

**AVIATION INSURANCE  
AND  
FINANCIAL RISK MANAGEMENT**

**Corporate Aircraft Insurance:  
Insuring Contractual Risks,  
Alternative Ownership  
and Operating Arrangements**

Paul V. Herbers  
Susan E. McKeon  
COOLING & HERBERS, P.C.  
2400 City Center Square  
1100 Main Street  
Kansas City, MO 64105  
816-474-0777 (Telephone)  
816-472-0790 (Fax)  
[www.coolinglaw.com](http://www.coolinglaw.com)

## CONTENTS

- A. VARIOUS RISKS TO THE OWNER/OPERATOR RESULTING FROM A LOSS
- B. CORPORATE AIRCRAFT INSURANCE COVERAGES
- C. WAIVER OF SUBROGATION
- D. GROUND HANDLING LOSSES AND HOLD HARMLESS AGREEMENTS
- E. INDEMNIFICATION AGREEMENTS
- F. ALTERNATIVE OWNERSHIP/OPERATING ARRANGEMENTS

## DISCUSSION

### A. VARIOUS RISKS TO THE OWNER/OPERATOR RESULTING FROM A LOSS

#### 1. Introduction

When a loss occurs, two obvious risks are present: risk of loss of the aircraft (and related items of cost), and risk of liability to others in a lawsuit. There are actually a number of specific risks included in these two general categories, and they need to be considered separately. This presentation focuses on the first general category concerning the loss of the aircraft and insurance coverages related to it, although the various types of liability coverages are also considered.

When a loss to an aircraft occurs, different types of damage can receive different treatment by the owner/operator's insurance policy, as well as by language in contracts between owners and operators which include indemnification and/or hold harmless agreements.

#### 2. Direct Physical Damage

The first type of damage is the **physical damage** to the aircraft itself, or to one or more of its components such as an engine. This type of damage is typically covered by the owner/operator's own hull insurance policy, and that insurer may in turn seek to recover the amount of its loss from a third party who may be at fault. This physical damage is sometimes referred to as **direct damage**. It is typically measured by the cost of repair, or in the event of a total loss, by the aircraft's depreciated or market value as of the date of the loss or by the stated value in the policy.

#### 3. Loss of Use -- Consequential Damage

The second type of damage is **loss of use damage**, which is the financial loss to the owner/operator resulting from the fact that, as a consequence of the actual physical loss, the aircraft (or the affected component) is out of service for repairs for some extended time. These damages are, therefore, sometimes called **consequential damages**.

The amount of this type of damage is easily measured if a temporary substitute is rented for the period of the down-time, and if that substitute is in fact reasonably necessary. Clearly, the temporary loss of an aircraft used daily in a charter operation represents the loss of daily revenue to the operator. On the other hand, the temporary loss of use of a recreational aircraft may result in little consequential damage.

An owner/operator may be able to obtain its own insurance against these consequential damages, resulting from damage to its own aircraft. Typically these are not recoverable if there is a total loss to the aircraft. At the same time, if the physical damage to the aircraft is the fault of a third party, these consequential damages are recoverable from the party at fault. The owner/operator will have a duty to “mitigate” damages, or minimize the period of use of the temporary substitute.

#### **4. Diminution in Value**

This category of damages is a topic of debate whenever it arises. **Diminution in value** describes the reduction of market value of the aircraft resulting from the damage history, even though the physical damage may have been fully repaired, and even though the repair may have been completed by the aircraft manufacturer.

The underlying assumption is that a prospective purchaser, inspecting two identical aircraft, one of which shows a major structural repair in its logbook, will likely only purchase the aircraft with a damage history if the purchaser can obtain a significant discount in the purchase price. Although this reduction in market value may appear intuitively obvious to the owner of the damaged aircraft, it is not so obvious to the party being asked to compensate the owner for it.

When the loss is the fault of a third party, the owner/operator is entitled to recover this diminution in value as one element of recoverable damages in a lawsuit. The amount of the diminution will be the subject of opposing expert testimony, often from aircraft brokers or appraisers, often varying between opinions of “no damage” to damages in the amount of 15% of market value or more.

In periods of falling market values, the amount of diminution is difficult to separate from market forces, and accordingly, equally difficult to recover. At the same time, in periods of rising values, the owner may have difficulty persuading anyone that it has suffered a loss.

Diminution in value is not normally covered by aircraft hull policies and is not considered direct physical damage. The owner/operator may be able to purchase its own insurance against potential diminution in value damages for a future event; however, such coverage is not readily available and its scope is often limited.

#### **5. Incidental Damages**

The category of **incidental damages** is a catch-all category for any other economic losses reasonably resulting from the damage to the aircraft. This might include such items as travel expenses, flight crew repositioning expenses, and other monetary costs which would not have

been incurred if the loss event had not taken place. This does not include recovery of attorneys' fees, which are generally never recoverable unless a contract between the parties so provides. The owner/operator can normally obtain additional insurance coverages for some of these items.

## **B. CORPORATE AIRCRAFT INSURANCE COVERAGES**

There is a broad range of insurance coverages typically available for corporate aircraft. Some are routinely offered, and some may need to be specifically requested. A list and brief explanation of such coverages follow. The list is not intended to be exhaustive, but rather used as a guideline to some of the coverages available.

A corporate aircraft owner's or operator's insurance policy may not afford coverage for all of the liabilities assumed by the owner/operator in the indemnification provisions of an agreement relating to the aircraft.

Typically, an aircraft insurance policy will contain a specific "Purpose of Use" or "Approved Use" clause, making coverage applicable only while the aircraft is used in accordance with the uses approved on the policy. Some corporate policies may describe the approved use in language such as "Industrial Aid," which could exclude "(a) instruction of any person not specified by name [in the policy] or (b) any operation for which a charge is made." However, the approved use could be something as broad as "All operations of the Named Insured." In the former situation, **coverage could be denied if any charges were being made for the use of the aircraft**, whether it was being used under FAR 91.501 or FAR Part 135.

An aircraft insurance policy will also contain a "Pilot Warranty" clause. A Pilot Warranty clause may specifically require that the pilot(s) hold certain types of pilot certificates, with particular categories and ratings, have a certain minimum number of logged flight hours, and obtain specific initial or periodic recurrent training at a manufacturer-approved training school. Minimum logged flight hours can be required not only for total time, but also for multi-engine time, turbojet or turboprop time, and make and model time. More often with policies for corporate operations, the Pilot Warranty clause is worded as broadly as, "Any pilot approved by the Named Insured's Chief Pilot." Recently, requiring initial and periodic formal training has been particularly emphasized within the aviation insurance industry, even for those pilots who can fly with the approval of the Named Insured's Chief Pilot. Failure to comply with the Pilot Warranty clause will void coverage.

Also, being an approved pilot and being an "Insured" are two distinct concepts. A pilot who meets the Pilot Warranty, even if specifically named as an approved pilot on the insurance policy, is not necessarily an Insured under the policy. For example, an independent contractor pilot could have all of the requisite qualifications to fly the aircraft, but not be an Insured due to an exclusion for such pilots typically found in corporate insurance policies. Thus, while the aircraft owner may have liability coverage for its own liability arising out of an accident or incident in which the aircraft was flown by an independent contractor, the pilot will not. In certain cases, the aircraft owner's insurer may be willing to add an independent contractor pilot

to the coverage as an Additional Insured at the specific request of the owner. This may make a big difference to the pilot, as discussed below concerning waiver of subrogation.

The following types of coverage are generally available for corporate use aircraft:

## **1. Liability Coverages**

Bodily Injury/Property Damage Liability  
Including Passengers

Legal Liability Coverage for use(s) specified in the policy for aircraft scheduled on and/or insured under the policy

War Risk and Allied Perils Liability

Legal Liability Coverage for aircraft scheduled on and/or insured under the policy arising out of act of war, terrorism, hijacking, riot, civil commotion, etc.; may include territory (geographical) restrictions/exclusions not present with respect to Bodily Injury/Property Damage Liability (never includes coverage for claims arising out of nuclear incidents)

Voluntary Settlement

"No fault" payment requested by the Named Insured for injuries to or death of passengers/crew as specified in the schedule of benefits, in exchange for a full release of all claims by the passenger/crewmember (coverage may include or exclude crewmembers of owned aircraft)

Temporary Substitute Aircraft Liability

Legal Liability Coverage for bodily injury/property damage arising out of use of a non-owned aircraft used as a temporary substitute for the aircraft specified/scheduled on the policy because the scheduled aircraft is out of service due to breakdown, repair, servicing, loss or destruction

Non-Owned Aircraft Liability

Legal Liability Coverage for bodily injury/property damage arising out of the use of non-owned aircraft, usually limited to use of aircraft having a stated maximum seating capacity; can also be limited to category of aircraft; not applicable to leased non-owned aircraft (which could include aircraft used under a Time-sharing or Interchange Agreement)

|                                                            |                                                                                                                                                                                                                                                                                                                                                                                                |
|------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Non-Owned Aircraft Physical Damage                         | Legal Liability Coverage for property damage to non-owned aircraft while in the care, custody or control of the Named Insured (may apply only while the aircraft is on the ground or in flight or to both)                                                                                                                                                                                     |
| Hangarkeepers Legal Liability                              | Legal Liability Coverage for property damage to non-owned aircraft at the Named Insured's premises and in the care, custody or control of the Named Insured (usually applies only while the aircraft is on the ground)                                                                                                                                                                         |
| Liability for Property Damage to Hangars                   | Legal Liability Coverage for property damage to hangars and their contents (excluding aircraft) arising out of the use of hangars by the Insured's aircraft operations only                                                                                                                                                                                                                    |
| Premises Liability                                         | Legal Liability Coverage for bodily injury/property damage arising out of the use of airport premises by the Insured's aircraft operations only                                                                                                                                                                                                                                                |
| Sale of Aircraft, Aircraft Products and Services Liability | Legal Liability Coverage for bodily injury/property damage arising out of the sale of the aircraft specified/ scheduled on the policy and the incidental provision of aircraft parts or services for aircraft of others on a non-profit basis; may only apply if insurer providing coverage was the insurer of the aircraft at the time it was sold (coverage will expire when policy expires) |
| Contractual Liability                                      | Legal Liability Coverage for bodily injury/property damage assumed by the Named Insured in certain limited types of contracts; does not increase the scope of the coverage provided by the policy; applies only to the extent that the policy otherwise provides coverage                                                                                                                      |
| Personal Effects and Baggage Liability                     | Legal Liability Coverage for personal effects of passengers that are in the Insured's care, custody or control                                                                                                                                                                                                                                                                                 |

|                               |                                                                                                                                                                                                                         |
|-------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Cargo Liability               | Legal Liability Coverage for the goods, merchandise and property of others that is carried/transported on an insured aircraft; does not apply to property leased to the Named Insured                                   |
| Personal Injury Liability     | Legal Liability Coverage for false arrest, defamation, libel, slander, etc. arising out of the operation of aircraft insured under the policy; written on an "Aggregate" basis with a maximum limit of \$25,000,000     |
| Host Liquor Liability         | Legal Liability Coverage for bodily injury and property damage arising out of serving alcoholic beverages in connection with the Named Insured's aircraft operations                                                    |
| Operation of Mobile Equipment | Legal Liability Coverage for bodily injury and property damage arising out of the use of mobile equipment and other vehicles not licensed for public road use while on airport property (e.g., tugs, fuel trucks, vans) |

## **2. Medical Payments Coverages**

|                                                  |                                                                                                                                                                                                                                    |
|--------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Medical Expense Payments for Passengers/<br>Crew | Reimbursement of actual medical expenses incurred by any passenger/crewmember who is injured in an accident arising out of the use of the aircraft specified/scheduled on the policy; can also extend to use of non-owned aircraft |
|--------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

Premises Medical Payments

Reimbursement of actual medical expenses incurred by any person who is injured on airport premises arising out of the Insured's aircraft operations on airport property

### **3. Physical Damage Coverages**

All Risks Physical Damage (Hull) with Not In Motion and In Motion Deductibles (can be Nil/Nil)

Coverage for damage to the aircraft specified/scheduled on Deductibles the policy; usually written on an "Agreed Value" or "Stated Value" basis

War Risks and Allied Perils Physical Damage (Hull) with NIL/NIL Not In Motion and In Motion Deductibles

Coverage for damage to the aircraft specified/scheduled on the policy arising out of confiscation, riot, civil commotion, etc.; may include territory (geographical) restrictions/ exclusions not present with respect to the "all risks" coverage (never includes coverage arising out of nuclear incidents)

Spare Engines and Parts

Coverage for damage to spare engines or spare parts owned by or leased to the Named Insured that are temporarily detached from the aircraft scheduled/specified on the policy (may or may not include transit of these parts)

Automatic Insurance for Increased Value of Aircraft and Spare Engines and Parts

Automatic coverage for increase in value of insured aircraft and spare engines and parts, up to a specified maximum

### **4. Miscellaneous Coverages**

Rental Expense of Temporary Replacement Parts

Reimbursement of rental costs incurred in renting parts temporarily needed to replace aircraft parts withdrawn from use due to a physical damage loss covered by the policy

Rental Expense for Temporary/Substitute Aircraft

Reimbursement of rental costs incurred in renting or chartering aircraft temporarily needed to replace a specified/scheduled aircraft withdrawn from use due to a physical damage loss covered by the policy;



|                                                                                                  |                                                                                                                                                                                                                                                  |
|--------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                                                                                  | limited to the differential between the operating costs of the owned aircraft and the cost of renting or chartering the temporary aircraft                                                                                                       |
| Trip Interruption                                                                                | Reimbursement of expenses incurred for food, lodging and travel of passengers to complete a given flight to its destination or original departure point if trip is interrupted/discontinued due to loss covered under the policy                 |
| Lay-Up Credit for Scheduled Aircraft                                                             | Return premium credit if scheduled/specified aircraft is laid up                                                                                                                                                                                 |
| Search and Rescue                                                                                | Reimbursement of expenses incurred in connection with search and rescue operations                                                                                                                                                               |
| Runway Foaming and Crash Control                                                                 | Reimbursement of expenses incurred in connection with foaming a runway or crash control                                                                                                                                                          |
| Automatic Coverage for Newly Acquired Aircraft (without prior approval by the insurance company) | Automatic liability and physical damage coverage up to certain limits for aircraft newly acquired by the Named Insured, without prior insurance company approval; usually, new aircraft must be reported to the insurance company within 30 days |
| Mexican Liability Policy                                                                         | Certificate of insurance required by the government of Mexico evidencing liability coverage issued by a Mexican insurance company for operation of the insured aircraft in Mexico                                                                |

## C. WAIVER OF SUBROGATION

### 1. Introduction

The **right of subrogation** is a legal right which allows the insurance company to recover its loss from a third party who is at fault for the loss. The insurance company is substituted for the insured person (subrogate = surrogate or substitute), because by paying its coverage under the policy, the insurance company steps into the shoes of its insured as far as making a recovery against a party at fault. The insured person (such as the aircraft owner) who has received the

insurance payment has a duty to cooperate with its insurer in trying to recover from the party at fault.

The insured also may have a right to recover those additional losses which were not covered by the policy, such as the deductible, cost of replacement aircraft, and diminution in value of its aircraft as a result of the damage history following the repair.

If the loss is the fault of one of the insured persons under the policy, the insurance company does **not** have the right to recover from one of its own insureds by way of subrogation.

The aircraft financing company may also insist that a waiver of subrogation clause be included in the loan agreement, since even lenders may be subject to an insurer's right of subrogation under common law.

It is common for aircraft hull coverage to contain a provision forbidding the insured to waive its rights of recovery against a wrongdoer, and thus the insurer's ability to subrogate against the wrongdoer for any loss it pays. For example, the policy issued by one major aviation insurer contains the following provision, **"This insurance is for your benefit alone and not for any other person or organization. . . . [Y]ou promise not to do anything that will take away our right to collect for damages caused by others."**

An example from another policy is the provision, **"In the event of any payment under this policy, the Company shall be subrogated to all the Insured's rights of recovery therefor against any person or organization . . . The Insured shall do nothing to prejudice such rights."** Thus, theoretically, an insurer could consider the customer's agreement to waive its rights of recourse against the FBO a violation of a policy that contains such or similar language.

In some states, the insurance company must fully satisfy all of its insured's losses (whether covered under the policy or not), and then only the insurance company pursues a lawsuit against the party at fault. In other states, the insurance company can bring a lawsuit against the party at fault, simply to recover the money it has paid under its policy. The insured aircraft owner can bring a separate lawsuit for its uninsured losses, or the owner can join in the insurance company's lawsuit.

In the event of such a lawsuit by the insured and the insurance company against an at-fault third party, there should be an agreement in advance as to how the judgment or settlement will be shared between the insured and the insurance company, to avoid a dispute later.

## **2. How the Issue Arises in Negotiations**

The "waiver of subrogation" issue arises in one of two ways.

Because the right of subrogation belongs to the insurance company, a true waiver of that right (i.e. an agreement in advance not to pursue a claim if a loss occurs) can only be made by the insurance company, and will be contained in the policy. As an example, the policy may recognize certain permitted users of the aircraft, and provide that if a loss occurs due to the fault

of one of those users, the insurance company will not seek to recover its pay-out from them. Alternatively, the policy may provide that these users are additional insureds, which has the same effect.

A second type of agreement sometimes referred to as a waiver of subrogation, but more accurately referred to as a waiver of right of recovery, is a contractual agreement by the owner or operator to waive (i.e., to release in advance) any future claim that might be made against the other party to the contract. This is a negotiated item which has obvious value to the other party to the contract. Such a waiver may violate the terms of the insurance policy itself, if it will impair the insurance company's right to recover in the event of a loss, and therefore, such an agreement may impair the owner's right to receive a payment from its own insurer in the event of a loss. So, this type of contractual waiver should never be granted in negotiations without having first cleared the issue with the owner or operator's insurance professional, and verifying that such a waiver will not impair insurance coverage.

Some policies may specifically authorize such a waiver, provided the waiver is limited to losses not covered by insurance. Some policies specify that the Insured cannot waive the insurer's right of subrogation after a loss. These types of agreements are included in the discussion below concerning hold harmless agreements.

In contract negotiations, the two primary considerations are (i) one of the parties (such as a lessee of the aircraft or a management company) will be asking for a waiver of subrogation in the event of loss, and (ii) there may be an additional premium which has to be borne by one of the parties to the contract or shared between them.

## **D. GROUND HANDLING LOSSES AND HOLD HARMLESS AGREEMENTS**

### **1. Introduction**

Over the past several years, corporate general aviation has been confronted with FBO Hold Harmless Agreements. This type of agreement is designed to alleviate an FBO's responsibility for damage to customers' aircraft, and other related losses such as loss of use and diminution in value of the aircraft. By signing the agreement, the customer essentially gives up its rights of recovery against the FBO for such damages, regardless of fault.

Understandably, flight crews are faced with a dilemma when presented with these agreements for signature upon arrival at the FBO. They may not have the authority to sign these agreements on behalf of the owner or operator. Signing them could present an insurance problem. Refusal to sign them could result in higher parking and handling fees or a denial of service by the FBO.

### **2. Examples**

An example of these types of agreements is one used by the FBO at one popular winter resort destination, in which the customer agrees to hold harmless the FBO for "**any damage**

**incurred or consequential loss involved to the aircraft occurring during snow removal on or around the aircraft or deicing of the aircraft.”** The customer further agrees to hold harmless the FBO for **“consequential loss, diminution of value, loss of use or other incidental loss but not actual physical damage to the aircraft, for other services offered by the FBO, including but not limited to towing or cleaning of the aircraft, lavatory services provided and fueling of the aircraft.”** Therefore, under the terms of the agreement, the customer has no recourse against the FBO for damage sustained during snow removal or deicing operations, and recourse only for direct physical damage to the aircraft arising out of any other operations.

Similarly to the agreement discussed above, the agreement used by a large national FBO chain provides that the customer **“releases [the FBO] from any damages sustained to the customer’s aircraft or other personal property as the result of high winds or other adverse weather conditions.”** In addition, the customer agrees that **“under no circumstances shall [the FBO] be liable to the customer for indirect, incidental, consequential, special or exemplary damages, whether in contract or in tort (including strict liability and negligence), such as, but not limited to, loss of revenue, loss of use or anticipated profits, diminution or loss of value, or costs associated with substitution or replacement aircraft.”** Thus, as with the agreement discussed above, the customer has given up any right of recourse against the FBO for any damages, direct or consequential, as a result of adverse weather conditions and has waived its right of recovery from the FBO for anything other than direct damage to the aircraft as a result of other causes.

Another popular winter destination resort’s service agreement states that, **“Owner hereby agrees to indemnify and hold [the FBO] and [the Airport Owner], their respective agents, representatives, officers, directors, servants and employees harmless from and against any and all claims, demands, damages, liabilities, losses, actions or causes of action of any nature whatsoever (including, without limitation, reasonable attorneys’ fees) sustained by the Aircraft . . .”** Further, **“Owner hereby waives its rights of subrogation and shall cause its insurer(s) to waive right of subrogation against [the FBO] and the [Airport Owner].”** In addition, **“[The FBO] assumes no liability for theft, collision, fire, vandalism or any other type or form of damage to Owner’s property or the contents thereof while the same is located on [the FBO’s] property.”** A literal reading of this language is that this FBO will not be responsible for any damage to the aircraft, whether direct or consequential.

### **3. Problems**

While the FBO that uses this type of agreement may be enjoying a reduction in the premium for its insurance coverage, the customer who signs the agreement may be violating its own insurance policy, at least with respect to direct damage to the aircraft.

Some hold harmless agreements also require that the customer: **“currently maintains policies of aircraft and commercial general liability insurance with respect to the aircraft, operations and maintenance, as well as ‘all risk’ type hull insurance on its aircraft and engines”** and stating that, **“In the event any third party claim is made against [the FBO], Customer’s insurance coverage shall provide primary coverage.”** One problem with this language is that not all aircraft operators maintain commercial general liability (CGL) coverage.

Further, the language implies that the FBO has been added as an additional insured on the customer's aircraft liability and CGL coverages and that those policies will provide primary coverage for the FBO for any claims made by third parties against it. Few aircraft owner/operators would want to provide liability coverage of any type to an FBO servicing the aircraft. However, even if the customer were willing to add the FBO as an additional insured to its policy, that would have to be done before signing the agreement. Again, few owner/operators will want to comply with this requirement.

This agreement also requires that the customer agree to **"indemnify, save and hold harmless" the FBO and the airport "from and against any and all claims, suits damages, fines and penalties including all expenses, reasonable attorneys' fees and costs incidental to the defense of any claims arising out of [the FBO's] acts or omissions . . . except to the extent such claims arise from the negligence or willful misconduct of [the FBO]."** Not only is there no reciprocal provision requiring the FBO to indemnify the customer, but the indemnification obligations assumed by the customer may not be covered by its insurance.

Similarly, the third agreement discussed above provides that, "Owner hereby agrees to indemnify and hold [the FBO] and [the Airport Owner], their respective agents, representatives, officers, directors, servants and employees harmless from and against any and all claims, demands, damages, liabilities, losses, actions or causes of action of any nature whatsoever (including, without limitation, reasonable attorneys' fees) . . . arising out of or related to the Aircraft's use of [the Airport] or [the FBO's] property, facilities or services." This agreement does not even exclude claims that arise from the FBO's negligence or willful misconduct.

Regardless of the desirability to the customer of accepting the provisions discussed above, the flight crew may not have the authority to enter into such agreements. For example, the pilot may be an independent contractor with no such authority whatsoever. Or an employee-pilot's authority may simply not extend to waiving his or her employer's rights. Even if an unauthorized pilot does sign the agreement, the customer might still be bound because the FBO believes the pilot has apparent authority.

Another problematic scenario can arise if the customer operates, but does not own, the aircraft. If the customer is the lessee of the aircraft and is obligated under the lease agreement to reimburse the lessor for damage to or diminution in value of the aircraft, the lessee may waive its right to recover such losses from the FBO while still remaining obligated to reimburse the owner/lessor for the entire loss.

The use of these agreements by an FBO located at a federally-funded airport may constitute a violation of the airport owner's "grant assurances" to the federal government. An airport receiving federal funds must assure the FAA that "the airport will be available for public use on reasonable conditions and without unjust discrimination," including all the licensees of the airport, such as an FBO.

If an FBO is not requesting that all of its customers sign the form (for example, only requiring it of operators of turbine aircraft), it is most likely discriminating. In what is probably

the more common situation, if an FBO charges higher fees to one customer that refuses to sign the waiver, but does not charge the higher fees to another customer that refuses to sign, the FBO would arguably be engaging in prohibited discrimination.

#### **4. Recommendations.**

So what can an FBO customer which objects to these hold harmless agreements do? One obvious response is for the flight crew to refuse to sign them altogether. At least one major aviation insurance broker recommends that course of action to its clients. Another response is for the pilot (if he or she has the authority) to cross out and initial any provisions considered to be unacceptable before signing the agreement. The former approach is probably preferable, as it should avoid any ambiguity in the customer's intent.

Obviously, it is essential that owners and operators communicate with their flight crews regarding how these issues are to be addressed. It would be very helpful for the flight crews to have a clear direction in advance of the flight, so as to avoid any problems on the ramp with a plane full of passengers.

Because the provisions of these FBO "hold harmless" agreements vary, an aircraft owner or operator asked to sign one should review the agreement's specific terms with its attorney and aviation insurance professional.

#### **E. INDEMNIFICATION AGREEMENTS**

Other agreements, such as aircraft loan agreements, lease agreements and management agreements, often contain provisions called indemnification agreements. A broad indemnification agreement will encompass third party claims and may include damage to the aircraft. In such agreements the indemnifying party will usually agree to assume the liability of the indemnified party for certain acts, which can range from negligent or intentional acts of the indemnifying party to negligent or intentional acts of the indemnified party. A typical indemnification provision in an aircraft lease might provide:

**"Lessee shall indemnify and save harmless Lessor, its successors, and assigns, from and against any and all loss (including Lessee's own loss of use), claims (including, without limitation, claims involving strict or absolute liability in tort, damage, injury, death, liability and third party claims), demands, costs and expenses of every nature, including reasonable attorneys' fees, arising directly or indirectly out of or caused by an intentional misrepresentation or fraudulent statement made by Lessee with respect to this Lease or by any damage or loss solely caused by Lessee's negligence or willful misconduct. Lessee's obligation herein shall also include the obligation to defend, indemnify and save harmless Lessor, its successors and assigns, from all claims arising from the negligent actions or omissions of or the improper performance of the duties of a flight crew**

**member's breach of the FARs, unless a claim is caused by Lessor's negligent or improper performance of its obligations under this Lease."**

Indemnification agreements may also include provisions in which the indemnifying party agrees to hold harmless the indemnified party for damage to the aircraft. The indemnifying party not only agrees to hold the other harmless from the specified claims, but affirmatively agrees as well to reimburse certain costs such as attorneys' fees. The expanded liability of the indemnifying party is a concern to the insurer, who may disclaim any responsibility under this clause unless it has been expressly approved in advance.

Accordingly, before an owner/operator enters into any contract with indemnification language, an insurance professional should be consulted to review that contract carefully, and either obtain the insurer's recognition of the agreement itself or make an appropriate endorsement to the policy to agree to cover the increased exposure.

#### **F. ALTERNATIVE OWNERSHIP/OPERATING ARRANGEMENTS**

Alternative ownership/operating arrangements such as time sharing, interchange, joint ownership, dry leases, management companies and fractional ownerships all have various insurance requirements that should be considered to ensure adequate coverage. As noted above, even having an independent contractor fly the aircraft can result in a partially uninsured situation.

It is important that alternative arrangements be in writing and copies of the agreement be submitted to all relevant insurance carriers for recognition under their policies. Specific insurance arrangements should be spelled out both in the agreements and the insurance policies.

The 1996 crash of a G-IV on take off from Palwaukee Airport illustrates this point. The aircraft was being flown under an interchange agreement with another corporate aircraft owner under which the two companies had arranged to trade time on each other's aircraft, with a crew composed of a pilot from each company. Apparently, the agreement did not designate who the pilot in command was to be. On the flight in question, which was for the benefit of the other aircraft owner, the left-seat pilot in command was employed by the owner of the other aircraft and the co-pilot was employed by the G-IV's owner. The accident resulted in the deaths of the two-pilot crew, the chairman/CEO of the other aircraft owner, and a contract flight attendant.

The G-IV and the other aircraft were insured by different insurers. Neither insurance policy specifically recognized this use of the aircraft insured thereunder nor recognized the agreement between the two companies. Both insurance companies denied that their insureds were liable for the accident. In addition, the insurer of the G-IV contended that since the pilot in command was employed by the other aircraft owner, the applicable liability coverage should be provided by the insurance policy for the other aircraft. By contrast, the insurer for the other aircraft maintained that the insurance policy on the G-IV should provide the liability coverage. A court has since ruled that the G-IV's insurer is the responsible insurer.

A trial for the death of the co-pilot employed by the G-IV's owner found the pilot in command employed by the other aircraft's owner to be 90% at fault for the accident and the co-pilot to be 10% at fault, resulting in a judgment of approximately \$19,000,000 against the other aircraft owner. A trial for the death of the pilot in command resulted in a finding of 5% fault by that pilot, 5% fault by the co-pilot and 90% fault by the airport owner/operator, resulting in a verdict of over \$10,000,000. The claims for the deaths of the passenger and flight attendant were settled out of court.

To avoid potential insurance problems, there are particular questions that should be addressed:

Use: Does the "Purpose of Use" or "Approved Use" clause in the policy allow for all uses to which the aircraft may be put? Are charges being made in connection with the use of the aircraft, whether under FAR 91.501 or Part 135? Has the insurance carrier been notified of exactly how the airplane is being used?

Non-Operating Owner: If the aircraft owner is covered on the operator's policy, are all of its interests (both with respect to liability and physical damage) sufficiently protected by the operator's policy? Is the owner an Additional Named Insured or Additional Insured with respect to liability coverage on the operator's policy? Does the owner have an Invalidation Clause with respect to the liability coverage? Is the owner a loss payee with respect to the physical damage coverage? Does the owner have a Breach of Warranty endorsement with respect to physical damage coverage?

Dilution of Limits: Is the policy limit for the aircraft owner's liability coverage high enough if other parties are insured under the same liability coverage? Are there two, four, six or eight other owners who will all have to share the liability limit afforded by the policy? Is there a management company or other commercial operator that will share the liability coverage? Does the aircraft owner need a separate excess liability policy for the aircraft?

Non-Owned Aircraft: Does the aircraft owner who is covered on someone else's policy have any liability coverage for its own use of non-owned aircraft? Does the aircraft owner have occasion to use non-owned aircraft? Does the operator's policy provide the owner with non-owned aircraft liability coverage (most won't for the use of aircraft outside of the insured fleet)? Does the aircraft owner need a separate non-owned aircraft liability policy?

Does a company that uses an aircraft under a time-sharing agreement (time-sharee) and that does not own its own aircraft have occasion to use other non-owned aircraft? Does the time-sharee need a separate non-owned aircraft liability policy?

Indemnification: Are indemnification provisions contained within the ownership or operating agreements covered under the policy? Is there coverage afforded under the policy for all liabilities assumed under an indemnification agreement?



Cancellation: Will the aircraft owner who is covered on the operator's policy receive adequate notice if insurance coverage is deleted, cancelled or materially altered? Does the insurance policy specifically provide for notice to the owner if the coverage is cancelled or materially altered?

Independent Contractor: Does the independent contractor who is flying the aircraft have its own liability coverage? Is liability coverage for the independent contractor excluded under the aircraft owner's policy (it usually is)? If so, does the independent contractor have its own liability coverage when it is flying the owner's aircraft?

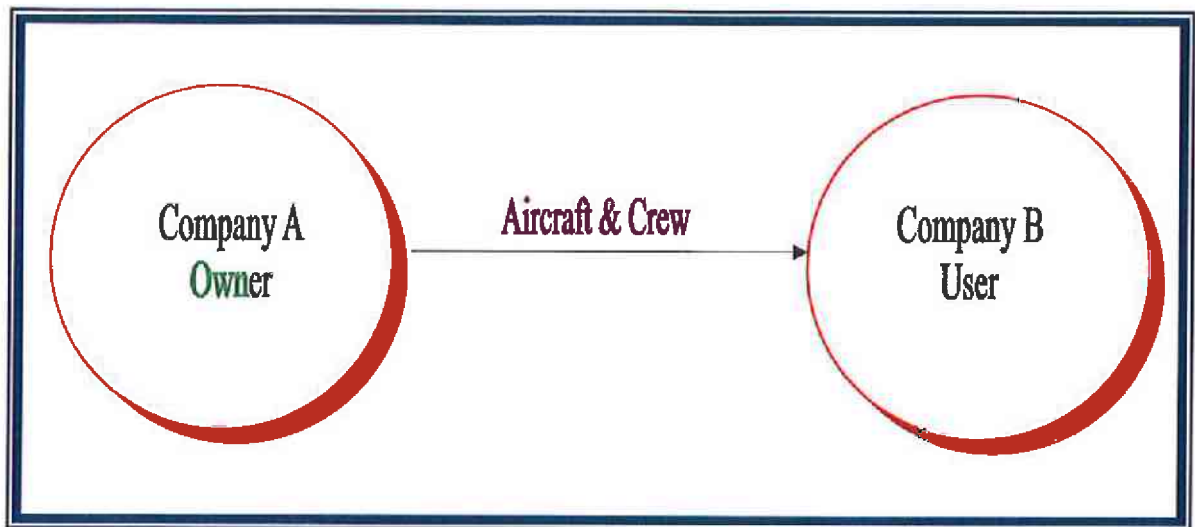
Attached to this paper are brief examples of some of the insurance considerations that can apply to various alternative ownership/operating arrangements. Although these examples do not encompass all of the varieties of alternative arrangements, they address common considerations for some typical situations, each of which is different from the other and requires a somewhat different approach. Other specific variations will require their own individual analysis.

### CONCLUSION

To make sure that the corporation aircraft owner's aviation insurance is adequate for, and appropriate to its particular situation, it is important to keep in mind the following:

- Choose an experienced aviation insurance broker who has specialized knowledge of both aviation insurance coverages and alternative ownership/operating arrangements.
- Put all alternative ownership/operating arrangements in writing.
- Watch closely any indemnification language in written agreements because they may include broader obligations than the insurer is willing to cover (consider recommending that a copy of the proposed agreement be submitted for the insurance broker's review and comments before it is signed).
- Provide the insurance broker with complete information regarding the corporation's operation, including a complete and accurate application and pilot history forms and a copy of any written alternative ownership/operating agreement.
- Make sure that all of the corporation's operations, whether alternative or not, are recognized under and covered by the insurance policy.
- If the corporation is covered under someone else's insurance policy (e.g., a management company's fleet policy), get a Certificate of Insurance and/or a copy of the full policy from the insurer to make sure that the corporation's interests are adequately covered.

## TIME-SHARING AGREEMENT



### Definition

*An arrangement whereby a person leases his airplane with flight crew to another person, and no charge is made for the flights conducted under that arrangement other than those specified in paragraph (d) of Section 91.501. FAR Part 91.501(c)(1).*

### Insurance Considerations

#### Company A (Owner)

Will carry the liability and physical damage (hull) coverage on the aircraft as the Named Insured

Will need to have a "Purpose of Use" or "Approved Use"

#### Company B (User)

Will want to be named as an Additional Insured with respect to liability coverage on Company A's insurance policy or have a separate non-owned aircraft policy to cover its use of the time-shared aircraft

Will want an invalidation clause with respect to liability coverage that allows for time-sharing use of the aircraft on Company A's insurance policy

Will want a waiver of subrogation with respect to physical damage coverage on Company A's insurance policy

**Company A (Owner)**

Will want adequate liability coverage limits to ensure sufficient coverage if the liability coverage has to be shared with Company B

Will want to determine whether, and the extent to which, any indemnification language in the time-sharing agreement will be covered by Company A's policy

**Company B (User)**

Will want adequate liability coverage limits on Company A's policy to ensure sufficient if the liability coverage has to be shared with Company A

May want to consider obtaining an excess liability policy for the use of the time-shared aircraft

May want to consider obtaining a non-owned aircraft liability policy for use of other non-owned aircraft

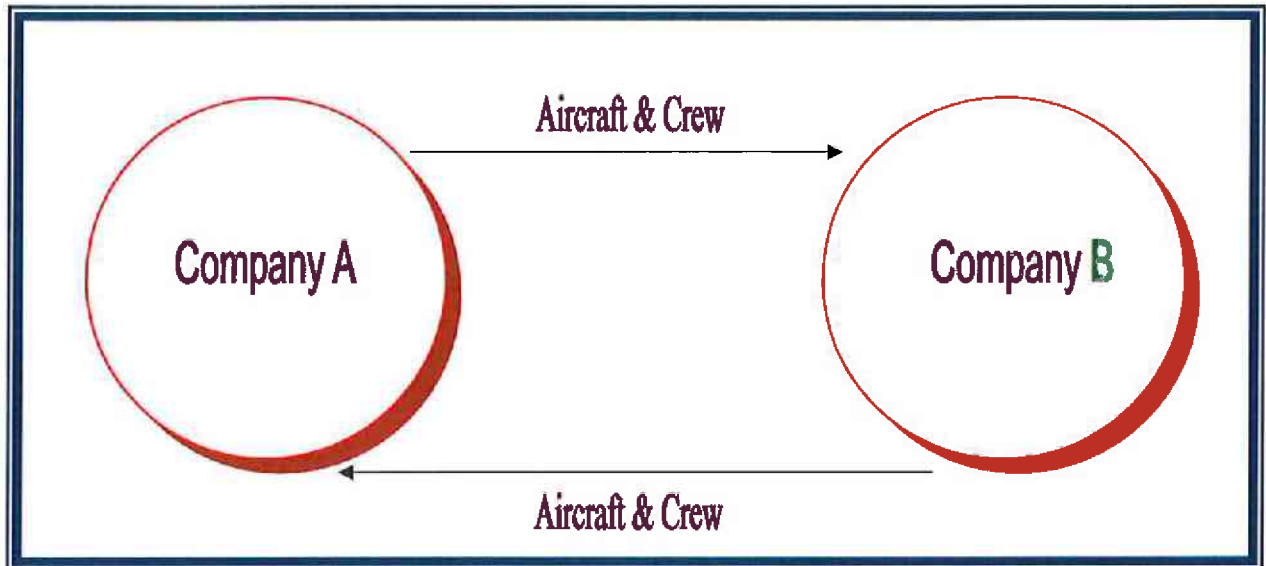
Will want to determine whether, and the extent to which, any indemnification language in the time-sharing agreement will be covered by Company A's policy

If Company B also owns its own aircraft, will want to advise its insurer of the time-sharing agreement and make sure that its own insurer recognizes the agreement; Company B's insurer may agree to provide Company B's liability limit as excess over the primary limits provided by Company A's policy

Will want to receive advance notice of deletion, cancellation or material changes in coverage for Company A's aircraft on Company A's insurance policy

Will want a Certificate of Insurance from Company A's insurer verifying coverages provided under Company A's policy

## INTERCHANGE AGREEMENT



### Definition

*An arrangement whereby a person leases his airplane to another person in exchange for equal time, when needed, on the other person's airplane, and no charge, assessment, or fee is made, except that a charge may be made not to exceed the difference between the cost of owning, operating, and maintaining the two airplanes. FAR Part 91.501(c)(2).*

### Insurance Considerations

#### Company A (Owner/User)

Will carry the liability and physical damage (hull) coverage on Company A's aircraft on its own insurance policy

Will need to have a "Purpose of Use" or "Approved Use" on its policy that allows for interchange use of the aircraft

Will want to be named as an Additional Insured with respect to liability coverage on Company B's insurance policy while

#### Company B (Owner/User)

Will carry the liability and physical damage (hull) coverage on Company B's aircraft on its own insurance policy

Will need to have a "Purpose of Use" or "Approved Use" on its policy that allows for interchange use of the aircraft

Will want to be named as an Additional Insured with respect to liability coverage on Company A's insurance policy while it is

**Company A (Owner/User)**

it is using Company B's aircraft or have the non-owned aircraft liability coverage on its own policy apply while using Company B's aircraft

If named as an Additional Insured on Company B's insurance policy, will want clause in Company B's policy that the insurance provided by Company B's policy is primary while Company A is using Company B's aircraft

Will want adequate liability coverage limits to ensure sufficient coverage if the liability coverage has to be shared with Company B

Will want a waiver of subrogation with respect to physical damage coverage on Company B's policy while it is using Company B's aircraft

Will want to determine whether, and the extent to which, any indemnification language in the interchange agreement will be covered by either policy

Will want to receive advance notice of deletion, cancellation or material changes in coverage for Company B's aircraft on Company B's insurance policy

Will want a Certificate of Insurance from Company B's insurer verifying coverages provided under Company B's policy

**Company B (Owner/User)**

using Company A's aircraft or have the non-owned aircraft liability coverage on its own policy apply while using Company A's aircraft

If named as an Additional Insured on Company A's policy, will want a clause in Company A's policy stating that the insurance provided by Company A's policy is primary while Company B is using Company A's aircraft

Will want adequate liability coverage limits to ensure sufficient coverage if the liability shared with Company A

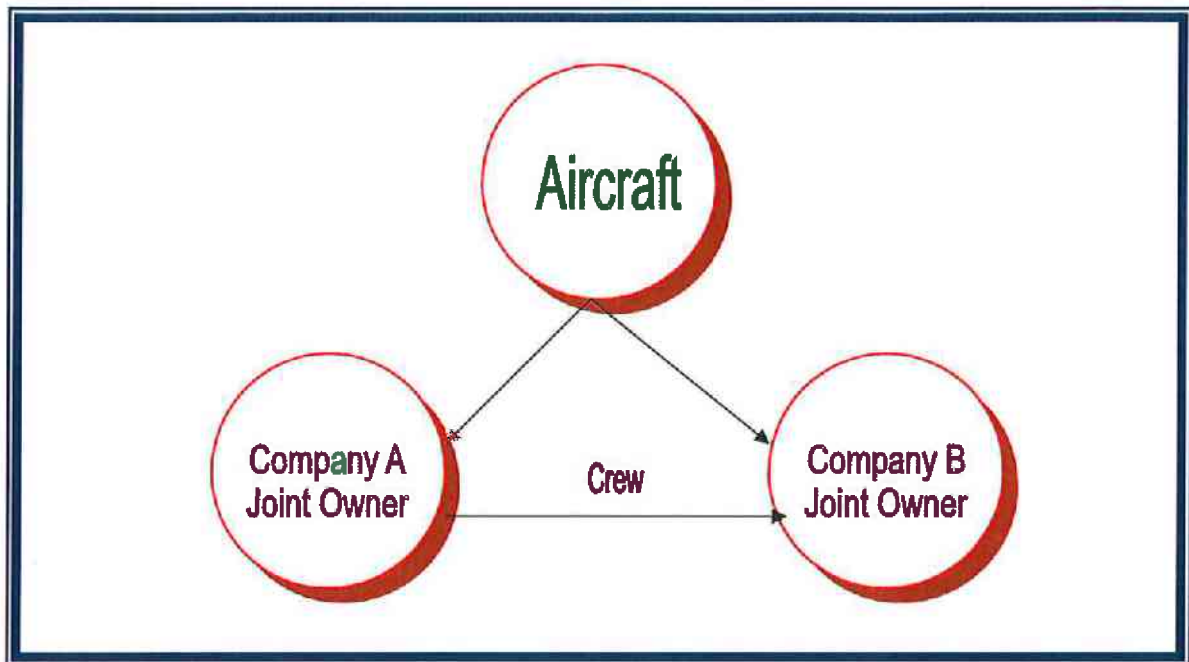
Will want a waiver of subrogation with respect to physical damage coverage on Company A's policy while it is using Company A's aircraft

Will want to determine whether, and the extent to which, any indemnification language in the interchange agreement will be covered by either policy

Will want to receive advance notice of deletion, cancellation or material changes in coverage for Company A's aircraft on Company A's insurance policy

Will want a Certificate of Insurance from Company A's insurer verifying coverages provided under Company A's policy

## JOINT OWNERSHIP AGREEMENT



### Definition

*An arrangement whereby one of the registered joint owners of an airplane employs and furnishes the flight crew for that airplane and each of the registered joint owners pays a share of the charge specified in the agreement. FAR Part 91.501(c)(3).*

### Insurance Considerations

**Company A**  
**(Owner furnishing flight crew)**

**AND**

**Company B**  
**(Owner using Company A's flight crew)**

Liability and physical damage (hull) coverage on the airplane will be on one policy, with all joint owners named as Named Insureds

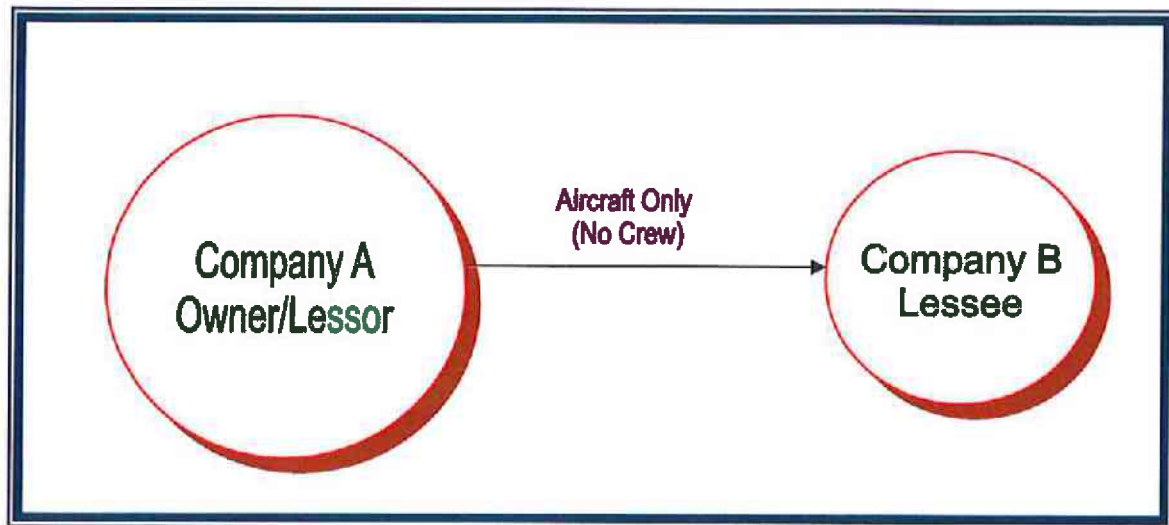
Will need to have a "Purpose of Use" or "Approved Use" clause in the policy that allows for paying a charge under the joint ownership agreement

Will want adequate liability coverage limits to ensure sufficient coverage because the liability coverage will have to be shared with the other joint owner(s)

May have a problem with the Workers' Compensation exclusion excluding liability coverage for all joint owners if an employee of any one of the joint owners is injured on the aircraft

All joint owners will want a Certificate of Insurance verifying coverages provided under the policy, or preferably, a copy of the full policy

## **EXCLUSIVE DRY LEASE AGREEMENT**



### **Insurance Considerations**

#### **Company A (Owner/Lessor)**

Will want to be named on Company B's Insurance policy as an Additional Named Insured with respect to liability coverage

Will want an invalidation clause with respect to liability coverage on Company B's insurance policy

Will want a waiver of subrogation with respect to physical damage coverage on Company B's insurance policy

Will want to be a loss payee with a Breach of Warranty endorsement with respect to physical damage (hull) coverage on Company B's policy

#### **Company B (Lessee)**

Will carry the liability and physical damage (hull) coverage on the airplane as the Named Insured



**Company A (Owner/Lessor)**

Will want Company B to carry adequate liability coverage limits to ensure sufficient coverage if the liability coverage has to be shared with Company B

May want to consider obtaining a non-owned aircraft liability policy for use of non-owned aircraft

Will want to determine whether, and the extent to which, any indemnification language in the dry lease agreement will be covered by Company B's policy

Will want to receive advance notice of deletion, cancellation or material changes in coverage for Company B's aircraft on Company B's insurance policy

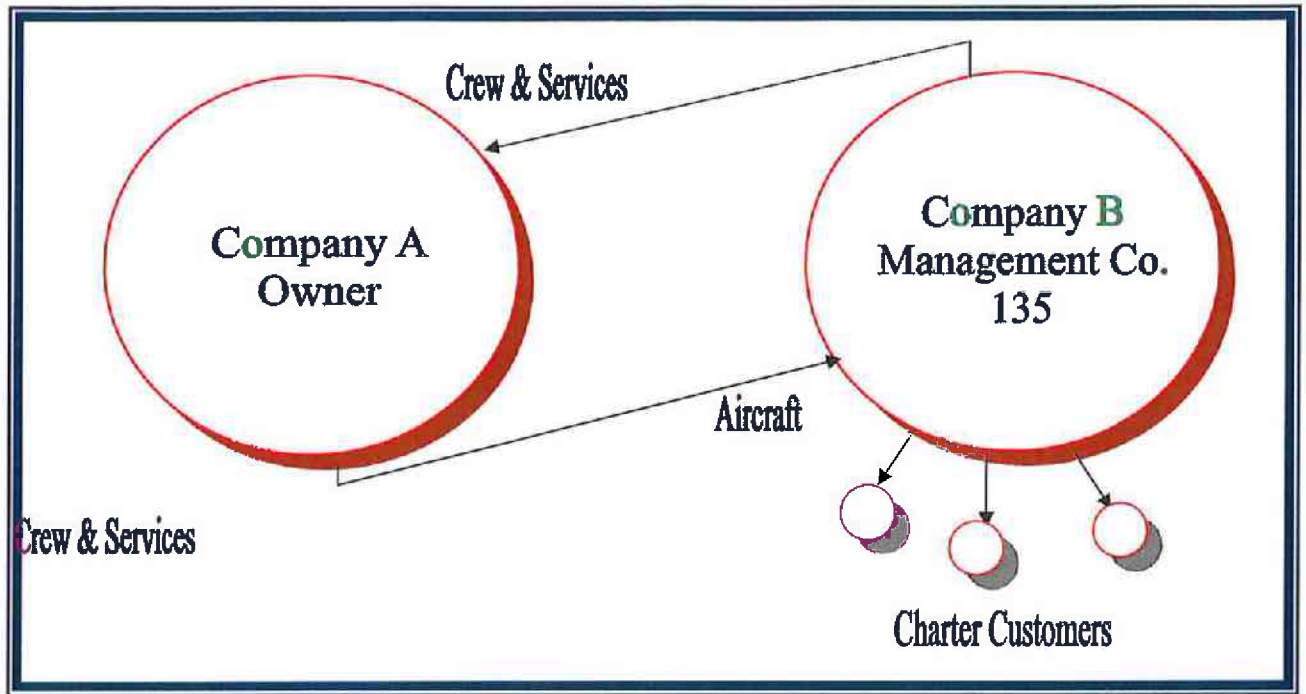
Will want a Certificate of Insurance from Company B's insurer verifying coverages provided under Company B's policy

**Company B (Lessee)**

Will want adequate liability coverage limits to ensure sufficient coverage if the liability coverage has to be shared with Company A

Will want to determine whether, and the extent to which, any indemnification language in the dry lease agreement will be covered by Company B's policy

## MANAGEMENT COMPANY WITH CHARTER TO THIRD PARTIES



### Insurance Considerations

#### Company A (Owner)

Will want to be named on Company B's policy as a Named Insured with respect to liability coverage for all uses of the aircraft by Company B (including use of the aircraft by Company A and Part 135 use of the aircraft by Company B, if any)

Will want an invalidation of interest clause with respect to liability coverage on Company B's policy

#### Company B (Management Company)

Probably will carry the liability and physical damage (hull) coverage on Company A's airplane on its own fleet insurance policy

Will need to have a "Purpose of Use" or "Approved Use" on the policy that allows for all uses (Part 91 and 135, if any) of the aircraft

May be able to obtain an invalidation of interest clause with respect to liability coverage on its fleet insurance policy

**Company A (Owner)**

Will want to be a loss payee with a Breach of Warranty endorsement with respect to physical damage (hull) coverage on Company B's policy

Will want adequate liability coverage limits on Company B's policy to ensure sufficient coverage if the liability coverage has to be shared with Company B

May want to consider obtaining an excess liability policy for the use of the aircraft

May want to consider obtaining a non-owned aircraft liability policy for use of non-owned aircraft that are outside of the fleet of aircraft insured under Company B's policy, if such coverage is not provided by Company B's policy

Will want to determine whether, and the extent to which, any indemnification language in the management agreement will be covered by Company B's policy

Will want to receive advance notice of deletion, cancellation or material changes in coverage for Company B's aircraft on Company B's insurance policy

Will want a Certificate of Insurance from Company B's insurer verifying coverages provided under Company B's policy or a copy of the full policy

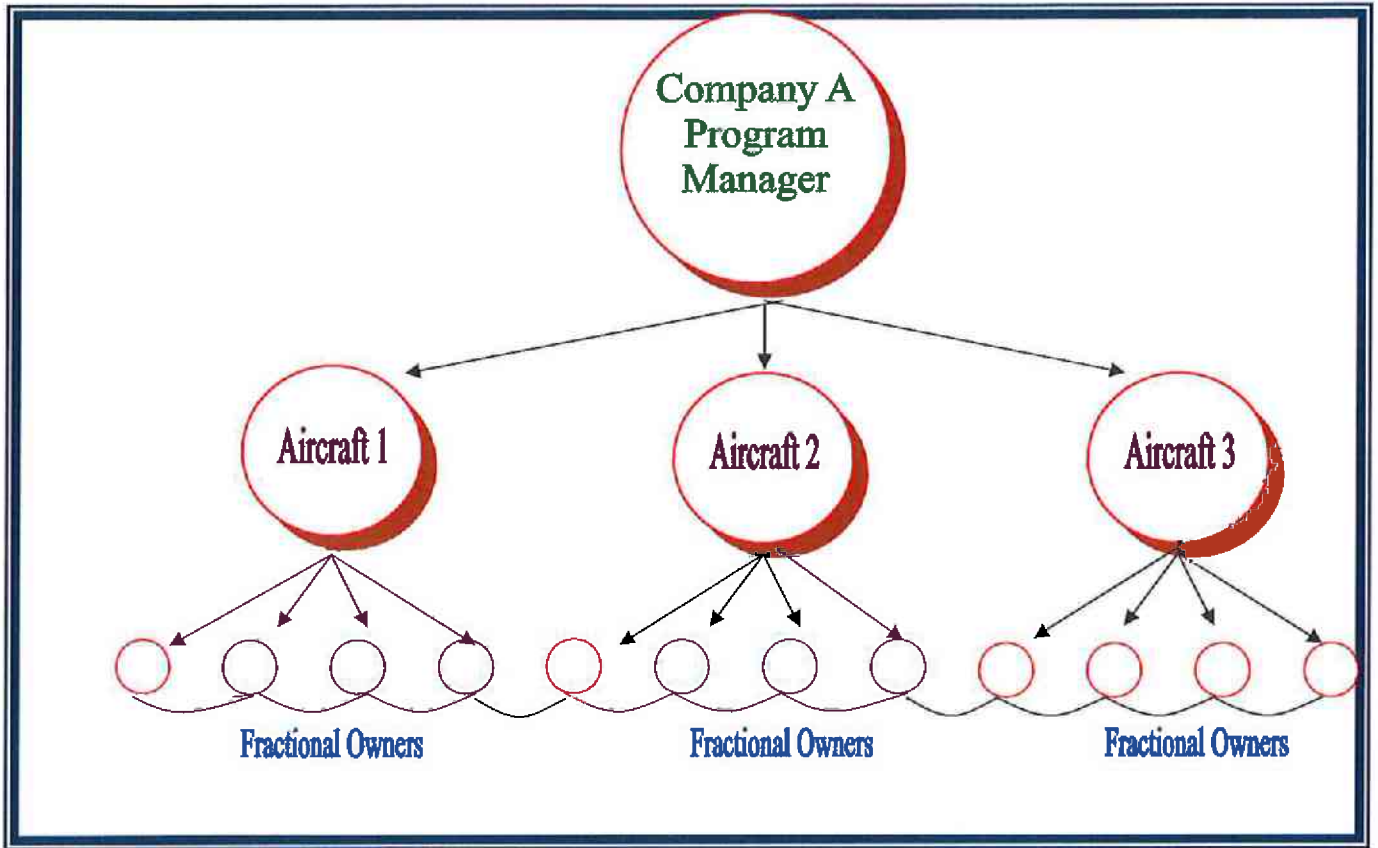
**Company B (Management Company)**

Will want adequate liability coverage limits on its policy to ensure sufficient coverage if the liability coverage has to be shared with Company A

Will want to carry non-owned aircraft liability coverage providing coverage for Company A's use of non-owned aircraft that are outside of the fleet of aircraft insured under Company B's policy, if such coverage is not provided by Company B's policy

Will want to determine whether, and the extent to which, any indemnification language in the management agreement will be covered by Company B's policy

## FRACTIONAL OWNERSHIP PROGRAM



## Insurance Considerations

**Company A (Program Manager)**

Probably will carry the liability and physical damage (hull) coverage on the fractionally-owned aircraft on its own fleet insurance policy

Will need to make sure there is coverage if it  
charters aircraft from outside the program for use  
by fractional owners

### Fractional Owners

Will want to be named on Company A's insurance policy as Named Insureds with respect to liability coverage for all uses (including use of the owned aircraft, reciprocal dry lease use of other fractionally-owned aircraft in the fleet, Part 135 use of the aircraft by Company A, if any, and use of chartered aircraft from outside the program)

**Company A (Program Manager)**

Will need to have a “Purpose of Use” or “Approved Use” on the policy that allows for all uses (Part 91 and 135, if any) of the aircraft

Will need to have a specific provision in the policy permitting reciprocal dry lease use by fractional owners of other aircraft insured on the policy

May be able to obtain an invalidation of interest clause with respect to liability coverage on its fleet insurance policy

Will want adequate liability coverage limits on its policy to ensure sufficient coverage if the liability coverage has to be shared with the fractional owners

**Fractional Owners**

Will want an invalidation of interest clause with respect to liability coverage on Company A’s policy

Will want a waiver of subrogation with respect to physical damage coverage on Company A’s insurance policy

Will want to be a loss payee with a Breach of Warranty endorsement with respect to physical damage (hull) coverage on Company A’s policy

Will want adequate liability coverage limits on Company A’s policy to ensure sufficient coverage if the liability coverage has to be shared with Company A

May want to consider obtaining an excess liability policy for the use of its fractionally-owned airplane and the other fractionally-owned aircraft in the fleet

May want to consider obtaining a non-owned aircraft liability policy for use of non-owned aircraft if Company A’s policy does not include coverage for use of non-owned aircraft outside of the program.

**Company A (Program Manager)**

Will want to determine whether, and the extent to which, any indemnification language in the fractional ownership agreement will be covered by its policy

**Fractional Owners**

Will want to determine whether, and the extent to which, any indemnification language in the fractional ownership will be covered by Company A's policy

Will want to receive advance notice of deletion, cancellation or material changes in coverage for the fractionally-owned aircraft on Company A's insurance policy

Will want a Certificate of Insurance from Company A's insurer verifying coverages provided under Company A's policy or a copy of the full policy