Welcome to the inaugural edition of Florida Aviation Law Vectors. Without breaking my arm patting myself on the back, but trying nonetheless, the concept of getting this off the ground, so to speak, was totally my idea. Thinking about that, if this crashes and burns we know wherein the probable cause will lie!

As are many of you, I am a member of various associations which provide analysis of legal issues and attend excellent seminars where many knowledgeable speakers keep us updated on the latest aviation legal issues. We also attend quality seminars which originate here in Florida, such as Embry-Riddle’s Aviation Law and Insurance Symposium and our quarterly aviation bar committee meetings where our own membership bring relevant and informative presentations. It is that expertise I hope to bring in written form to those who are unable to attend our meetings and to others both in and out of state who may have an interest in aviation related issues and law.

As always, there are people to recognize and thank for their participation. First, I pitched this idea to our past Aviation Bar Committee chair, Greg Popp, who began to say yes before I was able to finish my sentence. As usual his enthusiasm was immediate as he was sending an e-mail to our committee colleagues while we were still discussing the merits of the idea. Also, our present chair Elisabeth Kozlow, vice chair Harry Coe and Board liaison Brian Burgoon—whom I hope to meet at some point—spoke to all the right people to make this happen. You, the members, also got personally involved which is a testimony to responding to my call for help.

Second, I got this idea while perusing the standing committees section of The Florida Bar’s website. The Education Committee has been doing this for quite a few years and they do it well. Ultimately, if this publication is favorably compared with theirs I will consider it a success. To help with the layout and design of our publication Yvonne Sherron, Director of Professional Development lent her talent and expertise. Also, thanks to Connie Stewart for contacting Yvonne on our behalf.

Finally, I want to thank in advance those of you who take your time and contribute articles you believe would be of interest to our members. Remember, when I say articles of interest, they do not have to be legal, they can be fun aviation stuff! This is our journal and although a cliché, it will be only as good as those who contribute. As such, I expect great things, as the quality of legal aviation expertise on our committee is extensive.

With your help we will navigate weather deviations, expect further clearance times, holding patterns, and with quality VECTORS ultimately our flight into legal airspace will be rewarded with a successful conclusion. We are cleared to GO!
At our September 7, 2007 meeting in Tampa our agenda included updates and presentations from the certification chair of the Aviation Bar Certification committee, the Eilon Krugman-Kadi Foundation and the Aviation Law Committee Journal, as well as guest speakers Kent Jackson of Jackson, Wade & Blanck, LLC and Dr. Richard Karl from the University of South Florida School of Medicine.

The certification committee report consisted of reviewing the standards to take the board certification test including the required CLEs in the past 3 years which must be related to aviation law. There was also a discussion regarding teaching a review class in conjunction with the ERAU Aviation Law and Insurance Symposium to be held in January.

The next update was in regards to the endowment scholarship at ERAU in the name of former graduate Eilon Krugman-Kadi. Greg Popp encouraged those members who have not yet contributed to do so, reminding us of Eilon’s faithfulness to the committee and its membership. At this point the university has received about one-third of the necessary funds.

Steve Dedmon was the next updater as the Journal is his project. A prototype of the cover page was distributed to the committee for their perusal. There was then a lengthy discussion about content and possible expansion to include a variety of topics. The committee discussed a variety of issues; however, since this article is now in VECTORS, fortunately the discussions regarding publication issues are now MOOT!

Kent Jackson then presented “Challenges for the Charter Industry.” His emphasis was the relationship between aircraft owners and aircraft operators in Part 135 operations. The FAA appears to have issues with who exercises “operational control,” a term which appears to have broad implications yet a vague definition. Some of the issues of concern the FAA is focusing on include non-employee pilots, aircraft/pilots coming from the same entity, advertisement/booking/billing by the management company and certificate franchising. A primary focus is on an entity having one owner but several management companies.

Dr. Richard Karl, surgical oncologist professor at the USF medical school, and contributing editor for Flying Magazine discussed Aviation Safety Measures for use in Operating Rooms, Cath Labs and Endoscopy suites. His emphasis was essentially bringing CRM procedures to medicine as a means to reduce instances of surgical and medical mistakes. He provided some chilling statistics of medical malpractice which included wrong site operations, missing surgical tools, and even instances of operating on the wrong patient. Through video and flow sheets he compared operating room procedures to those required to turn on the coffee pot of a 747, extremely simple to complex, respectively. He said the AMA does not address the issue of surgical safety measures nor do M&M conferences. Literally, medicine still sees the doctor as the DC3 captain of old, beyond reproach and question.
Aviation Security: Are People More Dangerous Than Bombs?

By Timothy M. Ravich*

Introduction

The “freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.”1 Airline travel particularly has become such a usual mode of travel that many Americans simply presume their freedom to it. In fact, airline service, not airline security, was the topic that had the attention of transportation lawmakers throughout the 1990s. Airline passengers—among whom are members of Congress—fumed at airline overbooking practices, delays, and congestion at airports.2 September 11th jolted the nation’s focus from service to security.

In the aftermath of September 11th, aviation security officials relentlessly hunt for bad things. They continually develop, contract for, and deploy various high- and low-tech anti-terrorism measures, i.e., thermal neutron analysis, computerized tomography, X-ray devices and electromagnetic radiation, trace detectors or “sniffers,” bomb-sniffing dogs, airline personnel screening, and automated passenger profiling. Terrorists continually find new ways to threaten commercial aviation despite these security devices.3

On August 10, 2006, British intelligence prevented a terrorist plot to blow up ten airplanes by detonating common liquids. The United States Transportation Security Administration (“TSA”) subsequently banned carry-on items; today, passengers may carry on only 3-ounce or smaller containers of shampoo, toothpaste, skin creams and the like in a zippered, one-quart, clear plastic bag. In May 2007 the TSA unveiled “FIDO,” a hand-held scanner capable of detecting liquid explosives inside sealed bottles. While providing an important layer of security, carry-on restrictions and explosives-detecting equipment exemplify why profiling is necessary to safeguard commercial aviation. Reaction-based national aviation security policy focused myopically on objects instead of people is backward-looking and flawed, “the equivalent of fighting the last war.”4

Profiling airline passengers should be a vital part of commercial aviation security because screening for bad people is at least as important as screening for bad things. This article amplifies an argument that receives surprisingly scant public attention: “The ‘magic’ attributed to isolated technological fixes must be jettisoned in favor of systems perspectives including the human element.”5 People warrant at least as much attention as putatively dangerous objects.6 Biometric, psychometric, and sociometric profiling facilitates this reality by focusing on people and their ideas and behaviors, not just their weapons.

What is Airline Passenger Profiling?

Terrorism has always shadowed commercial airline travel. The first documented airline hijacking occurred as early as 1931, when Peruvian revolutionaries overtook a domestic flight to distribute propaganda. Hijackers since have seized commercial airplanes to bargain for the exchange of political prisoners or to escape to a particular destination like Cuba. The goal of the September 11th hijackers was different, to kill Americans and to destroy national icons of economic, military, and political power.

This shift in objective exposed erroneous assumptions upon which national aviation security policy operated for decades. Whereas the Soviet Union created “things” during the Cold War that could be observed and countered, a threat from non-sovereigns like al Qaeda is an indefinite threat, as “terrorists only create transactions that can be sifted from the noise of everyday activity only with great difficulty.”7 In this new context, airline profiling systems offer a preemptive and forward-looking mechanism to relate historical terrorist conduct to new terrorist plots.

The need for airline passenger screening was presented after July 17, 1996 when a Boeing 747, TWA Flight 800 from New York to Paris, exploded soon after it took off. A defective fuel tank caused the tragedy. Initially, however, government officials suspected the tragedy was terrorist-related. Consequently, on August 22, 1996, President Bill Clinton announced the creation of the “White House Commission on Aviation Safety and Security.”8 This body, which also was known as the “Gore Commission,” was charged with “develop[ing] and recommend[ing] to the President a strategy designed to improve aviation safety and security, both domestically and internationally.”9 On February 17, 1997, the Gore Commission issued a final report recommending the revitalization and reformulation of the 1960s Anti-Air Hijack Profile.

The first-generation computer airline passenger profiling system to follow the Gore Commission’s report was developed by Northwest Airlines in 1996 under a grant from the Federal Aviation Administration (“FAA”). Known as the “Computer-Assisted Passenger Pre-Screening System” (“CAPPS”), the government’s initial profiling device was presented as a “management tool” whose goal was “not to pick a needle out of the haystack, but to make the haystack smaller.”10 CAPPS collects approximately 39 pieces of pre-boarding data aimed at identifying travelers who should be subjected to heightened security procedures. The precise data that compose a CAPPS profile are not publicly known, but some airline security observers discern CAPPS focuses on specific features such as the method of payment for an airline ticket (i.e., cash or credit); the timing of a purchase (i.e., immediately before departure or much earlier); the identity of travelers, including with whom, if anybody, the passenger is traveling; the activity at the destination, including whether the passenger intends to rent a car; the flight itinerary, including where the flight originates and its ultimate destination; the passenger’s specific travel plans,
including ultimate destination when different than the flight upon which the traveler is aboard; and whether the flight is round trip or one-way.

After September 11, 2001, the federal government sought to update CAPPS with “CAPPS II.” This modified system would have authenticated the identity of commercial airline passengers by comparing each traveler’s Passenger Name Record (“PNR”), including full name, home address, telephone number and date of birth, against governmental databases for security assessment. CAPPS II would bridge law enforcement and intelligence databases. “CAPPS II would have notified law-enforcement officials whenever the screening process turned up passengers with outstanding warrants against them, even for non-travel-related incidents.”

Controversially, then, CAPPS II exploited commercial databases for counterterrorism purposes.

To defeat CAPPS II, civil liberty and privacy proponents publicized operational failures of CAPPS I. They noted that profiling outside of the aviation arena had been unsuccessful, for instance, the United States Customs Service has not stopped the drug trade using profiling. Profiling system critics also publicized the high risk of “false negatives,” where crucial people or events are missed. For example, in September 2004, British pop star Cat Stevens (who became a Muslim in the 1970s and is known today as Yusuf Islam) was removed from an international flight bound for the United States because his name was on the government’s “No-Fly” list. CAPPS I also identified United States Senator Edward M. Kennedy (D-Mass.) and United States Representative Don Young (R-Alaska) for extra security scrutiny. Finally, CAPPS critics cautioned against the dissemination of CAPPS profiles to other governmental agencies for purposes unrelated to terrorism or aviation security, so-called “mission creep.” The effort to roll-out CAPPS II was set back by these criticisms, and ultimately was defeated when it was learned that some airlines voluntarily provided the TSA with lists of their respective passengers for testing in the CAPPS II system – without the consent of those passengers. The TSA abandoned CAPPS II on July 13, 2004, after the United States General Accounting Office reported that the TSA failed to meet related privacy concerns.

The TSA followed its aborted CAPPS II program with “Secure Flight,” in August, 2004. Secure Flight was intended to improve government “No-Fly” and “automatic selectee” lists by reducing the number of domestic airline passengers pulled aside for more rigorous screening. More specifically, Secure Flight would shift passenger pre-screening responsibilities from the privatized airlines to the federal government. To test Secure Flight, therefore, the TSA ordered more than 70 domestic airlines to submit PNRs for the month of June, 2004. The data the TSA requested “varie[d] from airline to airline . . . and may also [have] include[d] the names of others traveling in the same party, meal preference, whether the reservation was changed, the method of payment and comments of all types by airline employees on matters like whether a passenger was drunk or belligerent.” This prompted privacy advocates to contend Secure Flight was more invasive than CAPPS II.

On September 19, 2005, Secure Flight was dealt a serious setback as the Aviation Security Advisory Committee forwarded a report of a nine-member panel of security and privacy experts (i.e., Secure Flight Working Group) to the TSA, without recommendation, stating: “First and foremost, TSA has not articulated what the specific goals of Secure Flight are. Based on the limited test results presented to us, we cannot assess whether even the general goal of evaluating passengers for the risk they represent to aviation security is a realistic or feasible one or how TSA proposes to achieve it.” These and other unresolved concerns about the intent and architecture of Secure Flight doomed the program in 2006. However, the Department of Homeland Security is working to reduce mistakes, protect privacy rights, and achieve reliability in order to release a revamped form of Secure Flight sometime between 2008 and 2010.

Is Common Sense Illegal?

Inarguably, profiling requires discrimination. Both “profiling” and “discrimination” have acquired strong negative connotations. Yet, profiling and discrimination are common, lawful features of economic life in America today. This is so because of the commoditization of personal information. Banks and supermarkets have long used profiling as marketing and strategic planning tools. Businesses today segment their customers on the basis of buying habits and patterns, where frequent customers earn benefits such as gift cards or giveaways. Airlines certainly profile and categorize their customers through computer reservation systems.

Committee to Meet in Conjunction With Florida Bar Midyear Meeting

The next meeting of the Aviation Law Committee will be Friday January 18, 2008 at the Hyatt Regency Hotel, in downtown Miami, from 2:00 - 6:00 p.m.
and yield management systems, along with frequent flyer reward programs. In state and federal courts across the nation, too, lawyers profile potential jurors during voir dire and doing so is an important and legitimate part of the judicial process. (Of course, lawyers may profile potential jurors on the condition they do not discriminate on the basis of race, color, religion, sex, national origin or economic status.) In the marketplace and in the courtroom, then, profiling can be rational conduct and discrimination can entail nothing more than differentiating individuals on permissible grounds for appropriate ends.

Like profiling and discrimination, surveillance is an activity whose connotation and legitimacy are context-based. From its founding, the United States government has surveilled its own citizens in response to external threats, alternatively justifying its actions as either care or control. In 1798, for example, Congress passed the Alien and Sedition Acts, which allowed President John Adams to deport non-citizens identified as threats to the country, without due process of the law. Later, during the Civil War, President Abraham Lincoln suspended the writ of habeas corpus on eight occasions; and, in 1875, in Totten v. United States, the United States Supreme Court upheld President Lincoln’s authority to enter into a contract with a private citizen to spy on Confederate troops. In 1917, during World War I, federal authorities prosecuted opponents to the war under the Espionage Act. Most infamously, on February 19, 1942, President Franklin D. Roosevelt authorized the internment of Japanese Americans to designated military areas, a decision upheld by the now disgraced decision of Korematsu v. United States. The legacy of “us-against-them” domestic and foreign policy brings into focus the broad question whether legitimate ends such as national security are justified by any means, including the deprivation of civil liberties and other rights for particular groups of people. The topic of airline passenger profiling encapsulates this analytic tension, touching upon the narrower, disturbing question of whether reason and racism are symbiotic and not mutually exclusive when it comes to protecting commercial aviation from terrorism.

Americans resisted profiling before September 11th, but later welcomed it as a common sense solution to aviation terrorism. Following the thwarted liquid-bomb plot of August 10, 2006, moreover, the Wall Street Journal criticized the TSA’s refusal to use religious or ethnic factors as even minor factors in screening:

Nobody is suggesting using ethnicity or religion as the only — or even the primary — factors in profiling terrorists. But it also makes no sense to take zero account of the fact that every suicide attack against U.S. aviation to date has been perpetrated by men of Muslim origin. While al Qaeda is no doubt seeking recruits who don’t obviously display such characteristics, that doesn’t mean we should ignore the likeliest candidates . . .

The law on this is settled, and in the other direction. On multiple occasions the federal courts have upheld programs that treat groups differently when a “compelling” public interest can be identified: affirmative action, minority set-asides, composition of Congressional districts, and the all-male draft have all met that legal test. Yet the same people who allocate jobs, federal contracts and college admissions by race or ethnicity object to using them merely as one factor in deciding whom to inconvenience for a few minutes at an airline checkpoint. Surely aviation security is a far more compelling public interest than the allocation of federal set-asides.

Profiling proponents do not discount the Constitution. Rather, they argue that common sense is not inconsistent with the Constitution. Yet, equating Arabs, Middle Easterners, Muslims, or any other group with terrorism is inequitable and contrary to law. Sociologically, too, marginalizing passengers along demographic lines ignores the fact that passengers selected for heightened screening probably are law abiding citizens posing no threat to any facet of society. In this respect, some observers of aviation security policy perceive airline passenger profiling to be overtly racist, where “flying while brown” and “flying while Arab” is as risky an activity as “driving while black.”

Profiling in terms of ethnicity, political agenda, race and/or religious affiliation is logical. Aviation security policy makers must imagine unprecedented and unprecedented threats from all passengers, not least of whom are passengers whose background fits with those who have terrorized commercial airline travel historically. The federal government’s systematic targeting of a substantial subset of its population (i.e., airline passengers) no doubt challenges ideals expressed in the Constitution and the Bill of Rights particularly. Therefore, the paramount questions for aviation security policy makers are whether and how it is possible to balance—not exchange—airline safety with civil liberties. These questions are likely to endure as long as any terrorist threat to commercial aviation persists.

Conclusion

Privacy, liberty, and security proponents are equally blameworthy in presenting their arguments for or against airline passenger profiling systems in absolute terms. The starting point for many libertarians and privacy advocates is Benjamin Franklin’s uncompromising statement in 1759 that “[t]hose who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety.” Oppositely, one well-known airline CEO gave this ultimatum: “You want to travel on the airline system? You give up your privacy. You don’t want to give up your privacy? Don’t fly. Your privacy isn’t equal to the safety of the rest of us.” Where emotions run high, sometimes it is best just to relate facts: Ten of the 19 September 11th hijackers were identified for further security screening by a computer passenger profiling system. How this data was managed by human beings is another matter.

Aviation Security
Endnotes:
1 'The author, a Miami, Florida commercial trial lawyer and Adjunct Professor of Aviation Law at the University of Miami School of Law, welcomes comments at ravich@bellsouth.net. This article excerpts Timothy M. Ravich, Is Airline Passenger Profiling Necessary?, 62 U. MIAMI L. REV. (forthcoming 2007).
4 A recent example of terrorism by people considered to be caregivers occurred on June 30, 2007, when several physicians put into action a plot to drive a propane-laden, suicide car-bomb into the arrival terminal at the airport in Glasgow, Scotland. See, e.g., Aditi Khanna et al., Doctors of Terror, INDIA TODAY, July 16, 2007, at 40. Olga Craig, ‘The People Who Cure You Will Kill You,’ SUNDAY TELEGRAPH (London), July 8, 2007, at 20.
7 The argument to scrutinize airline passenger behavior through profiling or otherwise is not an argument for diminished screening of dangerous objects. In this vein, the Transportation Security Administration’s decision to discontinue its prohibition of butane lighters as a carry-on item (effective August 4, 2007) is puzzling. See, e.g., Michael J. Sniffen, TSA Eases Carry-On Rules for Lighters, Breast Milk, ORLANDO SENTINEL, July 21, 2007, at A7.
8 See Paul Rosenzweig, Civil Liberty and the Response to Terrorism, 42 DUQ. L. REV. 663, 679 (2004).
14 Some airline passengers have challenged the No-Fly list (unsuccessfully) in federal court. See, e.g., Gilmore v. Gonzales, 435 F.3d 1125 (9th Cir. 2006).
21 92 U.S. 105, 106 (1875).
23 323 U.S. 214 (1944).
Litigating Insurance Coverage Issues Under Aircraft Liability Policies

By James B. Denman*

This article was presented at the Aviation Law and Insurance Symposium at Embry-Riddle Aeronautical University, Daytona Beach, Florida in January, 2000.

An analysis and evaluation of a coverage defense asserted by an aviation insurer should begin with an examination of the policy language as a whole including the declarations, insuring agreements, exclusions, limitations, conditions and sometimes definitions together with the circumstances surrounding a particular loss resulting in bodily injury and/or property damage. The language of the insuring agreement and circumstances surrounding a loss should be examined in light of established rules of construction and interpretation and the applicable law.

I. Applicable Law. The law of the place where a contract of insurance was entered into governs its construction. Florida will apply its own laws to interpret insurance policies which are purchased and delivered in this state.1

II. Construction and Interpretation of the Aviation Insurance Policy.

A. Plain Meaning Rule - Undefined terms in a liability policy are to be construed in accordance with their plain, ordinary, popular and natural meaning.2

In Insurance Company of North America v. Maurer, 505 S.W. 2d 931 (Tex. Civ. App. 1974) the Court concluded that the phrase “valid pilot’s certificate” since it was singular, referred only to one certificate, this being the pilot’s certificate and not the medical certificate which had expired. The additional phrase “as required by the Federal Aviation Administration” the Court concluded simply required the pilot have a valid pilot’s certificate as required by the FAA. The lack of a current medical certificate was found not to preclude coverage under this language.

Similarly, in Fireman’s Fund Insurance Company v. McDaniel, 18 F. Supp. 614 (Dist. Ct. Miss. 1960), affd 289 F.2d 926 (5th Cir. 1960) the typewritten provision in an aircraft liability policy providing that the persons authorized to operate the insured aircraft in flight included “T. H. McDaniel or any currently certified commercial pilot having a minimum of 500 logged solo flying hours including at least 50 hours as first pilot of multi-engine aircraft” was found to mean that McDaniel could pilot the aircraft in flight, with or without passengers aboard, and that the coverage would then be in effect, whether he was certificated or rated as a pilot or not.

B. Typewritten vs. Printed Provisions

- When there exists a conflict between printed provisions and typewritten provisions, the typewritten provisions must take precedence and supersede conflicting printed material in the policy.3

1. Typewritten provisions contained in a rider or a typewritten endorsement to an aircraft liability policy has been found to prevail over conflicting pilot certification provisions in the main printed body of the policy.

In LeBlanc v. American Employers Insurance Company, 155 F.2d 969 (5th Cir. 1946) the printed policy provisions provided that the aircraft should be operated only by instructor pilots in the employ of the insured who held commercial pilot certificates. However, a rider attached to the policy provided the insurance should apply only while the aircraft was operated for purposes incidental to and in accordance with requirements of the civilian pilot training program by a flight instructor or a student named in an attached schedule. The pilot of the aircraft was killed while flying the insured’s airplane but was not one of the pilots approved in the rider and the aircraft was not being operated for purposes incidental to the civilian pilot training program. The Court stated in finding no coverage that even if the printed provisions of the policy afforded coverage, it would be in direct conflict with the typewritten rider provisions, in which event, the rider provisions would prevail and supersede the printed provisions of the policy.4

C. Strict Interpretation in Favor of Insured and Against the Insurer

- Aircraft insurance policies will be interpreted in favor of the insured and against the insurer to give effect to the broad purposes of the policy to afford coverage when this can be done without doing violence to the language of the policy.5 By failing to define terms or to include any additional qualifying or exclusionary language, an insurer may not successfully insist upon a narrow and restrictive interpretation of the coverage provided.6

D. Policy to Be Read as a Whole - A provision in an aircraft liability policy defining the word “insured” had to be read in connection with other portions of the policy, including the pilot exclusion clause.7

E. Irreconcilable and Inconsistent Provisions of an Insurance Policy Will Result in a Construction Favoring the Most Coverage - Where separate provisions of a policy are irreconcilable and inconsistent, the Courts will adopt the construction of the policy which provides the most coverage.8

F. Ambiguous Terms Are Construed Against the Insured - In construing policies of aircraft insurance, the general rule is applicable that doubts as to coverage due to ambiguous policy provisions are to be construed against the insurer who drew the contract or chose the language used.9 Although ambiguities should be resolved against the insurer, this principle only applies when there exists a genuine inconsistency, uncertainty or ambiguity in meaning after resort to the ordinary rules of construction.10

1. Ambiguity Defined - An ambiguity exists only when the language of an
insurance policy makes it susceptible to two different, reasonable interpretations, one resulting in coverage, and one resulting in no coverage. An insurance policy is not ambiguous merely because some analysis is required in order to interpret it.

2. Parol Evidence Admissible - Parol evidence is admissible in order to change, add to or subtract from an insurance policy or affect its construction where the writing is ambiguous, uncertain or does not show an intent to embody the complete agreement between the parties.11

3. Agent’s Interpretation - If the terms of the insurance policy are ambiguous, the insurer may be estopped to deny the correctness of an interpretation put upon the policy by the insurer’s general agent.

III. The Causal Connection Test (A Method of Defeating a Denial of Coverage) - The Issue

Does the lack of a causal connection between a breach of a “policy provision” (exclusion, condition, declaration and/or warranty) and a loss prevent an aircraft insurer from successfully denying coverage based upon the breach?

A. Introduction-Aircraft Accidents Rarely Occur Without Either the Pilot or Aircraft Itself Being in Violation of the FARs - The Federal Aviation Administration (FAA) has promulgated a broad and comprehensive array of rules and procedures which govern the certification, maintenance, and operation of aircraft called Federal Aviation Regulations. A great number of these regulations are safety-oriented. Aviation insurance policies have largely incorporated one or more provisions that exclude coverage if the aircraft is being operated in violation of these FARs. Therefore, aircraft accidents are unlikely to occur without either the pilot or the aircraft being in violation of at least one or more of these FARs.

B. If Loss Causally Related to Breach of Policy Provision - No Coverage - If the aircraft related loss or losses are causally related to a violation of the FARs and breach of a policy provision the causal connection test does not become an issue to attempt to defeat the insurer’s coverage defense.

C. The Problem-If the Aircraft Loss is Not Causally Related to a Breach of a Policy Provision, Many Courts Refuse to Enforce The Insurer’s Coverage Defense - Very frequently an aircraft loss has no causal relationship to the Federal Aviation Regulations and policy provision alleged to have been breached. Courts have been reluctant to enforce such policy provisions and therefore to deny coverage, often finding it unfair or unconscionable to do so on public policy grounds. Therefore, in many jurisdictions it has been held that there must be a causal relationship between the breach of the policy provision and the accident. This has occurred in two ways. First, appellate courts have imposed by case law the causal connection requirement to defeat a denial of coverage for a technical breach of aircraft policy provisions. Second, antitechnical statutes have been passed in some states seeking to prevent insurance companies from avoiding coverage based on a technical policy violation or violation of a Federal Aviation Regulation (FAR) which did not cause or contribute to causing the accident.

1. Causal Relationship Required by Case Law - Many cases require proof of a causal link between the breach of the policy provision relied upon to deny coverage and the accident. Most of these cases utilize the same reasoning that it would be unfair or unconscionable and therefore against public policy to enforce a policy provision to deny coverage when the breach of that policy provision did not cause or contribute to causing an aircraft accident. This view has been referred to as the modern trend although there is a clear split of authority between those cases applying the causal connection test to avoid a coverage defense and those cases that do not apply it.12 A causal connection has been required to prevent a denial of coverage when the following type of breach of policy provisions was involved:

a. Invalid Airworthiness Certificate (Annual Inspection) - Pucket v. U.S. Fire Insurance, 678 S.W. 2d 936 (Tex.1984) holding that the insurer could not use the lack of a required annual inspection to deny coverage unless it was causally connected to the loss.


c. Breach of Pilot Warranty – In American States Insurance Company v. Bylerly Aviation, Inc., 456 F. Supp. 967 (S.D. Ill. 1978) the court held the insurer could not deny coverage even though an unnamed pilot flew the aircraft absent a showing that the breach contributed to the loss. In Firemans Fund Insurance Company v. McDaniel, 187 F. Supp. 614 (N.D. Miss 1960), Aff’d 289 F.2d 926 (5th Cir. 1961) the insurer could not deny coverage due to the insured’s failure to have a pilot’s license absent a showing that it contributed to the loss.

2. Causal Relationship Required by Statute - Aviation insurance policies generally include one or more provisions which exclude coverage if the aircraft is being operated in violation of the Federal Aviation Regulations. However, the government regulations are so comprehensive that it is probably impossible for an accident to occur without the pilot of the aircraft having allegedly violated one or more of the Federal Aviation Regulations.14 In response to this, some states have passed antitechnical statutes which seek to prevent insurance companies from avoiding coverage based on technical violations of “policy provisions” and/or federal regulations. The stat-
utes generally provide that in order for coverage to be suspended based on a breach of a policy provision, there must be a causal relationship between the breach and the accident. Florida has such a statute. The following cases required a causal connection between the breach of the policy provision and the loss based upon the application of an antitechnical statute:

a. Lack of Airworthiness - Pickett v. Woods, 404 So.2d 1152 (Fla. 5th DCA 1981) applied Florida’s antitechnical statute, §627.409(2) and held (1) that it was applicable to an aircraft liability insurance policy, (2) that the word “provision” in the statute was intended to include any material provision of the policy and (3) that a prior decision decided before the enactment of the statute required no causal connection between the breach of the policy provision and the loss, was superseded by Florida’s antitechnical statute.

b. Antitechnical Statute Cannot be Utilized to Created Coverage Where None Existed in the First Place - In the case of United States Aviation Underwriters, Inc. v. Sunray Airline, Inc., 543 So.2d 1309 (Fla. 5th DCA 1989) United brought a declaratory judgment action seeking a declaration that the insurance policy insuring Sunray which provided through an endorsement to the policy that it did not cover turbine powered aircraft. The insured airplane crashed as a result of fuel starvation and the affidavits of the insured’s experts opined that the fuel starvation was caused by pilot error and would have occurred under the same circumstances regardless of the turbine powered nature of the aircraft’s engines.

United urged the Fifth District to recede from Pickett v. Woods and especially from its holding that Fla. Stat. §627.409(2) applies to aviation insurance policies. In refusing to address that issue, the Court held that the causal connection requirement will not serve to extend or create coverage where none existed in the first place. In distinguishing Pickett, the Court in Sunray, characterized the operative provision in Pickett prohibiting the operation of the insured aircraft while its airworthiness certificate was not in full force and effect as a condition subsequent. The Court characterized the provision in the Sunray case as an exclusion. The Court stated in part as follows:

“Clauses which provide that a policy shall become void or its operation defeated or suspended, or the insurer relieved wholly or partially from liability upon the happening of some event, or the doing or omission to do some act, are not conditions precedent, but conditions subsequent and are matters of defense to be pleaded and proved by the insurer. A condition subsequent is to be distinguished from an exclusion from the coverage; the breach of the former is to terminate or suspend the insurance while the effect of the latter is to declare that there was the existence of insurance with respect to the excluded risk.”

In explaining its holding and distinguishing Pickett the Court held there was no “technical omission” since the aircraft was never insured under the policy and the Court saw nothing in Picket nor in the antitechnical statute which indicated an intent to supply coverage where none existed prior to the loss in question. The court went on to explain as follows:

“We do not believe that the legislature intended, by the enactment of §627.409(2), to give an insured coverage which is expressly excluded from the policy or to resurrect coverage under a policy or an endorsement which is no longer in effect simply because an insurer fails to comply with the terms of the aforementioned statute.”

C. If Aircraft Loss Was Not Casually Related To A Breach of A “Policy Provision” (Insurer’s Coverage Defense) Many Courts Will Still Enforce the Provision and Deny Coverage - Many courts have agreed that a causal link between the breach and the accident need not be proven where there is a clear breach of a specific and unambiguous policy provision that voids coverage.

1. Lack of Airworthiness - O’Connor v. Proprietors Insurance Company, 661 P.2d 1181, Aff’d, en banc 696 P.2d 282 (Colo. 1982) held that since the aircraft involved in the accident had not received its annual inspection, it was operated in violation of the terms of its airworthiness certificate and within an exclusion in the insurance policy rendering the insurance policy inapplicable even though there was no causal relationship between the failure to inspect and the accident. In Hollywood Flying Service, Inc. v. Compass Insurance Company, 597 F.2d 507 (5th Cir. 1979) the Court in applying Florida law held that a policy exclusion for an aircraft whose airworthiness certificate was not in full force and effect applied even though there was no showing of a causal link between the lack of a valid airworthiness certificate and the loss of the aircraft.

In Security Mutual Casualty Company v. O’Brien, 99 N.M. 638, 662 P.2d 639 (N.M. 1983) it was held the lack of a causal connection between the breach of an insurance policy exclusion requiring a current airworthiness certificate and an accident did not preclude denial of coverage.

Similarly, in Ochs v. Avemco Insurance Company, 54 Or App 768, 636 P.2d 421 (Or. 1981), it was held that no causal connection between the aircraft accident and the policy exclusion requiring a valid and current airworthiness certificate was required to invalidate coverage. The policy language excluded coverage for any aircraft in flight which did not have a valid and currently effective airworthiness certificate.

2. Lack of Valid and Current Medical Certificate - In Glades Flying Club v. Americas Aviation and Marine Insurance Company, 235 So.2d 18 (Fla. 3rd DCA 1970) it was held that the pilot’s failure to have a current medical certificate as required by the insurance policy, resulted in a suspension of coverage even though there was no causal relationship between the lack of
medical certificate and the loss.\textsuperscript{20}

The Court held:

“An aircraft insurance policy may validly condition liability coverage on compliance with a governmental regulation and, while noncompliance with such a regulation continues, the insurance is \textit{suspended} as if it had never been in force. There need be no causal connection between the noncompliance and the loss or injury.”

Other decisions holding similarly include:


3. Improper or Illegal Use of Aircraft

- It was held in \textit{Globe Indemnity Company v. Hansen}, 231 F.2d 895 (8th Cir. 1956) that the use of an aircraft for \textbf{aerobatics} within the insurance policy’s exclusion voided the insurance coverage. The \textit{Hanson} Court further held the excluded use need not be the cause of the loss for the insurance company to successfully deny insurance coverage.

- The operation of an aircraft for an \textbf{unlawful purpose} within the policy’s exclusion clause prohibiting \textbf{aerobatics} served to suspend the policy as if it had never been in force even though there was no causal connection between the breach of the exclusion clause and the accident.\textsuperscript{21}

- In \textit{Middlesex Mutual Insurance Company v. Bright}, 106 Cal App 3rd 282, (4th Dist. 1980) it was apparent from the crash site that the aircraft had been used to illegally smuggle \textbf{marijuana} into the United States from Mexico in violation of an exclusionary clause prohibiting \textbf{unlawful use} of the aircraft. The Court held that the insurer could lawfully limit its liability by excluding certain risks and hazards from coverage and that while the insured was engaged in excluded conduct, coverage was suspended. The Court further held that the insurer did not need to show a causal connection between the forbidden conduct and the resulting loss to successfully avoid liability under the policy.

4. Conversion

- In \textit{Gelder v. Puritan Insurance Company}, 100 N.M. 240, 668 P.2d 1117 (N.M. 1983) the Court upheld the granting of a summary judgment in favor of the insurer holding that no coverage was afforded where the policy contained a provision excluding coverage for conversion even though the conversion of the aircraft had nothing to do with the accident.

5. Pilots Other Than Named Pilots

- In \textit{Roberts v. Underwriters at Lloyds of London}, 195 F. Supp. 168 the Court granted the insurance company’s summary judgment based on exclusion in the aircraft insurance policy stating that the policy did not apply unless the aircraft was piloted by certain \textbf{named pilots}. The Court held that the insurance company was not required to show a causal connection between the exclusion and the resulting loss to successfully avoid coverage.

   - a. In affirming a summary judgment for the insurance company and apparently applying Florida law, the Court in \textit{Electron Machine Corporation v. American Mercury Insurance Company}, 297 F.2d 212 (5th Cir. 1961) said that since the aircraft was being used contrary to the insurance policy provision specifying \textbf{only three individuals} as covered, the insurance was not in force and it was immaterial that the excluded use was not a cause of the loss. The Court explained since the airplane was being used for a purpose which removed it from the coverage of the policy, it would not hold the insurance company to the coverage of risks which it expressly excluded. Therefore, even though there was no causal link between the excluded use and the loss, there was no coverage under the policy.\textsuperscript{22}

   - b. In \textit{Des Marais v. Thomas}, 147 NYS 2d 223 (NY 1955) the aircraft was piloted by an individual who was not a named pilot. The policy stated that it did not cover any loss arising from piloting of the aircraft by any person other than the pilots named therein. It was held that the exclusion clause in the policy relating to pilots imposed a \textbf{condition precedent} upon the insured, and the insurer need not show a causal connection between the accident and noncompliance with the condition in order to avoid coverage.

b. Lack of Required Pilot Qualifications

- In \textit{Lineas Aereas Colombianas Expresas v. Travelers Fire Insurance Company}, 257 F.2d 150 (5th Cir. 1958) the court, apparently applying Florida law, held the insured was not entitled to recover for the loss because the policy requirements were violated even though the loss was not caused by the violations. The airplane crashed while being used in operations which breached a provision of the insurance policy requiring the aircraft be operated by pilots with valid certificates from either the United States or the Republic of Colombia. At the time of the accident the airplane was being piloted by a \textbf{Mexican pilot who had neither a United States nor a Colombian certificate} and who was carrying passengers in violation of the Colombian registra
tion certificate. The policy provided there was no coverage for \textbf{operations which were unlawful and that violated civil air regulations}. In finding the insured was not entitled to recover for the loss, the Court stated the clear and plain meaning of the policy was that the risk was excluded if the loss was caused by the operation of the plane while it was being used in violation of the requirements of the policy.

- In \textit{Grigsby v. Houston Fire and Casualty Insurance Company}, 113 Ga. App. 572, 148 S.E. 2d 925 (Ga. 1966) it was held that the insurance company could avoid coverage based
on a policy exclusion from coverage of losses where there was an existing violation of any regulation pertaining to airman’s certificates, even though the violation in no way caused the loss when the pilot failed to have made the required number of takeoffs and landings within the 90 days preceding the flight in violation of Federal Aviation Regulations.

In Johnson v. The Security Insurance Company of Hartford, 135 Ill. App. 3d 690, 481 NE 2d 1263 (Ill. 1985) it was held there was no insurance coverage when a student pilot violated the terms of an aviation insurance policy endorsement by carrying a passenger even though a causal connection did not exist between the excluded conduct and the cause of the loss of the aircraft.

The denial of insurance coverage based on a policy exclusion for losses while the aircraft was in flight during or as a result of its operation in violation of government regulations was upheld on appeal where the pilot was flying the aircraft in weather conditions which were less than the minimums prescribed for visual flight rules but without a required instrument rating.

In Kilburn v. Union Marine and General Insurance Company, 326 Mich. 115, 40 NW 2d 90 (Mich. 1949) the Court held the lack of a causal relation between the accident and a student pilot operating the aircraft with a passenger in violation of the insurance contract was not relevant to the avoidance of insurance coverage. The exclusion section of the insurance policy contained a provision stating that the policy did not cover any loss while the aircraft was operated by any person in violation of the terms of his pilot’s certificate. Similarly, in Macalco, Inc. v. Gulf Insurance Company, 550 S.W. 2d 883 (Mo. App. 1977) the pilot of the airplane violated provisions of the policy while flying with a student pilot’s certification without approval and supervision of an instructor and by carrying passengers in violation of Federal Aviation Regulations. The Court held the excluded activity, suspended coverage as if it had never been in force and proof of a causal connection between the casualty and the pilot’s certification and rating as a student pilot was unnecessary. A similar result was reached in Des Marais v. Thomas, 147 NYS 2d 223 (NY 1955).

A pilot’s failure to have a current biennial flight review as required by the insurance policy was held to be a breach of a condition precedent and therefore the insurer’s obligation was terminated even though there was no causal link between the pilot’s qualifications and the loss, as held in Edmonds v. United States, 642 F.2d 877 (1st Cir. 1981).

When the pilot failed to have the specified number of hours as pilot in command as required by a condition precedent of the insurance policy, the insurer could avoid liability without any showing that the pilot’s failure to meet those requirements was a cause of the injuries and damage resulting from the aircraft accident. Similarly, in Di Santo v. Enstrom Helicopter Corporation, 489 F. Supp. 1352 (E.D. Pa. 1980) it was held the absence of a causal link between the failure of the pilot to have the required number of hours in a helicopter in violation of the pilot exclusion resulted in a finding of no coverage even though there was an absence of a causal link between the pilot qualification provision and the accident.

D. Practical Note - In analyzing the cases dealing with the causal connection test, it would appear that if a “policy provision” relied upon by an insurer to deny coverage can be characterized as an exclusion or condition precedent so that in applying unambiguous and clear “policy provisions” there is no coverage from the outset, then most courts will enforce the policy provision and find no coverage regardless of whether there is a causal connection between the aircraft accident and the policy provision relied upon. The rationale utilized by the cases is that courts will not create coverage where none existed in the first place. However, if the “policy provision” relied upon for denial of coverage by the insurer can be characterized as a condition subsequent then many courts when there is no connection between the aircraft loss and the “policy provision” will find by case law or by applying an antitechnical statute that the provision does not invalidate coverage.

IV. Common “Policy Provisions” (Exclusions, Conditions, Declarations and/or Warranties) Relied Upon for Denial of Coverage

The following outlines some of the more common policy provisions affecting insurance coverage under aviation liability policies. The cases cited are not intended to be comprehensive in coverage of the cases dealing with these type of policy provisions but rather utilized for illustrative purposes only.

A. Pilot Warranty Clause - Every light aircraft insurance policy contains a “pilot warranty clause” limiting coverage in flight only when certain named and/or pilots with certain specified qualifications are operating the aircraft. The “pilot warranty clause” may limit in-flight coverage of the aircraft only while the aircraft is operated by (1) certain specifically named pilots, (2) a combination of certain specifically named pilots and additional pilots with specified pilot qualifications, or (3) while operated only by pilots with at least certain specified qualifications (commonly referred to as an “open pilot warranty clause”). Most often the pilot clause containing the pilot warranty is stated as a declaration or condition as well as an exclusion in the policy.

1. Student Pilots - Student pilots carrying passengers, and while not under the direct supervision of a flight instructor, or whose flight is not approved by a certified flight instructor is a common exclusion in aircraft liability policies.

a. Students With Passengers - Other cases that have found no coverage due to a student pilot carrying passengers in violation of the policy exclusions are Johnson v. The Security Insurance Company of Hartford, 135 Ill. App. 3d 690, 481 NE 2d 1263 (Ill. 1985); Kilburn v. Union Marine and General Insurance Company, 326 Mich. 115,
In 29-Aircraft liability only a student pilot certificate and approval of a pilot holding an FAA flight direct supervision or have the specific with ambiguity.

indicated that although the provisions of the policy might appear complicated, the time of the accident, the airplane was not covered. The Court further indicated that although the provisions of the policy might appear complicated, their complexity should not be confused with ambiguity.

In Ranger Insurance Company v. Harrell, 286 So.2d 261 (Fla. 2d DCA 1973) the aircraft liability policy provided coverage only where a flight was under the direct supervision of, and was specifically approved by, a Certified Flight Instructor. The Second District Court of Appeals held that coverage did not exist when the flight instructor had not been authorized in advance of the flight in question, even though he had, for several months before the accident, generally authorized the student to make unsupervised cross country solo flights.

2. Flight Time- In Utica Mutual Insurance Company v. Emmco Insurance Company, 14 AVI. 17,130 (Minn. 1976) the aircraft policy required a minimum logged flying time of 5,000 hours as pilot in command. It was stipulated that the pilot, Bennett, had not flown as pilot in command in the literal sense for the requisite 5,000 hours. What was disputed was the extent to which other flying time could be “logged” as pilot in command time for purposes of satisfying the policy’s pilot qualification endorsement. It was stipulated that if 50% of Bennett’s co-pilot time was counted as pilot in command time that he would have had 5,007 hours as logged flying time as pilot in command.

The Minnesota Supreme Court found that the term “logged flying time as pilot in command” was ambiguous and that extrinsic evidence was admissible to support the finding that the pilot qualified for coverage under the open pilot warranty clause. In Security Mutual Casualty Company v. Luthi, 13 AVI. 17,685, 226 NW 2d 878 (Minn. 1975) the Minnesota Supreme Court had previously held the term “logged flying time” to be ambiguous in computing required hours of flying time and resolved that ambiguity by determining that the “block-to-block” method, whereby time was computed from the moment that the wheels moved until they stopped at the end of the flight, rather than the “time-in-service” method which computed flying time as the time the aircraft wheels leave the ground until they touch down again as the appropriate method of computing flight time under the open pilot warranty clause.

3. Instrument Rating- In Jim Hawk Chevrolet-Buick v. Insurance Company of North America, 15 AVI. 17,536 (Iowa 1978) the pilot endorsement (among other things) required, “ratings and certificates appropriate for the flight and the aircraft as required by the Federal Aviation Administration.” The pilot, Hawk, did not hold a rating for instrument flights. It was held that when Hawk flew the aircraft into instrument conditions, coverage was suspended and there was no coverage for the aircraft accident involved. It should also be noted that since a flight by a VFR pilot in instrument conditions is illegal under the Federal Aviation Regulations, there may also be a violation of the unlawful purpose exclusion of any given aircraft insurance policy.

In Glover v. National Insurance Underwriters, 14 AVI. 17,540 (Tex. 1977) it was held that “the flight,” as used in a pilot warranty clause of an aircraft liability insurance policy, refers to the entire time the aircraft is in flight. In characterizing “the flight” as VFR or IFR the court held that it must be looked at as a whole rather than in segments in making that determination and the character of “the flight” must be determined at its inception. Accordingly, a pilot who embarks on a VFR flight (so characterized from its inception) but during the flight encountered IFR conditions without holding an instrument rating was held not to exclude coverage under the pilot warranty clause.

4. Medical Certificate - Lack of a valid and current medical certificate may result in a suspension of coverage during the period after it expires (or time it is suspended or revoked). The typical pilot clause requires a “valid medical certificate” or a “valid and effective medical certificate.” This area has spawned much of the initial litigation that resulted in the development of the causal connection test discussed above. If the jurisdiction in question does not require a causal connection, the failure to have a valid and effective medical certificate will suspend coverage.

B. Airworthiness- Aircraft liability policies generally exclude coverage when the airworthiness certificate of the aircraft is not in full force and effect.

Puckett v. Woods, 404 So. 2d 152 (Fla. 5th DCA 1981) and United States Underwriters, Inc. v. Sunray Airline, Inc., 543 So. 2d (Fla. 5th DCA 1989) in which both discussed the above in connection with the causal connection requirement. Also see Puckett v. U.S.

C. Unlawful Use or Purpose - Although almost any Federal Aviation Regulation that is violated in connection with an aircraft loss could be characterized as an “unlawful use” or “unlawful purpose,” antitheatrical statutes and cases requiring a causal connection between the loss and the unlawful use may prevent unfairness and an unconscionable result.

In Arnold v. Globe Indemnity Company, 416 F.2d 119 (6th Cir. 1969) the aircraft insurance policy excluded coverage for losses during operation of an aircraft “in violation of any governmental regulation for civil aviation applying to instrument flying.” The policy held a private pilot certificate and was qualified to fly under “visual flight conditions only” but was not an instrument rated pilot or qualified to fly under instrument conditions. It was held that the policy language relating to unlawful use excluded coverage for the aircraft accident.

D. Rental Pilots- The rental pilot exclusion is another common policy defenses. Although most fixed base operators renting aircraft have insurance coverage for their aircraft insuring their facility, it is common for the policy to contain a rental pilot exclusion. In the event of an aircraft accident or loss the insured fixed base operator will be covered, but should the rental pilot be sued, the insurer may deny both a defense and indemnification to the rental pilot should there be a judgment against that pilot. The Non-owners Rental Pilot Liability Policy has been developed to provide coverage to pilots under these circumstances. There are a substantial number of cases dealing with this exclusion.

In Wzontek v. Zurich Insurance Company, 418 Pa. 30, 208 A.2d 861 (Pa. 1965) a typewritten declaration of a flying service’s liability policy extending coverage to “any private or commercial certificated pilot” was held to cover the operation by the renter pilot notwithstanding a printed provision in the policy excluding operation by a “renter pilot.”

In Saliba v. American Policyholders Insurance Company, 385 A.2d 328 (NJ 1976) the aircraft policy provided that permissible uses would be restricted to “limited commercial” purposes which was defined as including student instruction and rental to pilots but excluding passenger carrying for hire or reward. The policy provided that the term “insured” under the policy did not include a person operating the aircraft under the terms of any rental agreement providing compensation to the named insured for use of the aircraft. Under these policy provisions it was found that the lessee who operated the aircraft pursuant to an oral rental agreement was not insured under the policy.

For a collection of cases dealing with aircraft accidents and the rental pilot provisions see 86 A.L.R. 3d 118.

E. Crop Dusting and Spraying- Another common exclusion in aircraft liability policies is for activities involving aerial seeding, spraying, dusting and other activities requiring low level flying.

In Brown v. Lee County Mosquito Control District, 352 So. 2d 116 (Fla. 2d DCA 1977) the Mosquito District, in an effort to control the mosquito population, caused an excessive amount of pesticide and a large amount of fuel oil to be sprayed over the land used for grazing of cattle, causing the cattle to contract pneumonia and die. The Aircraft Hull and Liability Policy excluded coverage for damage occurring “while the aircraft is being used for or in connection with... crop dusting, spraying, seeding, fertilization...” It was argued that the exclusionary language was ambiguous because the activity involved did not involve “crop dusting, crop spraying, crop seeding and crop fertilization,” and since damages resulted from “mosquito spraying” rather than “crop spraying”, the activity was not excluded. Summary judgment was granted to the insurer in the trial court. On appeal, the Second District Court of Appeal found the exclusionary language to be unambiguous and refused to give it the meaning claimed to be applicable by the insured, and affirmed the summary judgment in favor of the insurer.

F. Territorial Limitations- Aircraft liability policies invariably contain clauses that limit coverage to a geographical territory. Some territorial geographical limitations clauses in aircraft insurance policies limit coverage by the distance the aircraft is from land as well as by description of the territory over which the aircraft will be flown and still covered.

G. Flights Requiring Special Permits or Waivers- Frequently an aircraft will require a ferry permit or a waiver to do aerobatics from the FAA. Other activities for which the aircraft is utilized may require a special permit or waiver as well. These activities are typically excluded under aircraft liability policies.

H. Seizure, Confiscation, Restraint or Detention of the Aircraft- It has been a frequent occurrence in the Bahamas for the government to seize aircraft utilized for unlawful purposes in violation of that country’s laws. Aircraft liability policies do not cover loss of aircraft or damage to them as a result of such activities. Aviation insurers provide coverage under War Risks Aircraft Insurance policies to cover the possibility of such governmental activity.

V. “Lienholders Interest Endorsement” or “Breach of Warranty Lienholders Endorsement” are not
B. Binding Outcome (Collateral Estoppel) - The outcome of the coverage dispute will be binding upon all parties to the action for declaratory relief. In the event that personal injury and wrongful death claims are later filed in separate actions, the outcome of the coverage dispute will be binding provided that there is an identity of parties in the action for declaratory relief and the subsequent personal injury or wrongful death action. To the extent that the parties are not identical the issue of coverage may be re-litigated by a party not previously joined in the action for declaratory relief.40

c. Avoidance of Jury Confusion - If the parties chose to try the coverage issues with the issues of liability and damages, it is likely that the jury would be confused by commingling the coverage issues with the issues associated with the liability and damage aspects of a personal injury or wrongful death action.

d. Uniform Results - In the event that there are likely to be multiple wrongful death and/or personal injury claims arising out of a single aircraft accident, one action for declaratory relief joining all claimants, insureds and the insurer will result in a binding disposition of the coverage issue by one court on one occasion. Otherwise, the coverage issue would be required to be raised in each personal injury and wrongful death case that was filed, potentially resulting in differing results as to coverage in each case.

e. Cost Savings - By litigating the coverage issue in the action for declaratory relief, multiple coverage trials and costs associated with repeatedly putting on the same evidence in each case can be avoided. From the claimant's standpoint, substantial costs associated with preparing and trying the liability and damage issues arising out of an aircraft accident may be avoided if there is a final determination that no coverage exists for the aircraft accident in question.

f. Attorneys’ Fees are Recoverable by the Insured - If the insured or an omnibus insured under an aircraft liability policy is successful in establishing coverage, attorneys’ fees may be awardable to counsel for the insured.41

B. Severance of Coverage Issue from Case in Chief - An insured under an aircraft liability policy, after being sued by a claimant seeking damages for personal injury or wrongful death, may implead the insurer raising the coverage issues and request that the third party action be severed from the case in chief. A claimant may not bring such an action until after judgment in most jurisdictions.42 If the trial judge can be convinced to try the severed coverage case separately and before the case in chief, many of the advantages of a direct action for declaratory relief can be realized.

C. Litigating Insurance Coverage Issues Along With Liability and Damage Issues - In many jurisdictions where there is no severance procedure by which the insurance coverage issue can be litigated in a separate trial from the issues of liability and damages, the choice is between an action for declaratory relief or litigating the issue in a trial along with the issues of liability and damages. This is the least preferable method of litigating the coverage issues.

VII. Attorneys’ Fees are Awardable to a Named Insured or Omnibus Insured Securing a Judgment Against an Insurer

Fla. Stat. §627.428(1) provides for an award of reasonable attorneys’ fees to a named insured or omnibus insured securing a judgment against an insurer.43 A claimant’s attorney is not entitled to an award of reasonable attorneys’ fees against the insurer in successfully pursuing a coverage case unless the claimant can secure an assignment of the insured’s rights under the insurance policy. In the latter case, the claimant is viewed as “standing in the shoes of the insured” and therefore having all of the rights of the insured against the insurer including the right
to reasonable attorneys’ fees.

A. Effect of Offer of Judgment - What effect does an Offer of Settlement by the insurer have upon the claim by a prevailing insured in a coverage case who secures judgment against an insurer but does not “beat” the insurer’s Offer of Settlement? According to Scottsdale Insurance Company v. DeSalvo, 24 Fla. Law W. S 422 (Fla. Sept. 9, 1999) the prevailing insured is entitled to recover attorneys fees under section 627.428 (together with costs and prejudgment interest) through the date of the first Offer of Settlement which exceeds the recovery amount. Also included are damage awards, attorney’s fees, costs, and interest the insured would have received if the insured had accepted that Offer of Settlement on the date it was made.

VIII. A Liability Insurer is Not Permitted to Deny Coverage Based on a Policy Defense Without Taking the Prescribed Action as Required in Fla. Stat. §627.426

The claims administration statute requires a liability insurer denying coverage to give written notice of reservation of rights to the named insured by registered or certified mail within 30 days after the liability insurer knew or should have known of the coverage defense. In addition within 60 days, or within 60 days after receipt of a summons and complaint, whichever is later, the insurer must do one of three additional things: (1) give written notice to the named insured by certified mail of the insurer’s refusal to defend the insured, or (2) obtain a non-waiver agreement after full disclosure, or (3) retain independent counsel mutually agreeable to the parties (presumably to represent the insured, although the statute does not clearly so provide).

IX. The Burden of Proof In the Coverage Case Shifts

Counsel involved in a suit to determine coverage under aviation liability policies should be aware of the shifting burden of proof.

A. The insured or claimant attempting to establish coverage bears the initial burden of proving that the aircraft loss was covered by the aircraft liability policy.

B. Once there is a prima facie case establishing coverage, the burden shifts to the aviation insurer to prove that the loss was sustained under circumstances whereby coverage would be excluded or defeated by the “policy provisions.”

C. If the insurer is successful in proving that a “policy provision” defeats coverage, then in some jurisdictions the insured or claimant attempting to establish coverage may attempt to prove that based on public policy considerations, there is no causal connection between the “policy provision” and the aircraft loss.

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Endnotes:
5 72 A.L.R 3d 525.
9 Peerless Insurance Company v. Son Line Helicopters, Inc., 180 So.2d 364 (3rd DCA 1965);
10 Denman Rubber Manufacturing Company v. World Tire Corporation, 396 So.2d 728 (Fla. 5th DCA 1981).
13 See also Pickett v. Woods, 404 So. 2d 1152 (Fla. 5th DCA1981).
14 See 14 C.F.R. §91.13.
15 Fla. Stat. §627.409 provides in part as follows: “627.409 Representations and applications; warranties...”
16 (2) A breach or violation of the insured's warranty, condition, or provision of any ... transportation insurance policy, contract of insurance, endorsement, or application therefor does not void the policy or contract, or constitute a defense to a loss thereon, unless such breach or violation increased the hazard by any means within the control of the insured.”
17 See Glades Flying Club v. Americas Aviation & Marine Insurance Company, 235 So.2d 18 (Fla. 3d DCA 1970) (invalid medical certificate) & Hollywood Flying Service, Inc. v. Compass Insurance Company, 597 F.2d 507 (6th Cir. 1979) (invalid airworthiness certificate). In Pickett the airworthiness certificate was invalid in violation of an exclusion in the policy providing that the policy did not apply to any insured who operated or permitted the operation of the insured aircraft while in flight unless the airworthiness certificate was in full force and effect. Failure to have a valid airworthiness certificate, however, did not contribute to the accident. The Court in Pickett stated "the statute is designed to prevent
the insurer from avoiding coverage on a technical omission playing no part in the loss.

17 404 So.2d 1152 (Fla. 5th DCA 1981).

18 The real basis for the holding was that the insureds failed to carry their burden of proof to show that the violation of the policy exclusion was not a cause of the aircraft accident. The Supreme Court of Colorado clearly enunciated a rule of law that the application of the exclusion should be precluded by public policy only when the insured can show that the violation of the regulation was not a cause of the accident. For the foregoing reasons, many writers and commentators place this case in the category with the modern trend. However, this case seems to place the burden of proof of lack of causal connection upon the insured while other cases following the modern trend on this issue seems to place the burden of proof on the insurer.

19 This case is superseded by Fla. Stat. §627.409(2). However, should the foregoing statute ever be repealed the law set forth in this case and Gladee Flying Club v. Americas Aviation and Marine Insurance Company, 235 So.2d 18 (Fla. 3rd DCA 1970) would once again set forth the law in Florida providing that no causal link between the breach of the insurance policy provision and the loss is required to invalidate coverage.

20 This case has been superseded by statute and is of doubtful precedential value in Florida since the passage of Fla. Stat. §627.409. Pickett v. Woods, 404 So.2d 1152 (Fla. 5th DCA 1981).

21 Bruce v. Lumbermans Mutual Casualty Company, 222 F.2d 642 (4th Cir. 1955).

22 This case would appear to be of continuing precedential value under the Sunray exception to the holding of Pickett v. Woods, supra. Hence the exclusion of the policy apparently made it clear that there was no coverage under the insurance policy to begin with when an individual other than one of those named on the list of covered students was operating the aircraft contrary to the purpose of the use clause in the policy.


25 A typical pilot warranty clause containing coverage for both named pilots and pilots meeting certain minimum qualifications provides as follows:

ITEM 6. Pilot: When in flight the aircraft will be piloted only by the following pilots, provided each has a valid pilot’s certificate including medical certificate appropriate to the flight and aircraft: John Doe or pilots holding a private pilot certificate or commercial pilot certificate with logged flying time of at least 500 hours total time, 50 hours in the make and model of aircraft insured herein, and 25 hours in retractable gear aircraft.

26 A typical exclusion provides:

“This policy does not apply:

2. To any insureds while the aircraft is in flight

a. If piloted by another than the pilot or pilots designated in the declarations;

b. If piloted by a pilot not properly certificated, qualified and rated under the current applicable Federal air regulations for the operation involved, whether or not said pilot is designated in the declarations;”

27 A typical exclusion provides as follows:

“This insurance does not apply:

3. In flight, if piloted by a Student Pilot:

(i) When there is a passenger in your aircraft unless that passenger is a Certified Flight Instructor teaching the student pilot; or

(ii) When the Student Pilot is not under the direct supervision of a Certified Flight Instructor for the flight involved.”

28 Student pilots are prohibited from carrying passengers by section 61.89(a)(1) of Title 14 C.F.R.

29 Section 91.203(a) of Title 14 C.F.R. provides in part: “no person may operate a civil aircraft unless it has...[a]n appropriate and current airworthiness certificate.” Section 91.409(a) (1) of Title 14 C.F.R. further provides that an aircraft may not be operated unless an annual inspection has been performed within the preceding twelve months.

30 A typical exclusion from the AIG Light Aircraft Policy provides as follows:

“This insurance does not apply:

(d) if the aircraft is not certified by the FAA under a standard Airworthiness Certificate;” A similar exclusion contained in the Old Republic Insurance Company policy issued through Phoenix Aviation Managers provides as follows:

“This policy does not apply:

2. To any insureds while the aircraft is in flight

(c) if the airworthiness certificate of the aircraft is not in full force and effect;”

(d) if the aircraft has not been subjected to appropriate airworthiness inspection(s) as required under current applicable federal air regulations for the operation involved”

31 A typical insurance policy exclusion for unlawful purpose is as follows:

“This insurance does not apply:

(i) with your knowledge and consent for either an unlawful purpose or for other than the approved use;”

32 A typical policy exclusion for rental pilots provides as follows:

“This policy does not apply:

... (a) to a loss or damage...by any person in possession of the aircraft under a bailee, lease, rental agreement, conditional sale...or for any loss or damage during or resulting therefrom;”

33 A typical policy exclusion provides as follows:

“This insurance does not apply:

(h) if the aircraft is being used for:

(i) aerial seeding, spraying, dusting, towing or photography;”

(ii) hunting, herding or spotting of animals, birds or fish;

(iii) patrol or surveillance of power lines, pipelines, traffic or fires;”

34 A typical provision provides as follows:

V. POLICY PERIOD, TERMINAL
All Coverages

“This policy applies only to bodily injury or property damage which occurs, and to physical damage losses to the aircraft which are sustained during the policy period, while the aircraft is within The United States of America, Canada or Mexico, or while being transported between ports thereof.”

35 A typical provision is as follows:

“This insurance does not apply:

(c) when the aircraft is in flight:

(ii) when a special permit or waiver is required by the FAA;”

36 An example of such an exclusion is as follows:

“This policy does not apply:

... (d) to loss or damage arising from capture, confiscation, seizure, arrest, restraint or detention or the consequences thereof or of any attempt thereat, or any taking of the property insured or damage to or destruction thereof by any government or governmental authority or agent (whether secret or otherwise) or by any military, naval or usurped power, whether any of the foregoing be done by way of requisition or otherwise and whether in time of peace or war and whether lawful or unlawful;”


38 See §86.031, Fla. Stat.


40 Pickett v. Woods, 360 So. 2d 45 (Fla. 4th DCA 1978).

41 §627.428 Fla. Stat. The statute provides as follows:

“§627.428 Attorney’s fee.

(1) Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured... under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured... prevailed, the appellate court shall adjudge or decree against the insurer and in favor of the insured... a reasonable sum as fees or compensation for the insured’s... attorney prosecuting the suit in which the recovery is had.”

42 The text of Florida’s nonjoinder statute is set out below:

“§627.4136 Nonjoinder of insurers.

(1) It shall be a condition precedent to the accrual or maintenance of a cause of action against a liability insurer by any person not an insured under the terms of the liability insurance contract that such person shall first obtain a settlement or verdict against a person who is an insured under the terms of such policy for a cause of action which is covered by such policy.” Also see §627.7262 Fla. Stat.

43 The statute provides as follows:

“§627.428 Attorney’s fee.

(1) Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured... under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured... prevailed, the appellate court shall adjudge or decree against the insurer and in favor of the insured... a reasonable sum as fees or compensation for the insured’s... attorney prosecuting the suit in which the recovery is had.”

44 Also known as an Offer of Judgment depending upon the jurisdiction and if the case is pending in state or federal court. Florida’s present law on this subject is found in Rule 1.442 of the Florida
Rules of Civil Procedure.
45 See also 748 So.2d 941 (Fla. 1999).
46 The applicable text provides as follows: “627.426 Claims administration.
(2) A liability insurer shall not be permitted to deny coverage based on a particular coverage defense unless:
(a) Within 30 days after the liability insurer knew or should have known of the coverage defense, written notice of reservation of rights to assert a coverage defense is given to the named insured by registered or certified mail sent to the last known address of the insured or by hand delivery; and
(b) Within 60 days of compliance with paragraph (a) or receipt of a summons and complaint naming the insured as a defendant, whichever is later, but in no case later than 30 days before trial, the insurer:
(1) Gives written notice to the named insured by registered or certified mail of its refusal to defend the insured;
(2) Obtains from the insured a non-waiver agreement following full disclosure of the specific facts and policy provisions upon which the coverage defense is asserted and the duties, obligations, and liabilities of the insurer during and following the pendency of the subject litigation; or
(3) Retains independent counsel which is mutually agreeable to the parties. Reasonable fees for the counsel may be agreed upon between the parties or, if no agreement is reached, shall be set by the court.”
In Pursuit of “Natural Quiet”
How The Evolution of Aircraft Noise Management in National Parks Could Affect Commercial Aviation Nationwide

By Daniel W. Anderson

Airports, airlines, and aircraft manufacturers are all too familiar with aircraft noise impacts and the resulting operational and design changes that have occurred since the Federal Aviation Administration first issued national noise standards pursuant to the Federal Aviation Act of 1958. What would likely be more surprising to those involved in the commercial aviation industry, however, is how the evolution of aircraft noise management at national parks may affect commercial aviation nationwide.

Grand Canyon National Park: A Case Study in Aircraft Sound Mitigation

In the late 1980s, environmental groups began advocating flight restrictions at GCNP in an effort to reduce increasing noise impacts on park visitors. In response to noise and safety concerns, Congress enacted the National Parks Overflights Act (Overflights Act) in 1987. The Overflights Act requires the Secretary of the Interior, through the National Park Service (NPS), to study overflight impacts at GCNP, Cumberland Island National Seashore, Yosemite National Park, Hawaii Volcanoes National Park, Haleakala National Park, Glacier National Park, Mount Rushmore National Memorial, “and at no less than four additional units of the National Park System, excluding all National Park System units in the State of Alaska.”

The Overflights Act also requires the NPS, and the FAA, to report back to Congress on the results of the study, and make recommendations regarding further regulatory and legislative action to address the issues discovered through the study.

The most controversial provision of the Overflights Act, however, and one which has resulted in substantial litigation, is the requirement that the NPS make recommendations to the FAA which “shall provide for substantial restoration of the natural quiet and experience of the [GCNP] and protection of public health and safety from adverse effects associated with aircraft overflight,” and that the FAA develop appropriate regulations to implement such recommendations, without change, unless the FAA determines that the recommendations will adversely impact aircraft safety.

At first blush, one might think such provisions to be relatively harmless, if not laudable. Upon closer inspection, however, it becomes clear that the proverbial “devil is in the details.” The issues presented by the GCNP related requirements of the Overflights Act are myriad, and to date, have not been completely resolved. The problem for the NPS, FAA, air tour companies, environmental groups, and even an Indian tribe, has been answering the multi-part question of: what is “substantial,” what is “restoration,” and what is “natural quiet.” Based on its initial definition of these terms, and its initial studies, the NPS transmitted its recommendations to the FAA in 1987 as required by the Overflights Act. In 1988, the FAA issued Special Federal Aviation Regulation (SFAR) 50-2, which, among other things, provided for limitations on the routes and altitudes air tour operators could fly. The NPS then began monitoring aircraft sound throughout the GCNP in preparation for the submission
of its report to Congress.

In late 1994, the NPS submitted its report to Congress as required by the Overflights Act. According to the NPS report, and a subsequent Environmental Assessment, the NPS and FAA determined that:

1. Aircraft “noise” is best quantified by measuring the percentage of time that aircraft are audible.

2. Audibility results when the sound emanating from the aircraft increases the ambient noise level by three (3) decibels, the smallest change perceptible to the human ear.

3. “Natural quiet” means that no aircraft are audible to the human ear, and that “substantial restoration” will occur when 50% or more of the park achieves natural quiet for 75 to 100% of the day.

On December 31, 1996, the FAA issued a final rule that: adopted the definitions contained in the 1994 NPS Report; established new flight-free zones; instituted flight curfews; and, set a cap on the number of aircraft (not the number of flights) that could fly over the park. In addition to issuing the final rule, the FAA also proposed noise limitations for certain aircraft operating in the vicinity of GCNP in accordance with the “aircraft’s noise efficiency quotient.” Unlike the noise standards applicable to most commercial jet aircraft (which does not factor in size or carrying capacity), the FAA’s “noise efficiency quotient” employed the novel concept of measuring “the relationship between the certificated noise level of the aircraft and the number of passenger seats on the typical configuration of that aircraft type” to place aircraft in three different categories of “noise efficiency,” and suggested three corresponding categories of limitation.

**Grand Canyon I**

Not surprisingly, both air tour operators and environmental groups filed suit, the former claiming the new regulations went too far, and the latter claiming that the regulations did not go far enough. In the first Grand Canyon case (Grand Canyon I), air tour operators asserted that the NPS/FAA had erred in their interpretation of the statutory phrase, “substantial restoration of the natural quiet and experience of the park,” and that the NPS/FAA interpretation “is overly restrictive of aircraft overflights because it is contrary to the ‘plain meaning’ of the statute and its legislative history.” In support of this proposition, the operators contended that the agencies erred by: defining the term “natural quiet” without regard to other sounds in the Park; “equal[ing] ‘quiet’ with the absence of detectable sound, rather than with the absence of ‘noise’ that would disturb visitors or disrupt their experiences of the park; defining “natural quiet” based on the decibel level a human ear can hear without regard to whether sound at that level would be disturbing; attempting to ensure quiet in 50% of the park for 75-100% of the day without regard to “whether there will be any visitors present to be disturbed” in [the protected] areas.” At the opposite end of the spectrum, environmentalists claimed that the regulations were “too little too late,” and that the term “substantial,” by its very definition, required the agencies to implement rules to protect more than half (50%) of the park.

Employing the well-known practice of giving deferential treatment to agency interpretation of statutes, as outlined by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Circuit Court of Appeals rejected the arguments of air tour operators and environmentalists alike. Because the statutory phrase “substantial restoration of the natural quiet” is ambiguous, the court concluded, the FAA regulations should be upheld because the NPS/FAA interpretation of the phrases is reasonable, and the resulting regulations are not inconsistent with the Overflights Act or its legislative history. Accordingly, the FAA may implement rules designed to reduce ambient sound levels without necessarily protecting the experience of park visitors so long as the regulations are consistent with the purpose and language of the Overflights Act. Likewise, the FAA regulations may also fail to reduce sound impacts in more than half of the park without running afoul of the statute.

**Post Grand Canyon I Regulations and Assessment**

At the time Grand Canyon I was decided, the FAA had already discovered that it had significantly underestimated the number of aircraft operating at the Grand Canyon, and the FAA informed the court at oral argument that it was considering a cap on the number of flights air tour operators could conduct. In July 1999, the NPS announced that it was changing the audibility threshold for aircraft operating in the backcountry areas of the park such that aircraft noise will be audible if it is eight decibels below the average natural ambient level. Then, in January 2000, the NPS issued a review of its change in noise evaluation methodology which gave a detailed explanation of the acoustic model the NPS used in assessing aircraft noise impacts at GCNP, and reiterated the definition of “substantial restoration of the natural quiet.”

The next month, in February 2000, the FAA issued a Final Supplemental Environmental Assessment (FSEA) setting forth the FAA’s analysis of the potential effect that a cap on the number of flights would have on aircraft noise at GCNP. In its FSEA, the FAA established the “average annual day” as the standard to be used in evaluating the percentage of “the day” in which natural quiet is restored to a given location. In April 2000, the FAA again published a final rule (the “2000 Rule”), this time imposing a cap on the total number of flights that air tour operators may conduct over the GCNP in any given year. As the 2000 Rule explained, the FAA and NPS had determined that the aircraft cap imposed pursuant to the 1996 rule did not adequately limit growth in the number of flights, and NPS noise modeling “indicated that the potential growth in the number of operations could erode gains made toward substantial restoration of natural
In Pursuit of “Natural Quiet”

quiet.”³⁰ As such, the 2000 Rule was a necessary step to reduce aircraft noise impacts at GCNP, though the FAA acknowledged that it would have to do still more, including requiring the use of quiet technology aircraft, to comply with the Congressional mandate of the Overflights Act.³¹

Grand Canyon II

Air tour operators and environmental groups again challenged the FAA’s final rule.³² Air tour operators asked the Circuit Court of Appeals to find that 2000 Rule was unlawful based on five arguments: “(i) the rule was prompted by an improper change in the definition of ‘natural quiet’; (ii) the acoustic methodology that justifies the rule is scientifically flawed; (iii) the FAA arbitrarily and capriciously issued the rule without first promulgating a quiet technology rule; (iv) in promulgating the rule, the FAA violated the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq.; and (v) the rule arbitrarily and capriciously ignores the needs of the elderly and disabled.”³³

The environmental groups also asked the court to find that the 2000 Rule was unlawful, claiming that the FAA’s interpretation of the term “the day,” as used in the 1994 NPS report to Congress, to mean “average annual day,” rather than “any given day.”³⁴ The groups also challenged the FAA’s noise methodology, arguing that: [i]n projecting the amount of noise experienced by different parts of the Park, the FAA’s noise model only considers noise emitted from air tour flights. By failing to account for noise from other aircraft that fly over the Grand Canyon— for example, from commercial jets, general aviation, and military flights—the model arbitrarily overstates how quiet the Park really is. The Trust asserts that if non-tour aircraft noise were included in the calculation, the percentage of the Park in which natural quiet would be substantially restored—even on the FAA’s average annual day— would be significantly less.³⁵

The court again employed Chevron in rejecting each of the arguments raised by the air tour operators.³⁶ The chief issue raised by the operators was that the NPS had impermissibly changed the “noticeability” standard at issue in Grand Canyon I, to a “detectability” standard which finds aircraft sound to be audible if it is eight decibels below the average natural ambient level.³⁷ According to the operators, such a standard departed from the Grand Canyon I requirement that “noise” be defined as that sound which adversely impacts visitor experience, because visitors to the park would “not notice below-ambient-level noise.”³⁸ The court disagreed, finding instead that the NPS had provided a “reasoned analysis” for its decision.³⁹ As the court explained, the use of below-ambient-sound levels “reflects the Park Service’s new understanding that audibility depends not just on volume (loudness), but also on frequency (pitch).”⁴⁰ As such, the court concluded, the agencies’ actions and interpretations should be upheld in accordance with the principles established in Chevron.

The court found greater merit in the contentions put forth by the environmental groups, finding that the FAA’s use of the “average annual day” standard is inconsistent and incompatible with the NPS interpretation of “the day” to mean “any given day” when such term is used in determining whether there has been “substantial restoration” of “natural quiet” to areas of the park.⁴¹ Accordingly, the FAA had used an improper standard in promulgating the 2000 Rule, and the court refused to uphold the rule to the extent that it conflicted with the NPS interpretation.

The court also agreed with the environmental groups’ assertion that the FAA’s noise methodology was flawed in that it excluded non-tour aircraft (e.g. commercial, general aviation, and military aircraft) from its noise measurements.⁴² As the court noted, [t]he FAA can certainly choose to achieve the substantial restoration of natural quiet by regulating air tours alone. But the FAA cannot dispute that whether or not non-tour aircraft are regulated, natural quiet does not exist when the sound they make is audible. Nor does the Overflights Act provide any basis for ignoring noise caused by such aircraft. Hence, the fact that the FAA has chosen not to regulate certain categories of aircraft does not justify ignoring the sound those aircraft make when deciding how extensively to regulate other categories. And in the absence of any reasonable justification for excluding non-tour aircraft from its noise model, we must conclude that this aspect of the FAA’s methodology is arbitrary and capricious and requires reconsideration by the agency.⁴³

In light of the foregoing, the court remanded the case to the FAA for further proceedings consistent with the court’s opinion.⁴⁴

Post Grand Canyon II Regulations and Assessment

In the wake of Grand Canyon II, the FAA and NPS went back to the drawing board in an effort to comply with the mandate of the Circuit Court of Appeals. The FAA issued a new supplemental notice of proposed rulemaking (“SNPRM”) in which it renewed the concept of categorizing aircraft by their relative “noise efficiency.”⁴⁵ The NPS issued a notice in which it clarified that the definition of “the day” means “any given day; that is . . . natural quiet must be substantially restored at GCNP on any given day of the year.”⁴⁶ About this same time, the FAA and NPS began working together to resolve differences in the approach the two agencies had been using toward noise mitigation at GCNP.⁴⁷ The culmination of these efforts was that in March, 2005, the FAA and NPS jointly announced the creation of the Grand Canyon Working Group (GCWG), a subdivision of the National Parks Overflight Advisory Group (NPOAG) which the FAA created after Grand Canyon II.⁴⁸ The FAA simultaneously released its final rule regulating flights at GCNP (the “2005 Rule”), the stated purpose of which is to classify aircraft used in commercial sightseeing flight operations over GCNP by the noise they produce.⁴⁹
In Pursuit of “Natural Quiet”

Commercial Aircraft Overflights at GCNP and Other National Parks

Not long after the 2005 Rule was published, the GCWG began working on developing additional recommendations in an effort to achieve the hard-fought noise standards established as a result of Grand Canyon I and II. In anticipation of the first GCWG meeting, Senator John McCain sent the FAA and NPS a letter in which he explained that Congress did not intend for the Overflights Act “to regulate commercial aircraft flying at or near cruising altitudes” over GCNP.58 In response, the FAA and NPS stated that the language of the Overflights Act governing “aircraft noise impacts at the Grand Canyon is not explicitly limited to sightseeing aircraft, and that “without specific legislative authority, [the FAA and NPS] do not have the ability to limit the application of the Overflights Act to air tour operators.”59 The letter further stated:

“[N]PS and FAA are working to complete the analysis of the extent to which substantial restoration of national quiet has been achieved or not achieved when all aircraft noise, rather than air tour noise only, is included in the analysis . . . [o]ur research to date has indicated that commercial and general aviation aircraft in the enroute system are audible at ground level, given the extremely low natural ambient noise levels in the Grand Canyon.”60

The results have been similar at Zion National Park where the Grand Canyon Trust sued the FAA for failing to conduct an EIS with respect to environmental impacts resulting from a proposed replacement airport at St. George, Utah.61 The FAA conducted a full EIS after the D.C. Circuit Court again found that the FAA had failed to comply with the requirements of NEPA.62 In June, 2006, Congressman Don Young, Chairman of the House Committee on Transportation and Infrastructure, wrote to the FAA and commented on the Final EIS:

[M]uch of the new found interest in potential noise impacts from aircraft operations in the vicinity of national parks is an outgrowth of efforts by the FAA and NPS to deal with safety and noise issues related to air tour operations over Grand Canyon National Park and other units of the NPS . . . Unfortunately, due to overzealous interpretations and faulty court decisions, these efforts have been greatly expanded to include all aircraft operations in the vicinity of a National Park, which can mean as much as several hundred miles away and at all altitudes.56

The one paragraph FAA response to Congressman Young indicated that the FAA “believe[s] it necessary to conduct extensive noise analysis presented in the EIS to fully and thoughtfully respond to the comments and concerns of the court, other Federal agencies, the public, and to satisfy NEPA and other legal requirements.”66 Clearly, the FAA now views NEPA as requiring that it consider commercial aircraft when evaluating and managing the cumulative impact of aircraft noise on national parks.

GAO Reports on Aircraft Noise

In September, 2001, the GAO submitted its report entitled, “Aviation and the Environment – Transition to Quieter Aircraft Occurred as Planned, but Concerns about Noise Persist.”66 The very title of this report foreshadows its findings: public opposition to airport expansion continues to increase despite the fact that fewer people are exposed to aircraft noise as a result of the transition to quieter aircraft by commercial airlines.59 The GAO report offers what would otherwise be a very laudable statistic: the transition to quieter aircraft resulted in a decline in the population exposed to unacceptable levels of noise from 2.7 million people in 1990, to 444,000 people in 2000 – an 83% reduction.69 But the report also states that in a 1999-2000 survey of the nation’s 50 busiest commercial airports, the GAO found that 35 airports reported that “over half of the noise complaints in the preceding year had come from persons living in areas whose noise levels FAA considers compatible with residential development.”60

On October 24, 2007, the GAO released a report detailing its more recent finding that, although aircraft operations have become quieter, “aviation noise is still a problem when communities allow incompatible land uses,” and “airspace redesign efforts . . . may expose some previously unaffected communities to noise, raising concerns in those communities about higher noise levels.”61 Remarkably, the GAO cited FAA data indicating that “noise mitigation efforts over the last 35 years have reduced by over 90 percent the number of people affected by significant aviation noise levels - defined as a 65-decible day night level (DNL 65 dB) or greater—despite nationwide increases in population and air traffic.”

Ramifications for Aircraft Noise Management and Commercial Aviation

Taken together, the GAO findings and developments at GCNP and Zion National Park offer some interesting insights with respect what the future may hold for aircraft noise management, and commercial aviation:

1. Quiet is a relative term

As the GCNP litigation illustrates, “quiet” can be defined in many ways. For instance, a “quiet” city street may still have noise - just less noise than a comparatively louder city street. Similarly, a jackhammer operator may define “quiet” differently than a librarian. Accordingly, the definition of “quiet” is contextual, and a “one size fits all” approach does not apply. Moreover, “quiet” is a moving target, and what some may consider “quiet” today may not meet that definition tomorrow. As such, one must understand that “quiet” is a fluid term of art, not a law of physics. Future noise management efforts will likely focus as much on arriving at a shared set of definitions as it will the methodology employed to ensure that the standards derived from such definitions are met.

2. Quieter is not the same as quiet

The commercial aviation industry
has made a great deal of progress in reducing aircraft noise, but as the GAO reports point out, aircraft noise complaints continue to increase despite the use of dramatically quieter aircraft. This apparent dichotomy should not be surprising. As a friend of mine once said: “if you made aircraft totally silent, people would still complain about seeing them.” Although some might consider this position absurd, the reality is that only the absence of aircraft sound aircraft results in silence, and for some, only silence is acceptable. Those involved in noise assessment and mitigation will need to address the concerns of individuals and organizations regardless of how extreme their positions may appear. The question of whether it is possible to achieve silence may seem absurd to some, but it is a question that many of those impacted by aircraft noise consider worth asking.

3. Sociological impacts may supplement acoustic measurement

There is no question that the FAA’s DNL 65 dB noise contour has been a useful tool in aircraft noise management efforts, but it may be time to reconsider the relevance of this standard to noise mitigation efforts. In its most basic form, the GCNP litigation was about competing values betweenuser groups. Although the context is different, the values of those impacted by aircraft noise in communities adjacent to airports/heliports is at the core of aircraft noise complaints. Future noise management efforts may include the consideration of such values, along with the values of the commercial aviation industry, in the noise management equation. Such an approach will likely involve the evaluation of sociological factors extending beyond the fundamental impacts (e.g. eating, sleeping, and working) upon which the DNL 65 dB noise contour is based. Further, noise contours extending to the outer limits of aircraft audibility and/or detectability will likely be considered, and different noise management tools will be applied to each.

4. Aircraft “noise efficiency” is almost certain to play a role in future noise management efforts

The aircraft noise efficiency categories established at GCNP may serve as a basis for similar categorization of aircraft throughout the aviation industry. The concept is far too logical to ignore: aircraft producing less noise per seat or per pound of cargo should be given priority over “less efficient” aircraft. Put another way, one might argue that aircraft producing the same amount of noise should not be treated equally where such aircraft do not produce an equal benefit to society. Such unequal treatment might result in preferential time slots, flight routes, or flight profiles, for more noise efficient aircraft.

5. NEPA and other federal laws will be used to reduce aircraft noise impacts in other national parks and in areas outside of national parks

The National Park System consists of 391 units encompassing over 84 million acres in virtually every state. The precedent established at GCNP and Zion National Park requires the FAA to consider every type of aircraft overflight when evaluating the cumulative impact of aircraft noise on National Park units. Without Congressional intervention, it is likely that the FAA will construe NEPA, and other federal laws such as the Overflights Act and Endangered Species Act, as requiring the FAA to assess and manage commercial aircraft noise impacts in other national parks. Moreover, those who wish to reduce aircraft noise impacts on other protected lands, such as wilderness and preservation areas, will cite these federal laws in court challenges to airport and airway development.

6. National Park groups offer lessons in consensus building

Whatever the future may hold for the commercial aviation industry, it is clear that such a future is dependent upon the ability of the industry to successfully build a consensus with those who have the most direct stake in aircraft noise management efforts. The concept of consensus building is not new to airport officials who have been dealing with aircraft noise issues for years. However, the methods employed by non-airport groups, such as the NPOAG and GCWG, to deal with thorny noise management issues may be of value to airport officials and others charged with the responsibility of addressing these issues. The alternative dispute resolution models developed and employed by non-airport groups will likely make their way into future local aircraft noise management efforts, as well as aircraft noise certification standards.

Conclusion

Airport officials, airlines, and aircraft manufacturers alike, should recognize that the evolution of aircraft noise management now occurring in our national parks will likely impact the commercial aviation industry nationwide. Rather than fear such developments, the commercial aviation industry would be well-served to study the lessons learned from national park aircraft noise management efforts, and to begin laying the groundwork to use these lessons to address aircraft noise concerns nationally. It is clear from GAO reports that the problems associated with aircraft noise are not going to go away if government and industry continue on the present course of simply reducing aircraft sound, changing flight profiles, and insulating homes. A new result requires a new approach, and in national parks at least, a new approach is already underway.

Endnotes:

1 Copyright © 2004 by American Bar Association; Daniel W. Anderson. Portions of the following article are reprinted herein with permission: In Pursuit of “Natural Quiet”: The Latest On Noise For Airports And Airlines, ABA Air & Space Lawyer (18-WTR Air & Space Law, 8).
2 Daniel W. Anderson is a Partner at Forizs & Dogali, P.L. in Tampa, Florida, and practices aviation law and general civil litigation. Prior to becoming an attorney, Mr. Anderson served as President of the United States Air Tour Association (USATA), representing the interests of airplane and helicopter tour operators at national parks throughout the U.S.. Mr. Anderson has not worked for or otherwise represented the USATA since March, 1997.
5 See id.; Public Law 100-91.
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6 Public Law 100-91 at § 1(a), (c); 16 U.S.C.A. § 1a-1.
7 Public Law 100-91 at § 1(d)(emphasis added).
8 Public Law 100-91 at § 3(b)(1)-(2). In the event that the FAA determines the NPS recommendations will adversely impact safety, however, the FAA’s duty does not end there. The same provisions of the Overflights Act further require that, in that event, the FAA must issue regulations which substantially restore natural quiet while eliminating the adverse effects on aviation safety which would otherwise result from the original NPS recommendations. The Overflights Act also has a built-in monitoring provision which requires the FAA to report back to Congress on whether the regulations were effective in substantially restoring natural quiet.


10 Id.

12 Id. At 60.

14 Id.

17 Id.
18 Grand Canyon Air Tour Coalition, 154 F.3d at 559-60. Litigants included 13 air tour operators led by the Grand Canyon Air Tour Coalition, the Clark County Department of Aviation, the Las Vegas Convention and Visitors Authority, the Hualapai Indian Tribe, and seven environmental groups led by the Grand Canyon Trust. Id. at 459. Only the issues raised by air tour operators and environmental groups are discussed herein. The author, a non-lawyer at the time this action was filed, was involved in obtaining counsel for the air tour operators, and providing counsel with information related to this litigation.

19 Id. at 465-66.
20 Id.
21 Id. at 476.
22 Id. at 466-72.
23 Id. at 466-69.

24 Id. at 464. Although the FAA had already capped the number of aircraft that air tour operators could utilize in conducting air tours over GCNP, it had not limited the number of flights that operators could conduct.


27 Id. at 4-12, 4-18, F.4. It is important to note that, as discussed supra, the NPS definition of “natural quiet” means that no aircraft are audible to the human ear, and that “substantial restoration” will occur when 50% or more of the park achieves natural quiet for 75 to 100% of the day. The FAA’s pronouncement of its interpretation of the “day” to mean “average annual day” was therefore a significant event, and one which would later lead to considerable controversy.

28 Id.
29 Commercial Air Tour Limitation in the Grand Canyon National Park Special Flight Rules Area, 65 Fed. Reg. 17708, Federal Aviation Administration, U.S. Department of Transportation (April 4, 2000) (codified at 14 C.F.R. §§ 93.303-93.325). Under the 2000 Rule, air tour operators were limited to conducting the same or fewer flights in the Park than they conducted during the base year of May 1, 1997 through April 30, 1998, pursuant to 14 C.F.R. § 93.319(a), (b).
31 See id. at 17714.
32 United States Air Tour Association v. Federal Aviation Administration, 298 F.3d 997, 1005 (D.C. Cir. 2002)(cert. den. by AirStar Helicopters, Inc. v. F.A.A., 123 S. Ct. 1783 (U.S. 2003)(hereinafter “Grand Canyon II”). In Grand Canyon II, litigants included the United States Air Tour Association, “a trade organization whose members fly air tours over the Park,” and a group of six environmental groups led by the Grand Canyon Trust. Id. The author was not involved in this litigation.

33 Id.
34 Id. at 1015. As discussed supra, this is the standard for determining whether natural quiet had been restored to certain areas of the park, or in other words, whether 50% or more of the park achieves natural quiet for 75 to 100% of the day, as the NPS had defined “substantial restoration” in its 1994 report to Congress.

35 Id. at 1018.
36 Id. at 1005-12. The court also stated that “[t]he Supreme Court has rejected the argument that an agency’s interpretation is not entitled to deference because it represents a sharp break with prior interpretations” of the statute in question.” Id. at 1006 (citing Ruot v. Sullivan, 500 U.S. 173 (1991)) (citations and internal quotations omitted).


38 Grand Canyon II, 298 F.3d at 1006.
39 Id.

41 Id. at 1015-1018. As the court stated, “[t]he problem for the FAA . . . is that it is not the Park Service, and ‘deference is inappropriate when [an agency] interprets regulations promulgated by a different agency.’” Id. at 1015 (citing Office of Pers. Mgm’t v. FLRA, 864 F.2d 165, 171 (D.C.Cir.1988) and Dept of the Treasury v. FLRA, 837 F.2d 1163, 1167 (D.C.Cir.1988)).

42 Id. at 1018-19.
43 Id. at 1019.
44 Id.

46 Clarification of the Term the day in the Definition of Substantial Restoration of Natural Quiet for Grand Canyon NP, National Park Service, U.S. Department of Interior, 68 Fed. Reg. 216 (November 7, 2003). When combined with the definition of “substantial restoration” discussed supra, the result is that 50% or more of the park must achieve natural quiet for 75 to 100% of any given day.


50 Correspondence dated July 12, 2005 from Senator John McCain to Marion Blakey (Administrator, FAA) and Fran P. Mainella (Director, NPS).

51 Id.
52 Correspondence dated September 22, 2005, from Sharon Pinkerton (FAA) and Paul Hoffman (NPS), to Senator John McCain.

54 Id. at 347.
55 Correspondence dated June 30, 2006, from Congressman Don Young to Marion C. Blakey (Administrator, FAA)(emphasis in
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original)(available online at http://www.airportsites.net/sgu-eis/Pages_PDF/2-App%20A-RTC_8-17-06.pdf)(last visited November 14, 2007).


58 Id. at p.2, 13-14

59 See id. at p.2.

60 Id. at p.13.
