

AD COMPLIANCE FOR EXPERIMENTAL AIRCRAFT

By

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It came to my attention, through the office of Cannon Aviation Insurance, that some of our clients had questions about the need to comply with airworthiness directives. I see this question having three sub-parts: FAR compliance (FARs are part of the Code of Federal Regulations (CFR), Title 14), insurance contractual compliance, and civil legal liability.

I'm not a lawyer although I did attend law school for a time. I didn't even sleep at a Holiday Inn Express last night. However, I do own, fly and teach in experimental aircraft, both jet and prop. I'm also a licensed aviation insurance agent. These are just my own thoughts, but let's look at the facts pertaining to each part in turn.

FAR COMPLIANCE

Herb Baker of Herb & Ditto Airshows recently forwarded a response from Tony Ritzman at Aero Trader about AD applicability for the T-28 prop. Here it is in part:

"My FSDO PMI says that FAR Part 43 is not applicable to Experimental certificated aircraft (43.1b) and, by extension, Part 39 (Airworthiness Directives) is not LEGALLY applicable either, nor would it be supported by an NTSB judge in a violation enforcement. However, if your operating limitations, attached to your aircraft, state that Part 43 or Airworthiness Directives apply to your aircraft, you are bound to comply. Since all ADs are issued because of a safety of flight condition, I would think that a prudent operator or pilot would want to be sure that they are accomplished for peace of mind. After performing this inspection on about 30 hydromatic props over the years, I would HIGHLY recommend this inspection be included in the budget every five years. I suggest everyone dig out their aircraft Operating Limitations and review the maintenance requirements..."

In fact, there is further support for this argument with certain caveats.

Part 43.1(b) "This part does not apply to any aircraft for which the FAA has issued an experimental certificate, unless the FAA has previously issued a different kind of airworthiness certificate for that aircraft."

I fly many foreign military aircraft so the likelihood of previous FAA certification is remote. But might US equipment have been certified otherwise?

I called my FSDO in ATL and asked their opinion on this subject. After being put on hold for quite a while, they finally agreed that if your aircraft's Operating Limitations letter does NOT specifically say that Part 43 or AD compliance is required, then you are not bound by the FAA to comply with ADs. However, they strongly urge you to comply for safety reasons.

With that being said, let me quote from some FARs that an inspector might just use to violate you if you had an accident or incident.

Part 91.7(a) "No person may operate a civil aircraft unless it is in an airworthy condition."

Part 91.7 (b) "The pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight. The pilot in command shall discontinue the flight when un-airworthy mechanical, electrical, or structural conditions occur."

Part 91.13 "no person...may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

Part 91.319 (b) (2) "No person may operate an aircraft that has an experimental certificate outside of an area assigned by the Administrator until it is shown that...The aircraft has no hazardous operating characteristics or design features."

Part 91.403 (c) "No person may operate an aircraft for which a manufacturer's maintenance manual or instructions for continued airworthiness has been issued that contains an airworthiness limitations section unless the mandatory replacement times, inspection intervals, and related procedures specified in that section or alternative inspection intervals and related procedures set forth in an operations specification approved by the Administrator under part 121 or 135 of this chapter or in accordance with an inspection program approved under §91.409(e) have been complied with."

The last FARs I want to draw your attention to are in Part 39 which defines airworthiness directives and the requirement for compliance.

Part 39.3 "FAA's airworthiness directives are legally enforceable rules that apply to the following products: aircraft, aircraft engines, propellers, and appliances."

Part 39.5 "FAA issues an airworthiness directive addressing a product when we find that:

- (a) An unsafe condition exists in the product; and
- (b) The condition is likely to exist or develop in other products of the same type design."

Part 39.7 "Anyone who operates a product that does not meet the requirements of an applicable airworthiness directive is in violation of this section."

You can see how the FARs contain enough variance of information to make for a good argument either way. My concern would be if an accident occurred due to the failure of a product which had an applicable AD and the owner had not complied. Do you think some of the Parts mentioned above might apply?

INSURANCE CONTRACTUAL COMPLIANCE

The very first page of your insurance policy states that "This policy is a legal contract between you and the Company, therefore, IT IS IMPORTANT THAT YOU READ YOUR POLICY CAREFULLY." The Coverage Identification Page, Items 9 and 10 list the requirements for the named pilots and use of the aircraft as defined under General Provisions and Conditions. Here's what mine say.

Item 9 "The Pilot Flying the Aircraft: The aircraft must be operated in flight only by a person shown below, who must have a current and proper (1) medical certificate and (2) pilot certificate with necessary ratings as required by the FAA for each flight. **There is no coverage under the policy if the pilot does not meet these requirements.**"

Item 10 "The Use of the Aircraft: The aircraft will be used for your pleasure and business related purposes where no charge is made for such use and also will be used for the following purposes: **YOUR STATIC DISPLAY AND AIRSHOW FLY-BYS, INCLUDING FORMATION FLY-BYS.**"

My General Provisions and Conditions also state:

"You must make certain that the aircraft is used for the purposes stated in Item 10 of the Coverage Identification Page. There is no coverage under the policy if the aircraft:

- a. Is used for any purpose not stated in Item 10 of the Coverage Identification Page;
- b. Is used for any unlawful purpose;
- c. Use requires a special permit or waiver from the FAA.
- d. Airworthiness certificate is not in full force and effect or..."

What I hope you get out of this mundane legal language is that an insurance policy is a legal contract between two parties, you and the underwriter. Each party has to perform or else that party is held in breach of the contract. The underwriter agrees to provide coverage in case of loss to you under very specific conditions. You agree to pay the premium, be properly qualified, only use the aircraft for the stated purposes, and keep the aircraft airworthy. Might a claim arising out of an accident, caused by non-compliance with an AD (causal factor), be justification to deny the claim even if you weren't violated?

Just to show my experience in this regard, I had a prop strike about four years ago. The first thing the underwriter's investigator wanted me to do was provide him copies of the following: license, medical, logbook, biennial flight review, and aircraft log entries. Thankfully, I had fully performed as per the contract.

CIVIL LEGAL LIABILITY

Tony Ritzman mentioned the word “prudent” in his response to the AD question. Here are some definitions of that word from various legal sources:

1. Showing wisdom and caution in practical matters; sensible.
2. Careful or wise in planning for the future; provident.
3. Aware of the probable consequences of one’s actions; mindful.

Some of the synonyms of prudent are safe, judicious, cautious and wary.

In a court of law, the burden of proof, and questions to be asked, in a case of liability are, “Did the individual act in a prudent manner? Did he act, and take precautions, as would be expected of a reasonable person?” If the answers are yes, then you’re likely to win the case. If the answers are no, then watch the rats abandon the sinking ship as fast as they can.

Airlines crews have an even higher burden of responsibility. They are expected to take “great care” to protect the safety of the aircraft, cargo and passengers. That means you must do EVERYTHING in your power to avoid an accident. Crews have been, and will be, held liable for not taking every action and precaution to protect life and property.

A lawyer friend of mine mentioned that “strict liability” may apply in the case of an accident caused by noncompliance with an AD. Typically, strict liability is applied to product liability cases where a manufacturer sells a product in a “defective condition” that is unreasonably dangerous to the ordinary user. The manufacturer would be held liable for any ensuing property damage or physical injuries.

Normally the liability arises out of a product’s defective design, manufacturing, packaging, instructions or warnings. However, I believe a case could be argued for this principle to apply to a product [a propeller perhaps] that an owner knew had a safety issue, but chose to ignore. Remember, advisory circulars deal with recommended, but not safety related issues. ADs specifically deal with issues that have been identified as impacting SAFETY OF FLIGHT.

Would you really want to bet the farm on a COURT that has been presented information that you KNEW a safety issue existed, but you CHOSE to ignore it? In a civil suit, a court is not bound by a ruling of an NTSB judge. Even if not found in violation of the FARs, the court could find against the owner/operator for damages (re: money).

I hope this article helps to give you some insight into the issue of AD compliance for experimental aircraft. It is complicated and layered. However, I believe if you do what is “prudent”, you will be holding up your end of the bargain. Fly safe, and ALWAYS remember to check six!

Mongoose

[Author’s notes – After completing this article, someone graciously sent me a copy of Advisory Circular 39-7C dated 11/16/95. It can be read at the following web address:

[http://www.airweb.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/0/ea051001b2ce246e862569b500508099/\\$FILE/AC39-7C.pdf](http://www.airweb.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/0/ea051001b2ce246e862569b500508099/$FILE/AC39-7C.pdf)

Of particular note is paragraph # 8 on page 2 which states,

“...Some aircraft owners and operators mistakenly assume that ADs do not apply to aircraft with other than standard airworthiness certificates, i.e., special airworthiness certificates in the restricted, limited or experimental category. Unless specifically stated, ADs apply to the make and model set forth in the applicability statement regardless of the classification or category of the airworthiness certificate issued for the aircraft...”

The circular is current and is an easy six pages to read. It has numerous explanations and examples. If anything, it leaves us with a clear picture of who is responsible for compliance and why. I hope this helps.]