

Frontier Reminiscences

By Oliver J. Janney, Esq.

The recent announcement that Republic Airlines is buying Frontier Airlines out of bankruptcy triggers memories of the sale of the first Frontier Airlines ("Frontier1") to PEOPLExpress in 1986. I was general counsel of the company that owned Frontier1 back in 1984.

The causes of the sales are different, although both were the result of severe deterioration in economic conditions. The current Frontier had to resort to Chapter 11 after its credit card processor announced it would retain 100% of Frontier's credit card transactions. The first Frontier did not survive severe changes in its marketplace. The current Frontier was started by former executives of Frontier1, and at its inception 75% of its



employees had been employed by Frontier1. Both Frontiers were based in Denver, and both focused on a core of the Rocky Mountain communities, for which Frontier was a major provider of transportation of people and mail. Both expanded to include cities outside the region, including destinations in Canada and Mexico. Both have been gobbled up by fast-growing regional air carriers. What was the original Frontier Airlines like, and why did it succumb 23 years ago?

The product of a merger in 1950 of three local carriers using surplus aircraft from World War II, Frontier 1 was for many years the dominant mover of people and mail in the Rocky Mountains Region. Like the new Frontier, Frontier1 expanded over the years through acquisitions (notably Central Airlines in 1967) and expansion to Canada and Mexico. It had frequent changes in top management but a dedicated workforce. The old Frontier was special. It hired the first female commercial pilot in the U.S. and employed the only Tuskegee Airman serving as a commercial pilot. In 1967 Time Magazine reported that Frontier had attained the greatest increase among all U.S. scheduled airlines in revenue passenger miles, largely by filling seats with "the wildest array of discount fares in the U.S." Frontier was 30 years ahead of its time in its variety of fares later made feasible and popular by the explosion of computers. In the mid-1980s Frontier1's stewardesses were reminiscent of those of the 1950s and 1960s, and it still served steak in coach. After its acquisition in 1968 by RKO General,

Inc., a leisure activities conglomerate based in New York City, which was a subsidiary of GenCorp Inc. (formerly The General Tire & Rubber Company), Frontier1 led the industry in profits. It modernized its fleet and seemed to share the rosy future of its broadcasting, soft drink bottling and resort management sister companies.

Then in 1982 Frontier1's market crashed. United Airlines began a campaign to dominate the Denver hub. During the years immediately preceding 1982, the CAB had been trimming Frontier1's generous subsidies. Then Congress in the 1983 appropriations bills terminated the authority of the Civil Aeronautics Board to pay subsidies for servicing of small cities after September 30, 1982. The subsidies provided in the Federal Aviation Act of 1958 had for many years supported the carriage of mail to cities too small for such services to be profitable. The subsidies had been a mainstay in Frontier1's profitability.

Frontier1 suffered major operating losses in 1983 and 1984, despite significant concessions on wages and benefits by its unions. Its majority owner, which prized profitable businesses, was unsuccessful in finding a buyer and sought to sell the airline to an ESOP for its employees. When those negotiations fell through, RKO sold its interest in Frontier1 to PEOPLExpress, which put Frontier1 into bankruptcy a year later and was eventually acquired by Continental Airlines. Frontier1 disappeared in 1986, to be reborn in the form of the current Frontier in 1993. ■■

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○ ISSUE 1 | ○ VOLUME 1 | ○ FALL 2009

*Aviation Insurance Newsletter is published by the law firm Robbins Equitas.
Comments and future story ideas can be directed to Stanley Howard: (866) 862-6878.
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Rolling the dice on complicated aviation indemnity cases Lessons learned from Wojciechowicz v. United States

By J. Christopher Robbins

It is mid-afternoon in the high sub-tropical rain forest of Puerto Rico. We are in an area called El Yunque, a mountainous zone 90 minutes from San Juan. These lush hills are populated by sierra palms, wild orchids, banyans, tree frogs, even parrots. It is the only real rain forest in the US National Forest System.

Today is January 5, 2002. It is a beautiful VFR day. The mid-winter trade winds are warm, 82 degrees, and blow lightly from the northeast. The only spotty weather is near the mountaintop itself. As warm moist air rises over the highlands, it cools. Clouds build. The rain can come several times a day.

El Yunque may be fogged in but pilot Alexander Wojciechowicz does not know it. He is 30 miles to the east. He and his wife own a beachfront home on the nearby Island of Culebra. All he can see is blue skies.

The 62-year-old engineer begins his pre-flight inspection of his Cessna 441 Conquest. The self-made engineer has flown over 1,400 hours in the aircraft. Much of it is on trips back and forth to Princeton, New Jersey. There, he founded a successful medical devices company. He also volunteers for charities and is involved with a Princeton University alumni group.

The flight today is to nearby San Juan, however. It is a 13-minute, 41-mile hop.

Christmas break is over. Wojciechowicz's daughter, grandson, and several other family members are meeting connecting flights to go home.

Wojciechowicz always does the flying. He holds a Commercial Pilot Certificate with multi and instrument ratings. The pilot is up-to-date in his training and instrument currency. The route is almost entirely over water. Neither El Yunque or its rain and fog are on Wojciechowicz's mind. They are both south of today's route.

The flight

The Conquest departed safely from Culebra around 2:10 p.m. At 2:18 p.m., the pilot radioed San Juan Approach. Wojciechowicz said he was 10 miles east of Fajardo inbound for landing.

Air traffic controller Marcos Santiago was the responder to the pilot's radio call. He told Wojciechowicz that he saw the Conquest on radar. Santiago gave the Conquest a squawk code and provided sequencing instruction. He told the pilot to expect a right downwind approach to runway 10 south of Plaza Carolina.

ATC's instructions, if followed, would safely put the Conquest on a flight path near San Juan Airport just south of a shopping

mall. The mall is called "Plaza Carolina." It is a local landmark and on the VFR chart. Controllers and pilots use it a reference point.

Upon reaching Plaza Carolina, the Conquest was supposed to extend its flight past the airport. Then the pilot would enter a right base and turn right again for final and a visual approach.

Wojciechowicz did not follow these instructions. Instead, he pointed the Conquest towards the south. He made the turn long before he reached Plaza Carolina. This southerly turn put the Conquest on a heading that would take it over a warning area on the chart. The warning area marked El Yunque and its sister peaks.

Flying towards the south at over 230 miles per hour, things quickly started going wrong. First, as Wojciechowicz neared the high sub-tropical rainforest, the terrain rose fast. The second problem was visibility. One moment he had it. The next moment he was in dense rain forest fog.

ATC radar plots show that Wojciechowicz climbed several times. A Conquest climbs like a rocket. At full bore, the aircraft's two Garrett TPE331-10 turboprop engines can turn 20 pounds of jet fuel into 2,500 feet of altitude

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every 60 seconds. At 230 miles an hour, he also could have simply pulled up and traded some of his impressive ground speed for altitude instantly. Since he did neither, Wojciechowicz didn't know he was in danger.

The rising terrain came up and met the aircraft. Only two minutes after his conversation with Santiago, the Conquest crashed into the upslope of El Yunque. Wojciechowicz and all four family members died instantly.

The crash site was at 3,378 feet above sea level. He would only have needed to climb 83 feet to safely pass over the top of the mountain.

NTSB findings

Following its investigation, the NTSB, with characteristic brevity, summarized the cause of the incident. "The pilot continued visual flight into instrument flight conditions



resulting in an in-flight collision with terrain. Low clouds were a factor," they wrote.

Like many NTSB reports, this one states the obvious. It does not answer the question: why was Wojciechowicz flying near El Yunque?

There are probably only two answers. The first is that Wojciechowicz did not know where he was – a situational awareness explanation. I do not see that, however. This pilot is too experienced. For him, a trip through dense fog should have been a walk through the park.

Instead, I think the pilot misconstrued Santiago's instruction. Santiago told him to "enter a right downwind for runway 10 south of Plaza Carolina." Yet the pilot's flight path – as well as his position at the time of impact – was consistent with this instruction:

"Enter a right downwind for runway 01, 10 south of plaza Carolina."

While we know what Santiago said (it is on tape), we will never know what the pilot thought he said.

What we do know is this: The pilot, not Mr. Santiago, controlled the flight of the Conquest. The pilot was operating under VFR rules. He, not ATC, was required to see and avoid traffic and terrain. Finally, we know that if the pilot had followed Santiago's directive, the Conquest would have been safely north of El Yunque and this calamity would not have occurred.

The indemnity case

US Specialty Insurance Company, a subsidiary of HCC Insurance Holdings, Inc. (NYSE:HCC) (<http://www.hcc.com/>), paid the agreed hull value of \$1.8 million. They also paid various settlements to decedents' estates. These appear to total another \$1 million, but court documents are unclear.

After paying these claims, USSIC made a written demand on the United States, as required under the Federal Tort Claims Act, 28 U.S.C. §2401(a). They argued that Santiago

and the FAA, not the pilot, caused the crash. When the government did not respond, they subsequently filed an indemnity claim in federal court.

USSIC's complaint alleged that Santiago was negligent by failing to provide any warnings to Wojciechowicz. The complaint further stated that the FAA was aware of the terrain near El Yunque and failed to tell the pilot. The complaint made another allegation relating to Santiago's failure to "provide safety alerts" and other unspecified "services." They asked the government to write them a check back for all the claims they paid.

Litigation strategy

Although it satisfied Federal Rule of Civil Procedure 8(a)(2), USSIC's indemnity complaint is no work of art. It contains few details. The narrative is choppy. Instead of sending a confident shot across the government's bow, this document was a rocky start and signaled a lack of confidence. Put another way, it was just the sort of complaint I like to see when I am defending a case.

Hoping to litigate in their backyard, the insurer originally filed in Texas in August of 2004. While an attractive possibility, I would not have done that either.

While true that 28 U.S.C. §1402(b) permits a plaintiff to file a case against the United States in his or her district, it is not the best authority. Better guidance for an insurer in an indemnity case was found in the case law and 28 U.S.C. §1404. The Texas case was therefore a false start.

After a few skirmishes, counsel for the USA persuaded USSIC's attorneys to transfer the case to Puerto Rico. There, the decedents' estates had filed their own actions for wrongful death. The matters were joined. After a failed attempt by the USA to dismiss USSIC's indemnity case, the government answered. Predictably, the USA denied all allegations. The crash was pilot error, they said.

Discovery ensued. This appears to have provided the first break for USSIC and the other plaintiffs. There was a treasure trove of useful information. It was so good that the plaintiffs were emboldened.

For example, it turned out that there were other crashes near El Yunque. Consequently, the FAA knew or should have known that controlled flight into terrain was a serious problem. Plaintiffs' counsel also unearthed

evidence of training and other irregularities for Santiago and other San Juan controllers. The biggest thrust of the case was the many internal operating procedures and best practices that, on their face, Santiago supposedly violated.

Had this not been a FTCA claim and a bench trial, it would have made for good theater. A jury might have eaten it up. It was a yeoman's attempt at making a negligent training and retention argument and turning a lemon of a case into lemonade.

But this was a bench trial. The defendant was the United States. And the same government that plaintiffs said killed the pilot and his passengers published a VFR chart with the following notice: "CARIBBEAN NATIONAL FOREST FLIGHT AVOIDANCE AREA... Maintain a minimum altitude of 2000 feet above the terrain." The pilot had the chart and was required to refer to it.

As to the FAA's internal rules, while they may be binding in the employer-employee context, the government argued that they did not impose nondiscretionary legal duties in the duty-breach-cause-harm context. Nor would there be causation if they did.

After four years of litigating, the matter was tried before United States District Judge Raymond Acosta. After a trial that lasted over a week, the District Court ruled in favor of the United States. On September 18, 2008, Judge Acosta wrote:

Although the tragic ending of Mr. Wojciechowicz's flight from the Island of Culebra to San Juan is painful to contemplate, this Court finds there is no contravention of



Air Traffic Controller Santiago's duties which could be classified as a contributory factor. In this case, Mr. Wojciechowicz's negligent actions in flying into clouds and into... an area of rising and rugged terrain, created a direct and unbroken causal relationship between the violation of the FARs and the crash of N441AW.

Four weeks ago, the United States First Circuit Court of Appeals affirmed Judge Acosta's decision.

Analysis

There is no doubt in my mind that Judge Acosta correctly decided the Wojciechowicz case. In his opinion, Judge Acosta circled around the problem which made USSIC's indemnity case absolutely untenable from the start.

In VFR flight, a pilot-in-command is responsible for more than just terrain and traffic awareness. He is responsible for terrain and traffic avoidance.

In the Wojciechowicz case, the plaintiffs wanted the court to shift that burden to ATC by imposing a duty to warn. Yet if we adopt this rule, every flight in the US national airspace system will become an IFR flight. Controllers will become responsible for every aircraft on radar. And in today's world, radar is nearly ubiquitous.

The rule would therefore have the practical effect of eliminating VFR flight. And it would further make the government an insurer of every human life and every piece of equipment that flies.

Aside from being bad public policy, this would also be an abdication of the VFR pi-

lot's traditional responsibility in the cockpit. We have a long tradition of deferring to the pilot's decisions and good judgment.

Given what I have learned about Alexander Wojciechowicz from this case, he sounds like a man who was proud to lead, to make tough choices, and to take responsibility for bad ones. I bet that he would be mightily unhappy with the teams of well-paid professionals who spent the last five years of their lives making excuses for him.

Pleadings versus practice

In spite of their creative arguments, the plaintiffs did not fairly depict ATC's actual practices.

Expecting more than sequencing – which the pilot got in this case – is unreasonable. That is especially true in the Caribbean. There, low altitude VFR pilots are lucky to get any services at all. Most experienced VFR pilots like it that way. This is another factual deal-breaker for the Wojciechowicz case.

Take this case out of the Caribbean and you might get a different result. Consider this: Could a VFR pilot expect more from a New York approach controller who has established radar and radio contact and where the VFR aircraft is on a collision course with a fog-enshrouded Verrazano Narrows Bridge?

Probably, yes. While still shaky, I think you would have a better chance of getting a comparative negligence award against the government.

On the other hand, put this case in the Bahamas and forget about it. If you arrive too late in the evening, controllers at Lynden Pindling International Airport might not even turn on the runway lights for a VFR aircraft.

At heart, this is a traditional negligence analysis of what constitutes the standard of care in a particular community.

Unreasonable expectations

Given the defects in this case, I would have set the client's sights lower from the beginning. The goal would have been a comparative-negligence finding, not victory.

Although the plaintiffs paid lip service to Puerto Rico's comparative negligence statute, they did not do enough at trial to acknowledge the pilot's culpability. Instead, they attacked the FAA and Santiago with ferocity. There is a time and place for a savage fight. But this case was not it.

Despite a meek beginning, the Plaintiffs'

post-discovery salvos against the FAA turned fierce. Emboldened by what they learned, they blamed Santiago and the USA for everything. Their objective was full exculpation of Wojciechowicz. Likewise, they sought full blame of Santiago. This simply was not reasonable, even under the most generous interpretation of the facts.

This sentiment worked against them. The plaintiffs lost face. They lost credibility. It set up a false dichotomy for the court.

Instead, the plaintiffs should have framed the central question differently from the start. The major thrust should have been: "What percentage of fault should Santiago and the FAA bear?" This more principled approach would have been better suited to a federal bench trial.

Rolling the dice

So what advice do you give your client when he asks your law firm to research the feasibility of bringing the Wojciechowicz indemnity claim?

For the insurer, most indemnity cases come down to a cost-benefit analysis. While the insurer's eagerness to roll the dice in-

creases proportionate with the size of the indemnity they just paid, that is only one part of analysis. The variables to apply in considering an indemnity case are as follows:

First, what is the likelihood of victory in the indemnity case? Here, I would have told USSIC that they had approximately a one-in-five chance of getting an award. The case is shaky for the all reasons discussed above. Nevertheless, given the size of the indemnity a 20% chance might still look like an attractive risk. If USSIC paid about \$3 million in claims, that alone might be worth a litigation investment, right? Unfortunately, no; this forgets the problem we have in this case with comparative negligence.

Any award we get will be set off by our percentage of fault. We therefore need to multiply USSIC's indemnity payment by the anticipated percentage of fault that is attributable to controller Santiago. So what would a good estimate have been?

In this case, it would have been a significant court victory if Judge Acosta had allocated more than 15% of the fault to the FAA and Santiago. And a token 5% award is just as likely. This permits us to calculate the

estimated award, which is the thrust of the second question: what is the estimated size of the indemnity award?

In this case, after applying comparative negligence, the award would be far less than the claims paid. The range, I would have estimated, would have been \$150,000 to \$450,000 at the most.

The final item to consider is the cost of defense. Cases against the United States are expensive. Air traffic controller liability cases are complicated. This is going to be a long war. I never would have predicted five years. But I would have expected two with a litigation budget of about \$10,000 a month.

So the bottom line advice to a client who considers filing a case like Wojciechowicz is that they have a approximately a 20% chance of recovering between \$150,000 and \$450,000 with anticipated litigation costs of \$240,000 over two years.

This case was a bad gamble for USSIC. It is a reminder to us all that when we make the decision to go into battle on an indemnity claim, we must go fully apprised of the facts and theories that we have, not the ones we wish we had. ■■

Over-60 Owner-Operators: Should they have Safety Pilots?

After years of debate and pressure, the FAA on July 15, 2009 nodded to Congress and raised the mandatory retirement age for commercial pilots. It is now 65. It had been 50 since 1959.

While regulators are showing leniency, insurers should still be cautious. The FAA's decision does not undo – and indeed has no impact upon – the risk factors most insurers have adopted over the years. It might not be politically correct, but age matters. The human body, like any other machine, will eventually exceed its duty cycle.

This is a complicated issue. Thanks to the miracles of modern medicine, better nutrition, and better health, most of us are living longer. Indeed, the up-and-coming generation will have more centenarians



than any prior population in human history. And age is not initially a bad thing. It is a benefit. Interpreting accident statistics, it appears that older pilots with many years of experience are less risk-loving, more responsible, and less likely to bore a hole in the ground.

At some point, however, the trend reverses. I will leave it to the actuaries to say

when, but somewhere along the line the human body starts having trouble keeping pace with the sometimes high-stress, fast-paced environment that can attend hard winter IFR flight conditions.

So here is a suggestion: insurer-approved safety-pilots. To minimize claims (and to maximize customer service), it might still be a good risk to insure older owner-operators provided they have help on the flight deck. To achieve the objective, the safety-pilot must possess adequate time in type and ratings. Obviously, it would serve no purpose to let rank amateurs co-pilot turbine aircraft. Moreover, the carrier should only insure the aircraft when approved safety pilots are present.

In fact, this practice is already occurring. But the question is whether the practice should be required when an owner-operator reaches a certain age. ■■