News from the Hill

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Protecting Yourself From Liability

Useful Clauses For Work Orders and Other Repair Station Documents

This article explains some of the liabilities associated with repair station work, and offers some contract-related strategies for limiting a repair station's exposure to liability.

Aviation repair can expose a company to many different forms of liability. The repair station can be sued for negligence in its own work. It can be sued for product liability related to the parts it has installed. A plaintiff can claim damages based on the aircraft's down-time or based on injuries to passengers or cargo. Whether the litigation is played out in courtroom or over a negotiating table, it may involve different aspects of contract law, such as the validity of specific warranty or liability provisions in maintenance or purchase agreements between the owner/operator and the maintenance provider.

Where is the Contract?

Many savvy businessmen and businesswomen are clueless when it comes to contracts. All that legal mumbo-jumbo makes them light-headed. Here's an important tip on contract clauses: they don't have to look like a lawyer's contract. In fact, an agreement between you and your customer is a contract, and any written communication that passes between you and your client has the potential to serve as evidence of your agreement. Unlike agreements for the sale of goods over $500, which should be in writing in order to be enforceable, agreements for the sale of services (like overhauls, maintenance, etc.) do not even need to be signed or in writing to be enforceable (although a signed writing certainly helps to prove the essential elements of the agreement).

Many repair stations make it a practice to write up a work order to detail the customer's desired work scope, and then have the customer sign the work order before the work is begun to confirm that the work scope is correct. A copy of the completed work order becomes a part of the record of the work performed. This work order is an excellent place in which to include your additional clauses and contract terms.

Make sure that you make the typeface on the work order large enough to read—many states have 'fine-print laws' that make contract language smaller than 10 point type unenforceable!

Jurisdiction Clauses Keep the Conflict at Home

Nothing is more frustrating than having to defend a lawsuit that is a thousand miles from where you do business. Maintenance providers can be subject to suit from an operator in the event of an accident or incident, or in the event of a malfunction other business-impeding event, and they may have little control over where the suit is filed. You might be subject to suit in a distant court. For example, in one case, a repair station in Ohio was brought into a suit in Georgia. The court, in deciding that it was fair for the Ohio repair station to be sued in Georgia, explained that the nature of an aircraft is such that it is suited for interstate travel, and because it is involved in interstate travel, it is reasonable for a repair station to expect to be sued in a distant state.

One way to limit where you can be sued is to include a jurisdiction clause in the contractual documents that pass between you and your customer (e.g. in the work order that the customer reviews and confirms). It can be a simple statement, like "Customer agrees that any litigation brought as a consequence of, or related to, the work described in this work order shall be brought in a court in the state of [insert your state here] and customer agrees to be subject to personal jurisdiction in that court." In addition to requiring all suits be brought in your home state,

this clause has an added bonus: an agreement to be subject to the court's 'personal' jurisdiction, which means that the customer's lack of other contacts with your state will not preclude him from being subject to the court's jurisdiction.

Indemnification and Liability Limitation

An indemnification clause can help shield the repair station from liability if it is inserted into a document between the repair station and the aircraft owner, like a customer-signed work order. Manufacturers have been making these sorts of clauses work for them for many years. In airplane crash litigation, courts have frequently upheld sections of a purchase agreement that indemnify a manufacturer from liability. In past cases, these sections have contained exculpatory clauses that shielded the manufacturer from liability for damages related to the manufacture of the aircraft. The warranty and liability sections found in purchase agreements can and should also be inserted in maintenance agreements so that service providers or repair stations can limit their liability for past or future maintenance liabilities.

Liability Limitations in Manufacturer's Agreements

The McDonnell Douglas Corp. (MDC) has been involved in litigation over the years regarding exculpatory clauses in their aircraft purchase agreements. The opinions from these cases provide specific examples of how exculpatory clauses can shield manufacturers from liability, and provide insight into what kinds of clauses can be inserted in maintenance agreements to shield maintenance providers from liability. In Delta Airlines vs. McDonnell Douglas Corp., the Fifth Circuit Court of Appeals upheld specific exculpatory clauses in a contract for sale of an aircraft to Delta Airlines. The warranty clause in the purchase agreement between Delta and MDC stated that MDC's aircraft, parts, equipment and accessories would be free from defects, and that if a defect were found, McDonnell Douglas would correct the problem subject to being reasonably notified. However, MDC shielded itself from liability regarding the manufacture of the aircraft and parts by inserting a section that relieved MDC of obligations or liability in instances where the aircraft is operated with a part that is not approved or manufactured by MDC, or where the aircraft has not been maintained according to MDC instructions. Thus, Court held that MDC was not liable for the damages suffered by the aircraft when the nose gear on the aircraft collapsed during a landing due to an incorrectly installed part.

In another case involving MDC, Continental Airlines Inc. vs. Goodyear Tire & Rubber Co., Continental sued MDC and Goodyear tires for a faulty escape slide and tires on a DC-10 plane purchased by Continental from MDC in 1978. The Ninth Circuit Court of Appeals found that the exculpatory clause in MDC's purchase agreement with Continental precluded both strict liability and post-delivery negligence claims. However, the Court found that the exculpatory clause did not bar Continental's claim against Goodyear and the other tire companies named in the suit. The Court reasoned that the exculpatory clause applied only to parts manufactured and serviced by MDC. Thus, through the specific language of the exculpatory clauses in the warranty section of their purchase agreements, MDC was able to shield itself from liability even though they faced lawsuits claiming negligence and strict liability. Courts will typically uphold exculpatory clauses as long as the clause is not contrary to public policy or unconscionable.

Why Indemnify?

At this year's AEA Annual Convention, an AEA member brought a fact pattern to my attention that gave us a good reason for seeking indemnification. His repair station was asked to do work on an aircraft. The work did not include a complete inspection of the aircraft (e.g. no 100 hour inspection) but nonetheless, a cursory inspection revealed that there were flaws in work that had been previously performed. When the details were brought to the owner's attention, the owner disagreed with the repair station's assessment of the jeopardy associated with these flaws, and refused to authorize any additional work to correct the deficiencies in the prior repair station's work. The repair station owner was concerned about how to protect himself in the event that the aircraft failed and the failure was attributable to him as the last repair station entry in the log book.

We've all seen this sort of situation before—sometimes the 'flawed work' was performed sloppily, sometimes it was simply done in a different manner from what we're used to, and sometimes it represents a genuine airworthiness issue. Obviously, this is a situation where you want to document what you have seen, make the owner/operator aware of the potential problems, and if they are not going to be corrected then you want to make sure that the documents concerning the flaws you detected become a part of your records, to protect you from liability (it is natural to blame the last entry in the log book, so don't get trapped in someone else's shoddy

Continued on following page

Continued from page 47

work).

Maintenance service providers and manufacturers that operate on a smaller scale than MDC can still benefit from the proven applicability and validity of exculpatory clauses in purchase or service agreements with owner/operators. Particularly where the operator insists on flying the aircraft when you believe that errors need to be corrected, you may want to seek out a simple exculpatory clause or else a clause by which the owner will indemnify you (pay you back if you are liable for damages) and hold you harmless (reimburse you for any liabilities or losses—yes, we lawyers realize that this is a bit redundant). Here is an example of a clause that explicitly shields the maintenance provider from liability from the owner/operator:

Repair station has brought the following issues to the attention of [operator] and [operator] has chosen NOT to have repair station investigate, inspect or address these issues. Repair station has fully explained the potential risk of failure, malfunction, incident or accident, and following this consultation, [operator] has agreed to indemnify and hold harmless the repair station for any losses, damages, or liabilities associated with this aircraft. [A list of the issues identified should follow the clause.]

And here is an example of a more general, very simple, indemnification clause:

[Operator] agrees to indemnify and hold harmless the repair station for any and all liabilities associated with the aircraft/component(s) that are the subject of this work order, except for repair station's willful torts and express written contractual obligations.

Note that this clause is limited in that certain liabilities of the repair station (intentional torts and contractual obligations) will not be the operator's responsibility. These limitations are meant to create a more 'fair' clause but are not required! Indemnification clauses can be much more complex, addressing issues like attorney's fees, types of actions for which liability limitation is offered, etc.

Limits on Your Favorable Contract Language

Assume that you change your work order to include all of your lawyer's language recommendations—does that mean that you are free of liability forever? No, not by a long shot. There are always peculiar fact patterns that give rise to novel approaches to a situation (if the law were simple then lawyers would be unnecessary). For example, a contract clause is only valid against those in privity to the contract—meaning those who are parties to the contract. This means that a jurisdiction selection clause may be powerless against a passenger who is injured, although if the owner has signed an indemnification clause, then the owner might be required to indemnify you and hold you harmless with respect to the passenger's lawsuit!

State laws vary, and the particular needs of each repair station vary. Also the laws can change. For all these reasons, as with any advice of this sort, you should consult with your local attorney before implementing any plan designed to limit your liability. ❑