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Aviation Law: Two Commuter Airline Cases: Comair 5191 and Colgan 3407

By Justin T. Green
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On the night of Feb. 12, 2009, a Colgan Air Inc. Bombardier Dash 8-Q400, doing business as Continental Connection Flight 3407 ("Colgan Flight 3407"), crashed during an instrument approach to runway 23 at the Buffalo-Niagara International Airport, Buffalo. Everyone on board the airplane and one person on the ground were killed.¹

The Buffalo tragedy comes after a remarkable period of aviation safety in the United States. Statistically, the last eight years have seen among the fewest fatalities over such a period in U.S. aviation history. Since the American Airlines Flight 587 disaster shortly after takeoff from Kennedy Airport in 2001, there have been only two fatal U.S. commercial airline aviation accidents, both involving commuter airlines: the Comair Flight 5191 crash in Lexington, Ky., in August 2006 and now the Colgan Air crash.

Earlier this year, the pilots of USAir Flight 1549 averted what could have been a terrible tragedy when the airplane flew into a flock of geese shortly after takeoff from LaGuardia Airport and lost power in both engines. The pilots managed to ditch the airplane in the Hudson River, not only saving the lives of the passengers and crew but avoiding a crash that could have harmed many others on the ground.

With the litigation from the Flight 5191 accident at an end, and litigation just commencing from the Flight 3407 accident, it seems appropriate to examine the legal issues in the two cases. While the accidents are factually quite different, various issues that arose in the Comair litigation are likely to re-surface in the Colgan Flight 3407 lawsuits.²

Comair Flight 5191

Comair Flight 5191 crashed while attempting an early morning departure from Bluegrass Airport in Lexington. The airplane had been assigned Runway 22, but attempted a take-off from Runway 26, which was too short for the airplane to get safely airborne before running out of pavement. The pilots had many cues that they were on the wrong runway, including the fact that the lights on Runway 26 were not lit. The airplane crashed just beyond the end of the runway, killing all 47 passengers and two of the three crew members.

The NTSB found pilot error was the probable cause of the accident:

The National Transportation Safety Board determines that the probable cause of this accident was the flight crew members' failure to use available cues and aids to identify the airplane's location on the airport surface during taxi and their failure to cross-check and verify that the airplane was on the correct runway before takeoff. Contributing to the accident were the flight crew's nonpertinent conversations during taxi, which resulted in a loss of positional awareness, and the Federal Aviation Administration's failure to require that all runway crossings be authorized only by specific air traffic control clearances.³

Plaintiffs sued Comair, Delta Airlines, the United States (for alleged FAA errors) and entities associated with the Bluegrass Airport.⁴ The litigation produced a number of interesting decisions.

Relatively early in the case, the plaintiffs moved for production of an unedited recording of the airplane's cockpit voice recorder, arguing that the written transcript that had initially been provided was incomplete, contained editorial inserts and did not reflect the "changes in voice tone, tempo, volume and inflection" which the plaintiffs argued were relevant to the alleged pilot errors, and that the transcripts also did not contain a record of other sounds during the accident sequence that might be relevant to the plaintiffs' pain and suffering claims. The court ordered the unedited CVR recovering to be produced to the plaintiffs finding, among other things, that "[t]he recording of the cockpit conversations is one of the few neutral pieces of evidence available to plaintiffs"⁵

Perhaps the most significant decision in the litigation was the court's ruling on punitive damages. Comair had moved to dismiss the plaintiffs' claims for punitive damages, arguing that it was not liable for punitive damages because it did not ratify or authorize conduct of the pilots and that the wrongful actions of the pilots in not conducting a proper pre-taxi briefing, having non-pertinent conversations during taxi (not maintaining a "sterile" cockpit) and their other mistakes were contrary to Comair's training and procedures. Plaintiffs responded that there was overwhelming evidence that Comair was grossly negligent in its oversight of the airline's safety program and that the crew's recklessness was foreseeable.

The court found that plaintiffs "demonstrated a genuine issue of material fact . . . as to the gross negligence of Comair."⁶ The court noted that plaintiffs had demonstrated notice to Comair of the danger of runway incursions, including a prior incident where Comair pilots took off from the wrong runway, and had proffered expert evidence that Comair practices reflected a reckless disregard for safety.⁷

The court also found that there was sufficient evidence of the crew's gross negligence to support a finding of punitive damages, including the crew's failure to perform a proper taxi briefing, its violation of a federal regulation and the Comair Operations Manual by engaging in non-essential conversation while taxiing, missing the cues that they were taxiing to the wrong runway, failing to follow proper procedures in determining that the airplane was on the correct runway prior to commencing the take-off, and in failing to abort the take-off even after the copilot recognized that they were on an unlit runway.⁸

All of the plaintiffs' cases were eventually settled, with the last settlement occurring a day before jury selection.

Colgan Flight 3407

Colgan Flight 3407 crashed while on an Instrument Landing System approach to Buffalo. The pilots flew the approach using the airplane's autopilot and autothrottle systems and were in instrument meteorological conditions on the approach.

The NTSB will hold its public hearings on May 12-14, remarkably soon after an accident of this magnitude. While we must await the hearing to learn the NTSB's investigators' findings, the NTSB has already provided significant insights into the investigation.

Late last month, the NTSB reported that it had examined the operation of the aircraft systems; reviewed the maintenance history of the aircraft; considered air traffic control conduct; evaluated the weather conditions at the time of the crash; reviewed the Flight Data Recorder (FDR) data; examined operational and human factors aspects relating to the crash; and evaluated toxicology specimens. The NTSB stated that it had not found any "indication of pre-impact system failures or anomalies" or any significant issues regarding aircraft maintenance. While the NTSB found that it was likely that the airplane had some ice accumulation on the approach, the Board determined "that the airplane continued to respond as expected to flight control inputs throughout the accident flight."⁹

The NTSB reported that data from the FDR indicated that Flight 3407 slowed on its approach to an airspeed that put the airplane at risk of stalling. The FDR showed that the system designed to warn the flight crew of an impending stall, the "stick shaker" system, activated during the approach. The "stick shaker" system works by "shaking" the control yoke back and forth in the pilot's and co-pilot's hands thereby warning them that the plane is approaching a dangerously slow speed. The airplane's "stick pusher" then activates, which pushes the yoke forward to fly the airplane out of the impending stall. The NTSB reports the FDR data indicates that instead of allowing the airplane's nose to The NTSB reported that data from the FDR indicated that Flight 3407 slowed on its approach to an airspeed that put the airplane at risk of stalling. The FDR showed that the system designed to warn the flight crew of an impending stall, the "stick shaker" system, activated during the approach. The "stick shaker" system works by "shaking" the control yoke back and forth in the pilot's and co-pilot's hands thereby warning them that the plane is approaching a dangerously slow speed. The airplane's "stick pusher" then activates, which pushes the yoke forward to fly the airplane out of the impending stall. The NTSB reports the FDR data indicates that instead of allowing the airplane's nose to drop to increase its speed, the pilot pulled back on the control yoke with 25 pounds of force overpowering the "stick pusher" and causing the plane's nose to pitch upward 31 degrees, which caused the airplane to stall and depart from controlled flight.

Lawsuits

To date, three lawsuits have been filed in federal district court in Buffalo. The three lawsuits name Colgan, Pinnacle Airlines Corp. (which owns Colgan), and Continental Airlines. The lawsuits also state products liability claims against Bombardier Inc., the airplane's manufacturer. By the time this article is published, we anticipate that a half dozen or more law suits will have been filed.

One law firm, representing an aviation safety advocate, filed a lawsuit against the Department of Transportation and FAA. The lawsuit seeks to compel the FAA to adopt regulatory changes recommended by the NTSB, including some regarding flight in icing conditions. The action was filed on Feb. 24, prior to the NTSB update we discuss above, and as of the time that this article was written, the government had not responded.

There were victims from different states and countries, and lawsuits will be filed in several jurisdictions. The Judicial Panel on Multi-District Litigation will ultimately transfer all of the actions to one federal court where they will be consolidated for pretrial purposes. Actions filed in state court that cannot be removed will not be subject to consolidation. The courts overseeing these cases, however, will likely coordinate their discovery schedules with the district court that the MDL Panel selects.

Attorney Solicitation

The laws governing attorney conduct in marketing to victims of aviation accidents has been the topic of this column numerous times. Questions concerning improper attorney solicitation of victims of aviation accidents have been raised following the Comair Flight 5191 and Colgan Flight 3407 accidents.

Federal law prohibits attorneys from soliciting victims' families for the first 45 days after an accident. There were reports of law firms mailing marketing materials to Flight 3407 families during the 45-day prohibition period, presumably not aware of the federal law.

New York has its own laws prohibiting attorney solicitation for 30 days after an accident. While the New York law provides a shorter prohibition period, only 30 days, it is broader than the federal law since it clearly prohibits advertisements, as well as directed mailings.

Attorney solicitation became an issue in the Comair litigation when one attorney put up a Web site, www.Comair5191families.com, which offered counseling to the victims' family members, but was also an attorney advertising Web site. The Web site contained a "legal assistance" link, which brought viewers directly to the sponsoring law firm's main Web site. The firm partner responsible for the advertisement received a public reprimand and had his license suspended for 30 days with the suspension probated on conditions, among Attorney solicitation became an issue in the Comair litigation when one attorney put up a Web site, www.Comair5191families.com, which offered counseling to the victims' family members, but was also an attorney advertising Web site. The Web site contained a "legal assistance" link, which brought viewers directly to the sponsoring law firm's main Web site. The firm partner responsible for the advertisement received a public reprimand and had his license suspended for 30 days with the suspension probated on conditions, among others, that he apologize for his conduct and comply with Kentucky's rules of lawyer advertising.¹⁰

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Endnotes:

1. NTSB Preliminary Report, http://www.nts.gov/ntsb/brief.asp?ev_id=20090213X13613&key=1.

2. In light of the ongoing litigation arising from Flight 3407, I will not address the merits of any legal claims or anticipated defenses arising from the accident.

3. NTSB Probable Cause Report, http://www.nts.gov/ntsb/brief.asp?ev_id=20068028X01244&key+1.

4. The claims against Delta and the airport entities were eventually dismissed.

5. *In re Air Crash at Lexington, Ky*, Aug. 27, 2006, 2007 WL 4321865 (E.D. Ky. Dec. 6, 2007) at *2.

6. *In re Air Crash at Lexington, Kentucky*, Aug. 27, 2006, 2008 WL 2369785 (E.D. Ky. June 6, 2008) at *8.

7. The court also issued decisions finding that the claims of passengers flying on international tickets were completely preempted by the Montreal Convention. See *In Re Air Crash at Lexington, KY*, 501 F.Supp.2d 902 (E.D. KY 2007) (denying plaintiff's motion to remand the case to state court. The court later dismissed punitive damages claims of plaintiffs whose claims were governed by the Montreal Convention. See *In Re Air Crash at Lexington, KY*, Aug. 27, 2006, 2008 WL 1909007 (E.D. KY April 25, 2008).

8. *Id.*

9. See NTSB Advisory, March 25, 2009, <http://www.nts.gov/Pressrel/2009/090325.html>.

10. See *Anderson v. Kentucky Bar Ass'n*, 262 S.W.3d 636 (Ky. 2008).