

# OFA Newsletter

AN ORGANIZATION OF FLYING ADJUSTERS

WINTER 2010

## President's Message



Happy New Year!

It's hard to believe that it's 2010, it seems like only yesterday that we were all worried about our computers crashing at the dawn of the millennium.

It's quite an honor to be elected President of OFA.

This is an organization that I'm proud to be a part of, rich with a history of elite claims professionals. One just has to look at membership to realize that.

Thanks to Clay Healey for hosting a great Convention in Oklahoma City. Great Food and Education!

I urge everyone to take a moment to browse through the new directory or pull up the web site at OFAinc.com and utilize our membership services when needed. Each member of the organization has an expertise to assist in claims handling whether it be regular, associate or emeritus member, all are eager to assist.

I am excited about the changes coming up this year for the association. Some say change is never for the better but it is inevitable. 2009 was a year of change and reinventing for many in our society. Let's look forward to 2010 and the positive effects of those changes. With Don Hendricks stepping down from his long and illustrious position as the Executive Secretary, we will need our organization to step up and fill his many hats. The association will continue to work through the changes and continue to be the elite claims professional organization for the aircraft industry.

Thanks to all the committee members for their work with the organization. I look forward to working with everyone this year. We have our mid-year meeting coming up, February 24th in Dallas so mark your calendar and make your reservations to attend this important event.

I look forward to seeing everyone in Dallas.

Sincerely  
Organization of Flying Adjusters

*Robert L. Betts*

President  
OFA 118



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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 contributors do not necessarily represent the position of the OFA.

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## ***OFA MID YEAR MEETING & RECEPTION***

**Meeting: 9:00am to 11:00am, Feb. 24, 2010**

**Reception: Feb. 24, 2010**

**Time: 4:00pm - 7:00pm**

**Location: Laquinta Inn & Suites - 1st Floor**

14925 Landmark Blvd., Dallas, Texas 75254

Tel: 972-404-0004 or Fax: 972-960-9439

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**When making reservation - Re: Organization of Flying Adjusters Group.**

Room Charges: 2 Beds/2 Persons: \$82.00, King size bed: \$92.00, and a Suite: \$108.00, plus 13% room tax. **Make reservation by 2-9-10.**

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**The OFA hospitality suite will be open for members and invited guests on the evening of February 23 and 24, 2010.**

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OFA President Robert Betts would appreciate a report from all of the committee chairmen to be presented at the Mid-Year Meeting on Wednesday morning, 2-24-10.



# ***Can Aircraft Insurance Coverage Be Voided By Allowing A Non Qualified Pilot To Operate The Controls During Flight?***

Jonathan S. Morse  
The Morse Law Group  
Santa Monica, CA

Many aircraft insurance policies covering business and pleasure use exclude coverage when the aircraft is operated in flight by a person not qualified under the policy. Other policies covering rental and instruction use exclude coverage if a renter pilot allows another person to operate the controls in flight. The purpose of this article is to discuss several cases in which coverage was and was not voided under such circumstances and to suggest some rules of general application to be considered by pilots in conducting such operations and by insurance adjusters investigating the circumstances of such accidents.



It is quite common for a pilot to allow another person in the front seat of an airplane to operate the controls in flight for brief periods, even if that pilot is not qualified under the insurance policy to do so, and even if that person has no pilot experience. Normally this never presents a problem for the insured or the insurer. However, where an accident results during or as a result of such operation, there may be no insurance coverage for the claims arising out of that accident.

Whether or not insurance coverage can be voided based on allowing another person to operate the controls in flight depends on the facts and circumstances of the accident, the language of the policy, and the state whose law is to be applied. While it is impossible to provide any rule covering all such situations, there are a number of general principles which appear to be applicable in such situations.

There are no published appellate court decisions in California involving the validity or enforceability of such exclusions. However, at least one trial court decision and several out of state appellate court decisions provide some guidance concerning the validity and enforceability of such exclusions.

In *American National Property and Casualty Company vs. Dragonfly Ventures, Inc., et al.*, Case No. 2:06-cv-00356, tried in the United States District Court for the Eastern District of California, the insurer obtained a De-

claratory Judgment establishing that it had no duty to defend or indemnify the owner or pilot of an airplane which crashed after losing power in the traffic pattern as a result of fuel starvation. A flight instructor working with a flying club rented the airplane to provide night instruction to her student because all of the flying club airplanes were down for maintenance. The instructor met the insurance policy's requirements to rent the airplane but did not meet the requirements to provide flight instruction. Following a two hour night flight, the student and instructor landed at a different airport and spent the night at the instructor's home. The next morning they were returning the airplane to the airport where it was rented. While the aircraft was in the traffic pattern the engine lost power because the fuel selector was on the empty right tank rather than the full left tank. The flight instructor took over the controls but was unable to make a safe emergency landing. The aircraft was destroyed and both the student and instructor received serious injuries. The insurer denied coverage on several grounds. In particular, the insurer contended that the renter pilot [the instructor] allowed the student pilot to operate the controls in flight. It was undisputed that the student pilot was in the left seat and operated the controls until she lost power. The student and instructor contended, however, that the flight instructor was operating the controls at the time of impact and therefore the exclusion did not apply. The court agreed with the insurer that the exclusion applied to bar coverage where the student was operating the controls up to the point where a life threatening emergency was created from which the instructor was unable to recover.

In *Powell Valley Elec. Coop. v. United States Aviation Underwriters*, 179 F. Supp. 616 (D. W. Va. 1959) the insurance policy covering the insured's helicopter expressly provided that it applied only while it was being operated by the named pilot and that no coverage was afforded while being used to provide flight instruction. The accident occurred when the student pilot operating the helicopter lost control and the named pilot was unable to recover. The Court held that coverage was suspended while the helicopter was being operated by the student pilot and did not revive until the named pilot took over and returned the helicopter to the same safe condition it was in before the student pilot took over. The Court further held that when the helicopter was in a dangerous and precarious position when the named pilot took over there could be no recovery under the policy even if the crash was caused by some malfunction of the helicopter or by some pilot error by of the named pilot in attempting to regain control and prevent the crash.

In *Beckwith v. American Home Assurance Co.*, 565 F. Supp. 468 (D. N.C. 1983), the Court enforced an exclusion in a life insurance policy and after mentioning the *Powell Valley* case came up with essentially the same general rule. In that case *Beckwith* was flying the aircraft with a more experienced pilot in the other pilot seat. After takeoff the engine lost power; the other pilot took over but was unable to prevent the crash. While acknowledging that policy exclusions are to be strictly construed against

the insurer the Court found as a matter of law that Beckwith was acting as a pilot and not as a passenger and that there was no coverage under the policy. In so holding, the Court explained that coverage under the policy was suspended while Beckwith was piloting the plane and the risk of loss increased while coverage was suspended. The Court further stated that coverage could be renewed only if the other pilot had been able to restore the aircraft to safe and normal operating condition, which he did not. The Court went on to state that a reasonable person could not conclude that Beckwith was riding as a passenger within the meaning of the policy.

While the insurer will almost always have the burden of proving that the unauthorized person was operating the controls, at least one case suggests that the insurer can meet this burden by using circumstantial evidence even if both pilot died in the crash. In *Keyser v. Connecticut General Life Ins. Co.*, 617 F. Supp. 1406 (N.D. Ill. 1985), the Court enforced an exclusion in a life insurance policy even though there was no direct evidence as to who was piloting the aircraft at the time of the crash. The insured owned the aircraft, a two seat biplane which could be flown from either seat. The insured was in what was generally considered to be the pilot seat and was heard speaking on the radio during the flight. The insured was accompanied by his father, also a licensed pilot, and both were killed in the crash. The Court held that the insured was either a pilot or crewmember during the flight and upheld the accidental death exclusion.

Circumstantial evidence is not always enough to carry the day, even though it may be quite compelling. In *Vander Laan v. Educators Mutual Ins. Co.*, 96 N.W. 2d 6 (Mi. 1959) the life insurance policy at issue covered the insured while riding as a passenger but not while operating or serving as a member of the crew of an aircraft. The insured owned the aircraft and was on an extended trip with another pilot and two passengers. Over the course of the trip the insured had handled substantial pilot duties but there was no evidence he was performing any pilot duties at the time of the crash. The court upheld judgment for the insured, holding that if the insured was not operating the controls or performing crew duties when the crash occurred he was a passenger, regardless of what he had been doing at earlier times during the trip.

There are, of course, cases which decline to follow the general rules set forth above. In one case, the Court essentially ignored the exclusion at issue over a dissenting opinion which would have followed the rules set forth in the Powell Valley and Beckwith cases.

In *Marshall v. Peerless Ins. Co.*, 428 S.W. 2d 190 (Ky. 1968) the accident occurred when a student pilot was accompanied by a licensed pilot, not a flight instructor, in the other pilot seat. The student operated the controls throughout the flight until the other pilot took over just before landing. The other pilot was at the controls when the aircraft ran off the runway and the accident occurred. The policy excluded coverage when the aircraft was operated in flight by a student pilot unless such flight was with

the specific advance permission of and under the direct supervision of a certified flight instructor. Despite this language, the Court held that the other pilot was qualified under the policy, had a set of controls and the authority to use them. Accordingly, the Court held that the other pilot, being pilot in command, met the requirements of the policy. The dissenting opinion noted the testimony of the student pilot who admitted that he was operating the controls until the other pilot decided they were in trouble and decided to do something about it. The dissenting judge then stated: "The owners would have us say that one of them could set in motion the events which caused the damage but be free from the consequences because Hammonds [the other pilot] took control at the last moment before the damage occurred. This we should not do." In short, the dissenting judge would undoubtedly have applied the same rule as the courts in the Powell Valley and Beckwith cases.

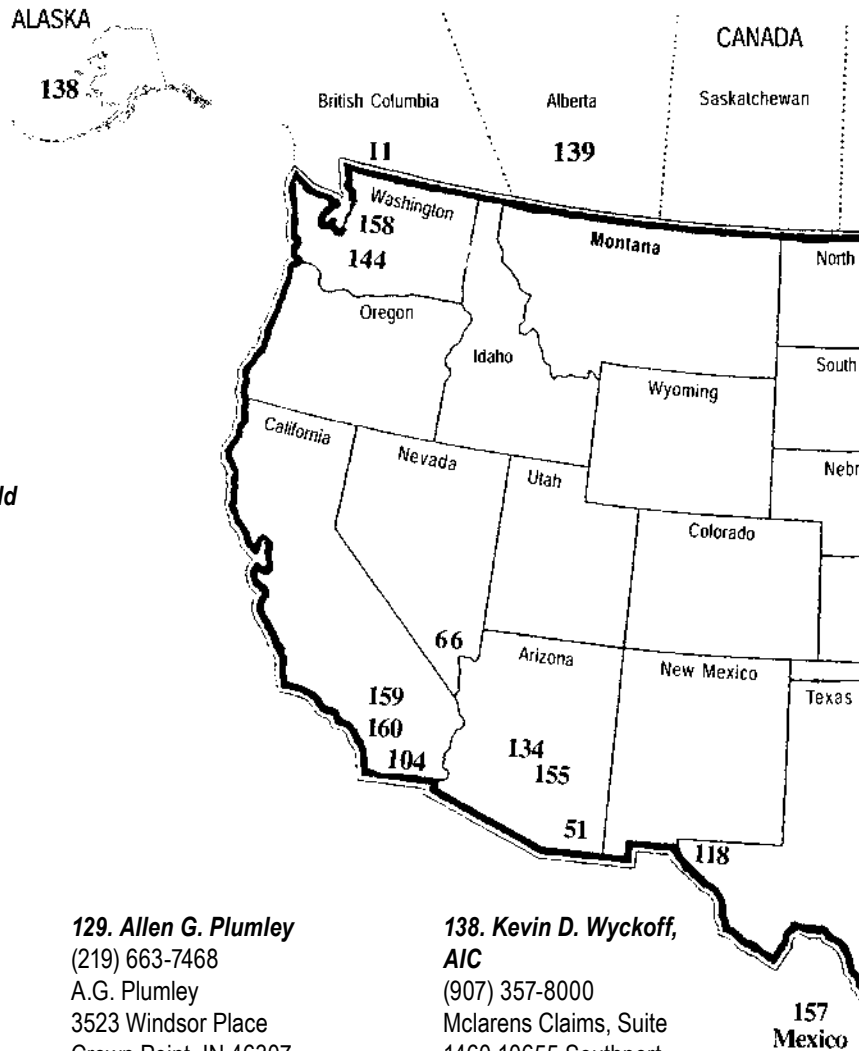
There is other out of state authority which has declined to follow the Powell Valley and Beckwith rule. In *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Hudson Energy Co., Inc.*, 811 S.W.2d 552 (Tx. 1991) the Court upheld an award of damages and attorney fees against the insurer. In that case the aircraft was being operated by a student pilot and a certified flight instructor. At the time of the accident the aircraft was being operated simultaneously by both after the student pilot lost control. The Court held that the policy did not prohibit simultaneous operation by a qualified and non qualified person, approved the holding in the Peerless case, refused to enforce the exclusion, and enforced coverage.

In summary, pilots operating airplanes with a non qualified pilot in the other pilot seat should use caution in allowing that other person to operate the controls in flight. While it is unlikely that any problem would develop from operating the controls in cruise, there is always a possibility that a problem could develop during takeoff and landing. Special care should be used during those phases of flight to avoid having the airplane placed into situations from which a safe recovery cannot be made.

[Note: This article is intended to provide only general information and is not to be construed as legal advice for any particular situation or any particular state. Policy language, state laws, and numerous other factors can affect the outcome of a case based upon a particular set of facts. General inquiries are welcome. For legal advice concerning any particular factual situation, the reader should contact an attorney admitted to practice in the state in question. The author will be happy to provide a suitable referral upon request.]

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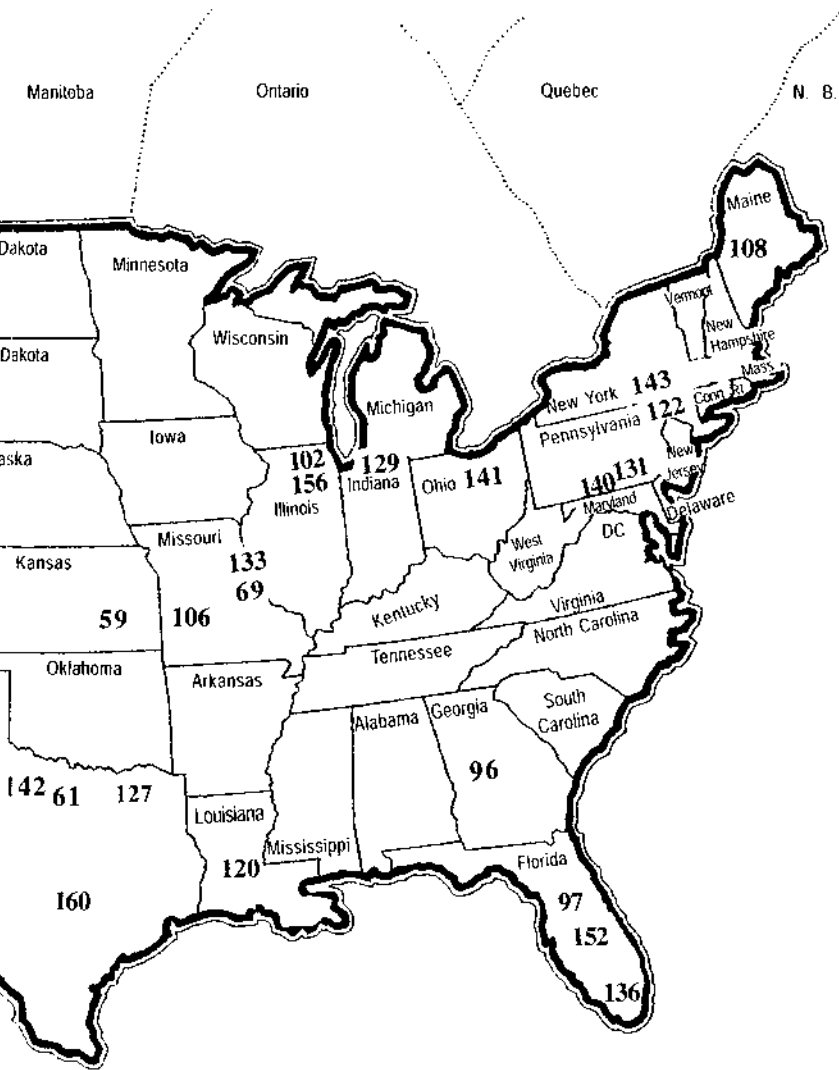
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### Conference Chairman

Bob Balslev  
 OFA 161

# THE OFA ANNUAL CONFERENCE WAS HELD IN OKLAHOMA CITY, OK

*Collaged are a few snapshots from the event.*







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**Mr. Bernie Coogan OFA 69 PP, our scholarship committee chairman made this scholarship presentation at the Embry Riddle Air Symposium in Orlando, FL on January 8, 2010**

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***Interesting history lesson for those of you so inclined SR-71 Blackbird***

In April 1986, following an attack on American soldiers in a Berlin disco, President Reagan ordered the bombing of Muammar Qaddafi's terrorist camps in Libya. My duty was to fly over Libya and take photos recording the damage our F-111's had inflicted.. Qaddafi had established a 'line of death,' a territorial marking across the Gulf of Sidra, swearing to shoot down any intruder that crossed the boundary. On the morning of April 15, I rocketed past the line at 2,125 mph.



I was piloting the SR-71 spy plane, the world's fastest jet, accompanied by a Marine Major (Walt), the aircraft's reconnaissance systems officer (RSO). We had crossed into Libya and were approaching our final turn over the bleak desert landscape when Walt informed me that he was receiving missile launch signals. I quickly increased our speed, calculating the time it would take for the weapons—most likely SA-2 and SA-4 surface-to-air missiles capable of Mach 5 - to reach our altitude. I estimated that we could beat the rocket-powered missiles to the turn and stayed our course, betting our lives on the plane's performance.

After several agonizingly long seconds, we made the turn and blasted toward the Mediterranean. 'You might want to pull it back,' Walt suggested. It was then that I noticed I still had the throttles full forward. The plane was flying a mile every 1.6 seconds, well above our Mach 3.2 limit. It was the fastest we would ever fly. I pulled the throttles to idle just south of Sicily, but we still overran the refueling tanker awaiting us over Gibraltar.

The SR-71 was the brainchild of Kelly Johnson, the famed Lockheed designer who created the P-38, the F-104 Starfighter, and the U-2. After the Soviets shot down Gary Powers' U-2 in 1960, Johnson began to develop an aircraft that would fly three miles higher and five times faster than the spy plane—and still be capable of photographing your license plate. However, flying at 2,000 mph would create intense heat on the aircraft's skin. Lockheed engineers used a titanium alloy to construct more than 90 percent of the SR-71, creating special tools and manufacturing procedures to hand-build each of the 40 planes. Special heat-resistant fuel, oil, and hydraulic fluids that would function at 85,000 feet and higher also had to be developed.

In 1962, the first Blackbird successfully flew, and in 1966, the same year I graduated from high school, the Air Force began flying operational SR-71 missions. I came to the program in 1983 with a sterling record and a recommendation from my commander, completing the weeklong interview and meeting Walt, my partner for the next four years. He would ride four feet behind me, working all the cameras, radios, and electronic jamming equipment. I joked that if we were ever captured, he was the spy and I was just the driver. He told me to keep the pointy end forward.

One moonless night, while flying a routine training mission over the Pacific, I wondered what the sky would look like from 84,000 feet if the cockpit lighting were dark. While heading home on a straight course, I slowly turned down all of the lighting, reducing the glare and revealing the night sky. Within seconds, I turned the lights back up, fearful that the jet would know and somehow punish me. But my desire to see the sky overruled my caution, I dimmed the lighting again. To my amazement, I saw a bright light outside my window. As my eyes adjusted to the view, I realized that the brilliance was the broad expanse of the Milky Way, now a gleaming stripe across the sky.

Where dark spaces in the sky had usually existed, there were now dense clusters of sparkling stars. Shooting stars flashed across the canvas every few seconds. It was like a fireworks display with no sound.

I knew I had to get my eyes back on the instruments, and reluctantly I brought my attention back inside. To my surprise, with the cockpit lighting still off, I could see every gauge, lit by starlight. In the plane's mirrors, I could see the eerie shine of my gold spacesuit incandescently illuminated in a celestial glow. I stole one last glance out the window. Despite our speed, we seemed still before the heavens, humbled in the radiance of a much greater power. For those few moments, I felt a part of something far more significant than anything we were doing in the plane. The sharp sound of Walt's voice on the radio brought me back to the tasks at hand as I prepared for our descent.

The SR-71 served six presidents, protecting America for a quarter of a century. Unbeknownst to most of the country, the plane flew over North Vietnam, Red China, North Korea, the Middle East, South Africa, Cuba, Nicaragua, Iran, Libya, and the Falkland Islands. On a weekly basis, the SR-71 kept watch over every Soviet nuclear submarine and mobile missile site, and all of their troop movements. It was a key factor in winning the Cold War.

I am proud to say I flew about 500 hours in this aircraft. I knew her well. She gave way to no plane, proudly dragging her sonic boom through enemy backyards with great impunity. She defeated every missile, outran every MiG, and always brought us home. In the first 100 years of manned flight, no aircraft was more remarkable. The Blackbird had outrun nearly 4,000 missiles, not once taking a scratch from enemy fire.

On her final flight, the Blackbird, destined for the Smithsonian National Air and Space Museum, sped from Los Angeles to Washington in 64 minutes, averaging 2,145 mph and setting four speed records.



## ***“Bear Attack 2009 on an Airplane”***

Apparently a bear attacked a plane while parked in a remote field up here in AK. He had not cleaned out the inside after a long fishing trip and the bear smelled it.

He had 2 new tires, 3 cases of duct tape and several rolls of cellophane delivered. Then went about repairing the plane so he could fly it home. Gutsy to say the least.



Submitted by Martin Clingwall OFA 11

## **Editorial Comments:**



October of 2009 was spent with wonderful warm family and friends at the OFA Annual Conference in Oklahoma City. The FAA tour was my favorite event and the food was abundant and delicious. It is my understanding that the spouses tour of the memorial left few dry eyes and I would say that overall it was a cozy very nice conference and we certainly want to thank Clay Healey and his staff for all of the hard work that I know they put into this conference. The photos are collaged in the center of the newsletter thanks to Don Hendricks, the Round Rock Connection, who sent them for my use.

The balance of the year was filled with laughter, giving thanks and Christmas festivities. Now with 2010 just getting under way I am optimistic about what all can be accomplished in this New Year.

I look at it as full of opportunities and blessings for the taking and appreciating.

I look forward to seeing as many of you as possible at our Mid-Year Meeting and Reception.

Tailwinds,  
Hope DeLong  
Editor  
OFA 141

[www.ofainc.com](http://www.ofainc.com)

Can you guess who is at church  
playing the Bass?



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