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Timothy Mark Bates

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AVIATION INSURANCE EXCLUSIONS — SHOULD A CAUSAL CONNECTION BETWEEN THE LOSS AND EXCLUSION BE REQUIRED TO DENY COVERAGE?

TIMOTHY MARK BATES

SEVERAL COURTS DISAGREE on the issue of whether an unambiguous aviation insurance policy exclusion requires a causal connection between the loss and exclusion in order for the insurer to deny coverage.¹ Air-

¹ A causal connection is not required with unambiguous aviation exclusions in Alaska, California, Georgia, Kansas, Kentucky, Massachusetts, Michigan, Missouri, Nebraska, North Carolina, New Mexico, Oregon, and Pennsylvania. *See* National Ins. Underwriters, Inc. v. Bequette, 280 F. Supp. 842 (D. Alaska 1968), *aff'd*, 429 F.2d 896 (9th Cir. 1970) (applying Alaska law); Arnold v. Globe Indem. Co., 416 F.2d 119 (6th Cir. 1969) (applying Kentucky law); Di Santo v. Enstrom Helicopter Corp., 489 F. Supp. 1352 (E.D. Pa. 1980); Western Food Prod. Co., Inc. v. United States Fire Ins. Co., 10 Kan. App. 2d 375, 699 P.2d 579 (1985); Bellefonte Underwriters Ins. Co. v. Alfa Aviation, Inc., 310 N.C. 471, 312 S.E.2d 426 (1984); Security Mut. Casualty Co. v. O'Brien, 99 N.M. 638, 662 P.2d 639 (1983); Ochs v. Avemco Ins. Co., 54 Or. App. 768, 636 P.2d 421 (1981); Middlesex Mut. Ins. Co. v. Bright, 106 Cal. App. 3d 282, 165 Cal. Rptr. 45 (1980); United States Aviation Underwriters, Inc. v. Rex Ray Corp., 15 Av. Cas. (CCH) 17,625 (Mass. 1979); Macalco, Inc. v. Gulf Ins. Co., 550 S.W.2d 883 (Mo. Ct. App. 1977); Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co., 189 Neb. 610, 204 N.W.2d 162 (1973); Grigsby v. Houston Fire Casualty Ins. Co., 133 Ga. App. 572, 148 S.E.2d 925 (1966); Kilburn v. Union Marine & Gen. Ins. Co., 326 Mich. 115, 40 N.W.2d 90 (1949).

States that do require a causal connection with unambiguous aviation exclusions are Alabama, Arizona, Colorado, Hawaii, Iowa, Florida, Illinois, Mississippi, Montana, South Carolina, and Texas. *See* Miguez v. Universal Airways, Inc., 18 Av. Cas. (CCH) 17,250 (S.D. Miss. 1982); Bayers v. Omni Aviation Managers, Inc., 510 F. Supp. 1204 (D. Mont. 1981); National Ins. Underwriters v. King Craft Custom Prod., Inc., 368 F. Supp. 476 (N.D. Ala. 1973), *aff'd*, 488 F.2d 1393 (5th Cir. 1974); Avemco Ins. Co. v. Chung, 388 F. Supp. 142 (D. Hawaii 1975); American States Ins. Co. v. Byerly, 456 F. Supp. 967 (S.D. Ill. 1978); Global Aviation Ins. Managers v. Lees, 368 N.W.2d 209 (Iowa Ct. App. 1985); O'Connor v. Proprietors Ins. Co., 696 P.2d 282 (Colo. 1985) (en banc); Puckett v. United States

plane policies frequently exclude coverage for accidents that occur when the insured violates certain Federal Aviation Administration² regulations (FARs).³ A typical specific exclusion requires that an airplane have a standard airworthiness certificate.⁴ When an airplane crashes because of the covered peril of pilot negligence,⁵ but the airplane lacks a current airworthiness certificate,⁶ the question then becomes whether the insurer must pay under the policy because of pilot negligence, or whether it can deny coverage because the airworthiness certificate has expired.⁷

Some jurisdictions allow denial of coverage with unambiguous exclusions,⁸ because the insurer did not assume

Fire Ins. Co., 678 S.W.2d 936 (Tex. 1984); *Pickett v. Woods*, 404 So. 2d 1152 (Fla. Dist. Ct. App. 1981), *petition for review denied*, *Foremost Ins. Co. v. Pickett*, 412 So. 2d 564 (Fla. 1982); *South Carolina Ins. Co. v. Collins*, 269 S.C. 282, 237 S.E.2d 358 (1977); *Ranger Ins. Co. v. Phillips*, 25 Ariz. App. 426, 544 P.2d 250 (1976).

² The Federal Aviation Administration is responsible for promulgating airline safety regulations. With the creation of the Department of Transportation in 1966, the Federal Aviation Agency became the Federal Aviation Administration. R. KANE & A. VOSE, *AIR TRANSPORTATION* 5-5 (1977)[hereinafter KANE & VOSE].

³ The Federal Aviation Act of 1958, 49 U.S.C. §§ 1421-1432 (1982). This act empowers the FAA to control safety regulations regarding airplanes. *Id.*

⁴ FAA Certification Procedures for Products and Parts, 14 C.F.R. § 21.181(a)(1) (1986) provides: "Standard airworthiness certificates. . . are effective as long as the maintenance, preventive maintenance, and alterations are performed in accordance with parts 43 and 91 of this chapter. . . ." 14 C.F.R. § 91.165 (1986) provides: "Each owner or operator of an aircraft shall have that aircraft inspected as prescribed in subpart D or § 91.169 of this part. . . ." 14 C.F.R. § 91.169(a)(1986) provides: "[N]o person may operate an aircraft unless, within the preceding 12 calendar months, it has had — (1) an annual inspection in accordance with Part 43 of this chapter. . . ." *Id.*

⁵ A "peril" is the event which causes a loss, such as fire, windstorm, collision, etc. See AMERICAN STATES GLOSSARY OF INSURANCE TERMS 13 (1983). A "covered peril" exists when the insured transfers the risk of loss by a specific peril to the insurer in consideration for a premium. See *id.* at 5.

⁶ See *supra* note 4 and accompanying text.

⁷ Because coverage existed for pilot negligence, the insured argued that recovery for this insured peril was allowed under the contract. See *Puckett v. United States Fire Ins. Co.*, 678 S.W.2d 936, 937 (Tex. 1984). The insurer's counter-argument was that without the valid airworthiness certificate, coverage did not exist for any risk associated with the flight. *Id.* See also Hagglund & Aurthur *Coverage Problems in Aviation Policies*, 23 FED'N OF INS. COUNS. Q. 4 (Summer 1973).

⁸ Courts use five different approaches to determine whether provisions in an insurance contract are ambiguous: (1) the general rule of contract construction;

the risk of the airplane flying without the FAA certificate.⁹ However, other jurisdictions require payment under the covered peril of pilot negligence, unless the omission of the airworthiness certificate caused the accident.¹⁰ These courts theorize that requiring a causal connection prevents insurers from denying coverage and receiving a windfall based on a technical defense.¹¹

To illustrate this issue, assume that a plane crashes on the border between New Mexico and Texas. If pilot negligence caused the crash, and the plane's airworthiness certificate expired prior to the crash, then determining which state law controls dictates whether the insured recovers. New Mexico, which follows the majority view, does not require a causal connection, so the insured would not recover because the policy excludes flying with an invalid airworthiness certificate.¹² In Texas, a minority view jurisdiction, the insured recovers unless the invalid airworthiness certificate causally connects to the crash.¹³

This comment discusses the conflict by looking at four areas: (1) history of aviation insurance; (2) exclusions con-

(2) the doctrine of *contra proferentem*; (3) adhesion; (4) reasonable expectations; and (5) the "wayfaring fool" doctrine. See K. YORK & J. WHELEN, *INSURANCE LAW* 32-79 (1982) [hereinafter YORK & WHELEN]. For a general discussion of these provisions, see YORK & WHELEN.

⁹ See *supra* note 1 and accompanying text.

¹⁰ See *supra* note 1 and accompanying text.

¹¹ A technical defense is a term of art which means that an insurer denies coverage based on a provision of the policy which does not have a substantial connection with the loss. See, e.g., *Puckett v. United States Fire Ins. Co.*, 678 S.W.2d 936, 938 (Tex. 1984). In discussing technical defenses the Texas Supreme Court noted:

It would be against public policy to allow the insurance company in that situation to avoid liability by way of a breach that amounts to nothing more than a technicality. If we held otherwise: it would actually be to the insurer's advantage that the insured failed to renew the airworthiness certificate. In such event, the insurer would collect a premium but would have no exposure to risk because the policy would no longer be effective.

Id. (quoting *Pickett v. Woods*, 404 So. 2d 1152 (Fla. Dist. Ct. App. 1981), *petition for review denied*, *Foremost Ins. Co. v. Pickett*, 412 So. 2d 465 (Fla. 1982)).

¹² *Security Mut. Casualty Co. v. O'Brien*, 662 P.2d 639 (N.M. 1983). For a discussion of the case, see *infra* notes 163-188 and accompanying text.

¹³ *Puckett v. United States Fire Ins. Co.*, 678 S.W.2d 936 (Tex. 1984). For a discussion of the case, see *infra* notes 190-213 and accompanying text.

trusted with warranties, conditions, and representations; (3) antitechnical statutes; and (4) public policy arguments. The first section, history of aviation insurance, gives a historical background of the impact of the FARs on the drafting and interpretation of aviation insurance policies. This examination of aviation insurance history shows how aviation exclusions evolved and the reasons for their promulgation. The second section explains the differences between insurance terms. These differences are important because the legal effect of the various terms significantly impacts whether the insured recovers.

The final two sections are the crux of the conflict between the courts. Section three shows why the courts are split on whether exclusions are controlled by antitechnical statutes. If exclusions fall under the statute, then a causal connection is usually required to deny coverage. Because most statutes do not explicitly apply to exclusions, the interpretation of the statute by the court is crucial. The fourth section discusses the issue of public policy. Some courts hold that even if antitechnical statutes do not apply, public policy requires a causal connection.

I. HISTORY OF AVIATION INSURANCE

A. *Beginning of Aviation Insurance*

On December 17, 1903, Wilbur and Orville Wright completed the first successful flight, without insurance, at Kitty Hawk, North Carolina.¹⁴ Nine years later, Lloyds of London wrote the first aviation insurance policy.¹⁵ The policy covered damage to persons and property, but excluded physical damage to the airplane.¹⁶ In 1917, the Queens Insurance Company of North America (acquired

¹⁴ See D. STEWART, AVIATION INSURANCE IX (1946)[hereinafter STEWART].

¹⁵ *Id.*

¹⁶ R. FLOWER & M. JONES, LLOYDS OF LONDON 142 (1974). Lloyds' first standardized aviation policy, called the "White Wings" policy, still exists at the Lloyds' library. *Id.* Airplane hull insurance was not available, but the policy offered third party liability insurance for injury to persons or property caused by the airplane crash. *Id.*

later by the Royal-Globe Insurance Companies) wrote the first hull insurance.¹⁷ By 1920, at least five major underwriting companies entered the new aviation insurance market.¹⁸ After several disastrous transatlantic flights in the 1920's,¹⁹ the demand for aviation insurance grew to the point that three major aviation insurance pools²⁰ formed to underwrite and study the risks associated with this new product.²¹ These first policies borrowed most of their provisions from various fire and automobile policies and added a few special endorsements²² to fit particular aviation risks.²³

B. *Modern Aviation Insurance*

The modern era of aviation insurance began after World War II.²⁴ Aircraft expertise gained during the war helped produce higher quality airplanes and made airplane production easier and more cost efficient.²⁵ An avi-

¹⁷ Hull insurance consists of insuring the airplane itself from physical damage. STEWART, *supra* note 14, at X. There are 3 basic divisions of aviation insurance: (1) insurance covering physical damage to the airplane; (2) insurance covering damage to third parties caused by the aircraft; and (3) personal accident insurance. *See id.* *See also* S. SPEISER & C. KRAUSE, 3 AVIATION TORT LAW § 22:2 (1980) [hereinafter SPEISER & KRAUSE].

¹⁸ *See* STEWART, *supra* note 14, at X.

¹⁹ *See* SPEISER & KRAUSE, *supra* note 17, at 22:2.

²⁰ *Id.* The three pools were (1) The United States Insurance Group (U.S.A.I.G.) formed on July 1, 1928; (2) The Associated Aviation Underwriters; and (3) The Aero Insurance Underwriters (A.I.U.), which split up in 1947. *Id.*

²¹ *Id.*

²² An endorsement is an amendment attached to and made a part of the insurance contract for the purpose of changing the original terms — either to restrict or expand coverage. AMERICAN STATES GLOSSARY OF INSURANCE TERMS 5 (1977). *See* H. LEWIS, AVIATION & INSURANCE (1920). Aviation insurance was comparable to boat insurance so marine insurance language was used. That is one reason why insurance covering damage to the airplane is called "hull" insurance. *See* STEWART, *supra* note 14, at X. Aircraft liability insurance did not use marine insurance terms but followed the automobile policy; therefore, the first aviation policies were a mixture of boat and automobile policies. *Id.*

²³ *See* LEWIS, *supra* note 22, at 39. One example of a special endorsement particular to aviation risks is coverage for "forced landings." *Id.* A "forced landing" is distinguished from an emergency landing because in an emergency landing the pilot still has control over the airplane engines, whereas, in a forced landing a pilot must land due to engine failure. *Id.*

²⁴ *See* SPEISER & KRAUSE, *supra* note 17, at 5.

²⁵ *Id.*

ation boom began as thousands of military-trained pilots and mechanics returned to the United States to find an unlimited supply of inexpensive war surplus aircraft and cheap fuel.²⁶ This aviation boom created an increase in the demand for sophisticated aviation insurance.²⁷

While the demand for aviation insurance grew, advances in technology and statistics made the risks associated with airplane accidents visibly more complex.²⁸ Better technology produced high-speed, high-cost airplanes manufactured with more complicated designs, engineering, and construction.²⁹ This rise in technology required the underwriter³⁰ to be more sophisticated in the determination of why an airplane crashes. Along with the risks associated with higher technology, the underwriters received statistics from past crashes to help assess future premiums.³¹ These statistics revealed that a single crash easily resulted in expensive damage claims, so premiums increased.³² As the aviation industry grew, insurers developed an untenable dependency on aviation experts for evaluating risks and handling aviation claims.³³ To end some of the dependency on experts, insurers began deferring to the Federal Aviation Regulations (FARs). With

²⁶ *Id.* Also, with the 1930's depression over, many people returned from the war with money to spend on consumer items. *Id.* The time was ripe for airplanes to take on a vital role in the economy by transporting people, supplies, and agricultural products. *Id.*

²⁷ See STEWART, *supra* note 14, at XI.

²⁸ *Id.* As airplane technology increased with greater speeds, distances, and weight, so did the risk of damage. Statistics of crashes showed some underwriters that their predictions of losses were incorrect. *Id.*

²⁹ N. TANEJA, *THE COMMERCIAL AIRLINE INDUSTRY* 7 (1981). World War II was responsible for rapid technical and operational development of transport aircraft. *Id.* New aircraft such as the DC-14 and Lockheed Constellation possessed higher payload capacity, range, and speed. *Id.* Also, refinements were made to radio communications, navigational aids, instrument flying, and airport facilities. *Id.*

³⁰ See AMERICAN STATES GLOSSARY OF INSURANCE TERMS 17 (1977). An underwriter is a person with the duty to select risks that are insurable, and to determine in what amounts and on what terms the insurer will accept the risks. *Id.*

³¹ V. ROLLO, *AVIATION LAW: AN INTRODUCTION* 120-23 (1979).

³² R. FLOWER & M. JONES, *LLOYDS OF LONDON* 142 (1974). Crashes were "ten-a-penny" and most underwriters underestimated the crash damages. *Id.*

³³ *Id.* at 143.

the advent of the FARs,³⁴ the underwriters became unwilling to insure airplanes flying in violation of the regulations;³⁵ therefore, they used conditions, warranties, and exclusions to define the insurable risks covered by the aviation policy.³⁶

Along with the increased demand for aviation insurance came the regulation of airplanes by the federal government.³⁷ In 1926, Congress passed the United States' first legislation regulating aviation.³⁸ The Air Commerce Act of 1926³⁹ gave the federal government power over the operation and maintenance of the airway system,⁴⁰ as well as power over all aids to air navigation.⁴¹ Furthermore, the legislation gave the Department of Commerce the duty and power to develop safety regulations.⁴² The Department of Commerce delegated the duty to the newly established Bureau of Air Commerce,⁴³ which later became the Civil Aeronautics Board.⁴⁴ Today the Federal Aviation Administration⁴⁵ controls this function.

Some of the first safety regulations promulgated included certification and medical examination of pilots,⁴⁶ as well as registration and licensing of aircraft.⁴⁷ The insurance companies responded by putting a "statutory vio-

³⁴ N. TANEJA, *THE COMMERCIAL AIRLINE INDUSTRY* 5 (1981). The Civil Aeronautics Act of 1938 placed the development, regulation, and control of air carriers under the jurisdiction of a single administrative body, the Civil Aeronautics Board. *Id.* The CAB developed federal aviation regulations. *Id.*

³⁵ See, e.g., STEWART, *supra* note 14, at 15.

³⁶ *Id.* at 71.

³⁷ See SPEISER & KRAUSE, *supra* note 17, at 5.

³⁸ Air Commerce Act of 1926, Pub. L. No. 254, ch. 344, 44 Stat. 568 (1926).

³⁹ *Id.*

⁴⁰ See generally Senate Committee on Commerce Report on the Air Commerce Act of 1926, S. REP. NO. 2, 69th Cong., 1st Sess. (1926).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Civil Aeronautics Act of 1938, Pub. L. No. 706, ch. 601, 52 Stat. 973, 985.

⁴⁵ See Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542 (1982). The FAA is under the Department of Transportation and not the Department of Commerce. *Id.*

⁴⁶ See KANE & VOSE, *supra* note 2, at 5-5.

⁴⁷ *Id.*

lation" exclusion in airplane policies. This exclusion provided for suspension of coverage for losses occurring when the plane violated civil air regulations.⁴⁸ The courts upheld these broad general exclusion clauses through the 1940's for two reasons. First, courts had little knowledge of aviation. Second, courts considered aviation dangerous enough to require strict adherence to all civil air regulations.⁴⁹

Nevertheless, federal safety regulations became more numerous and complex after Congress passed the Civil Aeronautics Act of 1938.⁵⁰ The 1938 Act gave the aviation industry a strong set of regulations to plan for future development.⁵¹ After twenty years of severe airplane crashes,⁵² Congress revised the Civil Aeronautics Act into the Federal Aviation Act of 1958.⁵³ The purpose of the revision was to increase aviation safety.⁵⁴ With this mandate to promote safety and with additional money from Congress,⁵⁵ the FAA put forth a serious effort to avoid the past newspaper publicity of horrible aviation collisions.⁵⁶ Necessarily, safety regulations proliferated with complete requirements concerning every potential harmful activity related to aviation.⁵⁷

Over the next few years, the number of air safety regulations increased to the point that nearly all accidents in-

⁴⁸ *E.g.*, *Kilburn v. Union Marine & Gen. Ins. Co.*, 326 Mich. 115, 40 N.W.2d 90 (1949).

⁴⁹ McGhee, *Flying Blind: The Medical Certificate Warranty and General Aviation Insurance Exclusions*, 5 AIR L. 211, 212 (1980).

⁵⁰ See KANE & VOSE, *supra* note 2, at 5-14.

⁵¹ *Id.*

⁵² *Id.* at 6-1, 6-3.

⁵³ *Id.* The Federal Aviation Act basically mirrors the Civil Aeronautics Act except that the FAA has expanded power in safety regulations. For a discussion of several of the crashes that led to higher safety standards and the passing of the Federal Aviation Act of 1958, see *id.* at 6.

⁵⁴ *Id.*

⁵⁵ Federal Aviation Act of 1958, 49 U.S.C. § 1301 (1982).

⁵⁶ See KANE & VOSE, *supra* note 2, at 6-2. One of these crashes was a mid-air collision over the Grand Canyon between a TWA Constellation and a United Airlines DC-7. *Id.* Both airplanes fell into the canyon. *Id.*

⁵⁷ McGhee, *supra* note 49, at 212.

volved the violation of at least one regulation.⁵⁸ Insurers found it easy and tempting to avoid coverage for airplane accidents based on a violation of a federal regulation.⁵⁹ In response, the courts and legislatures departed from their previous approval of general exclusion clauses by outlawing these clauses on public policy grounds.⁶⁰ Because nearly all accidents involved a violation of at least one regulation, the courts found it unfair to allow insurers the use of these broad catch-all exclusions to deny coverage.⁶¹ The unfairness resulted from the inability of the insured to comply with every FAR. This inability resulted in denial of insurance benefits.⁶² Instead of imposing a causal connection between the catch-all exclusion and the loss, courts simply disallowed general exclusions.⁶³ Nevertheless, courts upheld specific exclusions where the insured had the ability to comply.⁶⁴

Most insurers wrote specific exclusions into their aviation policies⁶⁵ that excluded coverage for any airplane accident involving a plane that did not have a valid air-

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* See *Roach v. Churchman*, 431 F.2d 849 (8th Cir. 1970). The *Roach* court reasoned that these general exclusion clauses made the insurance contract illusory since nearly all aviation accidents involved at least one violation of the FARs. *Id.* at 853. See also Petkoff, *Statutory Restrictions on Exclusions Contained in Aviation Policies*, 27 FED'N INS. COUNS. Q. 265 (Spring 1977).

⁶¹ See Petkoff, *supra* note 60, at 266-67. Specific exclusions are different from general exclusions based on their scope. *Id.* Broad exclusions are worded to exclude almost everything, whereas specific exclusions are more definable and narrow in scope. *Id.* See also *Threlkeld v. Ranger Ins. Co.*, 156 Cal. App. 3d 1, 202 Cal. Rptr. 529 (1984). In *Threlkeld*, the exclusion required the airworthiness certificate to be in "full force and effect" while the airplane was in operation. The insured argued that the exclusion was ambiguous because it might be construed to include all relevant FARs concerning flight operations. The court noted that the interpretation rendered the contract illusory since almost all crashes involve the breach of at least one FAR. The court rejected the insured's ambiguity analysis and held the exclusion was specific because it referred only to the airworthiness certificate. Because the insured did not get the airplane inspected, its airworthiness certificate expired, and coverage did not exist. *Id.* at 532.

⁶² See *Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co.*, 189 Neb. 610, 204 N.W.2d 162, 164 (1973).

⁶³ See Petkoff, *supra* note 60, at 266-77. See also McGhee, *supra* note 49, at 215.

⁶⁴ See McGhee, *supra* note 49, at 215.

⁶⁵ See STEWART, *supra* note 14, at 20.

worthiness certificate.⁶⁶ The underwriters theorized that an insured's airplane had to be properly certified as a prerequisite to being riskworthy.⁶⁷ Furthermore, insurers modeled this specific exclusion from the first regulations promulgated in the Air Commerce Act of 1926⁶⁸ and still embodied in the Federal Aviation Act of 1958.⁶⁹ This specific exclusion is now the focal point of litigation concerning whether a causal connection is needed between the specific exclusion and the accident in order for the insurer to deny coverage.⁷⁰

Once a valid specific exclusion is raised and its violation proved by the insurer, most jurisdictions allow the denial of insurance benefits even if no causal connection exists between the accident and the violation.⁷¹ In other words, if a policy specifically excludes coverage when the airplane does not have a valid airworthiness certificate, and an uncertified plane crashes, the insured cannot recover under the policy even though the crash was caused entirely by circumstances unrelated to certification, such as pilot error.⁷² However, one commentator points out that due to the windfall that will otherwise occur for the insurer, the modern trend should require a causal connection with all insurance policy provisions.⁷³

In summation, aviation insurance began in a regulatory-free world.⁷⁴ As the federal government became active in aviation safety, the number and complexity of regulations

⁶⁶ *Id.* 14 C.F.R. § 21.181(a)(1) (1986); see *supra* note 4 and accompanying text for a discussion of a standard airworthiness certificate.

⁶⁷ See STEWART, *supra* note 14, at 23.

⁶⁸ Air Commerce Act of 1926, 44 Stat. 568. See, e.g., Comment, *Florida's "Antitechnical" Statute: Should Insurance Exclusions Be Included?*, 10 FLA. ST. U.L. REV. 737 (1983).

⁶⁹ The Federal Aviation Act of 1958, 49 U.S.C. § 1301 (1982).

⁷⁰ See *Puckett v. United States Fire Ins. Co.*, 678 S.W.2d 936, 938 (Tex. 1984). In Texas alone, two cases were litigated between 1982-1984, which directly concerned this issue. *Id.* See *supra* note 1 for a listing of which states do or do not require causation.

⁷¹ See *supra* note 1 and accompanying text.

⁷² *Id.*

⁷³ J. APPLEMAN, 6A INSURANCE LAW AND PRACTICE § 4146 (1972).

⁷⁴ See STEWART, *supra* note 14, at IX.

grew.⁷⁵ Insurers in the past used these regulations as a basis for broad general exclusions in aviation policies. Currently, courts allow only specific exclusions because the numerosity and complexity of regulations dictate that any crash probably violates at least one regulation.⁷⁶ The disputed question between the courts is whether these specific exclusions require a causal connection between the exclusion and the loss for the insurer to deny coverage.

II. EXCLUSIONS CONTRASTED WITH WARRANTIES, CONDITIONS AND REPRESENTATIONS

The terms "warranty," "condition," "representation," and "exclusion" cause a lot of confusion. Policy "representations,"⁷⁷ "warranties,"⁷⁸ and "conditions"⁷⁹ are different from "exclusions."⁸⁰ The critical difference is the legal effect of a breach of one of these provisions by the insured.⁸¹ The determination of whether the insured recovers or forfeits proceeds of the policy depends on whether a provision is a "condition," "representation," "warranty" or "exclusion."⁸² Because courts do not like forfeiture⁸³ and construe ambiguity in insurance policies against the insurers,⁸⁴ confusion exists in applying and construing different types of provisions.⁸⁵ An exploration of terminology is needed to fully appreciate the difference between the policy provisions.

A "representation" is a statement made by the insured

⁷⁵ See KANE & VOSE, *supra* note 2, at 5-5.

⁷⁶ See Petkoff, *supra* note 60, at 266-67.

⁷⁷ 43 AM. JUR. 2d Insurance § 1011 (1982).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² 7 COUCH ON INSURANCE 2D 35:17, 35:44 (rev. ed. 1985). See *infra* notes 84-97 and accompanying text.

⁸³ See Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966). See also J. APPLEMAN, 6A INSURANCE LAW AND PRACTICE § 4146 (1972).

⁸⁴ See Gray, 419 P.2d at 171.

⁸⁵ See W. YOUNG, INSURANCE 78 (1971).

in an application for insurance upon which the insurer bases its decision to accept or reject the risk at a certain premium.⁸⁶ Unlike warranties, conditions, and exclusions, which are part of the insurance contract itself,⁸⁷ a representation is a statement made prior to the formation of the insurance contract.⁸⁸ Therefore, the insured's statement prior to the issuance of the policy that the airplane has a valid airworthiness certificate, is a representation.⁸⁹ If this representation is materially false, then the misrepresentation renders the policy void at the time the insurer realizes the false statement.⁹⁰

Two types of conditions exist in an insurance policy: condition precedent and condition subsequent.⁹¹ A "condition precedent" is an act or event that must occur after the terms of the contract are agreed upon in order for a policy to become effective.⁹² An example is a provision stating that the insurance policy is not effective until the first premium is paid. Without this conditional event or payment, the insured does not have a right to the policy proceeds.⁹³ "Conditions subsequent" are those acts or events which may occur after an effective policy exists.⁹⁴ After the insured pays the premium and accepts the policy, conditions subsequent impose obligations on the insured. The policy becomes ineffective if the insured breaches the obligations.⁹⁵ For example, a policy may contain a condition subsequent stating that the expiration of the airworthiness certificate voids the policy.⁹⁶

A "warranty" is a promise made by the insured that the existence of certain facts, essential to the validity of the

⁸⁶ See 43 AM. JUR. 2d *Insurance* §§ 1011-1037 (1982).

⁸⁷ *Id.*

⁸⁸ *Id.* at § 1023.

⁸⁹ See *id.*

⁹⁰ *Id.*

⁹¹ See SPEISER & KRAUSE, *supra* note 17, at 130-133.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

insurance contract, are literally true.⁹⁷ The insured's promise not to fly the airplane without a valid airworthiness certificate is an example of a warranty.⁹⁸ If the insured breaches this warranty, the insurer may void the policy. The policy is voidable even if the breach of warranty does not prejudice the insurer.⁹⁹

An "exclusion" provides that a certain risk or situation is not covered by the policy.¹⁰⁰ No promises are made by the insured or insurer.¹⁰¹ An example is a provision stating that coverage does not exist under the policy for any airplane flying without a valid airworthiness certificate.¹⁰²

The main distinction between these terms is that "exclusions," unlike the other three provisions, are not promises.¹⁰³ Exclusions simply state that no coverage exists under the policy when certain events or acts occur.¹⁰⁴ Warranties, conditions, and representations are promises that certain events either have, will, or will not occur.¹⁰⁵ If the promise is a warranty or condition then the materiality of the breach is presumed.¹⁰⁶ A breach of a condition renders the policy void,¹⁰⁷ and a breach of warranty renders the policy voidable.¹⁰⁸ If the promise is a representation, then the insurer must prove materiality or reliance on the misrepresentation.¹⁰⁹

Because the determination of the identity of the provisions directly affects whether the insured recovers, insureds and insurers litigate the definition and construc-

⁹⁷ *Id.* 7 COUCH ON INSURANCE 2D § 35:2 (rev. ed. 1985).

⁹⁸ See Note, *Florida's "Antitechnical" Statute: Should Insurance Exclusions Be Included?*, 10 FLA. ST. U.L. REV. 737, 738 (1983).

⁹⁹ *Id.* COUCH, *supra* note 97, at § 36:24.

¹⁰⁰ See Note, *supra* note 98, at 739.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 738.

¹⁰⁴ *Id.* at 739.

¹⁰⁵ *Id.* at 738.

¹⁰⁶ *Id.* at 739.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

tion of these provisions.¹¹⁰ The boundaries of these terms have become muddled and confused by lawyers and judges.¹¹¹ Naturally, insureds argue that warranties, conditions, and exclusions in the policy are really disguised representations so that the insurer must show materiality to avoid coverage.¹¹² Unethical insurers might play term games by labeling true representations as warranties in the policy in order to frustrate recovery after a slight breach.¹¹³ Furthermore, courts generally disfavor insurers avoiding coverage without a showing of materiality. Consequently, the courts sometimes use an ambiguity analysis to interpret warranties as representations.¹¹⁴ The courts achieve this result by relying on the old legal adage that all ambiguity is construed against the writer of the contract.¹¹⁵ So a term may be labeled a condition or warranty but arguably be a disguised representation.¹¹⁶

In summation, whether a term is labeled a representation, warranty, condition, or exclusion may determine whether the insured recovers. A misrepresentation must be materially false for the insurer to void the policy.¹¹⁷ A slight breach of a condition or warranty is fatal to the insured's claim.¹¹⁸ The breach of the former makes the policy voidable,¹¹⁹ while a breach of the latter voids the policy.¹²⁰ An exclusion is distinct from all of the other terms in that it is not a promise.¹²¹ It is a statement that coverage does not exist for certain acts or events.¹²²

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See Comment, *Misrepresentations and Nondisclosure in the Insurance Application*, 13 GA. L. REV. 876, 878-79 (1979).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See YOUNG, *supra* note 85, at 82.

¹¹⁶ *Id.*

¹¹⁷ COUCH, *supra* note 97, at § 35:76.

¹¹⁸ See Note, *supra* note 98, at 739.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 738.

¹²² *Id.* at 739.

III. ANTITECHNICAL STATUTES

A. *Application of Antitechnical Statutes to Exclusions*

In order to protect insureds and clear up the confusion of insurance terminology, legislatures enacted "antitechnical" statutes.¹²³ These statutes provide the criteria courts must use in determining whether a misrepresentation or breach of a condition or warranty will defeat an insured's claim.¹²⁴ Although the statutes vary, most are worded so that insurers must prove that the breach of a warranty, condition, or representation is (1) material;¹²⁵ (2) contributes causally to the loss;¹²⁶ (3) involves fraud;¹²⁷ or (4) increases the insurer's risk.¹²⁸ A typical antitechnical statute, enacted in 1943 by the state of Nebraska, provides:¹²⁹

Policy provisions; misrepresentations; warranties; conditions; effect. No oral or written misrepresentation or warranty made in the negotiation for a contract or policy of insurance by the insured, or in his behalf, shall be deemed material or defeat or avoid the policy, or prevent its attaching, unless such misrepresentation or warranty deceived the company to its injury. The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability, unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding.

Because most states have similar antitechnical statutes, the law defining warranties, representations, and conditions is largely statutory.¹³⁰ Because none of these statutes expressly include exclusions,¹³¹ the majority of

¹²³ *Id.* at 740. See also Petkoff, *supra* note 60, at 266.

¹²⁴ See Note, *supra* note 98, at 739.

¹²⁵ *Id.* at 740.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ 7 COUCH ON INSURANCE 2d 35:17, 35:44 (rev. ed. 1985).

¹²⁹ NEB. REV. STAT. § 44-358 (1984).

¹³⁰ See Note, *supra* note 98, at 740.

¹³¹ *Id.*

jurisdictions do not require a causal connection between the exclusion and the loss for the insurer to deny coverage.¹³² However, two state courts recently held that their antitechnical statute applies with exclusions.¹³³

B. Florida's Approach to Antitechnical Statutes and Exclusions

Recently in *Pickett v. Woods*,¹³⁴ the Florida Court of Appeals held that exclusions are controlled by Florida's antitechnical statute.¹³⁵ On October 6, 1974, Dr. Wilbur Pickett, after playing golf, accepted a ride home in a friend's small single-prop plane.¹³⁶ While flying home they encountered bad weather,¹³⁷ and upon attempting to land in instrument conditions, the plane crashed killing the pilot and three passengers.¹³⁸ The pilot was not instrument-rated,¹³⁹ and the FAA concluded that pilot error solely caused the crash.¹⁴⁰ The FAA further found that the plane's airworthiness certificate had expired because the last inspection of the plane occurred fifteen months prior to the accident.¹⁴¹ The expired airworthiness certificate did not contribute in anyway to the crash.¹⁴²

Foremost Insurance Company denied coverage for the crash due to the exclusion in the insured's policy which

¹³² See *supra* note 1 and accompanying text.

¹³³ *Pickett v. Woods*, 404 So. 2d 1152, 1153 (Fla. Dist. Ct. App. 1981), *petition for review denied*, *Foremost Ins. Co. v. Pickett*, 412 So. 2d 465 (Fla. 1982). See *infra* notes 134-155 and accompanying text. See also *Global Aviation Ins. Managers v. Lees*, 368 N.W.2d 209, 212 (Iowa Ct. App. 1985).

¹³⁴ 404 So. 2d at 1152 (Fla. Dist. Ct. App. 1981), *petition for review denied*, *Foremost Ins. Co. v. Pickett*, 412 So. 2d 465 (Fla. 1982).

¹³⁵ *Id.* Florida's antitechnical statute states: A breach or violation by the insured of any warranty, condition, or provision of any wet marine or transportation insurance policy, contract of insurance, endorsement, or application therefore shall not render void the policy or contract, or constitute a defense to loss thereon, unless such breach or violation increased the hazard by any means within the control of the insured. 18B FLA. STAT. ANN. § 627.409(2)(West 1984)(emphasis added).

¹³⁶ See Note, *supra* note 98, at 741.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

read: "This policy does not apply: . . . 4. to any insured (b) who operates or permits the operation of the aircraft, while in flight, unless its airworthiness certificate is in full force and effect. . . ." ¹⁴³ Dr. Pickett's widow brought suit against Foremost Insurance Company and the insured pilot. ¹⁴⁴ She claimed that the pilot was negligent and that his insurer, Foremost, should pay under the pilot's aviation policy for her damages. ¹⁴⁵

After the case was scheduled for trial, Foremost successfully severed the insurance coverage issue. ¹⁴⁶ The sole issue concerning the validity of the airworthiness certificate went to a jury, and the court entered final judgment in favor of Foremost. ¹⁴⁷ Mrs. Pickett appealed the judgment claiming that because the insurance coverage exclusion lacked a causal connection to the crash, the trial judge erred in denying her motion for directed verdict. ¹⁴⁸

In support of her argument, Mrs. Pickett cited several cases which required a causal connection between insurance provisions and the loss before an insurer could deny coverage. ¹⁴⁹ She portrayed these cases as a "growing modern trend." ¹⁵⁰ The courts cited based their holdings on the existence of their states' antitechnical statute. ¹⁵¹ Because Florida also has an antitechnical statute, Mrs. Pickett encouraged the Florida Court of Appeals to join the "growing trend." ¹⁵² Foremost answered by citing a long line of Florida and Fifth Circuit cases which clearly established that a causal relationship is not required when

¹⁴³ *Id.* at 742.

¹⁴⁴ *Id.* at 741.

¹⁴⁵ *Id.* at 742.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See *Pickett*, 404 So. 2d at 1153. See *supra* note 1 for a list of courts requiring a causal connection.

¹⁵⁰ *Pickett*, 404 So.2d at 1153. See *South Carolina Ins. Co. v. Collins*, 269 S.C. 282, 237 S.E.2d 358 (1977) (this case is often cited as the beginning of the modern trend). But see *Bellefonte Underwriters Ins. Co. v. Alfa Aviation, Inc.*, 310 N.C. 471, 312 S.E.2d 426 (1984).

¹⁵¹ See Note, *supra* note 98, at 743.

¹⁵² *Id.*

the provision in question is an exclusion.¹⁵³ Foremost further distinguished the "growing trend" cases by pointing out that they apply only to representations, conditions, and warranties. They do not apply to exclusions.¹⁵⁴

The Florida Court of Appeals held that under the Florida antitechnical statute, exclusions as well as warranties and conditions require a causal connection.¹⁵⁵ In interpreting the statute, the court recognized that the statute addressed "warranties, conditions, and provisions," and that the term "provisions" included exclusions.¹⁵⁶ Although the court failed to discuss the rationale for its method of statutory construction,¹⁵⁷ it stated that because the legislature apparently recognized the court's difficulty with insurance terms,¹⁵⁸ the legislature must have intended the term "provision" to include any material portion of the policy.¹⁵⁹

In distinguishing *Pickett*, most state statutes do not include the word "provision."¹⁶⁰ The majority of antitechnical statutes explicitly address only warranties, conditions, and representations, and therefore, do not apply to exclusions.¹⁶¹ However, if the particular antitechnical statute applies to "provisions" or "stipulations" as well as warranties, conditions, and representations, then exclusions arguably are controlled by the antitechnical

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Pickett*, 404 So. 2d at 1153.

¹⁵⁶ *Id.*

¹⁵⁷ See Note, *supra* note 98, at 744. The court probably used *ejusdem generis*, the well-founded rule of statutory interpretation. Under *ejusdem generis*, when a general word follows a list of specific words, the general word is construed to include any objects in the class of objects described by the specific words. *Id.* See R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 234 (1975).

¹⁵⁸ *Pickett*, 404 So. 2d at 1153. See also Note, *supra* note 98, at 743-44.

¹⁵⁹ See Note, *supra* note 98, at 745.

¹⁶⁰ See *id.* at 746.

¹⁶¹ See *Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co.*, 189 Neb. 610, 204 N.W.2d 162 (1973) (holding that the Nebraska antitechnical statute only applied to warranties and conditions and could not be construed to encompass exclusions).

statute.¹⁶²

IV. PUBLIC POLICY

A. *The Majority View*

The majority view does not require a causal connection between the exclusion and the loss. An example of the majority view is *Security Mutual Casualty Co. v. O'Brien*.¹⁶³ In 1975, Security Casualty Co. issued Mr. O'Brien two aviation insurance policies.¹⁶⁴ One policy provided for hull insurance, while the other provided Mr. O'Brien liability coverage.¹⁶⁵ Both policies contained an exclusion clause stating that the policy did not apply "while the aircraft is in flight, unless its Airworthiness Certificate is in full force and effect."¹⁶⁶ Mr. O'Brien leased the airplane to Pegasus Aerial Sports.¹⁶⁷ Pegasus then rented the plane to Ellsworth.¹⁶⁸ On July 14, 1979, Ellsworth collided with another airplane over Albuquerque, New Mexico.¹⁶⁹ Because the plane did not have its 1979 annual inspection per FAA regulations,¹⁷⁰ the airworthiness cer-

¹⁶² See *Global Aviation Ins. Managers v. Lees*, 368 N.W.2d 209 (Iowa Ct. App. 1985). Iowa's antitechnical statutes states:

Any condition or stipulation in an application policy or contract of insurance, making the policy void before the loss occurs, shall not prevent recovery thereon by the insured, if it shall be shown by the plaintiff that the failure to observe such provision or the violation thereof did not contribute to the loss.

IOWA CODE § 515.101 (1985) (emphasis added). The *Global* court, in construing its antitechnical statute realized that its statute was broader than Nebraska's, but not as broad as the Florida statute interpreted in *Pickett*. Because the *Global* court chose to interpret the word "stipulation" to encompass "exclusions," aviation exclusions are controlled by Iowa's antitechnical statute and must have a causal connection to the loss to avoid coverage. See *Global*, 368 N.W.2d at 212.

¹⁶³ 662 P.2d 639 (N.M. 1983).

¹⁶⁴ *Id.* at 640.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* See 14 C.F.R. § 91.169 (1986) (providing that no person may operate an aircraft unless it has had an annual inspection within the preceding twelve months); See also 14 C.F.R. § 91.165 (1986) (providing that each owner or operator of an aircraft shall have that aircraft inspected as prescribed by § 91.169).

tificate expired. The parties stipulated that the expired certificate did not cause the crash.¹⁷¹

Security claimed that New Mexico law did not require a causal connection between the exclusion (flying with an expired airworthiness certificate) and the midair crash in order to deny coverage.¹⁷² After both lower courts ruled in favor of O'Brien and held that a causal connection was required,¹⁷³ the New Mexico Supreme Court reversed and held that a causal connection is not required with an exclusion.¹⁷⁴

While the court recognized the split of authority on this issue, it rationalized that the majority view correctly portrayed New Mexico law for a number of reasons.¹⁷⁵ Justifiably, courts construe ambiguity against the insurer and dislike forfeiture.¹⁷⁶ However, the New Mexico Supreme Court recognized that courts cannot simply ignore the plain language of policy exclusions.¹⁷⁷ Even if the court agreed that the insurer should not be allowed to avoid liability for an accident unrelated to the exclusion, it was bound to follow legal precedent and longstanding public policy.¹⁷⁸

The policy behind these exclusions is to encourage aircraft owners to obtain annual inspections.¹⁷⁹ O'Brien knew of the exclusion and that the insurer did not provide coverage unless the plane received its annual inspec-

¹⁷¹ See *O'Brien*, 662 P.2d at 640.

¹⁷² *Id.* at 641.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 642.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* (citing *Visco Flying Co. v. Hansen & Rowland, Inc.*, 184 Cal. App. 2d 829, 7 Cal. Rptr. 853 (1960)).

¹⁷⁷ *O'Brien*, 662 P.2d at 642.

¹⁷⁸ *Id.* at 641. The court stated: "[t]o hold otherwise would allow courts to ignore the plain language of insurance policy exclusions whenever they feel an insurer should not be allowed to avoid liability for an accident unrelated to the policy exclusion." *Id.*

¹⁷⁹ *Id.* The court stated: "The policy behind such exclusions is clear and unambiguous. The exclusions encourage aircraft owners to obtain annual inspections of their aircraft. . . . These regulations prohibit an aircraft owner from flying his aircraft unless an annual safety inspection is performed." *Id.*

tion.¹⁸⁰ Because the insurance policy itself did not require a causal connection,¹⁸¹ the court refused to judicially create such a requirement.¹⁸² The court stated:

We start with the proposition that our function is not to write insurance contracts. We are not underwriters. We must apply them as written by the parties, even though the result compelled by the plain words used may appear or be thought to appear to be unreasonable, unduly harsh, or stringent. We cannot ignore them. We cannot substitute others for them.¹⁸³

The court concluded that Mr. O'Brien's policy must be enforced as written,¹⁸⁴ and that a causal connection between the exclusion and the accident is not a requirement in New Mexico for an insurer to deny coverage.¹⁸⁵

In summation, under the majority view, the courts should not rewrite insurance policies even if they have a desire to help the insured.¹⁸⁶ The courts' job is to enforce unambiguous contractual exclusions.¹⁸⁷ According to the majority view, because an exclusion is simply a clause stating a risk that is not covered instead of a promise, a logical reason does not exist to require a causal connection.¹⁸⁸

B. *The Minority View*

A decision contrary to *O'Brien*¹⁸⁹ is *Puckett v. United States*

¹⁸⁰ *Id.* The court stated: "Insurance coverage must not be afforded aircraft owners who ignore or refuse to comply with established certification requirements commonly part of policy exclusions." *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* "Because no annual inspection was performed on O'Brien's aircraft, the certificate lapsed and the policy exclusion was properly invoked. To hold otherwise, we would have to rewrite the regulations or the insurance policy." *Id.*

¹⁸³ *Id.* (quoting *Electron Machine Corp. v. American Mercury Ins. Co.*, 297 F.2d 212, 214 (5th Cir. 1961)).

¹⁸⁴ *O'Brien*, 662 P.2d at 642.

¹⁸⁵ *Id.* at 641. The court stated that the parties may add a causal connection requirement to the insurance contract. *Id.*

¹⁸⁶ *Id.* See *supra* note 1 and accompanying text.

¹⁸⁷ *O'Brien*, 662 P.2d at 642.

¹⁸⁸ See *United States Aviation Underwriters v. Rex Ray Corp.*, 15 Av. Cas. (CCH) 17,630 (Mass. 1979).

¹⁸⁹ *O'Brien*, 662 P.2d at 642.

*Fire Insurance Co.*¹⁹⁰ The facts of *Puckett* are similar to those in *O'Brien* because both airplanes crashed with invalid airworthiness certificates. In both cases, the insured's failure to pay for an annual inspection caused the invalidity of the certificate. The Texas Supreme Court consolidated *Puckett* with a similar case *Marney v. United States Fire Insurance Co.* for argument.¹⁹¹ These cases involved separate crashes where both airplanes had invalid airworthiness certificates at the time of the crash.¹⁹² Both suits involved a denial of coverage by United States Fire Insurance Company based on an exclusion of coverage while flying with an invalid airworthiness certificate.¹⁹³ In *Puckett*, the plane crashed more than one month after its airworthiness certificate expired.¹⁹⁴ In *Marney*, the plane crashed the day after its airworthiness certificate became invalid.¹⁹⁵ The owner of the plane in *Puckett* testified that he knew of the policy exclusion, but did not want to spend the money for the inspection until he decided whether he would sell the airplane.¹⁹⁶

In both cases the parties stipulated that the exclusion did not have a causal connection to the crash.¹⁹⁷ The trial court rendered summary judgment for United States Fire Insurance Company on the basis that no causal connection is needed between the exclusion and the loss to avoid coverage.¹⁹⁸ Relying on Texas precedent, the appellate court affirmed the trial court.¹⁹⁹ The Texas Supreme Court reversed and declared that due to public policy, a causal connection between the exclusion and accident is

¹⁹⁰ 678 S.W.2d 936 (Tex. 1984).

¹⁹¹ Brief of Amicus Curiae at 3, *Puckett v. United States Fire Ins. Co.*, 678 S.W.2d 936 (Tex. 1984).

¹⁹² *Id.* at 1-2.

¹⁹³ Petitioners Application For Writ of Error at 7, *Puckett v. United States Fire Ins. Co.*, 678 S.W.2d 936 (Tex. 1984).

¹⁹⁴ *Id.* at 5-7.

¹⁹⁵ Brief of Amicus Curiae at 2, *Puckett*, 678 S.W.2d 936 (Tex. 1984).

¹⁹⁶ Reply Brief of Appellee at 7, *Puckett*, 678 S.W.2d 936 (Tex. 1984).

¹⁹⁷ *Puckett*, 678 S.W.2d at 937.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

required before the insurer may avoid coverage.²⁰⁰ Furthermore, the court disapproved of a 1976 Texas case holding that representations required a causal connection with the accident to avoid coverage, but exclusions did not.²⁰¹

The Texas Supreme Court recognized the majority view does not require a causal connection when the provision is an exclusion.²⁰² Yet the court stated that failure to require causation upon a breach of contract would be unconscionable.²⁰³ Unconscionability results because the absence of a causal connection requirement gives the insurer a technical defense.²⁰⁴ The insurer would gain an unfair advantage when the insured does not get an inspection. The insurer would collect the insured's premium without any risk because all coverage is excluded.²⁰⁵

In reaching its public policy decision, the court looked to the Texas antitechnical statute covering fire insurance policies.²⁰⁶ Texas' antitechnical statute²⁰⁷ arguably includes exclusions because it addresses warranties, conditions, and provisions like the Florida statute; however, the

²⁰⁰ *Id.* at 938.

²⁰¹ *Id.* The court disapproved of *Schepps Grocer Supply, Inc. v. Ranger Ins. Co.*, 545 S.W.2d 13 (Tex. Civ. App. - Dallas 1976, writ ref'd n.r.e.). In *Schepps*, the court addressed the principle issue whether "once an insurer asserts a policy exclusion, it is necessary to prove a causal connection between the loss suffered and the breach of the policy." *Id.* at 14. The court held that when an exclusion in an insurance policy specifically suspends coverage in particular circumstances "the question of a causal relation between [the] failure to adhere to the . . . requirements and the loss is totally immaterial . . ." *Id.* at 16.

²⁰² *Puckett*, 678 S.W.2d at 937.

²⁰³ *Id.* at 938.

²⁰⁴ *Id.* But see *id.* at 940. The dissenting judges disagree that the insured's breach is a mere technicality. The object of the policy provision is to require compliance with federal safety regulations. *Id.*

²⁰⁵ *Id.* The court stated: "It would be against public policy to allow the insurance company in that situation to avoid liability by way of a breach that amounts to nothing more than a technicality." *Id.* Later the court citing *Pickett v. Woods*, 404 So. 2d 1152, 1153 (Fla. Dist. Ct. App. 1981), *petition for review denied*, *Foremost Ins. Co. v. Pickett*, 412 So. 2d 465 (Fla. 1982), stated: "it would actually be to the insurer's advantage that the insured failed to renew the airworthiness certificate. In such event, the insurer would collect a premium but would have no exposure to risk because the policy would no longer be effective." *Id.*

²⁰⁶ *Puckett*, 678 S.W.2d at 938.

²⁰⁷ TEX. INS. CODE ANN. § 6.14 (Vernon 1986).

Texas statute is distinct from the Florida statute in a major respect. The Texas statute solely addresses fire insurance policies.²⁰⁸ Yet, the Texas Supreme Court stated that this antitechnical statute should apply not only to fire insurance policies, but also to aviation and arguably all other insurance policies.²⁰⁹ The Court held that as evidenced by the fire insurance antitechnical statute, the Texas legislature intended public policy to require causation between material provisions and the loss in all insurance policies.²¹⁰ Therefore, in Texas, public policy demands a causal connection between exclusions and the loss in all insurance policies before the insurer can deny coverage.²¹¹

In summation, the minority view focuses on unconscionability. The minority view jurisdictions believe that it is against public policy to allow an insurer a technical defense by not requiring a causal connection.²¹² Allowing this unconscionable result would benefit insurers because insurers could collect premiums without exposure to risk.²¹³

V. CONCLUSION

The aviation industry has become highly regulated in the areas of safety since its inception.²¹⁴ The FAA requires that airplanes have current airworthiness certificates.²¹⁵ In order to comply, airplanes must be inspected

²⁰⁸ *Puckett*, 678 S.W.2d at 940.

²⁰⁹ *Id.* at 938-40. The dissenting opinion states:

Today's decision means that insurance policies — life, casualty, fire — though agreed upon by the insured and insurer, though authorized by the Board of Insurance, though clear and unambiguous, are burdened with uncertain terms that this court may from time to time determine should have been included in the parties' contract.

Id. at 940

²¹⁰ *Id.* at 938-40.

²¹¹ *Id.*

²¹² *Id.* at 940. See *supra* note 1 and accompanying text.

²¹³ See *Puckett*, 678 S.W.2d at 940.

²¹⁴ See *supra* notes 2-8 and 37-56 and accompanying text.

²¹⁵ See *supra* note 4 and accompanying text.

annually.²¹⁶

Most aviation insurance policies exclude coverage for all flights if the insured airplane does not have a valid airworthiness certificate. These exclusions are different from the policy provisions such as representations, warranties, and conditions.²¹⁷ Because of the confusion and strategic effect surrounding the use of these terms, most states have enacted antitechnical statutes.²¹⁸ These statutes require that warranties, conditions, and representations must be material and causally connected to the loss for the insurer to deny coverage.²¹⁹ While these statutes do not expressly include exclusions, the Florida Court of Appeals determined that the Florida statute includes all provisions of an insurance contract. Because an exclusion is a provision, exclusions must be causally connected to the loss to deny coverage.²²⁰

The majority of jurisdictions do not require a causal connection with exclusions.²²¹ They recognize a difference between exclusions and other contract provisions. One difference is that exclusions are not promises, but statements that certain events or acts are not covered.²²² If these events or acts occur, then the courts refuse to rewrite the insurance policy to require a causal connection.²²³ In other words, given the technical meaning of an exclusion, a logical reason does not exist for courts to require a causal connection absent legislative mandate.²²⁴

In the past five years, a few courts have changed prior law to require a causal connection with exclusions.²²⁵ This change occurred because the alternative of not requiring a causal connection gives the insurer a technical

²¹⁶ *Id.*

²¹⁷ *See supra* notes 77-122 and accompanying text.

²¹⁸ *See supra* notes 123-133 and accompanying text.

²¹⁹ *Id.*

²²⁰ *See supra* notes 134-162 and accompanying text.

²²¹ *See supra* note 1 and accompanying text.

²²² *Id.* *See supra* notes 163-188 and accompanying text.

²²³ *See supra* notes 163-186 and accompanying text.

²²⁴ *Id.*

²²⁵ *See supra* note 1.

defense.²²⁶ If an insurer collects premiums while the airplane's airworthiness certificate is expired, the insurer is not exposed to any risk.²²⁷ These minority jurisdictions hold that this technical defense is unconscionable and against public policy.²²⁸

While both viewpoints have some merit, the majority viewpoint is more tenable from a legal standpoint. Over the years insurance terms have produced much confusion and litigation.²²⁹ To dispose of some of the confusion and to protect insureds, state legislatures enacted anti-technical statutes. These statutes define warranties, conditions, and representations, but do not address exclusions. Easily, the legislatures could have incorporated exclusions into these statutes. Arguably, if they used the word "provision" then they left the question of exclusions to the courts.

However, even if the question is left to the courts, courts should not require a causal connection with exclusions because exclusions are different. They are not promises. They are statements that coverage never applies to airplanes when certain events or acts occur. Because the insured controls whether the plane gets inspected, and thereby controls whether coverage applies, a causal connection with specific exclusions is unnecessary.

Most insureds comply with FAA requirements and annually get their airplanes inspected. Others, like the insured in *Puckett*,²³⁰ consciously disregard the FAA inspection²³¹ because they do not want to pay to have

²²⁶ See *supra* notes 189-213 and accompanying text.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ See Note, *supra* note 98, at 739.

²³⁰ *Puckett*, 678 S.W.2d at 936.

²³¹ *Id.* at 940. The insured testified that he knew of the exclusion but did not want to pay for the inspection until he decided whether to sell the airplane. *Id.* Robert G. Holt, co-owner of the airplane testified in his deposition about the reason the insured plane was not inspected. He said:

Q. Do you know whether there was an annual inspection done between June 12 and June 18, 1981 - June 12, 1980 to July 18, 1981?

their airplane inspected.²³² In these cases, where the exclusion is unambiguous and conspicuous, courts should not rewrite the insurance contract to include a causal connection. The insured has willfully or negligently failed to have his airplane inspected. He knows or should know that any flight in an uninspected plane is not covered.²³³

Furthermore, the foundation of insurance is to provide indemnity to insureds for covered losses. Exclusions state what events or acts are not covered. Because a few insureds decided not to get their airplanes inspected annually, per FAA regulations and their insurance policies, the foundation of insurance has changed in the minority jurisdictions. In those states, an insurer must carry the burden and expense to prove a causal connection with an unambiguous exclusion, even though the insured knew and willfully chose to run the risk of flying without coverage.²³⁴ These courts disservice the insureds of their state

A. There was not any done.

Q. Do you know why it was not done?

A. Well, we had decided to sell the aircraft prior to the accident.

A. [W]e were trying to decide whether to sell the airplane with an annual or without an annual. So this is often done. The mechanic that was going to do the annual was on vacation in the latter part of June so we didn't get it done. And we decided to go ahead and get it done before we sold it so that whoever wanted to buy it could fly it.

Q. I assume then from what you are telling me, it was kind of a proposition that you wanted not to spend the money on the annual until you decided whether you were going to sell it or not, in substance; is that right?

A. Well, yes sir. And that is probably more or less our thinking at the time.

Id.

²³² *Id.*

²³³ *Id.* See *supra* note 231 and accompanying text. This comment assumes that the insured can comply with conspicuous, unambiguous aviation exclusions. The comment does not apply to "fine print" exclusions or exclusions that cannot reasonably be complied with by the insured. Thus, by not complying, the insured willfully or negligently abandons coverage.

²³⁴ See *supra* note 1. Of the minority jurisdictions that require a causal connection with aviation exclusions, only Texas and Colorado put the burden of proof on the insured to prove that a causal connection does not exist. See *O'Connor v. Proprietors Ins. Co.*, 696 P.2d 282 (Colo. 1985) (en banc). See also *Ideal Mut. Ins. Co. v. Last Days Evangelical Ass'n.*, 783 F.2d 1234 (5th Cir. 1986) (applying Texas law). Arguably because the Texas Supreme Court has not addressed the burden of proof issue, the burden could be on the insurer. However, the Fifth

by passing on to the aggregate of insureds the added expense of litigating a causal connection, and by removing an important incentive to comply with FAA regulations. Insureds who comply and pay for their airplanes' annual inspection should not be required to pay higher premiums for the negligent or wilful noncompliance of others.

Circuit ruled in *Ideal* that the Texas Supreme Court would put the causation burden on the insured. *Id.* at 1237. Even if the burden is on the insured, premiums must still increase because of expenses involved in litigating the causal connection issue.