OFA Newsletter

AN ORGANIZATION OF FLYING ADJUSTERS

WINTER 2015

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President's Message

Dear OFA Members, Friends, and Family,

I hope this newsletter finds you well in the New Year. Retrospectively, 2014 was a wonderful, but bittersweet year for the OFA. Both the Mid-Year and Annual meetings were wonderfully successful and productive. Let's remember though that we lost several good friends in 2014.

As I said in Baton Rouge, it is truly an honor to be a member and the President of this great organization. The OFA will always be family to me and I thank you all for the professional relationships and the everlasting friendships. Twice a year, when I arrive at each meeting, I immediately feel like I have never left and the conversations pick up just where they left off.

To continue the analogy that Past President Gourgues (OFA 152) made in Baton Rouge about the OFA being an airliner and I the Captain; we are currently level in cruise flight with the autopilot on. As we approach the Mid-Year meeting, it is time to click off the autopilot, hand-fly a little, and re-trim the aircraft.

At the last meeting, one of the actions that was discussed for action was the reinvigoration of the Advisory Committee. This work will happen soon and hopefully will bear fruit at the Mid-Year. I will report more to you in Dallas on March 25th.

I want to remind everyone that we all need to stay safe out there. Many of us fly light aircraft to claims. In the last few years, I have had 2 close calls while travelling to do claims work. As a group, we are diverse in our experience, proficiency, training, and capability. None of us are immune from allowing complacency or pressure to complete the mission affecting our judgment or flight discipline. After my 2 close calls, I have made myself slow down, plan better, and accept delays or diversions in the name of safety. I hope you all take a moment and consider doing the same.

Finally, I want to acknowledge the members we all know provide the work to keep this organization running.

Even as members rotate through the officer positions, the Executive Secretary, Hope DeLong (OFA 141), continues to be the force that makes the operation of the OFA seem so smooth.

Thanks also to Patty Otto (Honorary Member) and the Arnold family for all of the work and support they provide to make sure the meetings are a success.

Thanks to Tom Cook (OFA 120) and family for hosting the 2014 annual meeting. We will all remember the beauty of Baton Rouge and the fun we had for some time to come.

Thanks to all of you for continuing the rich tradition and professional fellowship of this organization.

I look forward to seeing you all soon!

Sincerely,

Eric Popper

Eric Popper
OFA 156
OFA President 2014-2015

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OFA Year 2015

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The OFA Newsletter is published for the benefit of the membership, the Aviation Insurance Industry and other related fields. Opinions expressed by the Editor and contributions do not necessarily represent the position of the OFA.

Contributions and correspondence should be addressed to the Editor and emailed to: rob@arnoldoffice.com with “OFA Newsletter c/o Rob Spencer” in the subject line. Articles and photos not written or taken by the contributor need to have authorization from the author or copywrite holder attached to the submission.

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RESERVATION OF RIGHTS BY THE INSURER—A PRIMER

By Jonathan S. Morse,
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Jon Morse is an Aviation Attorney with The Morse Law Group in Southern California. His ability to insert Humor into Law is as renown as his ability as an Aviation Attorney. Jon's occasional Stand Up Comedy is highly appreciated at many OFA events.

SUMMARY

Where it is unclear whether coverage is provided for a liability claim, it is common for the insurer to provide a defense subject to a reservation of rights—i.e. provide a defense while reserving the insurer's right to resist any claim for indemnity, and also reserving its right to commence and prosecute a Complaint for Declaratory Relief to resolve the coverage issues. This article provides a basic overview of such claims, using two examples—one hypothetical and one real.

INTRODUCTION

For many if not most of the liability claims submitted to an aircraft insurer, there is no genuine issue of coverage—either coverage applies by the terms of the policy or it does not. However there are other possibilities. For example, coverage may or may not exist depending on whether certain facts do or do not exist. Under these circumstances, it is a common practice for the insurer to provide a defense to its insured(s), subject to a reservation of rights—i.e. the right to deny indemnity, the right to commence a separate action for Declaratory Judgment to establish the absence of coverage, and the right to withdraw the defense if it is established that there is no coverage. In some cases, the insurer may even reserve the right to recover the attorney fees and costs incurred in providing the defense.

The purpose of this article is to provide a basic overview of the reservation of rights concept, and to describe what can happen in the defense of the underlying civil action by the claimant and the separate civil action to determine whether coverage exists. This article focuses on the law of California, as the laws are often quite different in other states.

It is beyond the scope of this article to provide an exhaustive overview of the subject. Moreover, this article is provided for general information only, and should not be considered as authoritative with respect to any particular fact pattern.

DUTY TO DEFEND VS. DUTY TO INDEMNIFY

At the outset, it is important to recognize that most aviation liability policies issued in the United States provide two separate and distinct benefits to the insured, namely the duty to defend and the duty to indemnify. The duty to defend can and often does arise even though the duty to indemnify is non-existent. In general, the duty to defend is triggered by the allegations of the complaint, even though the facts are otherwise. For example, if an insurance policy is in force from January 1 through December 31, 2011, and an accident occurs on January 1, 2012, then the policy provides no coverage for the claims arising out of the accident. However, if the claimant files suit and the complaint alleges that the accident occurred in December 2011, then the insurer has a duty to defend until it is established that the accident occurred outside the policy period. If the insurer denies coverage and the denial turns out to be incorrect, there can be some serious adverse consequences for the insurer. Under such circumstances, the insurer may well choose to defend the insured under a reservation of rights until it is crystal clear that there is no coverage afforded by the policy.

A duty to defend may also arise where an accident occurs and it is not clear whether the insured has complied with the applicable terms set forth in the policy. Assume, for example, that the policy requires the pilot to have 30 hours of flight time in the make and model of airplane; the pilot is killed in the accident and his logbook cannot be found. However, the pilot's flight experience might be established by other means, such as fuel receipts, flight instructor records, or other evidence. Meanwhile, the insurer may defend under a reservation of rights pending a resolution of the coverage issue.

EXAMPLES

The handling of a claim under reservation of rights can perhaps best be explained by use of specific examples. Set forth below are two such examples, one hypothetical and the other real.

Example 1—Was the conduct of the insured intentional or accidental?

Assume, for purpose of example, that Mrs. A is an insured under an automobile liability policy. While driving down the street she sees her husband walking along the sidewalk with his mistress. Mrs. A swerves the car onto the sidewalk and runs into both, seriously injuring the mistress. The mistress then files suit against Mrs. A with two separate causes of action. In the first cause of action, the mistress alleges that Mrs. A was negligent and seeks compensatory damages. In the second cause of action, the mistress alleges that Mrs. A's conduct was intentional, and seeks both compensatory and punitive damages. Mrs. A is arrested at the accident scene. From her jail cell, she files a claim with her insurance company and asked to be defended.

The insurance adjuster, upon reviewing the facts of the claim, determines that Mrs. A's act was intentional, notes that the policy specifically excludes coverage for intentional acts, and recommends that coverage be denied. However, the supervisor recognizes that there is allegation that the conduct was negligent, and that this allegation, if true, would result in a covered claim. Indeed, it is at least possible that Mrs. A, upon seeing her husband with his mistress, simply overreacted and swerved onto the curb without the intent to hurt anyone. Under these circumstances, the supervisor sends the case to an attorney for a legal opinion whether the claim is covered. The attorney recommends that Mrs. A be defended by the insurer, at the insurer's expense, subject to a reservation of rights. The attorney then sends a Reservation of Rights Letter to Mrs. A, setting forth the facts and circumstances as determined by the investigation, noting that if Mrs. A's acts were intentional, then there is no coverage for the claim arising out of the accident, and offering to defend the claim, subject to a complete reservation of rights, including the right to deny coverage in the event it is determined that Mrs. A's action was intentional, and particularly denying any liability to provide any coverage for any punitive damages which may be assessed. [Note: If there are other potential coverage defenses, these should also be spelled out specifically in the reservation of rights letter; otherwise, these unidentified coverage defenses may be deemed waived.]

After setting forth the potential coverage defenses and reserving the right to deny indemnity, the letter notifies Mrs. A that the insurer reserves the right to commence and prosecute a separate civil action for Declaratory Judgment to determine whether the policy provides coverage for the claim, including the right to deny any indemnity under the terms of the policy and to withdraw the defense if it is determined that Mrs. A's conduct was intentional. The letter further reserves the right to seek reimbursement for costs and attorney fees incurred in defending the claim prior to the determination of no coverage. The letter offers to select and retain defense counsel for Mrs. A, and contains a form letter to be signed by Mrs. A and returned to the insurer. Pursuant to Civil Code Section 2860(c), that form letter reads: "I have been advised and informed of my right to select independent counsel to represent me in this lawsuit. I have considered this matter fully and freely waive my right to select independent counsel at this time. I authorize my insurer to select a defense attorney to represent me in this lawsuit."

Mrs. A shows the Reservation of Rights letter to her criminal attorney, Sam Shark, who correctly notes that Mrs. A is entitled to choose her own defense counsel, and is not required to accept an attorney appointed by the insurer. In the absence of a coverage issue, the insurer typically has the right to select and appoint defense counsel. In this instance, however, the insurer has a conflict with the insured, because if it turns out that the action of Mrs. A was intentional, the insurer has no duty to pay anything to compensate the victim. Accordingly, the insurance company is not allowed to appoint counsel from its panel of defense counsel, since such counsel has at least some ability to affect the outcome of the coverage issue to have the actions of Mrs. A determined to be intentional rather than negligent, thereby favoring the insurer at the expense of Mrs. A. Defense counsel presumably has a potential incentive to favor the insurer in order to get further business from the insurer. Under these circumstances, Mrs. A has the right to select her own counsel, commonly referred to as Cumis counsel, subject to certain limitations. For example, the counsel selected must have at least five years of litigation experience, and the hourly rate charged cannot exceed the hourly rate normally charged by defense counsel appointed by the insurer. Subject to those limitations, however, Cumis counsel can defend the case aggressively and bill with a heavy hand. This right to independent counsel has been codified in California under Civil Code Section 2860.

Rejecting the insurer's offer to select defense counsel for her, Mrs. A retains Mr. Shark to defend her in the civil action. Mr. Shark, hungry for the work, pursues the defense aggressively, billing 80 hours per week at $200 per hour for four weeks, and sends his first bill to the insurer in the amount of $64,000. The insurer, alarmed at

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RESERVATION OF RIGHTS - Continued from pg. 3

the possibility of receiving huge bills throughout the lawsuit, instructs its coverage counsel to commence and prosecute a separate civil action, seeking a Declaratory Judgment establishing that Mrs. A's actions were intentional, and therefore the insurer has no duty to defend or indemnify Mrs. A for any claims arising out of the accident, and further seeking a money judgment to recover all attorney fees and costs incurred in the defense of the mistress' personal injury lawsuit. This action also names the mistress as an additional defendant so that she may also be bound by the Declaratory Judgment.

Mr. Shark, recognizing that a fact finder will probably determine that Mrs. A's actions were intentional, and not wanting to lose his gravy train, files a Motion to Stay the Declaratory Judgment Action pending the outcome of the personal injury action. Mr. Shark successfully argues that Mrs. A would sustain severe prejudice if she were to be forced to defend against the Declaratory Judgment Action, as the mistress and her attorneys could use the evidence against her in the personal injury action. The court agrees, and stays the declaratory judgment action, putting it on hold until the personal injury action is resolved. Meanwhile, the personal injury action proceeds, with Mr. Shark running up huge bills at the expense of the insurer.

Possible Outcomes

There are several possible outcomes to this matter, some of which are set forth below.

1. Prior to trial, the personal injury action is settled and the mistress releases all claims against Mrs. A. The insurer then files a supplemental complaint in the Declaratory Relief Action, seeking reimbursement from Mrs. A for the amount of the settlement plus the attorney fees and costs incurred in the defense of the personal injury lawsuit. [Note: If the insurer turns down an opportunity to settle for the policy limits and it is later determined that coverage existed for the claim, the insurer can be subject to payment of all damages, even beyond the policy limit, even if the refusal to settle was made in good faith.]
2. The personal injury action is not settled, and the case goes to trial, with the jury finding that Mrs. A was negligent, and the Court imposing a money judgment against Mrs. A in favor of the mistress. At that point, the mistress has standing to file a separate action against the insurer to enforce the judgment. In that action the insurer, not having been a party to the personal injury lawsuit, can resist payment of the judgment on the ground that Mrs. A's action was intentional. Since the Declaratory Relief action is already pending, having been stayed pending the outcome of the personal injury action, the Court may stay the new action against the insurance company or consolidate it with the Declaratory Relief Action, since the issue is the same in both cases—whether the insurer is required to indemnify the insured. In the alternative, the mistress can set forth a cross complaint in the Declaratory Relief Action, seeking to have the insurer compelled to indemnify Mrs. A by paying the judgment, or at least that part which is within the liability limit of the policy.
3. The personal injury action is not settled, and the case goes to trial, with the jury finding that Mrs. A's conduct was intentional, and the Court imposing a money judgment against Mrs. A in favor of the mistress for both compensatory and punitive damages. The insurer should be able to use the finding in the personal injury action to establish that Mrs. A's conduct was intentional, and thereby avoid having to litigate that issue in the Declaratory Relief Action. At that point, the insurer could file a supplemental or amended complaint seeking to recover from Mrs. A the amount of the attorney fees and costs incurred in providing the defense in the personal injury action.
4. Prior to trial, Mrs. A's criminal case goes to trial, and Mrs. A is convicted of battery as a result of her injuring the mistress. At this point, Mrs. A may be estopped (prevented) from arguing that her action was not intentional, and the finding in the criminal court may be used to establish that the insurer has no duty to indemnify her for the mistress' damages. At that point, the insurer could file a supplemental or amended complaint seeking to recover from Mrs. A the amount of the attorney fees and costs incurred in providing the defense in the personal injury action. Moreover, that conviction could be used by the mistress to establish that Mrs. A is liable for the damages.
5. Prior to trial, Mrs. A pleads no contest in her criminal case and the Court finds her guilty of battery upon the mistress. However, this conviction could not be used against Mrs. A in the civil proceeding, and Mrs. A could still defend herself in the Declaratory Relief Action on the ground that her action was negligent and not intentional, contending that the no contest plea was taken to avoid the risk of a more serious criminal conviction.

Example 2—Was there coverage for the flight instructor who rented a plane for a night flight with her student?

This is an actual case handled by the author, and the coverage case went to trial in the United States District Court, finding no coverage for the claims arising out of the accident. In a separate personal injury action, the plaintiff obtained nothing because the flight instructor declared bankruptcy. A synopsis follows, with the facts changed slightly to protect the innocent.

Aircraft Operator, Inc. ("Operator") owned and operated a single engine airplane (the "Aircraft") and made it available to the general public for rental and instruction. Operator's insurance policy provided liability coverage subject to a liability limit of $1,000, 000, with a sub limit of $100,000 per passenger, and providing coverage a permissive pilot is an additional insured for liability claims, subject to meeting the policy's other requirements. The policy required that renter pilots have at least five hours of flight time in the same make and model and also required that any pilot providing flight instruction must have at least twenty five hours of flight time in the same make and model. The policy excluded coverage if a renter pilot allowed another person to operate the controls in flight.

A flight instructor ("CFI"), who worked for a local flying club, rented the Aircraft to provide night instruction for her student pilot "(Student"), with Student paying for the rental. Upon CFI's learning that she did not meet the plicy's experience requirement to provide flight instruction, CFI (with the consent of Operator) went to Operator's insurance agent, filled out a pilot questionnaire and asked to be added to the policy as an approved flight instructor. The completed questionnaire was provided to the insurance agent late in the afternoon of the night flight, with no request that it be processed or approved before the planned night flight. The agent took no action that day, intending to submit the questionnaire the next day.

CFI was then checked out by Operator's owner, and given the keys to the airplane with full fuel less the amount consumed during the checkout. CFI and Student then flew for approximately two hours, landing at a different airport to spend the night. The next morning they flew back to Operator's airport. On final approach the engine quit and the airplane crashed off airport, seriously injuring CFI and Student. The FAA investigator found that the fuel selector was set to the right tank; the right tank was empty and the left tank was full.

Operator's insurance agent was notified of the accident before CFI's pilot questionnaire was submitted to the insurer. Accordingly, it never made a decision whether to approve CFI to provide flight instruction in the Aircraft.

Student retained counsel and filed suit against CFI and Operator to recover damages. The claim was tendered to the insurer, which determined that there appeared to be no coverage for the claim. In view of Student's serious injuries, the insurer offered to settle with Student for the policy limit of $100,000, subject to and contingent upon obtaining a release of both CFI and Operator and dismissal of Student's lawsuit with prejudice. The offer was rejected. The insurer then offered a defense to both CFI and Operator, subject to a complete reservation of rights. Counsel for CFI and Operator each retained counsel of their own choosing, and both defense counsel undertook an aggressive defense of the Student's civil action, at considerable expense to the insurer.

Faced with the prospect of continuing to provide an expensive defense for both Operator and CFI, the insurer retained the undersigned to commence and prosecute a separate civil action against CFI and Operator, seeking a Declaratory Judgment establishing that the insurer had no duty to defend or indemnify anyone, including CFI or Operator, for any claims arising out of the Accident. In particular, it was noted that CFI did not meet the minimum experience requirement to provide flight instruction and, alternatively, that as a renter pilot she allowed Student to operate the controls and thereby caused the Accident. CFI and Operator answered the complaint and denied that the insurer was entitled to a Declaratory Judgment. In particular, CFI alleged that she had timely provided the Pilot Questionnaire to Operator's insurance agent and was led to believe that she would be covered to provide flight instruction. Moreover, CFI contended that she had been providing flight instruction only during the night flight the previous evening, and at the time of the Accident she was merely returning the Aircraft to home base and not providing flight instruction. As to the exclusion based upon allowing a renter pilot to operate the controls, it was alleged that this exclusion did not apply because by the time of the Accident CFI had taken over the controls and therefore Student was not operating the controls at the time of the Accident.

CFI and Operator filed a Motion to Stay the Declaratory Relief Action pending the outcome of Student's personal injury action, alleging that they would be prejudiced

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O F A

an organization of flying adjusters

March 25, 2015

OFA MID YEAR MEETING & RECEPTION
BUSINESS MEETING: 9:00 AM TO 11:00 AM
MARCH 25TH, 2015. RECEPTION: MARCH 25TH, 2015
TIME: 4:00 PM TILL 7:00 PM

LOCATION: LAQUINTA INN & SUITES-1ST FLOOR
4850 WEST JOHN CARPENTER FREEWAY
IRVING, TX 75063
RES. TEL. NO.: (972) 915-4022 OR FAX NO.: (214) 524-5255
WHEN MAKING RESERVATION - RE: ORGANIZATION OF FLYING ADJUSTERS GROUP. ROOM CHARGES: $107.10
2 BEDS/2 PERSONS PLUS 13% ROOM TAX.
MAKE RES. BY 3-1-15.

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THE OFA HOSPITALITY SUITE WILL BE OPEN FOR MEMBERS AND INVITED GUESTS ON THE EVENING OF MARCH 24TH AND 25TH, 2015.

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OFA PRES. ERIC POPPER WOULD APPRECIATE A REPORT FROM ALL OF THE COMMITTEE CHAIRMEN TO BE PRESENTED AT THE MID YEAR MEETING ON WEDNESDAY MORNING. MARCH 25TH, 2015.

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FOR ADDITIONAL INVITATIONS OR FOR 2015 OFA DIRECTORIES, CONTACT HOPE DELONG
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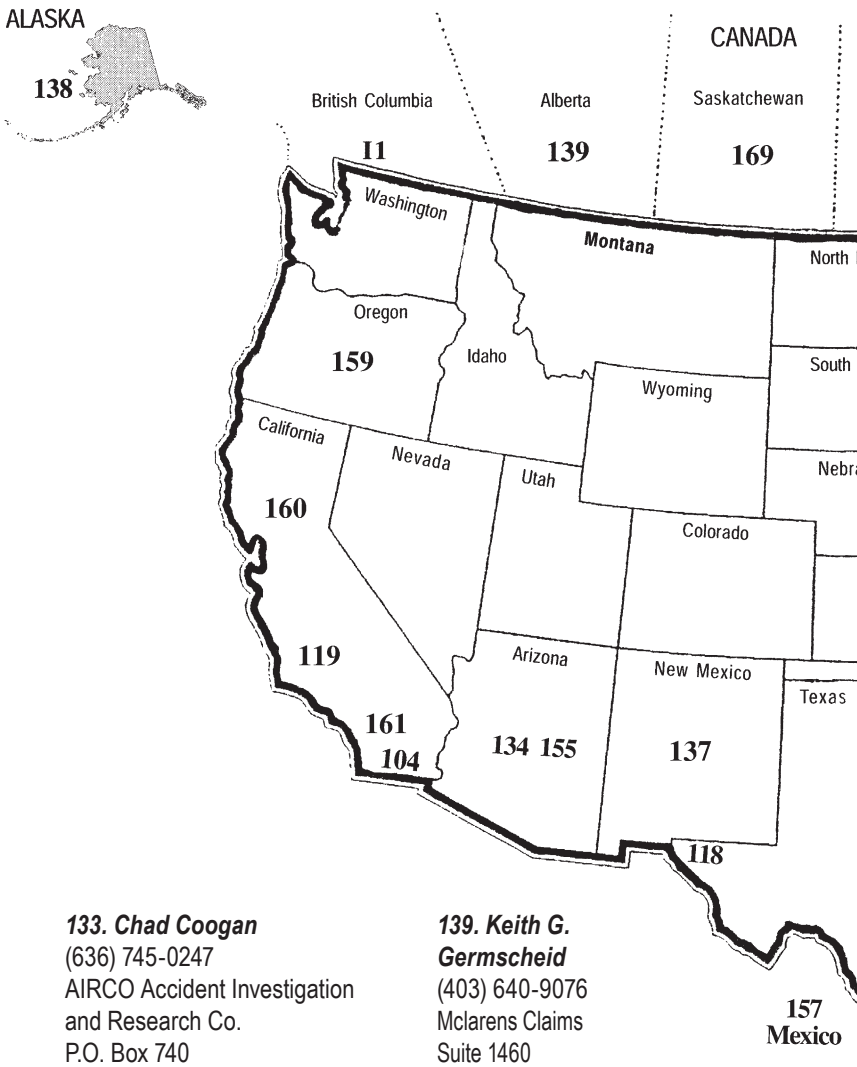
The membership of OFA is dedicated to the highest standard of professional ethics in handling aviation insurance claims, investigating causes of aircraft accidents objectively and promoting every aspect of air safety.



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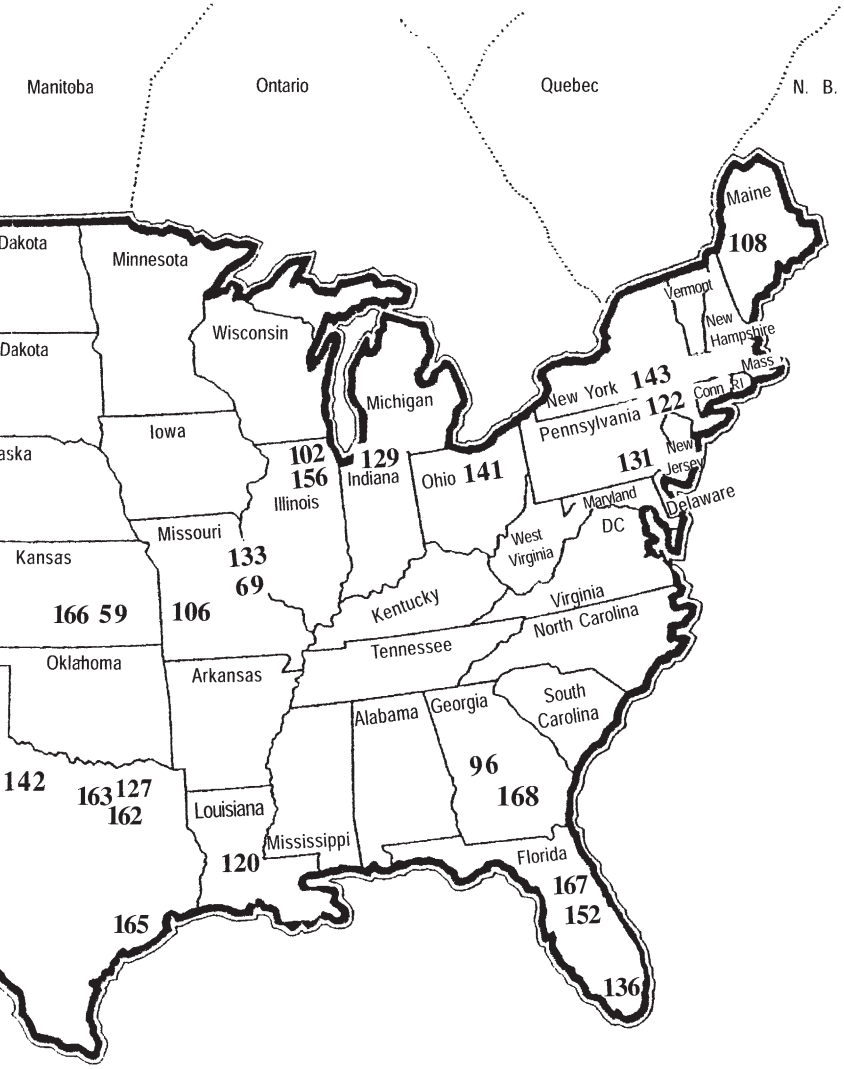

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Baton Rouge, LA 70895

Baton Rouge, Louisiana Conference

01 October through 04 October 2014

Rooms were rough…

But the food was great!

Our Host

Class

Class Break

Golf

Louisiana, gotta love it!

Heading In

***Just* Plain Fun**

In route to more fun

Best Photo, by Ralph

Sharing Knowledge

Gumbo Line

Hospitality with a captial H

NAME THAT AIRCRAFT

Last Flight

Lew Valkenaar, OFA 105

With great sadness we heard that Lew passed away on December 18th 2014 and went to his Lord and Savior. Lew was born in Zion, Illinois and joined the US Air Force after High School for five years, then remained in the National Guard and Air Force Reserves as a Flight Engineer until 1991. His last assignment was hauling supplies into Kuwait during Dessert Storm. Lew spent 11 years as a Police Officer in Southern California before he moved to Idaho and became a claims adjuster and manager with Grange Insurance. In 1980 he opened his own adjusting business, Frontier Adjusters, where he worked until his retirement in 2005. In 2013 and 2014 he occasionally assisted in Washington and Idaho claims inspections with Arnold and Arnold (and was a great help). Lew was president of the OFA in 1997 and 1998. He loved flying his P-210 on extended trips, especially to Mexico and singing in his Church Choir and with other singing groups. Lew is survived by his wife of 37 years, Dottie, six children, fifteen grand-children, and 17 great grand-children and god sons, as well as two brothers and his sister. This editor can only say his photo does not show how large and kind a man he was, or what a pleasure he was to work with. He will be missed.

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if they had to defend against the Declaratory Relief Action. We opposed that motion on the ground that the insurance issues involved in the Declaratory Relief Action were separate and distinct from those involved in the personal injury action. In particular, we noted that whether CFI was providing flight instruction at the time of the Accident or simply returning the Aircraft to home base with Student as a passenger, CFI's duty of care was the same, i.e. a duty to use reasonable care to ensure that the Aircraft was operated safely. Hence, for liability purposes it was irrelevant whether CFI was piloting the airplane or allowing Student to operate the controls. The Court agreed with our position and denied the Motion to Stay, allowing the Declaratory Relief Action to proceed.

We then filed a Motion for Summary Judgment, alleging that there was no competent evidence that the insurer had approved CFI to provide flight instruction and it was disingenuous to allege that CFI was not providing flight instruction at the time of the Accident. CFI then provided a Declaration opposing our motion, and the Court found that there were questions of fact as to whether CFI was led to believe she was covered and whether she was in fact providing flight instruction during the accident flight.

We conducted the depositions of Student and CFI to collect the evidence necessary to prove our case. Student agreed that she was the student on all previous flights with CFI, and that on all these flights CFI was the pilot in command and signed Student's logbook, thereby giving Student credit for dual flight time. While her logbook was not signed off for the Accident Flight, Student agreed that she expected to get credit for this flight time since she was operating the controls and paying for the rental of the Aircraft.

CFI, as expected, contended that when she provided her completed pilot questionnaire to Operator's insurance agent she was led to believe that she was covered for the night flight. She also contended that she was not providing flight instruction on the short flight back to the home base of the Aircraft, but merely returning the Aircraft after the night flight. She stated that she had not provided any logbook entry for the return flight, but admitted that there was no conversation between her and Student as to whether there would or would not be a signoff. She further admitted that Student had been operating the controls of the Aircraft up to the point where power was lost, at which point CFI took over the controls and continued to operate the Aircraft to the point of impact. With respect to her flight experience in the same make and model, CFI claimed that she had five hours at the time of the Accident. In particular, she had two hours during the instruction flight, one hour of checkout from Operator and two more hours on a previous occasion. However, she could not produce her pilot logbook, nor produce any details of this alleged two hours. In particular, she could identify neither the owner of that airplane nor its N number, nor could she identify the point of departure or the airports allegedly visited.

In a last ditch effort to settle this case and put an end to the defense costs, we convinced the Court in the Declaratory Relief Action to convene a settlement conference before another Federal Judge. We made it clear that the insurer was prepared to pay Student the entire $100,000 policy limit in exchange for a release of CFI and Operator, and that there would never be any more money available from the insurer. The Settlement Judge agreed that our position was reasonable. However, Student's attorney would not budge, and the case did not settle.

The Declaratory Relief Action then went to trial before the Federal Judge in Sacramento and went in favor of the Insurer on all major points. Highlights are set forth below.

We called Student as our first witness. Student agreed that on all previous flights with CFI, she was receiving dual flight instruction with CFI as the instructor, and that CFI as expected signed her logbook so she could get credit for the flight time. Student agreed that as a student pilot she could not be pilot in command with anyone else aboard the Aircraft and that the only way she could get credit for the flight time would be to receive dual flight time from the CFI. She agreed that for a student pilot logged flight time is like gold, and she fully expected to receive dual flight time credit for the return flight, especially since she was paying for the rental of the Aircraft. Student testified that for this return flight she had personally performed the preflight and operated the controls of the Aircraft at all times up to the point where the engine quit.

We then called the Insurance Agent as a witness and he testified about receiving the Pilot Questionnaire on the afternoon of the night flight, with no request that it be delivered to the insurance company that day. In fact, at the time it was delivered, about 4:00 pm, it was already past closing time in Dallas where the insurer is located. The Agent testified that he did not have authority to issue endorsements or bind

coverage without the express approval of the insurer, and that he never represented to Operator or CFI that he had such authority.

In the defense of the action, CFI's counsel called CFI as a witness. As we anticipated, CFI testified that she was led to believe that she would be covered as a flight instructor once she submitted her pilot questionnaire, that she was not providing flight instruction during the return flight to the Airport's home base, and that she, CFI, was operating the controls of the Aircraft at the time of impact. CFI's counsel then offered the completed Pilot Questionnaire as an exhibit in order to show that it contained the identity of the insurer; this was offered to support CFI's assertion that the Agent had apparent authority to bind coverage. After confirming that the Pilot Questionnaire was being offered for all purposes, we allowed it into evidence without objection.

On cross examination, CFI conceded that on all previous flights with Student, CFI had signed the logbook after the flight to give Student credit for the flight time. She further conceded that Student was paying for the rental of the Aircraft, including the return flight, and that there had been no conversation between CFI and Student to suggest that Student would not receive dual flight time credit for the return flight. CFI further conceded that Student had been operating the controls of the Aircraft at all times up to the point where the engine quit.

We then cross examined CFI about the contents of the Pilot Questionnaire. Since it has never been presented to the insurer for approval prior to the Accident, it was technically irrelevant. However, since CFI's counsel had it admitted into evidence for all purposes, it was fair game. CFI conceded that she had signed the Questionnaire and that all of the information on the Questionnaire had been completed in her own handwriting. CFI conceded that she understood that the insurer would be relying on the information she provided, and that the insurer was entitled to accurate information from her so it could evaluate her experience and make an informed decision whether to approve her as an instructor. We reminded CFI of her testimony at deposition wherein she stated she had only five hours of flight time in this make and model. We then asked her to explain to the Court why she had represented to the insurance company that she had twenty five hours in type. CFI responded that she had other flight time in this type of aircraft which was not recorded. We then impeached her with her deposition testimony in which she made it clear that she had only five hours in type. At that point CFI's credibility was seriously damaged.

After hearing all of the testimony, and after reviewing all of the exhibits overnight, the Court issued a ruling from the bench, finding for the insurer on all issues. In particular, the Court agreed that the Insurance Agent had no binding authority, and there was no basis for CFI to believe otherwise. Moreover, there was no evidence that the insurer had ever agreed to be bound by the acts of the Agent, and the testimony of CFI, even if believed, was insufficient to establish that the Agent had ever received such authority from the insurer or that CFI had any basis to believe Agent had such authority.

The Court agreed with our position that CFI had rented the Aircraft and was bound by the exclusion which prohibited a renter pilot from allowing another person to operate the controls in flight. The Court noted that this exclusion would not void coverage if a renter pilot allowed someone to operate the controls at altitude and then returned the controls to the renter pilot before landing. However, the Court accepted our position that the exclusion applies where the other person operates the controls and the pilot does not take over the controls until it is too late to prevent the accident.

On the issue of whether CFI was providing flight instruction during the return flight, the Court made a factual finding, based upon all of the evidence, that she was. The Court specifically found that CFI's testimony on this issue was not truthful, and that CFI's providing flight instruction formed the basis for a separate finding of no coverage for the claims arising out of the Accident. Since neither CFI nor Operator had any apparent assets, the insurer waived any claim for reimbursement of attorney fees and costs incurred in the defense of Student's personal injury action. The Court then entered a Declaratory Judgment establishing no coverage for the Accident, and specifically providing that the insurer had no duty to defend or indemnify anyone in connection with any claims arising out of the Accident.

After the deadline to appeal from the Declaratory Judgment had expired, the insurer withdrew the defense being provided to CFI in Student's personal injury action. By this time Operator had obtained Summary Judgment in the Student's action, establishing that Operator had no liability for Student's damages resulting from the Accident. Defense counsel for CFI, no longer on the insurer's payroll, withdrew as counsel for CFI. CFI then filed for bankruptcy. After several more years of litigation, Student received $5000 from CFI's Bankruptcy Estate.

END

Member Spot Light

Keith Brown, OFA 166

Keith Brown is our spotlighted member this issue. As with most of our members Keith's professional and work focused exterior hides a wealth of skills that boggle the imagination. We knew that he used to teach Ball Room Dancing (prior to meeting his lovely wife Heather) but we didn't know that he was a master carpenter building much of his own furniture, campers, and the stairs in his house. Heather said one Sunday afternoon he just started cutting a hole in the living room floor. Wisely she went shopping with her mom while Heather's dad and Keith turned the hole into stairs. Keith also likes to go big, evidently a party of 10 can turn to a party of 50 at a moments notice, as it is the same amount of work according to Keith (Heather may not agree on this). Their joy, aside from work (Heather is an Occupational Therapist), is motor homing and camping with family and friends. The item I was most amazed with is that Keith is, and has been, a bass in his Church Choir for over 23 years. We've seen him sing Karaoke, but now we know why there is no hesitation to go up on stage.

Keith has been involved in Aviation Insurance since 1993. He began his career with Rollins Burdick and Hunter, now known as AON followed by employment with Howe Associates where he worked with his dad in Aviation Insurance claims business. He then spent 15 years with Cessna Finance Corporation where he served as a regional managerial in the aviation/commercial asset remediation, investment control, collections & deficiency recovery, repossession and collateral inspection departments. He returned to Aviation Insurance Claims in 2011 with PW Claims. Keith is a licensed pilot and you can often find him in a Bonanza or Skylane. With an amazing background, high energy level, and love of work and life in general Keith is the epitome of our OFA membership. What you see it the tip of the iceberg, what he puts out there is the rest of the burg (and that is from land locked Kansas). Thanks Keith for being Keith.

Editor

Name that Aircraft answer: *Mission Ready MR6 Aeronautics XM6 Ti-QR. List price: $12,999.00. Usage: Agriculture and environmental photography. Computer programed flight plan with overrides for close hoover and inspection. Though UAV's may look similar, the details are in the load, flight time, and data cards, and their usage is expanding.*

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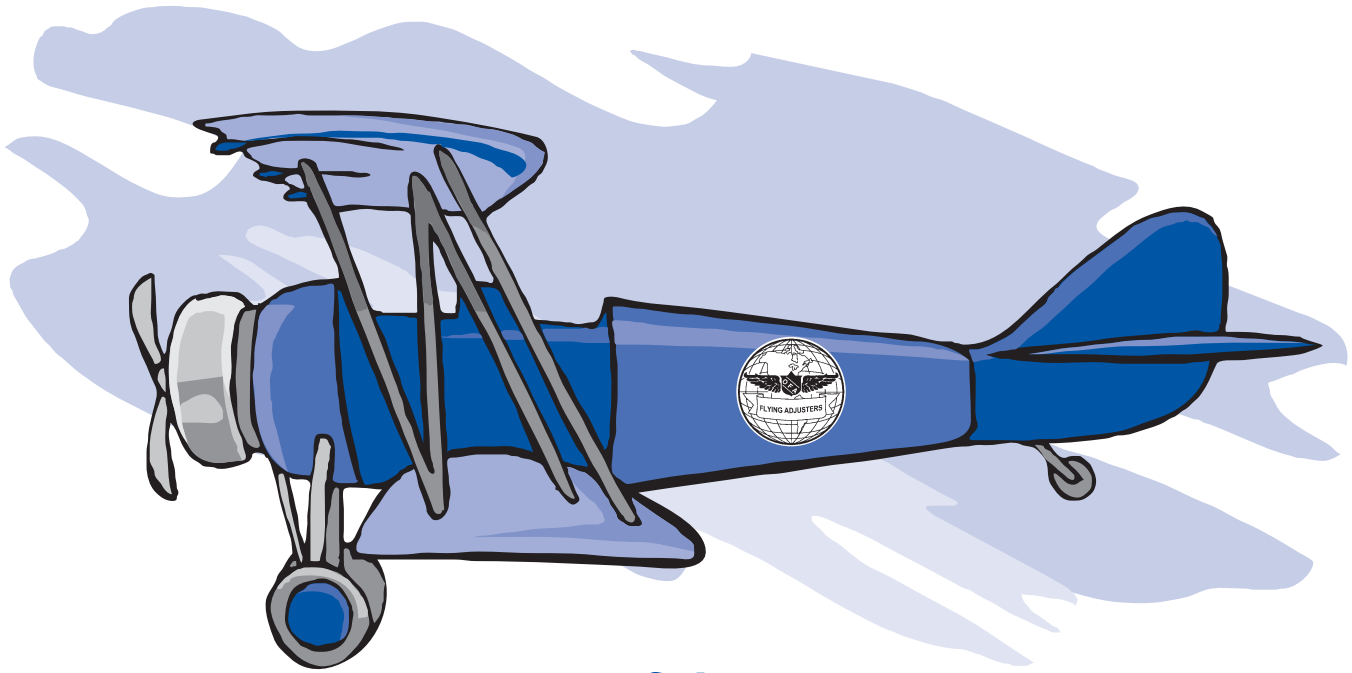

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