



Aviation and Space Law Committee

AVIATION DEFENSE LAW – DOES IT PAY?

By: [Sean Gates](#), Senior Partner, *Gates and Partners*

Defending aerospace industry clients is a fascinating niche business for a lawyer and provides the opportunity to work with some of the more exciting and entrepreneurial companies in the world. Increasingly, however, practice in this area has become less rewarding because of the time taken particularly in the international market to recover fees. International aviation insurance is organized differently from other insurance sectors and in the international arena. Fees for service providers instructed to defend or adjust claims have always been collected by the brokers of the Insured as part of the service they provide. It is commonly said by brokers nowadays that more than 50% of the entries they have to make in the various information systems operated by them and Insurers concern fee collections. Brokers have increasingly come to feel that collecting fees is an expensive exercise from which they derive little benefit and no, certainly no identifiable, stand alone, fee.

The insurance industry is of course not immune from the global

turndown and has had its own problems which have aggravated the diminution in profitability of the principal players in the market. Those players include brokers and there have been cutbacks and layoffs in this area in late 2008 and 2009. Over a number of years brokers have mooted the possibility that the collection service will no longer be provided free and possibly not at all in a cost saving exercise.

The process reached a conclusion of sorts just before the beginning of 2009 when one of the world's largest aviation insurance brokers (and brokers generally) Willis announced that from the beginning of January 2009 they would cease to collect new fees on behalf of service providers in the aviation market; and that service providers must hence forward make their own arrangements to carry out this function. Willis has indicated they will cooperate with such collection organisation with which each particular service

“Brokers have increasingly come to feel that collecting fees is an expensive exercise from which they derive little benefit”

provider wishes to work by providing, for example, the identities and shares of insurers participating in the risk and informing them of their need henceforward to respond to the designated provider.

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MESSAGE FROM THE CHAIR

Dear Committee Members:

Happy New Year! I am honored to serve as the Committee Chair in 2009. The annual Fall Meeting in Washington, DC, was a great success. As always, the Committee presented outstanding speakers on informative and timely aviation topics. In addition to the annual meeting, another significant advantage to being a member of the Committee is the receipt of the Committee's Newsletter, which provides members with information on developments in the field of aviation litigation. One of my goals as Chair is to make sure the Newsletter is one of the critical "go to" guides for aviation practitioners and insurers. To reach this goal, I need the help of all the members of the Committee. Your contributions to the Newsletter are critical to making it a success. I therefore encourage you to submit an article for publication or encourage others in your firm or organization to do so. There is no other aviation organization that represents plaintiffs, defendants and insurers and provides these benefits to its members. I encourage you contribute to its success by contributing to the Newsletter. ⚖️

Best Regards,

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MESSAGE FROM THE CO-EDITORS

Dear Committee Members:

We are honored to serve as the Co-Editors of the Committee's Newsletter for 2008-2009. We hope that you enjoy the first 2009 issue. Our goal is to provide the Committee with a convenient and timely source for updates on the law, emerging issues in the field of aviation and practice tips for aviation lawyers. Contributing to the Newsletter is also an excellent way to be published and gain additional exposure as an aviation practitioner. We are soliciting the following materials for inclusion in the following 2009 issues of the Newsletter: articles on emerging legal and factual issues affecting the industry or litigation, case summaries, book reviews and practice tips and pointers. We look forward to working with the Committee during the next year, and welcome any suggestions or comments you may have as to how we may improve the Newsletter. Please contact us by email at imedford@elrodtrial.com, palp@crowell.com or call us at the numbers below if you are interested in publishing in the Newsletter or have any suggestions or comments. ⚖️

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HELICOPTER EMS: SAFETY ISSUES AND REGULATORY OUTLOOK

By Paul Alp¹

It was close to midnight on September 27, 2008, when the pilot of a Maryland State Police medevac helicopter, call sign Trooper 2, reported that he was unable to receive the glideslope to Runway 19R at Andrews Air Force Base. On board were five persons, including two patients who were being transported to a hospital from the site of an automobile accident. Unable to proceed to the intended destination due to fog, the pilot had diverted to Andrews. Because of the unusable glideslope the pilot requested an Airport Surveillance Radar Approach, but the controller responded that she was not qualified to provide one. No further transmissions were received from the pilot. Another medevac pilot launched shortly after midnight as Trooper 8, heading in the direction of the last transmission of Trooper 2. Eventually a ground search located the crash site at around 1:30 in the morning. All on board except one of the patients had been killed, and the survivor was seriously injured.²

Eighteen days later, also at approximately midnight local time, another medevac helicopter was destroyed when it struck a radio station tower in the Chicago suburb of Aurora, Illinois. Two crewmembers, a nurse, and a one-year-old patient were killed. In January of this year, the parents of the deceased child filed a lawsuit against the medical transport

company, the operator, and the estate of the deceased pilot.³

The safety of helicopter emergency medical service (HEMS) operations has become a hot topic in the industry and the news media. Since December 2007, nine HEMS accidents resulting in a total of 35 fatalities have taken place. Although EMS helicopters transport nearly 400,000 patients every year without incident, the perception created by the accident record has put HEMS operations under newfound public scrutiny.⁴

Noting an “alarming rise in the numbers of EMS accidents,” the NTSB announced in November 2008 that it would hold a public hearing concerning HEMS operations. Four days after the NTSB’s announcement, the FAA proposed revisions to HEMS Operations Specifications. On February 3-6, 2009, the NTSB held its public hearing, in which technical experts and industry representatives presented detailed testimony about matters impacting the safety of HEMS.

For practitioners who may not be familiar with HEMS, this primer presents a summary of efforts by the NTSB and FAA to address HEMS issues and a preview of potential future developments.

BACKGROUND

Approximately 750 EMS helicopters are in operation in the U.S.

today. Although most operate under Part 135 rules when they carry patients, they may be operated under Part 91 during positioning flights where no patients are on board. Common causes identified in HEMS accidents include controlled flight into terrain, inadvertent operation into instrument meteorological conditions, and pilot spatial disorientation or lack of situational awareness in night operations.⁵ Factors that increase the potential risk of EMS flights as compared to other passenger-carrying operations include the substantial pressure to complete the mission and a need to operate in bad weather and at night to unfamiliar landing sites.⁶

In 1988, the NTSB issued a safety study that examined fifty-nine HEMS accidents between May 1978 and December 1986.⁷ The study concluded that a number of areas needed improvement including weather forecasting, operations during instrument meteorological conditions, personnel training requirements, design standards, crashworthiness, and EMS operations management. As a result of its findings, the NTSB issued nineteen safety recommendations to the FAA. The NTSB closed most of its recommendations when the FAA issued Advisory Circular 135-14A on June 20, 1991, which addressed most of the areas of concern the NTSB had identified.

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² See NTSB Preliminary Report No. MIA08MA203.

³ See NTSB Preliminary Report No. CEN09MA019.

⁴ See generally Remarks to the Air Medical Transport Conference 2008, Minneapolis, MN, by Robert L. Sumwalt, NTSB Board Member, Oct. 20, 2008, available at http://www.nts.gov/speeches/ris_idx.htm.

⁵ Fact Sheet, *EMS Helicopter Safety*, FAA (Washington, DC, June 30, 2008), available at http://www.faa.gov/news/fact_sheets.

⁶ See EMS Public Hearing Announcement, NTSB (Washington, DC, Nov. 28, 2008), available at <http://www.nts.gov/Events/Hearing-HEMS/Hearing-HEMS-announcement.htm> (Hearing Announcement).

⁷ *Commercial Emergency Medical Service Helicopter Operations*, Safety Study NTSB/SS-88-01 (Washington, DC, NTSB 1988).

UNMANNED AERIAL VEHICLES, IMPLICATIONS FOR THE AVIATION TORT PRACTITIONER

By: [Mark R. Velasquez](#)

A lot of discussion has taken place over the last several years regarding the emergence of unmanned aerial vehicles (UAV), and their integration into the national airspace system (NAS). While a literature search will yield numerous articles concerning military operations involving UAVs, their potential applications, development, history, and lists of different types of UAVs, relatively little information is available regarding the tort implications of UAVs operating within the NAS. However, enough time has lapsed since the emergence of the modern UAV that there is now adequate information to analyze how UAVs will be used and integrated into the NAS, and how they will affect the aviation tort practitioner.

BACKGROUND

A long history of UAV development is not needed to understand how UAVs operate, and will operate, within the NAS. It is sufficient to know that technology advances in the last 30 years, especially in electronics and miniaturization, have allowed for the development of the modern UAV. UAVs can be as small and simple as a remote controlled model aircraft flying within a few hundred yards of the operator, or as complex as a full-sized surveillance aircraft flying at flight levels controlled either manually, or through an autopilot using a satellite data link to connect the pilot to their aircraft, traffic control, and other planes. (The FAA uses the term Unmanned Aerial System

(UAS) to signify that unmanned flights involve more than just the aircraft).¹

In order to understand how the UAV will be integrated into the NAS, and the corresponding increased risk of a mid-air collision or damage to property on the ground, it is important to understand UAV applications and their corresponding airspace usage. The primary purpose for unmanned aircraft stems from the need to place a payload of some type in an aircraft. These needs fall into the categories of 1) Sensor/Surveillance, 2) Payload Delivery, 3) Orbiting, and 4) Transport. By far, the largest category of current applications for the UAV, both military and civilian, is Sensor/Surveillance.² The placement of a camera or other type of sensor on an aircraft has been shown to have a great number of uses especially in low level and high altitude surveillance and imagery. Currently UAVs are also used for payload delivery, including medical supplies and ordnance. Future UAV use is predicted to expand to include stratospheric communications platforms, environmental sensing, traffic reporting, and tactical local law enforcement operations.³

The application that a particular UAV is to perform ultimately determines the class of airspace in which it operates. For example, the Global Hawk developed by Teledyne Ryan Aeronautical is a high-altitude, long-endurance unmanned aerial reconnaissance system (HALE)

designed to conduct surveillance at FL60, which would bring it through, and into, controlled airspace including Class A. It is this need for UAVs to operate in different classes of airspace within the NAS that created integration issues. The initial question had been whether UAVs should have their own separate rules when flying within the NAS, or whether they should comply with current Federal Aviation Regulations (14 CFR Part 91) established for manned flights. The concern is not only that unmanned aircraft operations might interfere with commercial and general aviation aircraft operations, but that they could also pose a safety problem for other airborne vehicles, and persons or property on the ground. Most importantly, the inability of a UAV to follow the FAA's primary rule, to see and avoid other aircraft (FAR 91.113), raises significant safety concerns.

As Andrew V. Cebula, Executive Vice-President Aircraft Owners and Pilots Association stated in 2006 to the US House Of Representatives Committee On Transportation And Infrastructure Aviation Subcommittee: "With the exception of UAVs, there isn't an aircraft operating in today's NAS that has not complied with strict Federal Aviation Regulations (FARs) governing its certification and maintenance. And again, with the exception of UAV operators, there isn't a pilot operating today

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¹ Government Accountability Office, GAO-08-511; Unmanned Aircraft Systems, Federal Actions Needed to Ensure Safety and Expand Their Potential Uses within the National Airspace System.

² *The UAV and the Current and Future Regulatory Construct For Integration into the National Airspace System*, Journal of Air Commerce, 71 J Air L & Commerce 521 (2006).

³ See MITRE Product 040000323 (2004), Issues Concerning Integration of Aerial Vehicles in Civilian Airspace.

RECENT CASE UPDATE FIFTH CIRCUIT UPHOLDS PREEMPTION OF STATE LAW IN LOST BAGGAGE CLAIMS

By: Adam T. Schramek¹

On November 10, 2008, the Fifth Circuit affirmed the dismissal of state law claims in airline lost luggage cases in *Anjum Malik v. Continental Airlines, Inc.*, No. 08-50373 (5th Cir. 2008). The case concerned the loss of a piece of luggage on a cross-country, multi-leg flight from Austin, Texas, to Providence, Rhode Island. The passenger sued the airline, asserting violations of the Texas Deceptive Trade Practices Act and common law conversion and invasion of privacy. The passenger also asserted federal civil rights violations. The Fifth Circuit found that the passenger's state law claims were preempted by federal law and that she had failed to plead facts sufficient to state any civil rights violations.

Malik claimed in her complaint she had placed her bag (which she alleged contained irreplaceable heirloom jewels and antiques) near the front of the cabin in an overhead compartment before taking her assigned seat closer to the back. Her bag was later checked by a flight attendant because of overhead storage constraints. The bag did not appear at the baggage claim in Providence. The passenger

refused Continental's offer of the lost luggage maximum damages pursuant to federal law (at the time \$2,800), and she decided to sue the airline.

The airline asserted that all state court claims for lost luggage were preempted by the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. 41713(b)(1). The Fifth Circuit agreed, noting that the ADA had been enacted "[t]o prevent states from frustrating the goals of deregulation by establishing or maintaining economic regulations of their own." *Malik* at p. 5. It further explained that the United States Supreme Court had broadly construed the term "related to," which expresses "a broad preemptive purpose" and applies to "laws of general applicability" such as state consumer protection laws or laws "consistent" with federal laws. *Id.*

The Fifth Circuit also relied heavily on its prior decision in *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 335 (5th Cir. 1995) (en banc), which had defined airline "services" under the ADA to "include items such as ticketing,

boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself." The Court rejected the passenger's argument that her state law claims were not preempted because she had not "bargained" for the service of checked luggage. It noted instead that her claims struck "at the very heart of a 'service' that Congress intended to protect from state regulation." *Malik* at p. 6.

The Court also dismissed the passenger's civil rights claims, noting that she had failed to plead sufficient facts. Rather, the passenger's complaint was "rife with speculation that she feels 'she [has] cause to wonder'" why her bag had been checked. The Court noted that such "unsupported speculation" was insufficient to state a claim for intentional discrimination.

The Fifth Circuit concluded by noting that Malik had a federal claim for the value of her luggage and remanding the case to the district court for the limited purpose of adjudicating that claim, including the applicability of the \$2,800 limit on liability at issue in the case. 

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UNMANNED...

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that has not undergone rigorous pilot certification training and testing.” It is for this reason that UAV operations have been mostly limited to military operating areas (MOA), combat zones, or within restricted airspace. However, with the introduction of more aircraft, and more roles, the Department of Defense (DOD) and Homeland Security have turned to Certificate of Authorizations, or Waivers (COA) to fly UAVs within the NAS.

CURRENT UAV REGULATIONS

The FAA’s current policy concerning the operation of UAVs is based on whether the unmanned aircraft is used as a public aircraft, civil aircraft, or as a model aircraft. Currently, public and civilian use of UAVs is regulated by FAA Order 7610.4, and Certificate of Waivers or Authorization (COA). In addition, FAA AFS-400 UAS Policy 05-01 lists guidelines on the issuance of a COA. Model aircraft are regulated through FAA Advisory Circular 91-57. A good synopsis of the current state of FAA Regulations concerning UAVs can be found on the FAA’s website titled: Docket No. FAA-2006-25714, Unmanned Aircraft Operations in the National Airspace System.⁴

Operation of a UAV within the NAS that is not a model aircraft is only possible through obtaining a COA for military or public use, or

an airworthiness certificate for civilian use. This is because COAs are not authorized for civilian operations, and the FAA currently requires a civilian UAV operator to get a standard airworthiness certificate.⁵ If a UAV is used as a public/non-civilian aircraft (i.e., used by the

“Operation of a UAV within the NAS that is not a model aircraft is only possible through obtaining a COA for military or public use, or an airworthiness certificate for civilian use.”

DOD, Boarder Patrol, Sheriff’s Department, etc.), then the public agency must apply for a COA as indicated in FAA Order 7610.4. In 2005 the FAA came out with Interim Operational Guidance for evaluating applications of COAs for public/non-civilian use within the NAS. Interestingly, the FAA is required to approve them even if, under normal circumstances it would not, where the DOD or Homeland Security determines that doing so would be in the interest of national security.

The FAA has stated as a matter of policy that a standard airworthiness certificate is required for civilian operation of a UAV.⁶ However, the FAA is not currently issuing standard airworthiness certificates for UAVs, only experimental certificates and only for testing and research. Also, experimental certificates are not approved for commercial use. Therefore, only the military or other public/non-civilian agencies may effectively operate a UAV within the NAS. Civilian commercial operations of UAVs are generally prohibited. Unless you are a hobbyist flying a model aircraft, or a manufacturer conducting experimental flights of UAVs, you will be hard pressed to

find a way to operate a UAV within the regulatory framework currently in place.

Thus, the current and possibly long term policy of the FAA is to allow only military and public agency use of UAVs. These restrictions highlight the FAA’s safety, technical, and operational concerns regarding how to integrate UAVs into the NAS. In reality the *how* will be accomplished with the implementation of the FAA’s Next Generation Air Transportation System (NextGen). Such a system will address and solve most of the technical and operational issues regarding just how a UAV can be operated within the NAS. This will allow the FAA to adopt “sense and avoid” regulations for unmanned aircraft, while retaining “see and avoid” for manned aircraft.

FUTURE REGULATIONS

A search of the literature shows that after years of research, debates, and discussions the initial question of whether UAVs should have their own rules, or be integrated into the already established regulations, has been answered. It is apparent that operation of UAVs in the NAS will have to comply with most of the current FARs, with some exceptions and changes. This is evidenced by a review of the ASF-400 guidelines. For example, the person directly responsible for the operation of the UAV has the responsibility of Pilot in Command as defined by 14 CFR 91.3.⁷ The guideline’s long list requirements for approval of a UAV flight directly adopts and incorporates numerous current FARs that apply to normal operations of aircraft.

⁴ http://www.faa.gov/aircraft/air_cert/design_approvals/uas/reg/media/fmnotice_uas.pdf.

⁵ Federal Aviation Administration, AFS-400 UAS Policy 05-01.

⁶ http://www.faa.gov/aircraft/air_cert/design_approvals/uas/uas_faq/uas_ga-op/.

⁷ Federal Aviation Administration, AFS-400 UAS Policy 05-01.

⁸ National Aeronautics And Space Administration, Certification and Regulatory Roadmap: High Altitude and Long Endurance Unmanned Aerial Vehicles 11-14 (Version 1.3 2002).

In its ERSAT project for HALE UAV integration NASA has similarly come to the conclusion that most current regulatory criteria are already applicable to UAVs.⁸ The FAA has also separately determined that current regulations regarding pilot flight certification, medical certification, and responsibilities should apply to UAV operations. This includes the drug and alcohol restrictions. The FAA concluded that a pilot of a UAV must have the same medical certification as a commercial pilot of a manned airplane.⁹

RISK & LIABILITY

A core issue relating to the adoption of UAV operational regulations has been defining acceptable public risk. The FAA conclusion that a pilot of a UAV must have the same medical certification as a commercial pilot of a manned airplane was based upon acceptable public risk of UAV operations within the NAS. It is clear that as the frequency and use of UAVs within the NAS grows, so does the risk of a mid-air collision, or crash into property or persons on the ground. This is especially so as the size, payload, complexity, frequency, and the use of UAVs increase. Although no doubt exists that an UAV can be built with the same level of safety as a conventional piloted aircraft, the high level of complexity that will be required to operate a UAV within the NAS may well increase the risk of an accident occurring.

For now, the only operators of UAVs larger than a model aircraft (also called micro-UAVs) will be the military and other public agencies. Accordingly, the focus of the aviation tort practitioner will remain on the government when dealing with UAV accidents and incidents. To date, the government and public agencies have somewhat mitigated their liability since most UAVs are used by the military and collisions or accidents occur in combat zones or restricted airspace over non-populated areas. However, the government will increase its liability as it operates increasing numbers of UAVs within the NAS. Additionally, the government and public agencies not only face liability as a UAV operator, but also may face liability in their roles as designer and manufacturer of the aircraft, communications system, navigation system, and trainer of UAV pilots. Finally, as current regulations become officially applicable to UAVs, the operator and pilot will become open to liability for violations of the FARs as in any other aircraft accident.

CONCLUSION

As the applications of UAVs have increased, so to have the demand to fly them outside of the military and restricted areas where they currently operate. Operation of UAVs within the NAS increases the risk of damages and injury to the public, both in the air and on the ground. The current and near term

policy of the FAA is to allow only military and public agency use of UAVs in the NAS through COAs, and civilian operations through experimental airworthiness certificates. These restrictions on UAV operations, especially on civilian and commercial operators, will continue into the future. Not until the NextGen system is operational will there likely be a realistic integration of UAVs (except for model aircraft) into the NAS. Therefore, the majority of potential tort claims will be against the government, and manufacturers of the UAV systems.

For the tort practitioner, regulations of UAVs appear to have evolved such that methods of supporting liability exist against an operator, manufacturer, or even pilot of a UAV involved in an accident, just as in a manned aircraft accident. The military or public agencies guidelines for using, training, and operating UAVs, along with the FAA's guidelines, and requirements specific to a COA help establish the standards a public agency must meet in order to avoid liability. In addition, a tort practitioner may now be able to argue that the current federal aviation regulations establish, in whole or in part, UAV operational standards. This is especially true of civilian UAV manufacturers and operators who must meet the requirements and restrictions of experimental certificates. ⚖️

⁹ DOT/FAA/AM-07/3; Unmanned Aircraft Medical Certification Requirements.

HELICOPTER EMS...

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In 2004, the FAA convened a task force to address HEMS issues, the activities of which included

receiving input from industry participants. In 2005, the FAA issued three notices addressing HEMS safety, operations, and risk management.⁸

EMS accidents continued to take place in significant numbers, and the NTSB conducted another study, which analyzed 55 EMS accidents, including 41 involving helicopters

⁸ See Notice N8000.293 "HEMS Operations"; Notice N8000.302 "Operational Risk Assessment Programs for HEMS"; Notice N8000.307 "Special Emphasis Inspection Program for HEMS."

and 14 involving airplanes. In 2006, the NTSB issued the results of the study in a special investigation report.⁹ It concluded that 29 of the 55 accidents could have been prevented if the following corrective actions were implemented:

- *Operate positioning flights under Part 135.* The NTSB concluded that HEMS operations should not be permitted under Part 91 where a patient is not on board. Noting that Part 91 has looser weather minimum and crew rest requirements compared to Part 135, the NTSB recommended that the FAA require operations under part 135 for all legs of HEMS flights.
- *Conduct a formal pre-flight risk evaluation.* The NTSB concluded that safety could be enhanced by requiring a pilot to complete a standardized flight risk evaluation before every flight, including an assessment of weather and routing, to be completed in advance and without the influence of the urgency of completing the mission.
- *Use a formal flight dispatch procedure.* The NTSB's investigation revealed that many operators did not have consistent flight dispatch procedures, with missions sometimes being dispatched by the local 911

system or hospital staff unfamiliar with flight operations. According to the NTSB, a flight dispatch procedure that was part of a flight risk evaluation program would help mitigate risks. Moreover, dispatch procedures that include a person knowledgeable of flight operations would provide a pilot with consistent information, assist with go/no-go decisions, and allow a flight's position to be monitored.

- *Use a terrain avoidance warning system (TAWS).* The NTSB concluded that the use of TAWS would enhance the safety of flight operations, and recommended that the FAA require EMS operators to install TAWS and conduct appropriate training.¹⁰

Although the NTSB recognized the "positive steps" the FAA had taken by issuing recommendations, the NTSB took the FAA to task for not requiring HEMS operators to adopt mandatory safety measures.¹¹

Following on the heels of its 2006 report, the NTSB issued a number of formal safety recommendations that asked the FAA to issue mandatory changes to address the four areas the report spotlighted.¹²

"Although the NTSB recognized the "positive steps" the FAA had taken by issuing recommendations, the NTSB took the FAA to task for not requiring HEMS operators to adopt mandatory safety measures."

For its part, the FAA released a Safety Alert that encouraged HEMS operators to take various steps to mitigate accidents, such as providing enhanced training and emphasizing risk management. In addition, the FAA recommended that operators "consider" using enhanced vision systems such as TAWS and review the weather minimums, and, "if necessary, increase weather minimums to enhance safety."¹³ Thus, although the NTSB recommended that the FAA mandate operational changes, the FAA only issued recommendations for voluntary actions that operators could take to enhance safety.

On October 28, 2008, the NTSB added improving the safety of HEMS operations to its list of "most wanted" transportation safety improvements, stating as an objective for 2009 the mandatory implementation of the recommendations that came out of its 2006 report.¹⁴ When the NTSB announced its decision to conduct a public hearing into HEMS operations, it noted that the FAA had not fully implemented its 2006 recommendations.¹⁵ The NTSB expressed a concern that, until the FAA makes the NTSB's recommendations mandatory, "some EMS operators will continue to operate in an unsafe manner, which could lead to further accidents."¹⁶

⁹ *Special Investigation Report on Emergency Medical Services Operations*, Special Investigation Report NTSB/SIR-06/01 (Washington, DC, NTSB 2006).

¹⁰ The NTSB also considered night vision imaging systems (NVIS), but declined to recommend that the FAA mandate them because the effective use of such systems was best determined on an operator-by-operator basis. *Id.* at 13.

¹¹ *See id.* at XI.

¹² *See* NTSB Safety Recommendation A-06-12 through -15, Feb. 7, 2006. Subsequently, the NTSB also recommended that the FAA require HEMS operators to install radar altimeters in helicopters used for night operations. NTSB Safety Recommendation A-07-111, Dec. 21, 2007. *See also* NTSB Safety Recommendation A-07-112, Dec. 21, 2007, (ensure that minimum equipment lists for HEMS aircraft require radar altimeters for night operations).

¹³ *Safety Alert, Helicopter Emergency Medical Services (HEMS) Operators*, (Washington, DC, FAA SAFA 06001, Jan. 28, 2006). In May 2008, the FAA published an Advisory Circular (AC 120-96) regarding operational control centers for HEMS. It also has been taking steps to develop helicopter TAWS (H-TAWS) standards, and anticipates publishing a Technical Standards Order for non-mandatory H-TAWS standards in 2009.

¹⁴ Summary of October 28, 2008, NTSB meeting regarding Most Wanted List of Transportation Safety Improvements, at 11 (Washington, DC, NTSB 2008), available at <http://www.ntsb.gov>. The NTSB's most wanted changes were: (i) conduct all flights with medical personnel on board in accordance with Part 135 regulations; (ii) develop and implement flight risk evaluation programs; (iii) require formalized dispatch and flight-following procedures including up-to-date weather information; and (iii) install terrain awareness and warning systems.

¹⁵ Hearing Announcement.

¹⁶ NTSB, *Most Wanted Transportation Safety Improvements: Improve the Safety of Emergency Medical Services (EMS) Flights*, at <http://www.ntsb.gov/recs/mostwanted>.

THE FAA'S REVISED PART 135 OPERATIONS SPECIFICATIONS

On November 14, 2008, the FAA invited public comment on revisions to Part 135 Operations Specifications governing HEMS.¹⁷ The revisions to A021 require that, where any HEMS flight flown under visual flight rules (VFR) includes a Part 135 segment, then:

- (i) the pilot must conduct a preflight planning procedure that evaluates obstacles and determines minimum safe cruise altitudes to govern the flight; and
- (ii) all VFR legs of the sequence (including positioning flights) must be flown under revised weather minimums.¹⁸

In the alternative, such flights may be conducted under instrument flight rules (IFR). To facilitate IFR operations, A021 relaxes the destination weather-reporting requirement, allowing HEMS operators the flexibility to fly under IFR to a destination that does not have an approved weather reporting source, provided either that (i) an approved weather source is located within fifteen miles of the destination or (ii) an area forecast is available. The FAA also revised Operation Specification A050 concerning night-vision goggles to conform to the revised weather minimums in A021.

The public comment period for the revised Operations Specifications closed on December 15, 2008. The response of the

HEMS industry, which had worked with the FAA in developing the revisions, was to be favorable.¹⁹

THE NTSB PUBLIC HEARING

The four-day NTSB hearing concerning HEMS safety began on February 3, 2009.²⁰ Invited expert witnesses provided sworn testimony on issues such as historical risks, current and future safety initiatives, dispatch procedures, equipment, state and corporate oversight, and training. Various interested organizations representing constituencies in the HEMS industry were granted party status and questioned witnesses directly.²¹

Highlights of the hearing included testimony about industry safety initiatives; a discussion of HEMS in Canada, which has an excellent safety record; and detailed testimony concerning the development and implementation of operations using TAWS and NVG. Future technical developments discussed included improved cockpit and dispatching software, integration with ADS-B, synthetic vision, and advanced flight data recorders. Pilot culture and decision-making were examined, as well as the funding, profitability, and commercial aspects of HEMS services.

The FAA presented a review of safety data and actions the agency had taken. The hearing chair observed that industry compliance with the FAA's voluntary recommendations appeared not to be working. The FAA rejected the

premise that voluntary measures are not effective, and noted that regulations cannot change poor decision-making. The chair closed the hearing by noting that it marked only the beginning of the change process. Going forward, NTSB staff members will examine the evidence gathered and present the board with a plan for improving safety. In the future, the NTSB could release an updated safety study or make additional recommendations.

NEXT STEPS

Responding to criticism that the FAA failed to require the HEMS industry to adopt mandatory safety improvements, a spokesperson for the agency stated that encouraging the industry to make voluntary changes is a sensible short-term response because imposing new requirements can take time: "The main goal is to get the technology and procedures into the cockpit Rulemaking is one way, but it is not the only way."²² The FAA is currently considering long term initiatives such as issuing a proposed HEMS rulemaking in 2010 that would require:

- Part 135 on all legs;
- Equipage with radar altimeters, TAWS, and devices that perform the function of CVR/FDR;
- HEMS operational control centers; and
- Formalized risk assessment/hazard mitigation programs.

¹⁷ See Helicopter Emergency Medical Services Operations, FAA-2008-1208, 73 Fed. Reg. 67564-65 (Nov. 14, 2008).

¹⁸ The revised VFR minimums vary depending on whether the operation is conducted during the day, at night, with or without NVIS or TAWS, and whether the flight is in a mountainous area. They range from an 800 ft. ceiling with 2 miles visibility during the day, to a 1,500 ft. ceiling and 5 miles visibility at night in a mountainous area without NVIS or TAWS.

¹⁹ The comments to the revised Operations Specifications are available at http://www.regulations.gov/under_docket_number FAA-2008-1208.

²⁰ As part of the lead up to the hearing, on January 15, 2009, the NTSB released probable-cause and interim factual reports on a number of HEMS accidents. Included in the release of information were records concerning the September 2008 accident in Maryland. These records showed that, among other things, the pilot of the accident helicopter had received an outdated report of current conditions that put the cloud ceiling at 1,800 feet, instead of the actual ceiling of 500 feet. See Johnson, *Controller Reassigned in Medevac Copter Crash*, Washington Post, Jan. 16, 2009, (Metro), available at <http://www.washingtonpost.com>.

²¹ An archive of the webcast of the hearing is available at <http://www.nts.gov>.

²² FAA spokesman Les Dorr, quoted in Lowy, *Board Cites Poor Weather in Helicopter Crashes*, Associated Press, Jan. 15, 2009.

In addition, during 2009 the FAA is planning to evaluate the use of single-crew night vision goggle (NVG) operations to determine if they are safe and beneficial.

Upcoming changes in HEMS operations may not only be initiated by the executive branch. On July 8, 2008, US Senator Maria Cantwell introduced a bill entitled

the “Air Medical Service Safety Improvement Act of 2008,” which in essence sought to mandate the HEMS safety improvements recommended by the NTSB in 2006.²³ In addition, in the wake of the September 2008 accident in Maryland, two of that state’s legislators are spearheading an effort to introduce a sweeping overhaul of

HEMS operations, including proposing partial privatization of the state’s helicopter fleet and creating a Cabinet-level department to oversee EMS.²⁴

“Change” is in the air in Washington, and it seems likely to be coming to the HEMS industry in the near future. ⚖️

²³ See S. 3229, 110th Cong. (2008). The bill was referred to the Senate Committee on Commerce, Science, and Transportation, which has not yet acted on it, but may take it up in 2009.

²⁴ See Smitherman, *Md. Cabinet Post Urged For Medevac Oversight*, *The Baltimore Sun*, Dec. 19, 2008, available at <http://www.baltimoresun.com>. See also *Wrong Remedy*, *The Baltimore Sun*, Dec. 23, 2008, (Editorial), available at <http://www.baltimoresun.com> (“The idea, as floated by two legislators, sounds more like a grandiose prescription for trouble – and a scheme to privatize the state-run medevac helicopter service”).

AVIATION...

Continued from page 1

The sudden nature of the announcement has caused some consternation amongst those lawyers and adjusters who are active in this business. The issue of the collection of fees has been on the agenda for some time with a group comprising loss adjusters and lawyers housed in the UK and the United States who have made some significant progress in this area. This includes successfully lobbying for the adoption of a policy provision to be incorporated in the annual aviation policies of aerospace businesses whereby the individual Insurers subscribing to the policy accept that their relationship with service providers is regulated by UK law, that they will deal direct with those service providers working through their appointed agents and that, in the event of any dispute, issues will be justiciable by recourse to the Courts of England and Wales.

It may be helpful to explain in part at least how this situation came about. In the US domestic market, the Lead US Insurer, maintains a different relationship with service providers than is the case in

international business; settling their bills direct and then accounting to co-Insurers on the policy via the broker. The international market has always adopted the position that each Insurer on the risk must pay their own share. It is not unusual for a substantial Airline or manufacturer’s policy to be underwritten by 20, 30 or more different insurance companies based around the world. Each of those Insurers has a range of business in different classes; marine, non-marine and aviation; from each of the major brokers. The majority of those Insurers outside of London run their businesses with the brokers “in account.” This means that in each accounting period all of the payments to be made and received by the individual company and particular broker are calculated. There will be a balance due to one or the other for premiums or claims and the balance is paid to or from the broker as appropriate. Lawyers’ fees form part of this account and until the whole account is agreed between the broker and the individual Insurer, no money changes hands and the fees cannot be paid. The account can be voluminous and the disputes, often to do with matters completely unconnected to

fees, can be protracted. It is not uncommon nowadays for bills to take more than six months to be paid; with the upper limit being infinity!

The new approach proposed by the group of direct collection by a collection agent of fees from each Insurer avoids the problem of the “account” and at least in theory permits each Insurer to discharge each account separately as it arises. Before this can be done, the agreement parties on a policy would have to confirm the particular payment was in order. The major brokers have all indicated that their intention would be to retain this element of the fee collection service in house.

Inevitably there will be considerable teething problems with the new systems to be introduced. Various trial runs have been carried out most recently with Willis which had been successful on a small scale. The decision by Willis to implement the change with only a few weeks notice has meant that larger scale trials have not been possible before the system was forced to go live.

It is reasonable to anticipate that other brokers who are monitoring

this process will follow the Willis lead in view of the undoubted cost savings. The service provider group in London continues to discuss with various collection agents their terms and conditions and with Insurers and brokers on the various

issues arising out of the change in process. Already collection agents are bombarding us all with new advertising material; the group hopes to analyse the various options for its members.

One can only hope that in future the practice of aviation defense law will continue to be as attractive as it has been in the past! ⚖️

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