carry? Of course, each VPO will have its own personality but an analysis should include consideration of its assets and the Board's own philosophy of what constitutes adequate coverage. The structure of the assets and corporate entity should be also reviewed. (e.g. Are there assets which can be attached in the event of a judgment?)

Is the Release of Liability for the people being transported written well and enforceable? The NTSB report involving the death of a child in Iowa City in 2008 during a flight facilitated by a VPO contained a discussion about the mother's knowledge of the risks involved in General Aviation flights. It also contains a discussion about the relative risks of general aviation compared to commercial air carriers. This has prompted some in the community to question whether the Liability Release Form should contain information concerning the relative risks of transportation in a General Aviation aircraft (accidents and fatalities) verses Scheduled Air Carrier and On Demand Operations.

Will the Release of Liability be upheld if the parent signs on behalf of the minor child? Which states within the VPO's operation area have laws that may invalidate the Release signed by a parent?

Does the organization have a Disaster Action Plan? It is important that the organization designate its spokesperson in the event of an accident and that all of the Board and employees are familiar with it and have all necessary contact numbers.

Are the VPO's Bylaws and Articles of Incorporation current? Often these documents have not been reviewed or revised in a long time and may require updates. Conflict of interest policy for the officers and directors and Dissolution provisions may be absent or not in compliance with state law.

Liability Concerns – Does the VPO bear responsibility if the pilot fails to maintain proper certifications or currency? To what extent should the VPOs require the volunteer pilots to produce documentation concerning themselves and their airplane?

Cost Reimbursement and Deductable Expenses - A question that has been frequently discussed among the organizations is whether a VPO can reimburse the fuel expenses to the volunteer pilot who transports a person in need. Some question whether this steps into the world of Part 135. Also, what costs may be deducted by the volunteer pilot (direct only or a proportion of all costs) without running afoul of the IRS.

Of course, this is not an exhaustive list of the issues which may confront an attorney representing a VPO. But, it is a start.

COMMENT

Too Much Too Fast? Aviation Industry Arguments Against the European Emissions Trading Scheme

By Mr. Jing Liang

The European Union's latest action to curb greenhouse gas emissions has raised alarm and protest at a worldwide scale. Countries, ranging from the United States to Belize, expressed opposition to the European Union's Emissions Trading Scheme.[1] Last year, Congress passed the European Union Emissions Trading Scheme Prohibition Act which forbids American carriers from complying with this emissions scheme, and governments in other parts of the world undertook similar actions to counter what they perceive as the punitive effects of the EU's cap-and-trade system.[2] Several American airlines banded together to file a lawsuit seeking an exemption from this scheme in the European Court of Justice but they did not succeed.[3] Even Secretary of State Hilary Clinton issued a stern letter to the EU President, warning that the United States "will be compelled to take appropriate action" if the EU does not "halt or, at a minimum, delay or suspend application of this Directive; and re-engage with the rest of the world to find a way forward at ICAO to address this important issue."[4] China, India, Russia, and twenty other nations signed the Moscow Joint Declaration this February to coordinate retaliatory measures against the EU with nine possible ways already listed.[5] Russia threatened to cease issuing permits to European airlines to fly over Siberia from Europe to Asia,[6] and China already postponed signing a deal with Airbus for 10 A380 superjumbos worth $4 billion dollars.[7]

In its efforts to fight climate change, the European Union (EU) initially adopted the Emissions Trad-

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ing Scheme in 2005 to include electric power plants, oil refineries, glass manufacturers, and other large greenhouse carbon emitters.[8] But starting this year, the Emissions Trading Scheme (ETS) extends to all airlines that have operations in the EU.[9] Under this scheme, an airline receives allowances to emit a certain level of greenhouse gas per year, and the total of these allowances creates a "cap" on the airline's overall emissions.[10] If the airline anticipates that its gas emissions will exceed its allotted allowances, it can do one of two things: (1) reduce its emissions by resorting to more fuel-efficient technology or (2) purchase surplus allowances from other airlines who are able to produce emissions lower than their allowances, whichever is less costly.[11] If the airline fails to take either of these two actions, the EU would impose a penalty of 100 euros per metric ton of carbon dioxide equivalent on the airline operating in EU airspace.[12] The EU justifies this highly controversial cap-and-trade policy on the basis that, even though direct carbon emissions from aviation only account for about 3% of the world's emissions, the production of air pollutants by the international aviation sector has largely increased by 73% from 1990 to 2003.[13] If emissions continue at this rate, it will reach 150% by 2012.[14]

Having been criticized for taking unilateral action in an area that ordinarily requires multilateral commitments from other countries, the EU argued that the UN agency ICAO (International Civil Aviation Organization), that is supposed to regulate the global aviation industry, fails to achieve an effective way of curbing emissions levels because it was "caught up in unwieldy diplomacy of global-warming matters."[15] Connie Hedegaard, the European Climate Commissioner, defended the emissions scheme by saying that the EU had tried to develop a comprehensive worldwide solution for almost a decade but, having met with resistance from the non-EU states, it finally decided to impose the present scheme as a last resort to address the issue of climate change.[16] However, such a unilateral action on the part of the EU inevitably raises questions about non-EU states' sovereignty, possible breach of international agreements, and increased cost of plane tickets for consumers.

The application of the Emissions Trading Scheme appears to violate a non-EU country's sovereignty because of its regulatory overreach. According to Nancy Young, the Vice President of Environmental Affairs for ATA (Air Transport Association of America), the scheme violates the sovereignty of other countries because it applies to "airlines to, from, and within the EU, placing a cap on the total quantity of emissions for such flights."[17] For example, an American airline may have to buy carbon allowances to cover excess emissions once its airplane starts to taxi from the gate in San Francisco until it lands in London.[18] "As a percentage of total emissions, 29 percent take place in U.S. airspace, including those on the ground at the airport. A further 36.9 percent take place in Canadian airspace, and a another 25.4 percent over the high seas."[19] Even though less than 9 percent of emissions from this flight take place in EU airspace, the scheme will base the allowances requirement for this aircraft "on the emissions for the entire flight from start to finish."[20] Therefore, if an American airline refuses or fails to purchase extra allowances to cover its excess emissions, the scheme would impose a heavy penalty per metric ton of carbon emissions.[21]

Not only does the cap-and-trade system seem to be extraterritorial in its scope, but it also appears to breach international agreements by which all signatories are bound. When asked about countries that are planning retaliatory measures against the EU, the European Climate Commissioner responded: "Our legislation is not going to be changed."[22] The EU has further argued that while a worldwide system of carbon reduction standards would be ideal, setting out to devise such a system of standards is not practicable for the time being.[23] " ICAO recognized this by deciding against the idea of a global system based on setting up a new legal instrument under ICAO auspices."[24] ICAO, according to the EU, permitted each signatory state the right to draft international aviation emissions requirements in its own trading schemes.[25] Therefore, the EU asserted that it was acting under ICAO's approval when it set forth the current carbon trading scheme.[26] Despite the EU's claim of complying with ICAO policy, its unilateral action to regulate international aviation is still legally questionable because it breaches provisions of the Convention on International Civil Aviation – commonly known as the Chicago Convention – by which the EU is bound.

The Chicago Convention is an agreement among member countries committed to securing the "highest practicable degree of uniformity in regulations, standards, procedures and organizations" with regards to international aviation.[27] Because the EU took action to regulate international aviation on its own terms, it contravenes the very spirit of the convention. Article 1 of the Chicago Convention makes clear that every state has jurisdiction over its own airspace.[28] Therefore, the Emissions Trading System's extraterritorial application to other countries' airspace, as illustrated in the above San Francisco-to-London example, violates this convention. Moreover, Article 15 of the convention prohibits one member state from levying fees or other charges on another member state simply for the "right of transit over or entry into or exit from" the member state, which, in this case, is the EU.[29] Therefore, the EU violates this provision by its unilateral action. Furthermore, Article 24 forbids a country from taxing fuel onboard an aircraft and, because the EU bases its carbon levy on the amount of fuel an airline consumes,[30] the EU's cap-and-trade system is in breach of this provision.

While the issue of the legal validity of the cap-and-trade scheme could be addressed in a court of law, the more pressing question here is whether plane ticket prices would soar once the scheme is fully enforced. The EU stated that although this scheme does not directly regulate the pricing of tickets, it does have the effect of causing an airline to buy more efficient aircrafts to reduce fuel consumption or purchase allowances in addition to the ones allotted to it if it produces more emissions than it should.[31] A proponent of the emissions scheme, Jake Schmidt, the International Climate Policy Director at the Natural Resources Defense Council, noted that when an airline purchases fuel efficient planes, it is an "investment that will spur savings to American consumers at US-based carriers to improve the efficiency of their aged fleet."[32] But, regardless of whether the scheme is beneficial or not in the long run, recent estimates show that the scheme could put an additional $3 to $6 to the cost of a flight from, say, New York to London.[33] The ATA reports that, assuming the price of carbon allowance remains at its present rate of $10.50 per ton[34] for eight years, American airlines would still have to spend about $3.1 billion between 2012 and 2020 in the purchase of these allowances.[35] Such an expenditure could support more than 39,999 US airline jobs.[36] Additionally, the China Air Transport Association, which represents Chinese airlines, calculates that the scheme would cost its airlines 800 million Yuan or $123 million this year, and this figure could triple by 2020.[37] In the end, the scheme will have an effect on ticket prices and, given that airlines are businesses, they will more than likely shift the cost to the consumers, raising prices even more.

This latest action by the EU might eventually lead to a trade war if the major aviation players do not come to a compromise. Because countries like the United States and China have passed legislation prohibiting their respective airlines from complying with the Emissions Trading Scheme,[38] these airlines will risk being barred from EU airports for failure to either reduce emissions or purchase additional allowances for their excess emissions. If such a situation exists, then the non-EU countries would resort to retaliatory measures that could result in the EU airlines being forbidden to use non-EU countries' airports. The economic world order could experience great turmoil as a result. However, Foster Swift's aviation attorney Peter Tolley remarked that, given the present state of the EU economy, the EU will most likely concede to some of the demands of non-EU countries, especially the stronger developing ones like Brazil and China who have more leeway in negotiations. Therefore, all sides will want to avoid a trade war at all cost.

About the Author

Mr. Jing Liang, a law student, is presenting his own views with thanks for assistance from his friend and mentor, Dr. Victor Gonzales, Her Majesty's Lieutenant of the Royal Victorian Order, and from attorneys Steve Owen, Peter Tolley, and Jean Schtokal of Foster, Swift, Collins, and Smith, P.C.

Endnotes

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24 *Id.*

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26 *Id.*

27 *Id.*

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From left to right, Donald Frank, Dean Greenblatt, and Euel Kinsey spoke at an aviation law seminar given by the section

Light Sport Pilot Privileges

By Donald C. Frank
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We all know that private and higher rated pilots can fly an aircraft qualifying as a light-sport aircraft with just a valid driver's license rather than holding an FAA Medical Certificate. That entitlement has been widely reported in a variety of aviation magazines for years now. Unfortunately, it appears that not all FAA offices received that "memo" as I learned when the FAA brought an enforcement action against a client for operating a light-sport aircraft without a current Medical Certificate. Regional counsel (not our Great Lakes Region) took the position that a private pilot with a valid driver's license could not operate an airplane without a current FAA Medical Certificate even though the aircraft met the definition of a light-sport aircraft. So, what really is the legal basis for operating an aircraft as a light-sport aircraft without a Medical Certificate? Let me count the ways.

First, although new aircraft can now be specially certificated as a light-sport aircraft, "light-sport aircraft" is specifically defined in 14 CFR 1.1. That definition does not require certification as a light-sport aircraft, but rather lists thirteen criteria, such as maximum weight, seating capacity, maximum speeds, et cetera, that must be met since its original certification in order to be a light-sport aircraft. To help remove any uncertainty regarding some existing normally certificated aircraft, the FAA's Regulatory Support Division Light Sport Aviation Branch has even published a list of 131 existing certificated models, ranging from Aeronca to Taylorcraft, that qualify as light-sport aircraft. My client's aircraft in this enforcement action was even included on the FAA's own list.

The FAA alleged that operating this light-sport aircraft violated 14 CFR 61.3(c)(1) which provides that, except as provided in paragraph (c)(2) of that section, a person cannot act as a pilot unless they have a current and appropriate medical certificate or other documentation acceptable to the administrator. However, 14 CFR 61.3(c)(2) provides that the requirements of 14 CFR 61.3(c)(1) do not have to be met when exercising the privileges of a sport pilot certificate if the person holds a valid US driver's license, had been found eligible for at least a third-class airman medical certificate at the time of his or her most recent application, and has not had his or her most recently issued medical certificate suspended or revoked or most recent special issuance authorization withdrawn. 14 CFR 61.3(c)(2) does not say that you have to hold a sport pilot certificate to qualify for the exception to requiring a medical certificate, but rather that you must be exercising the privileges of a sport pilot certificate. Those privileges are set forth in 14 CFR 61.315 and were not at issue in this case.

In addition to 14 CFR 61.3(c)(2), operation of a light-sport aircraft without a current FAA Medical Certificate is authorized by 14 CFR 61.23(c) which provides that when exercising the privileges of a sport pilot certificate in a light-sport aircraft other than a glider or balloon, the pilot must hold and possess *either* a valid medical certificate *or* a US driver's license. Further, the tables of medical certificate expiration periods in 61.23(d) contain the following notation in the column listing requirements for different types of pilot privileges for each class of medical certificate: "a student pilot or a sport pilot certificate (when not using a U.S. driver's license as a medical qualification)."

If any doubt at all could remain after reviewing those three regulations, a fourth regulation should eliminate that doubt. 14 CFR 61.303(a) provides, in part:

> . . . If you hold . . . (2) *only a US driver's license* . . . and you hold . . . (ii) at least a Recreational Pilot Certificate with a category and class rating, . . . then *you may operate* . . . (A) any light *sport aircraft* in that category and class, . . . (emphasis added).

Finally, if any ambiguity can be found in those regulations, the FAA made its position very clear in the Federal Register when the FAA adopted sport pilot rules:

> Under Section 15 of SFAR No. 89, the FAA proposed to require sport pilot certificate holders; student pilots operating within the limitations of a sport pilot certificate; and

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> *higher rated pilots who elect to exercise only sport pilot privileges* to hold and possess either a current and valid *US driver's license or* a current and valid *airman medical certificate* issued under part 67. These provisions, as revised in the final rule, are located under §§ 61.3, 61.23, and 61.303 . . *(Emphasis added)*(Federal Register Volume 69, No. 143, July 7, 2004, page 44814)
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> . . .
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> The FAA acknowledges that those interested only in exercising sport pilot privileges may not seek airman medical certification or may allow their current airman medical certificate to expire. This is acceptable under this rule. (Federal Register, id, page 44818).

Ultimately, Regional Counsel dropped its enforcement action, but only after a motion to dismiss the FAA's complaint was filed and briefed with the NTSB and the Assistant Regional Counsel had what must have been an interesting discussion with the FAA Regulatory Support Division Light Sport Branch. At least now we know the legal authority for what we believed we all already knew.

The Montreal Convention and International Carriage by Air—An Update

By David R. Baxter
Nagi, Baxter & Seymour PC, Detroit, MI

Introduction

In 1929 delegates convened in Warsaw, Poland to discuss the fledgling airline industry and standardizing methods of compensation for passengers and cargo as international carriage by air was evolving from "…if we get there…" to "…when we get there…". The fruits of their labors came to be known as the Warsaw Convention. The Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, 3014, T.S. No. 876 (1934), note following 49 U.S.C. §40105.

The Warsaw Convention was "an international treaty created in the early days of airline travel, which sought to create the conditions under which the then extremely fragile industry could grow, by limiting airline accident liability." *Weiss v. El-Al Israel Airlines, Ltd.*, 433 F.Supp.2d 361, 365 (S.D.N.Y. 2006).

The author gratefully acknowledges the efforts, research, and article by section member John D. McClune regarding the Warsaw Convention of 1929. In it, originally published in **The Innermarker, Volume 8, No. 1, April 2001, pp. 4-10,** he discusses the Convention's compensatory scheme and the periodic attempts to address its shortcomings.

Mr. McClune's article referenced the creation in May 1999 of the Montreal Convention, but went to press prior to the ratification by the United States of the Convention in November 4, 2003. The Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. Treaty Doc. No. 106-45, 2422 U.N.T.S. 350, commonly referred to as the "Montreal Convention".

The Montreal Convention, "is not an amendment to the Warsaw Convention," but rather "is an entirely new treaty that unifies and replaces the system of liability that derives from the Warsaw Convention." *Erlich v. American Airlines, Inc.*, 360 F.3d 366, 371 n.4 (2nd Cir. 2004). In "recogniz[ing] the importance of ensuring protection of the interests of consumers…and the need for equitable compensation based on the principal of restitution," *Weiss* at 365, the Montreal Convention has been described as "a treaty that favors passengers rather than airlines." *In re: Air Crash at Lexington, Kentucky*, 501 F.Supp.2d 902, 907 (E.D. Ky. 2007) (citations omitted).

Though the Montreal Convention replaced the Warsaw Convention, it intentionally "contain[ed] provisions which embrace similar language as the Warsaw Convention." *Watts v. American Airlines, Inc.*, 2007 WL 3019344, *2 (Not reported in F.Supp. 2d., S.D. Ind. Oct. 10, 2007). This was done in an effort to avoid "a complete upheaval of the common law surrounding the Warsaw Convention." *Id.* One such example of similar language, pertinent to passenger claims for death or bodily injury, can be seen in Chapter 3, Article 17, Section 1 of the Montreal Convention:

> "The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that **the accident which caused the death or injury** took place on board the aircraft or in the course of any of the operations of embarking or disembarking." Montreal Convention, Article 17 (emphasis added).

The reader should note that the language of Article 17 of the Warsaw Convention similarly provided:

> "The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, **if the accident which caused the damage** so sustained took place on board the aircraft or in the course or any of the operations of embarking or disembarking." (emphasis added).

The Montreal Convention, as did the Warsaw Convention, preempts remedies under domestic law, whether or not the application of the Montreal Convention will result in a recovery in a particular case. *El-Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 161 (1999); *see also Best v. BWIA West Indies Airways, Ltd.*, 581 F.Supp.2d 359 (E.D.N.Y. 2008); *Baab v. Virgin Atlantic Airways Ltd.*, 473 F.Supp.2d 591 (S.D.N.Y. 2007). "[R]ecovery for a personal injury suffered on board an aircraft…if not allowed under the Convention, is not available at all." *Tseng* at 161.

The reader should note that Chapter 1, Article 1, Section 1 of the Montreal Convention states that: "This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward." Further, Article 17 of the Montreal Convention specifically encompasses claims related to the death of a passenger.

The Montreal Convention and Preemption of State Law Claims

As outlined by the Supreme Court in *Tseng*, "recovery for a personal injury suffered on board an aircraft…if not allowed under the Convention, is not available at all." *Tseng* at 161. Numerous federal district and circuit courts have relied on *Tseng* in preempting state law causes of action which encompass claims covered by the Montreal Convention. One such case dealing with the Montreal Convention and jurisdiction is *Aikpitanhi v. Iberia Airlines of Spain*, 553 F.Supp.2d 872 (E.D. Mich. 2008), wherein the plaintiffs, parents of the deceased who died on an international flight, claimed that the Alien Tort Claim Act, 28 U.S.C. §1350, provided the Court with subject matter jurisdiction outside the boundaries of the Montreal Convention. *Aikpitanhi*, 553 F.Supp.2d at 874. The United States District Court for the Eastern District of Michigan, Judge Borman, relying upon the Supreme Court's *Tseng* opinion rejected the plaintiffs' argument as follows:

> "…[T]he Supreme Court has stated that the Montreal Convention, and its predecessor the Warsaw Convention, affords the exclusive remedy for any personal injury suffered on board an international flight or during any operations of embarking or disembarking. In the present action, Plaintiffs allege the Decedent died as a passenger on board an international flight. Pursuant to *Tseng*, Plaintiffs' exclusive remedy lies under the Montreal Convention. As a result, Plaintiffs' arguments that a separate cause of action exists such that subject matter jurisdiction may be independently found are without merit." *Aikpitanhi*, 553 F.Supp.2d at 879.

The Court determined that plaintiffs failed to meet any of the 5 jurisdictional guidelines set forth in Article 33 and dismissed plaintiffs' case.

Similarly, causes of action against air carriers alleging state law tort and contract claims are preempted pursuant to the terms of the Montreal Convention. Furthermore, the Montreal Convention specifically prohibits allowing recovery for punitive/exemplary damages in Article 29 as follows:

> "In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention…**In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.**" Montreal Convention, Chapter 3, Article 29 (emphasis added).

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The Montreal Convention
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This prohibition contained in Article 29 of the Montreal Convention was previously the result of case law interpreting the Warsaw Convention.

Time to Sue

Practitioners should note that the Montreal Convention retained, in Article 35, the same period of limitations as set forth previously in Article 29 of the Warsaw Convention. Article 35 specifically states:

> "1. The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.
>
> "2. The method of calculating that period shall be determined by the law of the court seized of the case." (Montreal Convention, Chapter 3, Article 35).

In *Fazio v. Northwest Airlines, Inc.*, (2004 WL 1001234) (Not reported in F.Supp. 2d., W.D. Mich., March 15, 2004), Judge Bell decided a case in March 2004 under the Warsaw Convention. The court explained its decision to apply the Convention's 2-year statute of limitations:

> Article 17 does not define the period of time before passengers enter the interior of the airplane when the "operations of embarking" commence. *Day v. Trans World Airlines, Inc.,* 528 F.2d 31, 33 (2nd Cir.1975). The fact that the accident occurred in an airport terminal is not sufficient to either include or exclude the accident from the scope of the Warsaw Convention. *Buonocore v. Trans World Airlines, Inc.,* 900 F.2d 8, 10 (2nd Cir.1990). Instead, courts apply a flexible approach, considering factors such as the activity of the passenger at the time of the accident, the extent to which the airline was exercising control over the passenger at the time of injury, the imminence of actual boarding, and the physical proximity of the passenger to the gate. *Buonocore,* 900 F.2d at 10; *Evangelinos v. Trans World Airlines, Inc.,* 550 F.2d 152, 155 (3rd Cir.1977); *Martinez Hernandez v. Air France,* 545 F.2d 279, 282 (1st Cir.1976).
>
> ....
>
> Plaintiff's theory of liability against the airlines is premised on her contention that the airlines owed her and her husband a duty to assist in embarkation and disembarkation by providing wheelchair assistance through the airport to the airplane at each point on their itinerary. Plaintiff's allegations indisputably pertain to the "operations of embarking and disembarking" because Plaintiff's theory of liability expands the scope of the airline's operations of embarking and disembarking with respect to these two travelers. Accordingly, construing the complaint in the light most favorable to Plaintiff, the Court is satisfied that Plaintiff's claims are governed by the Warsaw Convention. 2004 WL 1001234, *3 (W.D.Mich.)

A similar result under similar allegations would continue today under Article 35 of the Montreal Convention.

Compensation Scheme

The practitioner should note that the Montreal Convention contains monetary limits and parameters for compensating passenger injury or death in Article 21 and contains monetary limits and parameters in relation to compensating for delay or loss of baggage and cargo in Article 22, which differ from limits previously set forth in the Warsaw Convention and their progeny, succinctly set forth by John McClune in his article mentioned above.

Conclusion

Practitioners are urged to review the Montreal Convention at their leisure to ensure familiarity with the new terms insofar as they may differ from the terms and conditions of the Warsaw Convention. The intent of this brief overview was to highlight selected provisions which may be of interest; however, it is not intended to be either a complete or comprehensive review of all (or any) of the 55 Articles which comprise the Montreal Convention of 1999.

Medical Certificate Updates

By Donald C. Frank
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The FAA has made some significant changes to procedures involving its Pilot Medical Certificates. Although it has now been a few years since the FAA revised question 18v on its application form (8500-8), the changes may be easily overlooked by applicants, and they are legally significant. For decades, question 18v has required disclosure of any convictions involving driving under the influence of alcohol and other convictions specified in that question. However, the FAA has now revised the form to require disclosure not only of convictions, but also of arrests "involving" driving while under the influence of alcohol and other arrests specified in a way that could prove to be a trap for unwary applicants. Some applicants could have truthfully and correctly answered "no" to question 18v on numerous applications over previous decades if they had an arrest but no conviction, but now that same applicant would have to change the answer to "yes" and provide an explanation. Further, it may be problematic to determine whether the arrest was for something that is required to be reported. Question 18v is a complicated compound question and is not limited to arrests or convictions involving alcohol or drugs and driving. The last part of question 18v now also requires applicants to report any arrest "involving an offense(s) ... which resulted in attendance at an educational or rehabilitation program" regardless of whether they are ever ultimately convicted of anything.

Another alcohol related change to the medical certificate application procedure is heightened scrutiny related to alcohol use. Previously, with a first offense DUI, the usual concern may have been just to make sure that all related "motor vehicle actions" were each reported within sixty (60) days as required by 14 CFR 61.15(e) and actual convictions were also reported on the 8500-8 medical certificate application. While those remain important concerns, now the FAA Guide for Aviation Medical Examiners (the "Guide") also requires medical certificate applicants making a first-time report of an alcohol or drug related event in response to question 18v on the application form to provide more detailed information and records including, but not limited to, copies of all court and arrest records related to all reportable arrests, convictions, or administrative actions occurring within five (5) years before the FAA medical exam. Further, the Guide also now requires FAA aviation medical examiners to defer issuance of the medical to the FAA for any of the following: Failure to provide all required court and arrest records to the aviation medical examiner within 14 days of the medical exam; any arrest, conviction, or administrative action involving alcohol- or drug-related driving incidents if the applicant had a blood alcohol content of .15 or greater or the applicant refused blood alcohol testing; any arrest, conviction, or administrative action involving alcohol- or drug-related driving incidents within the preceding 2 years if there has been another arrest, conviction, or administrative action AT ANY TIME (emphasis in the Guide); the applicant has a total of 3 arrest(s), conviction(s), and/or administrative action(s) within a lifetime; or a total of 2 arrest(s), conviction(s), and/or administrative action(s) within the preceding 10 years. If an application is deferred to the FAA because of alcohol or drugs, the FAA then has substantial additional information and records that it will require before considering issuance of a medical certificate.

Recently the FAA has been requiring holders of special issuance authorizations to carry the authorization with them in addition to carrying their Medical Certificate. According to the Federal Air Surgeon's Medical Bulletin, Vol. 50, No. 2, (the "Bulletin") this was the result of an International Civil Aviation Organization audit of the FAA in 2007. According to the Bulletin, the FAA has published a request for comments in the Federal Register regarding a proposed final rule that would eliminate the requirement to have their authorization letter in their possession, and the rule is expected to go into effect on July 20, 2012 if no negative comments are received. After that date, the holder of a special issuance authorization will only need to carry their FAA medical certificate and not a copy of their special issuance authorization.

Finally, the FAA has announced that it will no longer accept paper 8500-8 Medical Certificate Applications after October 1, 2012. Beginning on October 1, 2012, all Medical Certificate Applications will have to be made using the FAA's on-line MedXPress system.

FAA Medical Certificate Alcohol Issues

By Gregory A. Pinnell, M.D.
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Man's use of alcohol dates back thousands of years. In fact, jugs made for beer have been found that date back to the Neolithic period, circa 10,000 B.C. It is a safe assumption that the misuse of alcohol—and alcoholism likely date back nearly as far. It is also safe to say that this disease, alcoholism, respects no socioeconomic bounds. There are no groups or societies that are untouched… including the world of aviators. It has been about 20 years since the highly publicized incident involving a major U.S. air carrier whose crew was fired after completing a flight to Minneapolis, Minnesota while under the influence of alcohol—a sobering reminder that even pilots are not immune to the sometimes addictive properties of this substance. But while the rate of alcoholism in pilots mirrors that of the general population and alcohol related aircraft incidents are rare, the subject of alcohol in the cockpit remains a significant focus of the FAA.

As a reminder, airmen in the course of their normal periodic flight physical are required fill out FAA form 8500-8. With the use of this instrument, the FAA obligates them to divulge "any conviction(s) involving driving while intoxicated by, while impaired by, or while under the influence of alcohol or a drug; or (2) history of any conviction(s) or administrative action(s) involving an offense(s) which resulted in the denial, suspension, cancellation, or revocation of driving privileges or which resulted in attendance at an educational or a rehabilitation program." They are also required to report if they have "ever had any other (non-traffic) convictions (e.g., assault, battery, public intoxication, robbery, etc.) If so, name the charge for which you were convicted and the date of the conviction." The airman, by signing block 20 of the 8500-8 form, gives the FAA Security Division a one-time look at the National Driver Registry. Enforcement action is risked if the FAA Form 8500-8 is falsified. Such falsification to the FAA is codified under Title 14 CFR 67.403.

In March of 2007 the NTSB published a Safety Recommendation in response to a study of aircraft accidents where it felt the FAA was (or had reason to be) aware of substance dependence issues germane to the accident. In their study they cited cases where potentially actionable hints of continued substance abuse/dependence were in the FAA's possession but did not yield enforcement action. The NTSB recommendations were that:

1. A complete copy of the arrest/court record for the event which triggered an aeromedical evaluation for substance abuse be placed in the airman's FAA medical file prior to any clinical evaluation

2. All arrest/court record(s) be made available to any practitioner tasked with the evaluation of the airman's substance abuse evaluation and

3. Any airman who has a substance abuse diagnosis be placed under Special Issuance similar to the process for other clinical diseases such as heart disease or diabetes.

Pursuant to these recommendations the FAA generated a change to its guidance for Aviation Medical Examiners (AMEs) who perform the periodic certification exams on pilots. Previously, an airman with a DUI/DWI first conviction was essentially given a "free pass" for that first event. The FAA only required a good explanation. In the 2010 "Guide for Aviation Medical Examiners" the criteria for issuance of a medical certificate were changed. Notably the guidance now requires that ANY arrest, conviction and/or administrative action which involves a blood alcohol level of 0.15 requires that the medical certificate enter the "deferral process." In essence, "deferral" means that rather than the local AME being able to issue a medical certificate, the process must be deferred to the FAA in Oklahoma City where the relevant facts are reviewed and weighed before a medical certificate is issued.

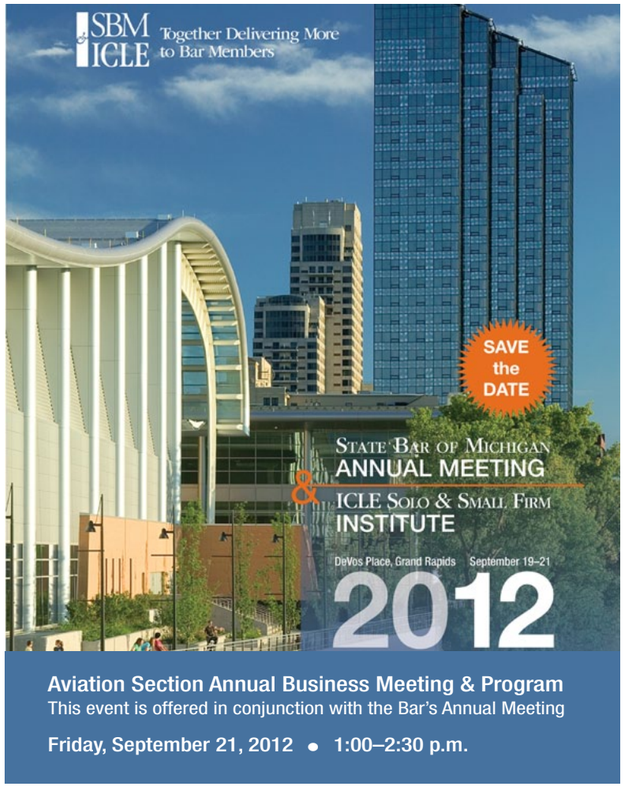
Any refusal of a lawful blood alcohol test also requires deferral. Once deferred, the FAA requires significant supporting documentation including personal statements, all court/treatment documents, and a substance abuse evaluation by a psychologist and psychiatrist familiar with aviation standards. A notable exception is that the FAA does allow the AME to issue the medical certificate if the event was "remote" or greater than 5 years ago, and if no other deferral criteria were met. It is clear that these changes put additional scrutiny on the airman and require increased vigilance on the part of the AME.

Obviously alcohol abuse and any situation or occurrence that involves it can lead to a lengthy delay in medical certification and possibly even denial. Even so, this does not mean that such circumstances lead to an automatic career-ending "dead end" for the aviator, nor does it mean that there is no help available. For example, a program that offers professional pilots a route back to the cockpit is the Human Interventional Motivation Study or "HIMS" program. The HIMS program "coordinates the identification, treatment, and return to the cockpit of impaired aviators". It is an industry-wide effort in which companies, pilot unions, and FAA work together to preserve careers and further air safety. This cooperative venture has returned a significant number of pilots to work after appropriate evaluation, treatment and extensive monitoring. While this program is not without failures, it does offer an expedited option to get help, and eventually medical certification, for motivated individuals. More information about this program is available on the internet at *www.himsprogram.com*.

Certainly the use of alcohol has been, and likely always will be a part of our society, and thus so will the known issues associated with its abuse. In no arena is alcohol abuse's potential impact to public safety more of a risk than in that of the aviation environment. With this in mind, the oversight bodies such as the FAA, local AMEs, associated attorneys, and most importantly, the aviators themselves must be ever mindful of this fact. Having said this, the encouraging message for all involved is that there is a process in place that offers a pathway for identification and treatment for the impaired aviator that is ever mindful of the highest goal, that of maintaining and improving public safety and the safety of the flying environment.

Gerry Padilla's house on Mackinac Island. Join us there on July 21, 2012!

Gerry Padilla (second from right) on his deck at Mackinac Island during a joint social meeting of the Lawyer-Pilot Bar Association and our Aviation Law Section.



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