

HOW DOES AN AIRCRAFT OWNER SECURE FAIR TREATMENT IN AN AIRCRAFT DAMAGE CLAIM?

By: Alan Armstrong

I.

INTRODUCTION

The insurance industry appears to hold the upper hand when an owner attempts to negotiate the settlement of an aircraft damage claim. The insurance company employs claims adjusters and aviation lawyers who routinely and systematically settle, arbitrate, and litigate claims involving damage to aircraft. An aircraft owner with little experience in this activity may feel somewhat intimidated. Regrettably, owners lacking knowledge or sophistication in this field of activity or owners who are unwilling to hire experienced counsel may achieve less than optimal results when seeking to have their aircraft repaired or replaced following damage to the aircraft. This article will examine the landscape of the damaged aircraft insurance claim and give the reader the benefit of the experience of a lawyer who has handled and litigated a number of aircraft damage claims.

II.

THE DECK IS STACKED AGAINST YOU

- A. Like-kind and Quality: If your aircraft is damaged, the chances are that your aircraft is not brand-new. Because your aircraft is “used,” you can expect the insurance adjuster to support a repair estimate that involves employing used parts to make repairs to your aircraft. This is not merely a bargaining position employed by the insurance adjuster. Most aircraft insurance policies contain a provision in the definitions that recites the aircraft will be repaired with “like-kind and quality” parts. The insurance companies use this to try to force the insured to accept used parts as opposed to new parts when effecting repairs to aircraft.
- B. The Nearest Available Repair Facility: Another clause frequently found in aircraft insurance policies and employed by insurance adjusters who are trying to find the cheapest way out in repairing your aircraft is a clause that says your aircraft will be repaired at the nearest available repair facility. This may be some obscure aircraft maintenance facility in the sticks that is not an FAA-certified repair station. The facility may be understaffed and may lack expertise in making repairs to your particular kind of aircraft. If you allow yourself to be caught in this trap, your aircraft may be down while undergoing repairs for many months. All the while, you are paying for insurance on an aircraft you cannot fly and possibly making payments on a note for an aircraft you cannot fly. Adding insult to injury, when the so-called “repairs” are completed, you may discover they are less than optimal. Your aircraft records may include an FAA Form 337, indicating a major repair has been effected to your aircraft, a red flag to any prospective purchaser when the day comes and you eventually decide to sell this aircraft.

This is not in your financial interest.

- C. The Insurance Industry/Repair Facility Network: You simply cannot ignore the fact that the claims adjuster may deal frequently with certain repair facilities. The adjuster may be on a first-name basis with the owners or operators of many facilities. Human nature being what it is, these realities may play a part in the decision of the claims adjuster to request a repair estimate from a facility when your aircraft is damaged. In the South, we call this the “good ole boy network.”

III.

TAKING THE OFFENSIVE

- A. Get Your Own Estimate: Just like flying, it is important to be proactive when dealing with a problem relating to your aircraft. Do your homework and find a repair facility with extensive experience in repairing your type of aircraft. Visit with the principal in charge of this aircraft maintenance facility. Explain to him that you would prefer that your aircraft not have damage history in the aircraft’s logbooks. If the repair facility you are in communication with is an FAA-certified repair station, you may discover that it has more latitude in the entries made in your aircraft’s logbooks, as opposed to a repair facility which is not an FAA-certified repair station. An FAA-certified repair station may be able to remove and replace components, re-skin components, and do a host of things on your aircraft that might otherwise involve the execution and entry in your aircraft’s records of an FAA Form 337 (major alteration or repair). While the work from an FAA-certified repair station may be more expensive, you may find that the benefit is worth it in terms of avoiding the stigma of your aircraft having “damage history.”

Remember, it is your airplane. You have to sign the proof of loss approving repairs to your aircraft. You have to endorse the check that will pay the repair facility for repairs to your aircraft. Either directly or through counsel, remind the insurance adjuster that this is your aircraft. Remind the adjuster that safety of flight is of paramount concern to you. Remind the adjuster that you are concerned about the aircraft having diminished market value if it carries the stigma of “damage history.” Also, if your aircraft was damaged by the actions of a third person, tell the insurance adjuster that he has no reason to be niggardly with your claim, since the insurance company has the potential of recovering the money from the responsible party by way of a subrogation claim.

- B. GET THE AIRCRAFT MANUFACTURER INVOLVED: Based upon my experience, if you get a highly-qualified FAA-certified repair station involved in the dialogue, more often than not the claims adjuster will capitulate to your insistence that the aircraft be repaired at the facility of your choosing. However, sometimes even this technique does not work. The insurance company wants to play hardball. The insurance company wants to “patch”

pressure vessels and patch punctured skin on a relatively new aircraft. Also, your aircraft may have been subjected to substantial trauma during the course of its impact with the ground or other fixed objects. The aircraft manufacturer that put the plane in service may have a vested interest in not having some cobbled up airframe returned to flight status by a marginal repair facility. While it is expensive, you may play the trump card by getting the aircraft manufacturer involved in evaluating whether your airframe can be safely restored to flight status. In some situations, I have had success with the aircraft manufacturer declaring to the insurance company that if the aircraft is repaired, the manufacturer will not support it. In other words, the aircraft manufacturer will not sell parts to keep the airplane flying. Other times, the repair estimate from the manufacturer is so cost-prohibitive that the insurance company realizes the only course of action to follow is to sell the airplane for salvage and let you buy a replacement aircraft.

- C. Do Not Settle for Less Than an Excellent Repair/Restoration: Without question, your insurance company's claims representative will be able to find a host of marginal operators who claim they can return engines to service that have been over-torqued and over-temped, who claim they can return to propellers to service that have been over-torqued, who claim they can return airframes to service that has impacted fixed objects and experienced accelerations of unknown quantities, who claim they can repair aircraft structures that should be re-skinned without employing an appropriate fixture or jig to keep the structure properly aligned during the re-skining process, and who claim that pressurized aircraft with damaged pressure vessels can be patched. Marginal repair facilities, apparently working in concert with the insurance adjuster, will attempt to minimize the damage to the aircraft. Sometimes, the repair facility will claim it did not know the actual history on the aircraft. It will characterize the damage to the propeller and engine as a mere prop strike, when, in fact, the aircraft components underwent stresses and abuse of a far more serious nature. Again, a capable and experienced FAA-certified repair station acting as your advocate can counter the misinformation employed by marginal repair facilities and insurance adjusters as they attempt to put your aircraft in service with inadequate repairs which may place you and your passengers at personal risk and place your investment in the aircraft at economic risk. A repair facility seasoned in the games the insurance industry plays can be your significant ally as you lobby for your aircraft being restored to the same condition in which it existed prior to the accident or damage.
- D. Be Prepared to Sue for Bad Faith: While you cannot sue the insurance company of a third party who damaged your aircraft for bad faith, if your insurance company refuses to recognize that your aircraft should be totaled and insists that your aircraft be restored or repaired by a marginal operator, then be prepared to file suit against your insurance company for bad faith. If relations between you and your insurance company have deteriorated to this

point, your counsel will want to have the aircraft inspected by an FAA-certified repair station with experience in this particular kind of aircraft and/or by the aircraft's manufacturer. If an FAA-certified repair station or the manufacturer generates a repair estimate that makes the aircraft economically non-repairable, this will bode well for your prospects of having the aircraft totaled and purchasing an aircraft that has not been damaged. Also, consider that if you have to go to court, you can explain to the court and the jury your "safety of flight" concerns as relates to repairing your aircraft. These concerns, however, should not just be unfounded anxiety; they should be based in data you have acquired by employing an experienced FAA-certified repair station and/or by persuading the manufacturer to examine the aircraft and render a report on how and under what conditions the aircraft could be returned to flight status. In Georgia, the insurance company may be required to pay the insured value of your aircraft, plus a twenty-five percent penalty on that amount, plus all reasonable attorney's fees for the prosecution of the action. Remedies in other jurisdictions may vary.

- E. Preserve Your Claims for a Loss of Use and Diminished Market Value: If you routinely use your aircraft in business, your pilot records or aircraft flight records will support the argument that your aircraft has historically aided you in the prosecution of your business. You can demonstrate that the aircraft saves you time as you travel and/or allows you to fly to communities without regularly-scheduled air service. No doubt, your accountant can tell you what it costs to operate your aircraft per hour. If you can rent a replacement aircraft for particular missions while your aircraft is down for repairs, this kind of evidence would assist you in prosecuting a claim against a third party for loss of use of your aircraft. Typically, you cannot expect your insurance company to provide you with a replacement aircraft while your aircraft is being repaired. This is another incentive for your insurance company to use a marginal operator with discount prices. The fact that your aircraft is down for repairs twice as long as it should be is of no economic concern to your insurance company. Again, the focus of a "loss of use" case is generally on a party or entity other than your insurance company. This would be true, for example, if an FBO backed a tug into your aircraft that put your plane out of service for a month or two. You may settle with your insurance company for the repairs required to return your aircraft to flight status. However, you will want to be careful in executing any proof of loss or release forms to ensure that you reserve and preserve for your own prosecution and recovery any loss of use claim arising out of the incident or accident in question.

If two aircraft are advertised for sale and had the same equipment, the same number of flight hours, and are in the same condition cosmetically, and one aircraft has a damage history and the other aircraft does not, which aircraft are you going to buy? If a brand-new or relatively new aircraft has been damaged and the damage history is clear in reviewing the aircraft logbooks, then you can expect the aircraft with a damage history to have a diminished market value of between five and fifteen percent of the aircraft's total value.

It is not difficult to find aircraft appraisers or persons with experience in this area to make a declaration of this nature in court. Again, the diminished fair market value claim is not something you make against your own insurance company. This is something you preserve for prosecution against the third party or entity that damaged your aircraft. If your insurance company has paid to have the aircraft repaired, then it will ask you to sign a proof of loss or release form. As was the case with the “loss of use” claim, your claim for “diminished market value” should be something you insert as being preserved for yourself in the proof of loss or release form. While your insurance company paid to have your aircraft repaired and may bring a subrogation claim (in your name) to recover from the offending third party, the money it paid you to fix your airplane, your insurance company did not pay you for your loss of use, and your insurance did not pay you for your aircraft’s diminished market value. Because your insurance company did not pay you for those claims, you should preserve those claims for yourself. Any form presented to you by your insurance company should be modified to reflect that you are preserving for your own interest, your claims of loss of use and diminished market value as relate to your aircraft.

IV.

CONCLUSION

Getting your aircraft repaired following a major incident or accident can be a real nightmare. While a reputable facility may indicate the cost of repairs is \$110,000, a marginal operator may come forward claiming your aircraft can be restored for less than half that amount. Some grit and determination on your part may be necessary not to concede to the insurance company’s pressure that you allow the marginal operator to undertake repairs to your aircraft. While the marginal operator’s initial repair estimate may be less than half of that of an FAA-certified repair station, without a doubt, the marginal operator’s repair estimate is going to have a “hidden damage” clause. In other words, the marginal operator will try to get the job claiming the aircraft can be repaired for less than half the amount charged by an FAA-certified repair station. Then, after you and the insurance adjuster agree to let the marginal operator undertake the work, the marginal operator will suddenly “discover” there is hidden damage to your aircraft. You should not be surprised at the end of the day to find that the final repair invoice from the marginal operator nearly equals the original repair estimate you obtained from the FAA-certified repair station. People with experience in repairing your particular kind of airplane can generally come pretty close to telling you exactly what it is going to cost to repair the aircraft. Marginal operators who try to work on all kinds of aircraft are constantly experiencing surprises. These surprises come in the form of requests for additional payments from the insurance company for “hidden damage.”

This article is not an exhaustive discussion of all the pitfalls and issues that are presented when aircraft operators attempt to get their damaged aircraft repaired. However, it should sensitize the reader to the fact that there are techniques and activities that the aircraft operator may employ to blunt the initiative of the insurance claims adjuster to foist a marginal repair to the aircraft on the aircraft operator. You may also find that there is value in employing an experienced aviation lawyer when dealing with

problems of this nature.