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Season's Greetings

(Photo by Marty Weiss)

WINTER MEETING — Sunscape Sabor Resort – Cozumel Island, Mexico — Feb. 11-15, 2015

SUMMER MEETING — Watkins Glen Harbor Hotel – Watkins Glen, NY — July 22-26, 2015

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AIRCRAFT LIEN RIGHTS: ONE TYPICAL STATE LAW SCHEME

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Like other artisans, individuals or businesses supplying labor or materials to aircraft occasionally need to impose a lien to ensure the collection of an unpaid debt. Although recognizing aircraft liens, federal law does not create any such rights. Instead, aviation lien rights arise under state laws which must be followed precisely, on penalty of not achieving secured party status. Practitioners must be familiar with these requirements and their interplay with federal and international law.

This article describes the statutory scheme established in Ohio, which has a fairly typical approach. Although Ohio's provisions, codified at §§ 1311.71 to 1311.80 of the Ohio Revised Code ("R.C."), have been in effect since April 16, 1993, there is scant case law interpreting or applying them.

Who May Obtain an Aircraft Lien and for What? The general rule is that any person performing labor upon or furnishing materials for an aircraft in Ohio may obtain a lien to secure payment of an amount owed. Several important exceptions apply. For instance, no lien is available if the lien claimant remains in possession of the aircraft. Nor may a lien be sought for labor or materials exceeding \$1,000 if the aircraft owner has not "requested or consented" to the work performed or the materials supplied. For this reason, potential lien claimants should always obtain the aircraft owner's written consent to perform repairs or improvements or to supply materials.

It is not necessary for the lien claimant to have enhanced the value of the aircraft through a repair or improvement. Ordinary consumables such as gasoline, oil, and lubricants are included in the statutory definition of "materials." Thus, fixed base operators supplying aviation fuel to transient aircraft are afforded some protection if payment in full is not received before the aircraft departs.

Property Subject to an Aircraft Lien.

A lien may attach to any "aircraft," which is defined as "any contrivance used or designed for navigation or flight in the air, excepting a parachute or other contrivance for such navigation used primarily as safety equipment." R.C. § 4561.01(B). This definition seems to preclude a lien attaching directly to aircraft parts such as engines, propellers, or other accessories that have been removed from an airframe. Nevertheless, a lien may be available on the aircraft on which these components were previously installed, because the statute defines "materials" to include "accessories, parts, and equipment . . . furnished for an aircraft." R.C. § 1311.71(C).

How is an Aircraft Lien Perfected?

To perfect the lien, the claimant must file a sworn affidavit with the Federal Aviation Administration. The FAA charges a \$5 fee to record the affidavit of lien, which should be mailed to FAA Aircraft Registration Branch, AFS-750, Post Office Box 25504, Oklahoma City, OK 73124-0504. The lien is considered filed with the FAA "as evidenced by a certified mail return receipt." R.C. § 1311.73(A).

The affidavit must include the amount owed, a description of the aircraft (including manufacturer, model, serial number, and registration number), the name of the person for whom the labor was performed or materials supplied, the name of the aircraft owner, the name and address of the lien claimant, the date that the claimant (or his employee) last performed any labor upon or furnished materials for the aircraft, the date the claimant surrendered possession of the aircraft, and the name of the person who prepared the affidavit. The affidavit must be signed by the lien claimant or his agent (who must provide a statement of his relationship to the lien claimant). Any inaccuracy or omission of any address will not invalidate the affida-

vit. A sample form of lien is set forth in R.C. § 1311.73(B).

A copy of the affidavit must be served on the aircraft owner within 30 days after filing with the FAA. It should be sent to the owner's address "as last recorded" with the FAA. The statute requires that the mailing be sent by certified mail, and then by regular mail if the certified envelope is returned unclaimed. If the affidavit is sent in compliance with the statute, then the lien is valid even if the aircraft owner did not receive its copy.

For airplanes with more than eight seats (including crew) and helicopters with five or more seats (including crew), the affidavit must also be recorded with the International Registry (www.internationalregistry.aero), established pursuant to the Convention on International Interests in Mobile Equipment (also known as the Cape Town Treaty) and the related Protocol on Matters Specific to Aircraft Equipment. Under the Ohio statute, the affidavit may also be filed with the County Recorder in the Ohio county where the work was performed or materials supplied, but this optional filing does not confer any additional protections to the lienor. (The original version of the enacting legislation provided for primary filing with the County Recorder and optional filing with the FAA, but these priorities were reversed in the final version of the legislation.)

When to File an Aircraft Lien. The lien affidavit must be filed within 90 days after possession of the aircraft is surrendered. If the lien claimant remains in possession of the aircraft, the affidavit must be filed within 90 days after the last labor is performed or materials are furnished, but the lien will not attach until possession is actually surrendered.

Validity and Priority of an Aircraft Lien. An Ohio aircraft lien "is valid against any person except a purchaser or encum-

brancer who in good faith, without notice, and for value acquired rights prior to the recording of an affidavit for lien." R.C. § 1311.72(C). Furthermore, an Ohio aircraft lien "has priority over all other liens, claims, or encumbrances, except wage and salary claims of workers who have no ownership interests in the business of the lien claimant and amounts that are owed by the lien claimant to the aircraft owner and that are subject to setoff against the amounts due for the labor and materials that are the basis for the lien." R.C. § 1311.75(A). In the case of competing liens, the earlier-filed lien has priority over any later-filed liens.

Consistent with these provisions, in *Hanusosky v. FirstMerit Bank, N.A.*, 121 Ohio Misc.2d 1 (Ohio C.P. 2002), the court found that an Ohio aviation lien had priority over the purchase money security interest (PMSI) of the bank that financed acquisition of an airplane on which the lien claimant subsequently provided repair services. *Id.* at 5-6. As such, an aircraft lien is an exception to the general rule under § 9-324 of the Uniform Commercial Code that a perfected PMSI has priority over any conflicting security interest in the same property. See R.C. § 1309.324(A); *Hanusosky*, 121 Ohio Misc.2d at 6.

Enforcement of an Aircraft Lien.

The lien claimant may enforce the lien through the filing of a civil action. In Ohio, the action may be filed in any court having jurisdiction in the county where the work was performed or materials supplied, or in any county in Ohio where the lien claimant's primary place of business is located. If the action results in a judgment in the lien claimant's favor, the lien claimant must forward a certified copy of the judgment to the FAA.

Duration of an Aircraft Lien. An Ohio aircraft lien is valid for six years from the date the affidavit is filed with the FAA, or until one of four events occurs: the lien claimant receives full payment of the amount due; the lien claimant accepts less than the full amount pursuant to a written agreement with the aircraft owner (*i.e.*, a novation); the owner files a bond to release the lien; or a court having jurisdiction enters a final judgment releasing the lien. There is no procedure to extend the six-year lien period, nor can the lien claimant record a successive affidavit to perpetuate the lien because any such filing would be beyond the 90 day post-possession deadline for filing.

Releasing an Aircraft Lien. To release the lien through a bond, the aircraft owner

must obtain a bond, payable to the claimant, for the full amount stated in the lien affidavit "conditioned for the payment of any judgment that may be recovered on the lien, with costs." R.C. § 1311.77. The bond must be posted with a court having jurisdiction in the county where the labor was performed or materials supplied. The company issuing the bond must be licensed and authorized to do so in Ohio.

Once the lien is satisfied (whether through payment or released via the bonding procedure), the lien claimant has 30 days to provide a written release to the FAA (and the County Recorder, if the lien was recorded locally). The Ohio Revised Code does not provide a specific form for a lien release as it does for a lien affidavit. However, the FAA's "Conveyance Recordation Notice" (AC 8050-41), which is returned to the lien claimant upon recording of the affidavit, contains a "release" section that the lienholder can execute and file with the FAA to release the lien.

Notice to Commence Suit. The owner of an aircraft subject to a lien can force the lien claimant to bring suit or risk losing its security interest. To do so, the owner must send the lien claimant a written demand to commence suit on the lien. The demand must be sent to the address set forth in the lien affidavit, and it may *only* be served by certified mail, return receipt requested (*i.e.*, service by regular mail is not sufficient). Within 30 days after completion of service of the notice, the aircraft owner must execute an affidavit setting forth the manner by which service was completed, attach evidence of successful service, and file both documents with the FAA.

Serving a notice to commence suit can be a useful tool for aircraft owners. If the lien claimant does not bring suit within 60 days after the notice is served, then "the lien is void, and the aircraft is wholly discharged from the lien." R.C. § 1311.78(D); *Burke Lakefront Servs. v. Lemieux*, No. 79665, 2002 WL 1821962, at *6 (Ohio Ct. App. Aug. 8, 2002). In that circumstance, the underlying claim remains effective but secured party status has been lost forever. If service cannot be completed at the owner's address on file with the FAA, and the owner cannot be located after a "diligent search," R.C. § 1311.79(D), then service can be effected by publishing the affidavit once a week for six consecutive weeks in a newspaper of general circulation in the county where the

owner's address as stated in the notice to commence suit is located.

If the lien claimant does bring a lawsuit to recover the amount of the lien, it must also file an affidavit with the FAA setting forth its name and address and that of the aircraft owner, the date the enforcement action was commenced, the court in which the action was filed, and the case caption and number. The affidavit must be accompanied by evidence that it was served on the aircraft owner.

Attorney Fees. The prevailing party in a civil action related to an Ohio aircraft lien – either the lien claimant or aircraft owner – is entitled to recover reasonable attorney fees incurred in connection with the court action.

Conclusion: Be Careful! Claimants seeking to take advantage of state law lien rights for labor or materials supplied to an aircraft must carefully comply with all aspects of the statute or risk losing the substantial benefits of obtaining a secured position. In addition, adherence to the requirements of federal and even international law is required. Potential lienholders who are unfamiliar with the requirements established by the applicable state, federal, and international laws should seek a lawyer's advice and assistance before filing an aircraft lien.

Professional Announcement

Vincent Allen, LPBA Sustaining member and partner in the Dallas firm of Carstens & Cahoon, LLP, was voted by his peers to be one of D Magazine's Best Lawyers in metro Dallas. The magazine asked Texas lawyers to nominate two lawyers outside their firm and one within who "you would rank as the best, among those whose work you have witnessed firsthand." Among 502 thus selected, Vince was recognized as one of 16 of the best in his practice specialty of Intellectual Property, along with his partners David Carstens and Colin Cahoon. Congratulations to Vince and his firm.