



# AIRCRAFT BUILDERS COUNCIL NEWS

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## President's Column

by **Timothy Carter**  
President, ABC Board of Trustees

**T**he Aircraft Builders Council (ABC) will be celebrating its 50th Anniversary September 20 & 21st in Washington D.C. Our theme for the conference will be "The ABC & Aerospace - A 50 Year Partnership." The speakers for the conference will highlight the significant historical developments in our industry and with the ABC and will provide exciting details of future developments in the world of aviation.

The ABC program renewed on December 1st of 2003 with the ability to write risks with limit requirements up to \$1 billion dollars. This year, the placement consists of two layers, a \$500 million primary and \$500 million excess layer. Ace Global Markets and Global Aerospace Underwriting Managers are the co-leaders of the program and quote all renewals for the participating companies.

The program continues its longstanding offering of a broad form policy wording and product integrity seminars conducted by Mendes and Mount.

As part of the 50th Anniversary celebration, we are producing a documentary video of the history of the program. I have been spending time with our production company to review the video interviews with past and current brokers, underwriters, program participants, and ABC board members. Their

recollections are fascinating and give a diverse perspective on how the program has developed to what it is today.

Please note that we changed the dates for the fall conference to the dates below. We look forward to seeing you in Washington D.C.



PHOTO COURTESY OF RITZ-CARLTON, WASHINGTON D.C.

### DISCLAIMER

The reader should note that the opinions, views or statements of authors appearing in the newsletter are their own, and do not necessarily represent the opinions, views or statements of Aircraft Builders Council, Inc., its Board of Trustees, committees, officers or editors.

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## Aircraft Builders Council 2004 Fall Conference

September 19-21, 2004

Ritz-Carlton, Washington D.C.

Conference Registration & Program Information  
will be mailed soon!

# Broker's Report

By John H. Howes, Chair, London Brokers Committee

The 2003/04 Program was duly completed for 1 December renewal date. The degree of difficulty in placing the renewal reflected the overall position relating to aerospace products liability which, due to the long term nature of the business, experienced a further escalation in loss reserves over a number of back years. The deterioration took into account a substantial increase in reserves for some specific claims where only nominal amounts had previously been reserved, in addition to new reserves relating to asbestos claims.

The overall position concerning rating levels changed very little throughout 2003. Increases on the whole were relatively small compared with 2002, although this did not apply to insureds coming off 3 year programmes or those who had adverse loss experience where substantial increases were applied. The overall increase probably averaged between 5 and 10 per cent.

Although the insurance market for aerospace products liability remains relatively stable, 2003 did see the withdrawal of 2 Lloyd's markets: Brit and Trenwick. The former has chosen to remain only in the space and reinsurance aviation business and the latter has withdrawn from the class completely.

The rating levels for the 2003/04

ABC products liability facility began following a similar pattern to last year with only moderate premium increases for most of the business so far renewed (accounts with a poor claims record are being singled out for special treatment), however market indications now infer that situation to be short

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lived. Although there is a substantial amount of aerospace products liability market still available, trends within that market would indicate that many underwriters involved in the class are now more than ever carefully reviewing their position as the tail continues to wag. There is little doubt that several underwriting groups are reviewing their products liability book of business and further reductions in capacity could repeat

the problems that affected the market in the mid-80's, when capacity became very difficult to obtain and many insureds were forced to co-insure as the only way to complete their placement. The ABC Program, during that era, remained one of the few markets able to provide 100 per cent capacity of \$500 million.

The ABC Program for 2003/04 incorporates the same flexibility as last year and continues to be rated by the two leading underwriters Ace Global Markets and Global Aerospace for limits up to \$1 billion any one insured. The Program, as previously, also offers insureds, at no additional cost, the ability to have individually tailored seminars in loss prevention integrity techniques through the Program's lawyers, Mendes and Mount.

As we have now entered into the 50th year of the Program, I think it appropriate to congratulate the ABC Board of

Trustees who, in partnership with the underwriters and brokers involved, have successfully continued their efforts in keeping the ABC at the cutting edge of aerospace products liability which has underpinned the Program throughout its history

We all look forward to celebrating 50 years in Washington DC, at the Annual Conference in September.

# Mendes & Mount Report

By Garrett J. Fitzpatrick, Esq., Partner in the Law Firm of Mendes & Mount, New York  
& Michael Hession, Associate in the Law Firm of Mendes & Mount, California

## The GARA's "knowing misrepresentation" exception and Federal Rule 9(b): a natural analogy.

The General Aviation Revitalization Act of 1994 (the "GARA") created a statute of repose barring claims against manufacturers arising from all aviation products and components more than 18 years after their manufacture date. See 49 USC 40101, *note*. The statute was intended to offer some refuge to the struggling aviation industry from the "long tail" of potential product liability claims. The GARA includes four exceptions: two excepted classes of plaintiff (medical emergency patients and those not on the plane) and two excepted classes of claims (those based on written warranties, and those causally related to a "knowing misrepresentation" made by a manufacturer to the FAA). *Id.*

Three of the exceptions are straightforward. The last -- claims causally related to a manufacturer's "knowing misrepresentation" to the FAA - is more ambiguous. *Id.* at 2(b)(1). To prevent this narrow exception from swallowing the 18 year rule, the GARA included a "plead with specificity" requirement. *Id.*

Courts have recognized that this "plead with specificity" requirement is "an obvious analog to Federal Rule of Civil Procedure 9(b)." See *Rickert v. Mitsubishi Heavy Indus.*, 923 F. Supp. 1453, 1462 (D. Wyo. 1996) ("*Rickert I*"), *rev'd on reh'g on other grounds*, 929 F. Supp. 380 (D. Wyo. 1996). This is a natural analogy because the "knowing misrepresentation" exception allows lawsuits only "where there was clear and convincing evidence of fraud." See *Almanac: 103rd Congress 2nd Session 1994*, Congressional Quarterly, Vol. L., 1994 at p. 180.

The exception was intended to "protect people injured by a manufacturer's deception." *Id.* One GARA drafter confirmed the exception was intended to avoid the statute of repose only where the "manufacturer has misrepresented certain safety information to the F.A.A.": See Hon. Jack Brooks, General Aviation Revitalization Act of 1994, H.R. Rep.No. 103-525, pt. 2 at p. 8. Thus, the

exception applies only to fraud-based claims, making analysis of Federal Rule 9(b) appropriate. *Rickert I.*

Because the GARA is less than ten years old and is applicable only in aviation litigation, there are few published cases on its scope and use. Case law interpreting Rule 9(b), however, is well-established and largely confirms that without the appropriate level of specificity, a plaintiff's complaint sounding in fraud should be dismissed. While courts typically allow an opportunity to amend a complaint to plead with the proper specificity, under Rule 9(b) "courts throughout [the] nation have held, a plaintiff may not use discovery to provide facts he presently does not have to plead fraud with specificity." *Beck v. Cantor, Fitzgerald Co., Inc.*, 621 F. Supp. 1547, 1552 (D.C. Ill. 1985). It is axiomatic that:

if plaintiff does not presently possess the relevant, indispensable facts to state a fraud claim with particularity, the precepts upon which Rules 9(b) and 11 are founded mandate that he has no business charging a party with fraud on the slim hope that he may use the various and expensive tools of discovery available under the Rules to put meat on the bare bones of his fraud claim. Fraud is too serious a charge, and litigation is too expensive, to allow such tactics.

*Id.* at 1552-1553; see also *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740, 95 S. Ct. 1917, 1927 (1975).

Thus, the applicability of the "knowing misrepresentation" exception should be determined before discovery begins. Discovery is expensive and time consuming, and should be avoided if possible. Free rein to rummage through a defendant's records would offer assistance to determined plaintiffs hoping to plead the exception properly. Neither the GARA nor Rule 9(b) require this; rather, they prohibit it. See 49 USC 40101, *note*, at 2(b)(1); Rule 9(b).

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# Lead Underwriters' Column

By John Green, ACE Global Markets Limited  
& Martin Cox, Global Aerospace Underwriting Managers

The ABC program celebrates its 50th anniversary this year; a true testimony to its success is that it has been able to supply aviation products liability insurance continuously since its inception. Throughout this period of time there have been many insurance underwriting cycles, both hard and soft.

The aviation products liability market is undoubtedly facing some very difficult times ahead as the escalation of claims in the back years continues to out strip the reserves carried by underwriters on their books. This is a disappointing development and is despite the legal defences available to underwriters and the insureds under the General Aviation Revitalisation Act and the Government Contractors Defence. In view of the claim development many underwriters and in particular their capital providers are closely examining their future role in the products liability area. There is little doubt that some capacity will be lost, a situation that started to occur during the second half of 2003.

In order to stop the decline in capacity the products liability business has to become profitable in its own right and increased premiums are necessary if the capital providers are going to continue to support this class of business and at the same time provide the level of coverage currently available, whilst still remaining flexible to the needs of the insureds.

The program started in 1955 and has seen the introduction of jet aircraft, wide-bodied aircraft, commercial supersonic flight, exploration into space, manned space flight, all taken in its stride. Full credit should go to the Board of Trustees over its life time in developing the program to encompass these changes. Their continued work in maintaining the ABC program together with their Brokers and Mendes and Mount, at the forefront of aviation products insurance should be commended.

We look forward to this year's 50th renewal and the conference in Washington.