NEWSLETTERS

Aircraft Lessor Lesson Learned: Is Your Aircraft Properly Insured?

JANUARY 19, 2018

Commercial transactions, particularly those involving aircraft lease agreements and insurance coverage, often involve numerous parties and complex relationships between them. The Eleventh Circuit's decision in *Aviation One of Florida, Inc. v. Airborne Insurance Consultants (PTY), LTD, et al.*, No. 16-16187 (11th Cir. Jan. 11, 2018) serves as a prime example both of the importance of reviewing contractual terms, and exercising due diligence to ensure that such terms are adhered to by the opposite party.

While the underlying facts are convoluted, they are not unlike many commercial transactions. Aviation One of Florida, Inc. ("Aviation One"), based in Florida, leased an aircraft to S.A. Guinee, a Georgia company, for operation of an aircraft in West Africa. Aviation One required S.A. Guinee to obtain insurance on the aircraft, and specifically to obtain a breach of warranty endorsement.

S.A. Guinee contacted Airborne Insurance Consultant Ltd. ("Airborne"), an insurance broker based in South Africa, to obtain the necessary coverage. Airborne obtained coverage for the aircraft, but failed to obtain the required breach of warranty endorsement in a subsequent renewal of the policy. While the renewal policy was in effect, the aircraft crashed and was a total loss.

Aviation One filed an insurance claim through Airborne, but the insurance carrier rejected the claim on the grounds that the S.A. Guinee's renewal policy did not include a breach of warranty endorsement. Airborne subsequently recommended Aviation One retain the law firm of Clyde & Co., based in England, to pursue a claim against the insurance carrier in South Africa. However, it was not disclosed to Aviation One that Clyde & Co. had a long-standing relationship with Airborne. Aviation One retained Clyde & Co. to represent it in a lawsuit in South Africa against the insurance carrier, but ultimately abandoned the suit without any recovery.

Aviation One then filed a lawsuit in federal district court in Florida against S.A. Guinee and Airborne alleging that they had negligently failed to obtain the required breach of warranty endorsement. Aviation One also filed suit against Clyde & Co., alleging that it had failed to disclose a conflict of interest through its relationship with Airborne.

Aviation One settled with S.A. Guinee. The district court then dismissed Aviation One's claims against Airborne on the grounds that the court lacked personal jurisdiction over Airborne. The district court also dismissed Aviation One's claims against Clyde & Co. on the grounds that the representation agreement provided that any disputes must be heard by a court of England.

Eleventh Circuit Affirms Dismissal

The Eleventh Circuit affirmed the district court's dismissal of the claims. As to Airborne, the court noted that Airborne, which was located in South Africa, obtained the insurance coverage on behalf of S.A. Guinee, which was located in Georgia. While Aviation One was listed as an additional insured under the policy, the court affirmed that "Airborne did not solicit business in Florida, did not insure property or a risk in Florida, and had no direct contact with Aviation One in Florida before the crash."

As to Clyde & Co., the court affirmed that the forum-selection clause in its agreement with Aviation One required any disputes to be heard in England. Even though Aviation One alleged that Clyde & Co. fraudulently failed to disclose its relationship with Airborne, the court concluded that those allegations, even if true, did not invalidate the forum selection clause.

Practical Considerations

In many ways, the result of *Aviation One* is not surprising. Generally speaking, a defendant must have some connection to the jurisdiction in which it is being sued, and courts often uphold forum-selection clauses between contracting parties that require disputes to be heard in certain courts. There are, however, two significant takeaways from Aviation One that may have changed the outcome or prevented the entire situation from arising in the first place.

First, lessors should require lessees to provide copies of current insurance policies covering any leased equipment, and should review those policies to ensure their continuing compliance. When a lessor leases equipment and the lessee must provide insurance coverage, it is a common contractual term that the lessee must provide up to date insurance policies to the lessor (whether for aircraft or any other type of equipment). Just as importantly, lessors should always review, or have qualified counsel review, any updated policies to ensure that there are no inadvertent changes in coverage-exactly what happened in *Aviation One*.

While relegated to a footnote in the Eleventh Circuit's decision, the court noted that the breach of warranty endorsement that spurred the entire litigation *may* have been included in the original insurance policy Airborne had procured, but was subsequently (for reasons unknown) left off the renewal insurance policy that was in effect at the time of the accident. This likely would not have changed the *outcome* of the court's decision, but the entire dispute may have been avoided in the first if due diligence had been exercised to review the renewal insurance policy to ensure it contained the required coverages.

Second, contracting parties should always pay attention to all contractual terms, including seemingly innocuous provisions such as forum selection clauses, to ensure they can effectively prosecute (or defend) their rights in the event of a later dispute. In *Aviation One*, the district court in Florida almost certainly had personal jurisdiction over Clyde & Co., but Aviation One ultimately doomed itself by previously agreeing that any disputes with Clyde & Co. would only be heard in England. Similarly, while Aviation One did not have direct contact or direct relationship with Airborne until after the aircraft accident, it was aware of Aiborne's involvement in obtaining the coverages at issue on behalf of S.A. Guinee.

Multiple transactions involving multiple parties frequently pose complications for where subsequent disputes will be heard, often to the detriment of the lessor or the party at the "top of the chain" when

delegating contractual responsibilities to lessees. Lessors should involve qualified counsel to ensure their rights are protected “down the line” in any commercial transactions.

For more information on this topic, contact a member of our Transportation & Logistics Practice Group.

David Krueger | dkrueger@beneschlaw.com | 216.363.4683

David is a partner with the firm’s Litigation and Transportation & Logistics Practice Groups, representing businesses in commercial and consumer disputes, aviation, and class action litigation, and maintains currency on both his private pilot and remote pilot certificates.