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The Need to Audit Your Hull and Liability Insurance Program to Avoid Expensive Risks

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Obtaining hull and liability insurance is a checklist item in the closing of a transaction for the purchase, financing, and lease of an aircraft, as well as for extending the term of a lease of an aircraft. The parties typically enlist the services of an insurance broker to obtain the required amounts of coverage from a licensed insurer.

All too frequently, however, the party contractually obligated to obtain the required insurance is ill-equipped to do so. Failures occur in ensuring that the nature, scope, and amount of the insurance procured meet one or more of the several involved parties' specific requirements.

The reasons for such lapses range from an unfamiliarity with how insurance and insurance policies work to a failure to fully read and understand both the insurance requirements contained in the various transaction documents, on the one hand, and the terms, conditions and exclusions of the procured coverage, on the other. There is also sometimes a failure to appreciate how the contracting parties' existing insurance coverages may affect (or be affected by) the terms of newly-acquired policies. There also may be confusion about who is responsible to consider and resolve insurance-related issues, be it the broker, the insurer, legal counsel to one party or another, or one or more employees or representatives of the contracting parties.

The brief summary of certain representative litigation below also reflects that parties may fail to consider whether entering into ancillary agreements, such as interchange agreements, could void insurance coverage by changing the risks that the insurer had agreed to cover. Additional risks to the applicability and sufficiency of insurance coverage arise if the operator of an aircraft flies the

aircraft outside of its insured areas of operation, or if an aircraft is flown by a pilot who does not have the required training or type rating. Insurance may not be payable if all relevant parties do not have breach of warranty coverage if it turns out that warranties about the piloting of an aircraft have been breached.

There are also court decisions from outside of the United States (from Russia, for example) which have voided coverage in instances in which an aircraft has been insured only for private use and is, in fact, used on commercial flights or illegal cabotage flights in another country.

In sum, there are not infrequently discrepancies between the parties' specific requirements for insurance coverage and the terms of the insurance policy (or policies) that have been procured as part of the transaction. There are also discrepancies between requirements for the operation of aircraft and their actual operation. Such discrepancies create very substantial and expensive risks for the parties to an aircraft transaction that frequently go unrecognized until the happening of an accident (and the assertion of attendant claims) when it is too late to change the existing insurance coverage.

An individual person or company (the "Guarantor") is commonly required to guarantee to a lender or a lessor that all payment- and other obligations of an aircraft operator will be satisfied on an ongoing basis. Those obligations frequently include having to purchase and maintain appropriate insurance. As such, it is incumbent upon the Guarantor to seek to ensure that: (i) the parties' respective insurance requirements are both accurately described in the transaction documents and fully met by the policy (or policies) of insurance that are purchased by, or on behalf of, the parties to the transaction; and (ii) that the aircraft is operated in strict accordance with the requirements of the insurance. Failing to do so may expose the Guarantor, or another party to a transaction, to significant financial liability.

Accordingly, Guarantors who are guaranteeing compliance by an operator with all of its duties and obligations should, in advance of a problem's arising, attempt to verify that all transaction-related, insurance requirements have been properly addressed; in the transaction documents, in the applicable policies of insurance, and in the operation of the aircraft. The next opportunity to police

all of these issues may not arise until it is time to extend an aircraft lease, or other finance or security agreement, or interchange agreement, or upon insurance-policy renewal. Aircraft owners, financiers, operators, and Guarantors may want to make the necessary inquiries today before the possible occurrence of an unfortunate event that could render such an exercise too late. An ounce of prevention is worth a pound of cure.

In order to encourage you to launch such inquiries pre-emptively and, in so doing, to help you to avoid the difficult and often expensive conflicts that may arise when there are misunderstandings concerning the transacting parties' insurance-related requirements and coverages, this article highlights some (but certainly not all) of the issues to be considered in undertaking such reviews.

A. Who is Requiring Insurance and What are the Requirements?

1. Typical Lessor Requirements

Lenders and Lessors set out different levels of specificity about required insurance in their prototype agreements, depending on their preferences for standard agreements and governing law. An agreement governed by English law that is prepared by British lawyers may well call for the use of specific policy wordings and/or endorsements employed by underwriters at either Lloyd's or in the broader London Market. For example, an aircraft lease agreement may provide:

… [T]he Lessee shall be entitled to maintain insurance in respect of the Aircraft for the purposes of this Agreement which reflects Lloyds' endorsement AVN67B and AVN67B (Hull War) … The Insurances required to be maintained are as follows:

> (a) Hull All Risks of loss or damage whilst flying and on the ground with respect to the Aircraft on an agreed value basis for an amount equal to the Agreed Value, and with a deductible not exceeding US$50,000 each claim or such other greater amount as is consistent with market practice in the aviation industry from time to time;
>
> (b) Hull War and Allied Perils, being such risks excluded from the Hull All Risks Policy, to the fullest extent available from the leading international insurance markets, including confiscation and requisition by the State of Registration or the Habitual Base for the Agreed Value in the relevant policy year applicable from time to time (with form LSW555D);

(c) Spare All Risks (including War and Allied Risk except when on the ground or in transit other than by air) property insurance on all Engines and Parts when not installed on the Aircraft for their full replacement value and including engine test and running risks;

(d) Aircraft Third Party, Property Damage, Passenger, Baggage, Cargo and Mail and Airline General Third Party (including Products) Legal Liability for a combined single limit (bodily injury/property damage) of an amount not less than the Minimum Liability Coverage for the time being for any one occurrence for each aircraft (but in respect of products and personal injury liability, this limit may be an aggregate limit for any and all losses occurring during the currency of the policy). War and Allied Risks are also to be covered under the policy to the fullest extent available from the leading international insurance markets (which coverage shall include, but not be limited to, an extended war risk coverage endorsement equivalent to the terms of AVN52E for an amount not less than [a certain sum] for any one occurrence and in the annual aggregate).

The lease agreement may also require that there is hull insurance in the amount of the original purchase price of an aircraft, despite the fact that, owing to depreciation, the subject aircraft may now be worth far less.

In one recent transaction, liability insurance had been obtained that featured neither the specific Lloyd's endorsements called for in the parties' lease agreement, nor the required limits. Moreover, the hull insurance that had been procured was in an amount substantially less than the $30,000,000 called for by the lease and, instead, approximated the current fair market value of the aircraft which was $25,000,000 one year and $20,000,000, the next. In the event of a catastrophic loss, these discrepancies could have potentially rendered the Guarantor liable for the difference between the amounts of coverage required by the lease agreement, and the actual amount of coverage obtained by the operator. These discrepancies came to light as the parties were negotiating an extension of the lease and prior to the expiration of both the lease and the attendant policies of insurance. As a result, the involved parties were forced to amend the lease to conform its requirements to the amounts of insurance that had been procured.

2. Typical Lender Requirements

U.S. loan and security agreements typically do not call for, or require, the use of Lloyd's endorsements and are more generic in their requirements. For example, one such security agreement provides:

4.6 Insurance.

(a) Customers agree to maintain at all times, at their sole cost and expense, with insurers of recognized reputation and responsibility satisfactory to Lender (but in no event having an A.M. Best or comparable agency rating of less than "A-"):

(i) (A) comprehensive aircraft liability insurance against bodily injury or property damage claims including, without limitation, contractual liability, premises liability, death and property damage liability, public and passenger legal liability coverage, and sudden accident pollution coverage, in an amount not less than $200,000,000.00 for 20 or more seats, or if the Aircraft will be chartered, or $100,000,000.00 for 10 or more seats, or $50,000,000.00 for fewer than 10 seats for each single occurrence, and (B) personal injury liability in an amount not less than $25,000,000.00; but, in no event shall the amounts of coverage required by sub-clauses (A) and (B) be less than the coverage amounts as may then be required by Applicable Law;

(ii) "all-risk" ground, taxiing, and flight hull insurance on an agreed-value basis, covering the Aircraft, provided that such insurance shall at all times be in an amount not less than the greater of (1) the full replacement value of the Aircraft (as determined by Lender), or (2) the unpaid principal amount of the Note (each such amount re-determined as of each anniversary of the date hereof for the next succeeding year throughout the term of this Agreement); and

(iii) war risk and allied perils (including confiscation, appropriation, expropriation, terrorism and hijacking insurance) in the amounts required in paragraphs (i) and (ii), as applicable.

(d) At least ten (10) days prior to the policy expiration date for any insurance coverage required by this Section 4.6, the Customers shall furnish to Lender evidence (having the form and substance consistent with Section 1(f) of the Closing Terms Addendum) of the renewal or replacement of such coverage, complying with the terms hereof, for a twelve (12) month or greater period commencing from and after such expiration date.

The foregoing provisions are more flexible and, therefore, advantageous, as compared to the insurance requirements discussed above, because: (i) they provide that the insurance may be provided by any reputable insurer satisfactory to the lender, (ii) the amount of hull insurance is not fixed but is, instead, determined by a formula tied to both the replacement value of the aircraft and the amount owed to the lender, and (iii) the amount of required "war risk" coverage does not exceed the amount of required liability coverage.

A second sample insurance clause from an aircraft security agreement provides:

Maintenance of Insurance. Grantor shall procure and maintain at all times all risks insurance on the Collateral, including without limitation, ground, taxiing and in flight coverage, loss, damage, destruction, fire, theft, liability and hull insurance, and such other insurance as Lender may require with respect to the Collateral, in form, amounts, coverages and basis reasonably acceptable to Lender and issued by a company or companies reasonably acceptable to Lender. Grantor shall further provide and maintain, at its sole cost and expense, comprehensive public liability insurance, naming both Grantor and Lender as parties insured, protecting against claims for bodily injury, death and/or property damage arising out of the use, ownership, possession, operation and condition of the Aircraft, and further containing a broad form contractual liability endorsement covering Grantor's obligations to indemnify Lender as provided under this Agreement. Lender's other requirements for insurance as of the date of this Agreement, subject to modification at Lender's reasonable discretion, include the following: (1) the Borrower must be the named insured; (2) the policy must provide coverage to the engines while removed from the Airframe; (3) unless otherwise consented to by Lender in writing, the liability insurance policy must provide a minimum of $10 million liability coverage; (4) the all risks policy must be for the greater of (a) the amount of the Indebtedness or (b) the full insurable value of the Aircraft, and the basis must be the replacement value of the Aircraft; (5) the policy must contain a Breach of Warranty Endorsement up to 90% of the policy; (6) coverage must be maintained, in full force and effect, for the duration of the Note; (7) [Lender] (or its assignee) must be named as lienholder and Loss Payee; (8) the policy must not prohibit the loss payee from making insurance payments upon Grantor's failure to make payments or upon Borrower's default; (9) the policy must include territorial limits; (10) the policy must include coverage for possible seizure and/or impoundment, and/or war risk perils; (11) if the Aircraft is to be operated by a charter operator or is party to a lease agreement with a charter operator, and Lender has consented to such use, the policy must include coverage for charter operation and for spare parts (engines); and (12) the policy must provide for notification of the loss payees upon termination of coverage. Such policies of insurance must also contain a provision, in form and substance acceptable to Lender, prohibiting cancellation or the alteration of such insurance without at least thirty (30) days prior written notice to Lender of such intended cancellation or alteration. Such insurance policies also shall include an endorsement providing that coverage in favor of Lender will not be impaired in any way by any act, omission or default of Grantor or any other person. Grantor agrees to provide Lender with originals or certified copies of such policies of insurance. Grantor, upon request of Lender, will deliver to Lender from time to time the policies or certificates of insurance in form satisfactory to Lender. In connection with all policies covering assets in which Lender holds or is offered a security interest for the Indebtedness, Grantor will provide Lender with such lender's loss payable or other endorsements as Lender may require. Grantor shall not use or permit the Collateral to be used in any manner or for any purpose excepted from or contrary to the requirements of any insurance policy or policies required to be carried and maintained under this Agreement or for any purpose excepted or exempted from or contrary to the insurance

policies, nor shall Grantor do any other act or permit anything to be done which could reasonably be expected to invalidate or limit any such insurance policy or policies.

Here again, the foregoing provisions are more flexible and advantageous as compared to the insurance requirements cited above because: (i) the amount of liability and hull insurance is not fixed but may be adjusted by the Lender without having to amend the security agreement; and (ii) the coverage is not specifically identified, but must, instead, be in form and amounts "reasonably acceptable" to the Lender and issued by a company "reasonably acceptable" to the Lender.

Another sample "Aircraft Chattel Mortgage and Security Agreement" provides, in pertinent part:

4.13. Insurance.

4.13.1. Public Liability, Property Damage and War Risk Insurance. The Grantor will maintain at its own expense with respect to the Aircraft (i) aircraft liability insurance (including without limitation contractual liability, passenger legal liability insurance and insurance for product liability or strict liability in tort) totaling an amount not less than $100,000,000 per occurrence, (ii) property damage liability insurance in amounts and of the type usually maintained by persons engaged in the same or similar business, similarly situated with the Grantor and owning or operating similar aircraft and engines, which covers risks of the kind customarily insured against by such persons, and (iii) war risk liability insurance totaling an amount not less than $50,000,000 per occurrence. All policies of insurance required to be maintained by this Section 4.13.1 shall name the Secured Party as an additional insured.

4.13.2. Insurance Against Loss or Damage to the Aircraft. The Grantor will maintain at its own expense all-risk ground and flight aircraft hull insurance covering the Aircraft (including a war perils endorsement), and fire and explosion coverage, including lightning damage, with respect to the Aircraft and with respect to the Engines and the APU while removed from the Aircraft of the type and in substantially the amounts usually maintained by persons engaged in the same or a similar business, similarly situated with the Grantor and owning or operating similar aircraft and engines. In any event, such insurance shall at all times be in an amount equal to the aggregate amount of principal then outstanding under the Note. All policies of insurance required to be maintained by this Section 4.13.2 shall name the Secured Party as loss payee as its interests may appear.

4.13.3. General. All insurance required by this Agreement shall:

(i) be maintained in effect with insurers of recognized responsibility reasonably satisfactory to the Secured Party, shall be in full force and effect as of this date and shall continue in effect until the Secured Obligations have been discharged in full;

(ii) provide that, if the insurers cancel such insurance for any reason whatever, or any substantial change is made in the coverage which affects the interests of the Secured Party, or such insurance coverage is reduced, such cancellation, change, lapse or reduction shall not be effective as to the Secured Party for thirty days (30) days or the longest period as may be commercially available in the case of war risk coverage) after receipt by the Secured Party of written notice from such insurers of such cancellation, change, lapse or reduction;

(iii) provide that, in respect of the interest of the Secured Party in such policies, the insurance shall not be invalidated by any action or inaction of the Grantor and shall insure the interest of the Secured Party, regardless of any breach or violation of any warranties, declarations or conditions contained in such policy by the Grantor;

(iv) waive any right of subrogation of the insurer against the Secured Party;

(v) waive any right of the insurer to any setoff or counterclaim or any other deduction, whether by attachment or otherwise, in respect of any liability of the Secured Party; and

(vi) provide that the Secured Party shall not be deemed to be an operator of the Aircraft or to have any operational responsibility or liability therefor.

These sample insurance requirements are, again, much more flexible than those discussed above. The insurance is to be maintained in effect with an "insurer of recognized responsibility reasonably satisfactory to the Secured Party."

3. Does the Insurance Coverage Satisfy the Requirements?

Though leases and loan- and security agreements identify which party is obligated to maintain insurance, either in specific amounts or pursuant to a formula, it often happens, that the responsibility to confirm that the required insurance is, in fact, in place, is spread among several parties. As a result, the likelihood that transaction-related insurance requirements are not being precisely adhered to increases significantly.

Who bears day-to-day responsibility to obtain and maintain required coverage may be unclear between and among the parties to the relevant contracts and those advising them. These may include a lessor, a lender, a lessee, a borrower, a guarantor, an insurance agent, an insurance broker, an aircraft operator, the administrator of a fleet insurance policy, and pilots and other advisers who may all be involved in the chain of communications. Miscommunications or

inattention to important details may lead to incorrect assumptions that someone else has confirmed that the required insurance is in place and that its terms are being complied with.

Further, representatives of the parties may agree informally in email communications or otherwise to reduce or modify insurance coverage, and then fail to ensure that such informal agreements are properly reflected in both the transaction documents and the insurance policy (or policies) at issue. Accordingly, parties may believe there is agreement about all insurance issues when, in fact, there are one or more discrepancies between the requirements and the coverage that has been obtained. Unless corrected, any undiscovered discrepancy between required- and existing insurance may very well give rise to litigation in the event of a crash or other unfortunate mishap.

B. Lessons to be Learned from Litigation

1. Denial of Insurance Coverage Because of Policy Exclusions, such as an Exclusion Applicable to Interchange Agreements

The case of Alberto-Culver Co. v. Aon Corp., 351 Ill. App. 3d 123 (2004), involved the October 30, 1996 crash of a Gulfstream G-IV aircraft during takeoff from Palwaukee Aircraft in suburban Chicago, resulting in the death of all four persons aboard and the destruction of the aircraft. The plane was owned by the Alberto-Culver Company (“Alberto”) and was being utilized by Aon Corporation ("Aon") and flown by a chief pilot employed by Aon Aviation (an Aon subsidiary), at the time of the crash. The decedents included an Aon Aviation chief pilot, a co-pilot employed by Alberto, the CEO of Aon Risk Management, and a flight attendant employed by a third-party.

At the time of the crash, both Aon and Alberto maintained separate flight operations at the airport, and each owned their own G-IV aircraft. They had also entered into an Interchange Agreement, under which each was entitled to use the other’s aircraft when needed. In pertinent part, the Interchange Agreement obligated Aon and Alberto to:

1 hold harmless and indemnify the other from loss; expense, damages, claims, or suits which they might suffer as a result of any act or omission of the other party;

2 maintain operational control of their own G-IV during use by the other party; and

3 have, and keep in effect, an aircraft insurance policy with a minimum $150 million value to provide coverage when piloting each other's airplanes. Id. at 126.

Alberto was insured under an aircraft insurance policy issued to Alberto by Associated Aviation Underwriters (AAU). Aon was insured by an aircraft insurance policy issued to Aon by United States Aviation Underwriters (USAU). Neither the USAU policy nor the AAU policy made any mention of the Interchange Agreement, nor were the insurers involved apprised of its existence prior to the crash.

The crash was followed by seven years of litigation, during which Alberto and AAU sought, among other things, a judicial declaration that Aon was not insured under the AAU policy.
Early in the litigation, USAU intervened and cross moved for summary judgment against both AAU and Alberto that Aon was, in fact, covered under the AAU policy. The trial court found that Aon was entitled to coverage under the AAU policy, that the AAU coverage was primary, and that, therefore, AAU had a duty to defend and indemnify Aon. Alberto appealed.

On appeal, Alberto and AAU continued to maintain that Aon was not covered by the AAU policy, and Aon argued, in turn, that it was entitled to such coverage. Reversing the lower court, the Illinois Appellate Court held that Aon was not entitled to coverage under the AAU policy due to the operation of Exclusion I of that policy, finding that Exclusion I denied coverage to "any person or organization engaged in the operation of any flight service, or aircraft or piloting service." In the court's words:

> In finding the exclusion inapplicable, the [circuit] court believed the construction of the AAU policy was contingent upon the Interchange Agreement. It commented that the AAU 'policy contemplated this interchange agreement that existed between the two plane owners," and 'if they [Aon Aviation] operated within that Interchange Agreement, my impression is this languages [sic] would not exclude coverage.' The [lower] court determined the exclusion would not exclude coverage. The court determined the exclusion would operate only if a service was being offered to a 'portion of the public that was interested in piloting and aircraft services as opposed to two groups of owners' [i.e. Alberto and Aon] accommodating each other, and ultimately concluded that 'if commercial is not something that gives color to the term 'flight service,' then there is no coverage [for] [permissive] usage of the aircraft. [Id. at 134]

* * *

> The circuit court was aware of the terms of the Interchange Agreement and the relevant insurance policies; however, it did not recognize that the AAU policy defeats primary coverage for those flights that were the subject of the Interchange Agreement. As noted above, however, AAU was not a party to the Interchange Agreement, the policy did not endorse the Interchange Agreement, and AAU received no additional premiums for Aon Aviation's coverage. AAU was entitled to implement its policy exclusions without regard to the Interchange Agreement. [Id. at 136]

Lessons from this opinion for those purchasing or renewing their aircraft insurance coverage include:

1. Familiarize yourself with the specific provisions of your existing policies, including the exclusions from coverage contained therein, and discuss with your insurance broker any question you might have upon completing your review;

2. Do not enter into so-called "interchange agreements," or any other type of agreement that could be read to affect, or be affected by, your existing aircraft coverage without first reviewing the proposed terms of any such agreement, and the terms of the other party to the agreement's existing insurance coverage, with both your insurance broker and your legal counsel; and

3. In the event that you do elect to enter any such agreement, make sure that your existing insurance policy, and the policy insuring the other contracting party (and any renewal(s) thereof) are amended and/or endorsed to specifically reference the agreement and to explain, in clear terms, what, if any, implications the agreement has for the coverage otherwise afforded by the parties' policies.

2. Denial of Insurance Coverage Because of Misrepresentations Regarding Both Where the Aircraft was to be Flown and Pilot Training

In Lima Delta Co. v. Global Aerospace, Inc., 338 Ga. App. 40 (2016), Global Aerospace, Inc. ("Global") issued a broad horizon aviation insurance policy to Lima Delta Company, Trident

AS, and Socikat, insuring a Gulfstream IV aircraft. The plane then crashed while landing in the Democratic Republic of the Congo on February 12, 2012. Following the crash, Global filed an action in a Georgia state court against both the named insureds and other entities, seeking rescission of the insurance policy for misrepresentation and fraud concerning where the aircraft was to be based, the ownership of the aircraft, and the primary use to be made of the aircraft. Alternatively, Global sought a judicial declaration that no coverage existed for the crash because the involved pilots lacked the qualifications required by the policy. The defendants, in turn, moved to dismiss the action for lack of personal jurisdiction, and that motion was denied. The defendant then answered, asserting a counterclaim for breach of contract, which counterclaim they later amended.

After completing discovery, the parties crossed moved for summary judgment. The trial court granted Global's motion in part, holding that Global had grounds to rescind the policy due to defendants' misrepresentations and omissions (including a misrepresentation the coverage was being sought solely for flights within the European Union) and also that Global was entitled to a declaratory judgment that the policy did not cover the crash because of defendants' noncompliance with the policy's open pilot warranty provision. The court denied defendants' cross motion, and defendants appealed.

On appeal, defendant Trident, among other things, argued that the pilot-training requirement contained in the open pilot warranty provision had been waived. Under that provision, the policy coverage would not apply while the scheduled aircraft was in flight unless both the commanding pilot and the second in command had completed the manufacturer's ground and flight training school for the applicable make and model aircraft within the twelve months preceding the date of the flight for which coverage was sought. In flatly rejecting Trident's argument, the appellate court explained:

> Trident has not pointed to any document showing that [the insurer] Global agreed to any such waiver or extension of the training requirement, and the policy specifically provides that its terms 'can be amended or waived only by endorsement issued… by Global Aerospace, Inc. and made part of this policy.' No such endorsement was made part of the Policy.

> We conclude that (1) summary judgment was properly granted to Global because, at the time of the accident, one of the pilots had not completed the manufacturer's recommended ground and flight training school for the applicable make and model aircraft within the 12 months preceding the date of the flight, as required by the plain language of the Policy. Id. at 43-44.

3. Denial of Insurance Coverage Because of a Misrepresentation about Pilot Training and a Missing Policy Endorsement

The case of Trishan Air, Inc. v. Fed. Ins. Co., 635 F.3d 422 (9th Cir. 2010), concerned the renewal by the plaintiff, Trishan Air, of its aircraft insurance policy covering a Dassault Falcon 900 B aircraft. Through its chief pilot, Trishan Air had instructed its insurance agent, Mr. Wittwer, that the renewal policy should require that its second-in-command pilots need only comply with the basic training requirements of 14 C.F.R. section 61.55 and not with any more stringent requirements.

Mr. Wittwer contacted Trishan's insurance broker instructing them to attempt to place the renewal with Starr Aviation. Starr's underwriter, in turn, determined that he could not, in fact, provide the limited pilot warranty sought by Trishan. Instead, Starr provided a binder for the coverage featuring the following pilot warranty endorsement:

> It is required that the aircraft is operated by a two-pilot crew at all times that has been approved by the named insureds [sic] chief pilot.
>
> It is further required that such pilot(s) must have successfully completed a ground and flight recurrent/initial training course for the make and model operated within the past 18 months. Any such course must incorporate the use of a motion-based simulator specifically designed for the insured make and model/make and model series. Id. at 425.

Once issued, the actual policy contained a nearly identical pilot warranty and an "Exclusion F", which excluded coverage consistent with the pilot-warranty provisions.

The insured aircraft was then involved in a crash, Trishan made a claim under its insurance policy with Federal Insurance Company (for whom Starr Aviation had served as the program manager for policy underwriting), Federal denied the claim, and litigation ensued.

At the time of the crash, the insured aircraft was being piloted by Trishan's chief pilot, Scott Michael, and co-piloted by Dennis Piermarini, a very experienced pilot, but one who had not completed the flight-simulator training required by the pilot warranty that had been included in the Policy. At the time of the crash, neither pilot was aware of the insurance policy's inclusion of the more stringent training requirement for second-in-command pilots.

In the trial court proceeding, Michael, Piermarini, and Trishan's expert witness, Charles Tatum, all opined that the crash would not have been avoided had Piermarini undergone the required additional training before the flight. In fact, in his expert report, Mr. Tatum stated that Permarini's "8-10 hours of static cockpit training [was] very similar to simulator training and in some cases better" … " and that "a full motion simulator course" would not have altered Piermarini's qualifications "in the slightest." Id. at 426.

The trial court granted summary judgment for Federal, holding that its denial of coverage was in keeping with California law, as Trishan had not strictly complied with the pilot warranty requirements, and Trishan appealed.

On appeal. Trishan argued that it was entitled to coverage because it had substantially, if not strictly, complied with policy requirements. The Ninth Circuit Court of Appeals, applying California law, flatly rejected Trishan's position:

> Trishan seeks universal application of the substantial compliance doctrine untethered from the type of warranty at issue. However, strict compliance with pilot warranties serves as a necessary corollary of aviation insurance policies. 'Federal courts uniformly enforce [pilot warranties] … and for good reason. Pilot qualifications and experience are obviously factors bearing directly on the risk the insurer is underwriting.' [citations omitted]. Trishan's approach undermines the reasons for including pilot warranties in aviation insurance policies. Id. at 428.

Lessons from these opinions for those purchasing or renewing their aircraft insurance coverage include:

1. Any misrepresentation or omission made by a prospective insured to an insurance broker in seeking to obtain aircraft insurance coverage (or any coverage, for that matter) may, and likely will, be used by the insurer to either rescind the policy or otherwise negate the insurer's coverage obligations;

2. The failure to comply with pilot warranty requirements concerning the nature, extent, and timing of pilot training can work to void coverage otherwise afforded by an aircraft insurance policy; and

3. Any amendment to the existing language of an aircraft insurance policy (or, again, any policy of insurance) should be both in writing and made part of the policy by means of an agreed-upon endorsement.

4. Denial of Insurance Coverage Because a Pilot Lacked the Warranted Rating and due to a Failure to Obtain Breach of Warranty Coverage for the Operator

The case of Royal Aviation, Inc. v. Aetna Cas. & Sur. Co., 1984 US Dist. LEXIS 24544, concerned a lease purchase agreement (the "Agreement") which plaintiff Royal Aviation, Inc. ("Royal") had entered into on April 10, 1981 with Reliance Leasing Corp. ("Reliance") for a Cessna Citation aircraft. The Agreement required Reliance to obtain breach of warranty insurance for General Electric Credit Corporation (GECC), as the lienholder that had financed the purchase of the aircraft, and to have Royal listed as a loss payee and additional insured under the policy. The Agreement did not require Reliance to obtain breach of warranty coverage for Royal.

Reliance, as Royal's agent for procuring the insurance, contacted the Aviation Assurance Agency ("Assurance") which, in turn, obtained quotes for the requested insurance from several sources, including USAIG. The latter bound coverage for a period of one year. The resulting insurance policy provided breach of warranty coverage for the lienholder, GECC, through a "Lienholders or Lessor's Interest Endorsement," and listed Royal as a loss payee and an additional insured, but it did not provide Royal with breach of warranty coverage.

Shortly thereafter, the subject aircraft was damaged while landing at an airport in Mesquite, Texas. At the time of this incident, the aircraft was being flown by a Reliance pilot who both lacked the proper rating required by the policy's pilot warranty and who, in further breach of that warranty. was not accompanied by a co-pilot.

Royal then sought reformation of the insurance policy, arguing that the policy's failure to include Royal within the breach of warranty coverage was the product of a mutual mistake. The court, after making detailed factual findings, concluded that the insurance policy had been procured in strict accordance with the terms of the agreement, which nowhere had required that Royal be provided with breach of warranty coverage, and that, as a result, the failures of the respective Alliance-, Assurance-, and USAIG personnel to include such coverage for Royal did not constitute a "mutual mistake" that would support Royal's reformation claim. According to the court:

> To prevail on a reformation of contract theory, a party must establish by clear and convincing evidence that a mutual mistake was made in the execution of the contract. There are two requirements of a Reformation claim: first the party seeking relief must show the true agreement, and second, he must show that the instrument incorrectly reflects that agreement because of a mutual mistake. In this case, there was no mutual mistake in the execution of the insurance contract. USAIG bound the coverage it intended to buy. Id. at 7.

(Note: For a good example of a court decision's granting a party's post-accident claim to reform an aircraft insurance policy, see Ill. Natl. Ins. Co. v. Wyndham Worldwide Operations, Inc., 85 F. Supp. 3d 785; 2015 U.S. Dist. LEXIS 9468 (insurer's post-accident reformation claim allowed when an endorsement contained in a renewal policy created an expansion of policy coverage wholly unintended by both the insurer and the insured))

Lessons to be learned from this case:

The above case demonstrates, in stark terms, the importance of ensuring that the insurance requirements contained in an aircraft lease agreement, lease purchase agreement, or other related agreement, accurately address the parties' respective insurance needs in a given transaction. It is then equally, if not more, important for the parties to ensure that their coverage requirements are,

in fact, met by the policies of insurance they purchase. To help ensure that the proper aircraft insurance is requested, obtained, and maintained for any given transaction, the parties should consult with suitably experienced insurance professionals and legal counsel throughout the agreement-preparation and insurance-procurement processes.

Conclusion

Avoid unknown risks and financial exposure by verifying that the insurance requirements of the parties to aircraft-related transactions are both clearly articulated in the transaction documents and met by the insurance coverage that is ultimately purchased. Do it now; not after the happening of an unfortunate event and, in so doing, review the relevant documents and policies of insurance in their entirety. Additionally, remember that Certificates of Insurance merely attest to the existence of insurance coverage; they do not afford any coverage in and of themselves, and they do not offer the requisite detail concerning the nature and extent of the coverage provided to properly inform your review, which, again, should be undertaken with the assistance of both qualified insurance professionals and legal counsel. Verify also that requirements with regard to pilot licensing and training, commercial or private use of an aircraft, and geographic use of an aircraft, are satisfied by the actual current or planned use of your aircraft, or, if you operate more than one aircraft, all aircraft in your fleet, in order to avoid discovering, when it is too late, that appropriate insurance was not in place when needed.