

1987

## Casenotes and Statute Notes

J. Randy Beck

---

### Recommended Citation

J. Randy Beck, *Casenotes and Statute Notes*, 53 J. AIR L. & COM. 581 (1987)  
<https://scholar.smu.edu/jalc/vol53/iss2/8>

This Case Note is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

**INSURANCE — REQUIREMENT THAT INSURED'S BREACH OF AIRCRAFT INSURANCE POLICY CONTRIBUTE TO LOSS FOR INSURANCE COMPANY TO AVOID LIABILITY —** Under Texas law, when an insurance company pleads an exclusion, an insured party seeking to recover under the policy has the burden of proving that its breach of the insurance policy did not contribute to the loss. *Ideal Mutual Insurance Co. v. Last Days Evangelical Association*, 783 F.2d 1234 (5th Cir. 1986).

On July 28, 1982, a Cessna 414 crashed near Lindale, Texas.<sup>1</sup> Last Days Evangelical Association (Last Days) had leased the plane in February, 1982, from William Jenkins (Jenkins), doing business as Junk Air, Inc. (Junk Air).<sup>2</sup> The pilot, Don Burmeister (Burmeister), and his eleven

---

<sup>1</sup> *Ideal Mut. Ins. Co. v. Last Days Evangelical Ass'n*, 783 F.2d 1234, 1235 (5th Cir. 1986).

<sup>2</sup> *Id.* at 1236. The name "Last Days Evangelical Association" apparently captured the court's imagination. The opinion begins:

The evidence in the record does not disclose whether any augurers counselled otherwise when Last Days Evangelical Association decided to lease a Cessna 414 from William Jenkins' Junk Air. Nor does the record disclose whether the Fates chuckled vindictively when Ideal Mutual Insurance Company insured the airplane. Be that as it may, the relationship between Junk Air and Last Days ended tragically. . . .

*Id.* at 1235. The first footnote of the opinion quotes a long passage from Shakespeare's *Julius Caesar* in which Caesar's wife tries to convince him not to go to the Senate because there have been reports of terrifying omens. *Id.* at 1235 n.1. Caesar's response to Calphurnia includes this passage:

It seems to me most strange that men should fear,  
Seeing that death, a necessary end,  
Will come when it will come.

W. Shakespeare, *Julius Caesar* II ii. 35-37 (Signet Classic Shakespeare 1972). At least one of the passengers on Last Days' Cessna 414 also had no fear of death. In one of his songs, Keith Green wrote:

I can't wait to get to Heaven,  
Where You'll wipe away all my tears,  
In six days You created everything,  
But You've been working on Heaven 10,000 years.

K. Green, *I Can't Wait to Get to Heaven*, THE PRODIGAL SON.

passengers, died in the crash.<sup>3</sup> Ideal Mutual Insurance Company (Ideal) insured the plane, and Last Days promptly filed a claim under the policy.<sup>4</sup>

Ideal initiated a declaratory judgment action in Federal District Court for the Northern District of Texas, naming Last Days, Jenkins and Junk Air as defendants.<sup>5</sup> Ideal pled that, due to several exclusionary clauses, the policy did not cover the accident.<sup>6</sup> Rejecting all of Ideal's arguments but one, the district court found coverage lacking because the policy required Burmeister to have 1045 "total logged hours" of flight, and defendants had failed to produce the requisite time records.<sup>7</sup> Ruling that the airplane lease established Jenkins as Last Days' agent for the purpose of insuring the plane,<sup>8</sup> the court attributed Jenkins' knowl-

<sup>3</sup> *Last Days*, 783 F.2d at 1236. Keith Green, one of those killed in the crash, was a popular Christian musician and founder of Last Days Ministries. Rabey, *Keith Green, 11 Others Killed in Plane Crash*, CHRISTIANITY TODAY, Sept. 2, 1982, at 47. Green converted to Christianity in 1975 after travelling through the drug culture and various philosophies. *Id.* at 51. Last Days grew out of Keith and Melody Green's habit of opening their home to those needing a place to stay. *Id.* The ministry had a unique "whatever you can afford" policy, mailing out thousands of free copies of albums and literature. *Id.* Keith considered himself an "elbow" in the body of Christ, nudging people to "get right with God." *Id.* at 50. Also killed in the crash were Keith's son, Josiah David, 3, daughter, Bethany Grace, 2, and the eight members of the John Smalley family who had stopped to visit the Greens on their way to begin a church in Connecticut. *Id.* at 47. Litigation arising out of the crash resulted in legal fees and settlements costing Last Days around \$445,000. Letter from Melody Green to Supporters (Feb. 13, 1986).

<sup>4</sup> *Last Days*, 783 F.2d at 1235-36.

<sup>5</sup> *Id.* at 1236.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* The disputed exclusion provides:

This policy does not apply: . . . 2. to any occurrence or to any loss or damage occurring while the aircraft is operated in flight by other than the pilot or pilots set forth under Item 7 of the Declarations.

Item 7 reads:

PILOT CLAUSE. Only the following pilot or pilots. . . will operate the Aircraft in flight: SEE ENDORSEMENT # 1.

Endorsement # 1 provides in part:

It is hereby understood and agreed that Item 7 of the Policy declarations shall be completed to read as follows: . . . Don Burmeser [sic] . . . having a minimum of 1045 total logged flying hours. . . .

*Id.* at 1236-37.

<sup>8</sup> *Id.* at 1236 n.2. The parties hotly contested the agency issue on appeal. Last Days contended that Jenkins was not its agent and that Ideal dealt with Jenkins and Last Days as co-principals. Brief for Appellant Last Days Evangelical Associa-

edge of the exclusionary term to Last Days.<sup>9</sup>

Agreeing with the district court that the clause requiring Burmeister to have 1045 hours of logged flying time created an unambiguous condition precedent to coverage under the policy,<sup>10</sup> the Fifth Circuit nevertheless reversed and remanded the case on the basis of a recently decided Texas Supreme Court opinion, *Puckett v. United States Fire Insurance Co.*<sup>11</sup> Under *Puckett*, for an insurance company to

---

tion, Inc. at 5 [hereinafter Last Days' Brief]. Therefore, Jenkins' knowledge of the policy terms was not attributable to Last Days. *Id.* at 13. Ideal responded that the lease clearly supported the finding of agency, as well as Last Days' conduct in allowing Jenkins to solicit insurance on its behalf. Brief of Appellee/Cross-Appellant Ideal Mutual Insurance Company at 13-14 [hereinafter Ideal's Brief]. The court of appeals affirmed the district court's finding of agency on the basis of the aircraft lease. *Last Days*, 783 F.2d at 1236 n.2.

<sup>9</sup> Last Days' Brief, *supra* note 8, at 13. Apparently, the false statement that Burmeister had "1045 total logged hours" found its way into the policy through no fault of either Last Days or Ideal. See *Last Days*, 783 F.2d at 1237. An insurance broker, Aviation Assurance Agency by Dickens ("Assurance"), arranged the insurance purchase. *Id.* at 1236. Ideal sent an application binder, which was completed by Assurance and signed by Jenkins, requiring a figure for the "total logged hours" of each pilot. *Id.* at 1237. Assurance sent a pilot experience form to Burmeister asking for "total hours" rather than "logged" hours. *Id.* Assurance apparently failed to convey to Burmeister that the policy required "logged" hours. *Id.* Burmeister filled out the form indicating that he had 1045 total hours. *Id.* Assurance returned the form with the application binder to Ideal. *Id.* Ideal then incorporated the 1045 figure into Endorsement # 1's statement that Burmeister had 1045 logged hours. *Id.* Logged flight time differs from total flight time and consists of only those hours of flight of which a record exists. Logged time is given greater credence. *Id.* at 1239 (citing *Stewart v. Vanguard Ins. Co.*, 603 S.W.2d 761, 762-63 (Tex. 1980)). Many of Burmeister's flying hours were not logged because they were obtained during military training. *Id.* at 1237. Since Assurance was Last Days' agent, the insured could not use Assurance's mistake against Ideal. *Id.* at 1240 n.6.

<sup>10</sup> *Last Days*, 783 F.2d at 1238. Last Days argued that the clause was ambiguous because one could reasonably construe it as a mere description of Burmeister and, alternatively, that even if the clause created a condition precedent, Burmeister's pilot experience form would satisfy the exclusion. *Id.* The court rejected both arguments, holding that to be reasonable, a construction must give meaning to the disputed language and that the obvious purpose of the clause was to provide "a warranty that the risk [Ideal] insured initially would be the same risk it paid out on." *Id.* at 1238-39. Pilot experience is an element of risk and "both the risk and the premium will be higher if the pilot is Wrong Way Corrigan instead of Chuck Yeager." *Id.* at 1239. Perhaps the most quotable portion of the opinion reads: "As necessity is the mother of invention, so is ambiguity the father of multiple reasonable constructions, and where lawyers are involved, one never lacks an eager parent of either gender." *Id.* at 1238.

<sup>11</sup> 678 S.W.2d 936 (Tex. 1984) (cited in *Last Days*, 783 F.2d at 1240-41).

avoid liability on an aviation policy, the breach of contract by the insured must contribute to the accident.<sup>12</sup> *Puckett* did not, however, reach the question of who has the burden of proving that the policy breach did or did not contribute to the loss.<sup>13</sup> The Fifth Circuit, in remanding the case for trial, held that under Texas law, when an insurance company pleads an exclusion, an insured party seeking to recover under the policy must prove that its breach of the insurance policy did not contribute to the loss.<sup>14</sup>

### I. LEGAL BACKGROUND

The majority of courts addressing the issue have held that for an insurance company to avoid liability on the basis of a condition precedent in an insurance policy, there need be no causal connection between the actual loss and the excluded risk.<sup>15</sup> For instance, in *Schepps Grocer Supply*,

---

<sup>12</sup> *Last Days*, 783 F.2d at 1240.

<sup>13</sup> *Puckett*, 678 S.W.2d at 937. The parties in *Puckett* stipulated to the lack of causation. *Id.*

<sup>14</sup> *Last Days*, 783 F.2d at 1240. The court seemed to feel some regret over the opinion, saying "[a]lthough we might prefer to do otherwise, we believe that were the Texas Supreme Court to address this question, it would place the burden . . . on the insured to prove that the failure to comply with the terms of the policy in no way contributed to the loss." *Id.*

<sup>15</sup> See *Arnold v. Globe Indem. Co.*, 416 F.2d 119 (6th Cir. 1969) (under Kentucky law, liability excluded where pilot flew in low visibility weather in violation of FAA regulations); *Monarch Ins. Co. v. Polytech Indus., Inc.*, 655 F. Supp. 1058 (M.D. Ga. 1987) (Georgia law requires no causal connection between crash and violation of policy for insurance company to avoid coverage); *Edmonds v. United States*, 492 F. Supp. 970 (D. Mass. 1980) (liability excluded where plane had not received biennial flight review), *aff'd*, 642 F.2d 877 (1st Cir. 1981); *Di Santo v. Enstrom Helicopter Corp.*, 489 F. Supp. 1352 (E.D. Pa. 1980) (liability excluded where mechanic flying helicopter did not meet qualifications of policy pilot clause); *National Ins. Underwriters, Inc. v. Bequette*, 280 F. Supp. 842 (D. Alaska 1968) (liability excluded where pilot violated policy by carrying passengers), *aff'd*, 429 F.2d 896 (9th Cir. 1970); *National Union Fire Ins. Co. v. Estate of Meyer*, 192 Cal. App. 3d 866, 237 Cal. Rptr. 632 (1987) (coverage excluded where pilot lacked medical certificate); *Middlesex Mut. Ins. Co. v. Bright*, 106 Cal. App. 3d 282, 165 Cal. Rptr. 45 (1980) (liability excluded where plane had been used to illegally transport marijuana); *Grigsby v. Houston Fire & Casualty Co.*, 113 Ga. App. 572, 148 S.E.2d 925 (1966) (liability excluded where pilot had no medical certificate and violated FAA regulations); *Western Food Prod. Co. v. U.S. Fire Ins. Co.*, 10 Kan. App. 2d 375, 699 P.2d 579 (1985) (liability excluded where pilot of plane not listed in policy's pilot clause); *United States Fire Ins. Co. v. West Monroe Charter Serv., Inc.*, 504 So. 2d 93 (La. Ct. App.) (coverage excluded

*Inc. v. Ranger Insurance Co.*,<sup>16</sup> an insurance company sought to avoid liability, arguing that the insured party violated the policy.<sup>17</sup> The policy excluded coverage if the pilot flying the plane lacked an FAA multi-engine rating.<sup>18</sup> At trial, the insured introduced evidence that the pilot flying the plane at the time of the fatal crash possessed the skills necessary to pass the FAA test, but failed to do so only because he could locate no FAA examiner before the flight.<sup>19</sup> Affirming the trial court's judgment for the insurance company, the Texas Court of Civil Appeals held that the absence of a cause and effect relationship between the pilot's failure to obtain a multi-engine rating and the loss was immaterial.<sup>20</sup> To require causation would, in the court's opinion, create a new contract between the parties.<sup>21</sup>

---

where pilot lacked valid medical certificate), *writ denied*, 505 So. 2d 1141 (La. 1987); *United States Aviation Underwriters, Inc. v. Rex Ray Corp.*, 15 Av. Cas. (CCH) 17,625 (Mass. Super. Ct. 1979) (no causal connection required between loss and violation of pilot hours clause); *Kilburn v. Union Marine & Gen. Ins. Co.*, 326 Mich. 115, 40 N.W.2d 90 (1949) (liability excluded where student pilot violated pilot certificate by carrying passengers); *Macalco, Inc. v. Gulf Ins. Co.*, 550 S.W.2d 883 (Mo. Ct. App. 1977) (liability excluded where student pilot violated pilot certificate by carrying passengers); *Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co.*, 189 Neb. 610, 204 N.W.2d 162 (1973) (liability excluded where pilot lacked valid medical certificate); *Security Mut. Casualty Co. v. O'Brien*, 99 N.M. 638, 662 P.2d 639 (1983) (liability excluded where plane lacked valid airworthiness certificate because annual inspection not performed); *Bellefonte Underwriters Ins. Co. v. Alfa Aviation, Inc.*, 61 N.C. App. 544, 300 S.E.2d 877 (1983) (coverage excluded where pilot lacked valid medical certificate), *aff'd*, 310 N.C. 471, 312 S.E.2d 426 (1984); *Ochs v. Avemco Ins. Co.*, 54 Or. App. 768, 636 P.2d 421 (1981) (liability excluded where plane lacked valid airworthiness certificate because annual inspection not performed), *petition for review denied*, 644 P.2d 1128 (Or. 1982); *Insurance Co. of N. Am. v. Lynpal, Inc.*, 14 Av. Cas. (CCH) 18,067 (Tenn. Ct. App. 1977) (coverage excluded where pilot lacked valid medical certificate).

<sup>16</sup> 545 S.W.2d 13 (Tex. Civ. App. 1976).

<sup>17</sup> *Id.* The insurance company also sought reimbursement of more than \$54,000 paid to the lienholder of the insured aircraft and a declaration that it was not required to defend the insured in any action arising out of the crash. *Id.* The trial court granted all relief requested by the plaintiff. *Id.*

<sup>18</sup> *Id.* at 14.

<sup>19</sup> *Id.* Three days prior to the crash, the pilot had taken a three-hour check flight with his instructor in preparation for the test and his instructor recommended him for a multi-engine rating. *Id.*

<sup>20</sup> *Id.* at 16.

<sup>21</sup> *Id.* The court treated the issue of whether there must be a causal link be-

In contrast to the majority position represented by *Schepps Grocer Supply*, a number of jurisdictions have adopted the rule that causation must exist to avoid liability.<sup>22</sup> One commentator calls the causation requirement

---

tween the policy breach and the loss as purely a matter of construing the policy. *Id.* Thus, no causation requirement existed under the language of this particular contract. *Id.* The court did not consider imposing the causation requirement as a matter of public policy. Compare with *Puckett*, 678 S.W.2d at 938.

<sup>22</sup> *Migues v. Universal Airways, Inc.*, 18 Av. Cas. (CCH) 17,250 (S.D. Miss. 1982) (insurer must show causal connection between policy breach and loss to avoid liability); *Bayers v. Omni Aviation Managers, Inc.*, 510 F. Supp. 1204 (D. Mont. 1981) (pilot's lack of medical certificate does not exclude liability where causally unrelated to crash); *American States Ins. Co. v. Byerly Aviation, Inc.*, 456 F. Supp. 967 (S.D. Ill. 1978) (fact that pilot flying plane was not listed in policy would not exclude liability unless pilot error contributed to crash); *Avemco Ins. Co. v. Chung*, 388 F. Supp. 142 (D. Haw. 1975) (pilot's lack of medical certificate does not exclude liability where causally unrelated to crash); *Florida Power & Light Co. v. Foremost Ins. Co.*, 433 So. 2d 536 (Fla. Dist. Ct. App. 1983) (burden on insured to show breach of pilot warranty increased hazard within meaning of Florida statute); *Pickett v. Woods*, 404 So. 2d 1152 (Fla. Dist. Ct. App. 1981) (lack of airworthiness certificate did not void policy where pilot error caused crash), *petition for review denied sub nom.* *Foremost Ins. Co. v. Pickett*, 412 So. 2d 465 (Fla. 1982); *Global Aviation Ins. Managers v. Lees*, 368 N.W.2d 209 (Iowa Ct. App. 1985) (plane insured under Iowa statute where failure to maintain airworthiness and medical certificates did not contribute to loss); *South Carolina Ins. Guar. Ass'n v. Broach*, 291 S.C. 349, 353 S.E.2d 450 (1987) (burden on insurer to show causal connection between unapproved flight by student pilot and crash); *South Carolina Ins. Co. v. Collins*, 269 S.C. 282, 237 S.E.2d 358 (1977) (pilot's lack of medical certificate does not exclude liability where causally unrelated to crash).

One of the cases cited in *Puckett* as supporting the majority rule was *O'Connor v. Proprietors Ins. Co.*, 661 P.2d 1181 (Colo. Ct. App. 1982). On appeal, the Colorado Supreme Court affirmed the lower court ruling, but adopted a modified form of the causation rule. *O'Connor v. Proprietors Ins. Co.*, 696 P.2d 282, 285-86 (Colo. 1985). The court held that:

The use of the equitable doctrine against forfeiture of coverage to override clear and unambiguous forfeiture provisions in an insurance policy should not be invoked except under the most compelling circumstances. Where the relationship of the regulation to safety is not apparent, the insured has the burden of showing the absence of such a relationship. Furthermore, when the regulation is clearly or implicitly safety-related, the application of the exclusion should be precluded by public policy only when the insured can show that the violation of the regulation was not a cause of the accident.

*Id.* at 286. The Colorado Supreme Court, like the Fifth Circuit in the present case, placed the burden of proving causation on the insured party rather than the insurance company. The Iowa "anti-technicality" statute also mandates that the insured party bear the burden of proving its policy breach did not contribute to the loss. IOWA CODE ANN. § 515.101 (West 1949); see also *Lees*, 368 N.W.2d at 211-12. Apparently, only Colorado and Iowa follow the rule adopted by the Fifth Circuit in *Last Days*.

the "modern trend."<sup>23</sup> For example, the South Carolina Supreme Court adopted the new approach in *South Carolina Insurance Co. v. Collins*.<sup>24</sup> An insurance company brought suit to avoid liability for an airplane crash.<sup>25</sup> The parties stipulated that the pilot did not possess a valid medical certificate at the time of the accident.<sup>26</sup> Plaintiff argued that this failure constituted a breach of the policy.<sup>27</sup> The parties further stipulated that the lack of a medical certificate did not contribute to the loss.<sup>28</sup> The South Carolina Supreme Court, relying on an old line of automobile insurance cases, held that the insurer must demonstrate a causal connection between a breach of the policy and the crash of the aircraft in order to avoid liability.<sup>29</sup> Adopting the rationale of the prior cases, the court argued that parties to an insurance contract do not arbitrarily bar coverage under excluded conditions.<sup>30</sup> Rather, when drafting a policy, the insurance company desires to relieve itself from liability for accidents *caused* by the excluded risk.<sup>31</sup> Therefore, the requirement that breach of the policy condition contribute to the loss can be seen as implicit in the parties' agreement.<sup>32</sup> Almost every case adopting the causation requirement places the burden of proving causation on the insurance company rather than

---

<sup>23</sup> 6A J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4146, at 439 (1972).

<sup>24</sup> 269 S.C. 282, 237 S.E.2d 358 (1977).

<sup>25</sup> *Collins*, 237 S.E.2d at 358.

<sup>26</sup> *Id.* at 359. The parties stipulated that the pilot had a valid pilot certificate at the time of the crash, but his two-year medical certificate lapsed three months before the accident. *Id.*

<sup>27</sup> *Id.* The pilot clause required that only named pilots "holding valid and effective pilot and medical certificates operate the aircraft." *Id.* at 360.

<sup>28</sup> *Id.* at 359.

<sup>29</sup> *Id.* at 360-62. The court relied on *Reynolds v. Life & Casualty Ins. Co.*, 166 S.C. 214, 164 S.E. 602 (1932) and *McGee v. Globe Indem. Co.*, 173 S.C. 380, 175 S.E. 849 (1934).

<sup>30</sup> *Collins*, 237 S.E.2d at 361-62.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*; see A. WINDT, INSURANCE CLAIMS AND DISPUTES § 6.07 (1982). This argument answers the objection that a causation requirement alters the parties' agreement. See *supra* note 21 and *infra* note 49 and accompanying text for examples of the objection.



the insured party.<sup>33</sup>

Jurisdictions may impose the causation requirement by statute as well as case law.<sup>34</sup> Texas has long had an "anti-technicality" statute, article 6.14 of the Insurance Code, adopting the causation rule for personal property fire insurance policies.<sup>35</sup> Without explaining their rationale, Texas cases interpreting that statute have placed the burden of proving causation on the insurance company.<sup>36</sup>

In *Puckett*, the Texas Supreme Court for the first time considered the causation requirement in the context of an aircraft insurance policy.<sup>37</sup> United States Fire Insurance Company brought a declaratory judgment action in Texas state court seeking to avoid liability when a plane covered by one of its policies crashed.<sup>38</sup> The policy contained an exclusion suspending coverage if the plane's "airworthiness certificate [was] not in full force and effect."<sup>39</sup> Under federal law, one must comply with all maintenance re-

---

<sup>33</sup> Cases placing the causation burden of proof on the insurance company rather than the insured party include *Migues*, 18 Av. Cas. (CCH) at 17,257; *American States*, 456 F. Supp. at 970; *Avenco*, 388 F. Supp. at 151; *Florida Power & Light*, 433 So. 2d at 536-37; and *Collins*, 237 S.E.2d at 362. Colorado and Iowa place the burden on the insured party. See *supra* note 22.

<sup>34</sup> See, e.g., FLA. STAT. ANN. § 627.409(2) (West 1984); IOWA CODE ANN. § 515.101 (West 1949).

<sup>35</sup> The text of the statute reads:

No breach or violation by the insured of any warranty, condition or provision of any fire insurance policy, contract of insurance, or applications therefor, upon personal property, shall render void the policy or contract or constitute a defense to a suit for loss thereon, unless such breach or violation contributed to bring about the destruction of the property.

TEX. INS. CODE ANN. art. 6.14 (Vernon 1981).

<sup>36</sup> See *Austin Bldg. Co. v. National Union Fire Ins. Co.*, 403 S.W.2d 499, 505 (Tex. Civ. App. 1966); *Springfield Fire & Marine Ins. Co. v. Whisenant*, 245 S.W. 963, 964 (Tex. Civ. App. 1922); *Texas State Mut. Fire Ins. Co. v. Richbourg*, 243 S.W. 590, 591 (Tex. Civ. App. 1922), *rev'd on other grounds*, 257 S.W. 1089 (Tex. Comm'n App. 1924); *Westchester Fire Ins. Co. v. Roan*, 215 S.W. 985, 987 (Tex. Civ. App. 1919).

<sup>37</sup> See *Puckett*, 378 S.W.2d at 938. The insurance company argued that several previous Texas Supreme Court decisions had rejected the causation requirement, but the majority opinion countered that the causation issue had never been raised in those cases. *Id.*

<sup>38</sup> *Id.* at 937. The trial court rendered summary judgment for the insurance company and the appellate court affirmed in an unpublished opinion. *Id.*

<sup>39</sup> *Id.*

quirements for a certificate to be effective.<sup>40</sup> One maintenance regulation requires an inspection within the twelve months prior to operation of the plane.<sup>41</sup> The annual inspection numbers among the hundreds of federal law requirements for an effective airworthiness certificate.<sup>42</sup> The parties stipulated that the inspection was not performed, but that the failure to inspect the plane in no way contributed to the accident.<sup>43</sup> The court addressed only the issue of whether the insured's breach of the inspection requirement excused the insurance company from liability under the policy absent a causal connection between the breach and the crash.<sup>44</sup> Rejecting the majority approach, the court agreed with *South Carolina Insurance Co. v. Collins* and other authorities that the causation requirement provides the better rule.<sup>45</sup> The court looked to the Texas personal property fire insurance statute as an indication that denial of recovery because of a breach amounting to a mere technicality would violate Texas' public policy.<sup>46</sup> In so holding, the court expressly disapproved of the decision in *Schepps Grocer Supply*.<sup>47</sup> Since the parties stipulated to the lack of causation, the court never determined who would have the burden of proof on the issue.<sup>48</sup> However, the two dissenting justices assumed that the burden of proof would be on the insurance company.<sup>49</sup>

---

<sup>40</sup> *Id.*; see 14 C.F.R. § 21.181(a)(1) (1987).

<sup>41</sup> *Puckett*, 678 S.W.2d at 937 n.1; see 14 C.F.R. §§ 91.165, 91.169 (1987).

<sup>42</sup> *Puckett*, 678 S.W.2d at 938; see Maintenance, Preventative Maintenance, Rebuilding and Alteration Requirements, 14 C.F.R. §§ 43.1 - 43.12 (1987); General Operating and Flight Rules, 14 C.F.R. §§ 91.1 - 91.311 (1987).

<sup>43</sup> *Puckett*, 678 S.W.2d at 937. The crash apparently occurred through pilot error. *Id.* at 938.

<sup>44</sup> *Id.* at 937.

<sup>45</sup> *Id.* at 937-38.

<sup>46</sup> *Id.* at 938; see *supra* note 35 for the text of the statute. The court felt that it would be unconscionable to allow the insurance company to avoid liability on the basis of a technical breach because the cause of the crash, pilot error, was clearly covered by the policy. *Puckett*, 678 S.W.2d at 938.

<sup>47</sup> *Id.*; see *supra* notes 16-21 and accompanying text for a discussion of *Schepps Grocer Supply*.

<sup>48</sup> *Last Days*, 783 F.2d at 1240; *Puckett*, 678 S.W.2d at 937.

<sup>49</sup> *Puckett*, 678 S.W.2d at 940 (Pope, C.J., joined by McGee, J., dissenting). The dissenters suggested that "[The majority] adds to the contract the requirement

Around the time that it decided *Puckett*, the Texas Supreme Court was considering the case of *United States Fire Insurance Co. v. Marr's Short Stop*.<sup>50</sup> United States Fire Insurance Company sought to avoid liability under an aviation insurance policy on the basis of a jury finding that the pilot had breached the policy by knowingly flying into weather conditions for which he had not obtained an FAA rating.<sup>51</sup> The court issued its original decision in *Marr's Short Stop*, granting the insurance company the relief requested, several months before *Puckett*.<sup>52</sup> The court's denial of the petition for rehearing, however, came more than a month after the *Puckett* decision.<sup>53</sup> A concurring opinion and a dissenting opinion, added to the majority's denial of rehearing, considered, among other issues, the relevance of *Puckett* to the court's action in the case at bar.<sup>54</sup> The lone dissenter, Justice Ray, argued that *Puckett* should apply and that the court should remand *Marr's Short Stop* for a determination of whether the breach of the aircraft policy was causally connected to the crash.<sup>55</sup> The dissenting opinion suggested that the burden of proving that the breach contributed to the crash should be on the insurance company.<sup>56</sup> In response, Justice Spears, the author of *Puckett*, wrote a concurring opinion in which Jus-

---

that the insurance company must prove that the breach was the cause of the accident." *Id.* (emphasis added). With regard to the charge that the causation requirement adds to the parties' agreement see *supra* note 32 and accompanying text.

<sup>50</sup> 680 S.W.2d 3 (Tex. 1984).

<sup>51</sup> *Id.*

<sup>52</sup> See *id.* at 3; *Puckett*, 678 S.W.2d at 936. *Marr's Short Stop* was decided on April 4, 1984. The *Puckett* decision came down on October 24, 1984, more than six months later.

<sup>53</sup> See *Marr's Short Stop*, 680 S.W.2d at 3; *Puckett*, 678 S.W.2d at 936. Rehearing was denied in *Marr's Short Stop* on November 28, 1984, more than a month after the October 24, 1984 decision in *Puckett*.

<sup>54</sup> *Marr's Short Stop*, 680 S.W.2d at 6-11.

<sup>55</sup> *Id.* at 11.

<sup>56</sup> *Id.* at 10. "Insurance coverage should not be denied Marr unless U.S.F.I. proves that Marr encountered IFR weather [Instrument Flight Rule weather requires the pilot to fly in low visibility, relying on his instruments] and that his failure to have an instrument rating was causally related to the crash." *Id.* (emphasis added).

tice Kilgarlin joined.<sup>57</sup> The concurrence argued that *Puckett* should not apply to *Marr's Short Stop* because the causation issue had not been preserved for appeal.<sup>58</sup> The concurring justices also contended that if *Puckett* applied, the burden of proof should be on the insured party to show that his breach of the policy did not contribute to the loss.<sup>59</sup>

## II. *IDEAL MUTUAL INSURANCE CO. v. LAST DAYS EVANGELICAL ASSOCIATION*

### A. *Critical Analysis*

Texas' rejection of the majority rule in *Puckett* set the stage for *Last Days*, the first case to which the *Puckett* rule applied.<sup>60</sup> The Fifth Circuit found that the policy of insurance unambiguously required Burmeister to have 1045 total logged hours of flying time.<sup>61</sup> Last Days failed to produce any evidence supporting the pilot form's claim that Burmeister had logged 1045 hours.<sup>62</sup> Since the actual pilot had logged insufficient hours, he could not be the Burmeister listed in the pilot clause.<sup>63</sup> Therefore, the court of appeals agreed with the trial court that the insured had breached the policy.<sup>64</sup>

Nevertheless, the Fifth Circuit refused to affirm the lower court's decision since, in its judgment, Texas law after *Puckett* would not allow avoidance of coverage with-

---

<sup>57</sup> *Id.* at 6-7.

<sup>58</sup> *Id.* at 7. The dissent disputes the assertion that the issue was not preserved for review. *Id.* at 10.

<sup>59</sup> *Id.* at 7. Though giving no explicit rationale, the concurring justices seem to favor placing the burden of proof on the insured party because that party has breached the policy. *Id.*

<sup>60</sup> The Fifth Circuit was asked to apply *Puckett* in an earlier case but refused to do so since the theory was not argued at trial and was not the subject of any assignment of error on appeal. *Royal Aviation, Inc. v. Aetna Casualty & Sur. Co.*, 770 F.2d 1298, 1300 n.1 (5th Cir. 1985).

<sup>61</sup> *Last Days*, 783 F.2d at 1238. In the court's words, "Unlike the deconstructionists at the forefront of modern literary criticism, the courts still recognize the possibility of an unambiguous text." *Id.*

<sup>62</sup> *Id.* at 1240.

<sup>63</sup> *Id.* at 1239.

<sup>64</sup> *Id.* at 1241.

out a finding that Burmeister's failure to log 1045 hours somehow contributed to the loss.<sup>65</sup> The court still faced the open question of which party has the burden of proof on causation, insurer or insured.<sup>66</sup> As a federal court sitting in diversity, the Fifth Circuit must apply the substantive law of Texas, and burden of proof falls within state substantive law.<sup>67</sup> Since *Puckett* did not decide the burden of proof issue, the Fifth Circuit had to predict what the Texas Supreme Court would do in this situation.<sup>68</sup>

The court held that the Texas Supreme Court would place the causation burden of proof on the insured party,<sup>69</sup> advancing two reasons for its opinion. First, the author of *Puckett* had suggested putting the burden of proof on the insured party in his concurring opinion in *Marr's Short Stop*.<sup>70</sup> Second, a well settled rule of Texas law requires that when an insurance company pleads an exclusion, the insured party must show that the exclusion does not apply.<sup>71</sup> The court reasoned that placing the

---

<sup>65</sup> *Id.* at 1240-41.

<sup>66</sup> *Id.* at 1240.

<sup>67</sup> *Id.* The court cited to *Benavides v. Mutual Life Ins. Co.*, 516 F.2d 393, 400 (5th Cir. 1975), dealing with the Texas presumption against suicide in actions to recover under life insurance policies, for the proposition that burden of proof is a matter of state substantive law which a federal court sitting in diversity must apply.

<sup>68</sup> *Last Days*, 783 F.2d at 1240. On May 30, 1986, the Texas Supreme Court adopted TEX. R. APP. P. 114, allowing certification of questions by a United States Court of Appeals when there exists "no controlling precedent in the decisions of the Supreme Court of Texas." Unfortunately, the rule did not take effect until January 1, 1987 and, thus, could not be used by the Fifth Circuit in *Last Days*.

<sup>69</sup> *Last Days*, 783 F.2d at 1240. The court said:

Although we might prefer to do otherwise, we believe that were the Texas Supreme Court to address this question, it would place the burden, as did Justice Spears concurring in *Marr's Short Stop*, on the insured to prove that the failure to comply with the terms of the policy in no way contributed to the loss.

*Id.*

<sup>70</sup> *Id.* at 1240; see *supra* note 59 and accompanying text.

<sup>71</sup> *Last Days*, 783 F.2d at 1240. The court commented on the harshness of the rule. *Id.* It has been challenged, but never with success. See, e.g., *Hardware Dealers Mut. Ins. Co. v. Berglund*, 393 S.W.2d 309, 316 (Tex. 1965). Essentially, the only attempt to justify the rule is the statement that Texas courts construe exclusions as "taking something out of the general portion of the contract, so that the promise is to perform only what remains after the part excepted is taken away."

burden of proving the policy breach contributed to the loss on the insurance company would clash with this rule.<sup>72</sup> Requiring the insurer to demonstrate that the breach of the exclusion contributed to the accident would first obligate the insurer to show the existence of the excluded condition and, thereby, negate the insured's duty to prove the exclusion inapplicable.<sup>73</sup>

The Fifth Circuit's prediction of the Texas Supreme Court's future holding can be questioned on several grounds. First, though two justices, including the author of *Puckett*, suggested placing the burden of proof on the insured, three other justices have either advocated or assumed the application of the opposite rule.<sup>74</sup> The two dissenters in *Puckett* assumed that the burden would be on the insurance company.<sup>75</sup> Further, the dissenting justice in *Marr's Short Stop* specifically suggested as much.<sup>76</sup> Thus, Justice Spears' opinion on the burden of proof issue could well be a minority position on the Texas court.

The court's second argument also deserves scrutiny. The court reasons correctly that requiring the insurer to show that an excluded risk contributed to the loss would conflict with the Texas rule that the insured has the burden of proof on the initial applicability of an exclusion.<sup>77</sup> Logically, if an insurance company must prove that the breach of the policy contributed to the loss, it must first prove that the policy was breached.<sup>78</sup> This relieves the insured's burden of demonstrating that the exclusion does

---

*Id.* (quoting *Travelers' Ins. Co. v. Harris*, 212 S.W. 933 (Tex. Comm'n App. 1919)). This view is contrasted with the position that exclusions are defensive in nature, "added to the principal contract to avoid the promise of the insurer by way of defeasance or excuse." *Id.*; see *infra* note 80.

<sup>72</sup> *Last Days*, 783 F.2d at 1240.

<sup>73</sup> *Id.* at 1240-41.

<sup>74</sup> See *supra* notes 49 and 56 and accompanying text for relevant passages from the opinions in *Puckett* and *Marr's Short Stop*.

<sup>75</sup> See *supra* note 49 for the relevant passage from the dissenting opinion.

<sup>76</sup> See *supra* note 56 for the relevant portion of Justice Ray's dissent.

<sup>77</sup> See *supra* notes 72-73 and accompanying text, setting out the court's reasoning.

<sup>78</sup> *Last Days*, 783 F.2d at 1240-41.

not apply.<sup>79</sup> However, the important question remains. Would this conflict keep the Texas Supreme Court from placing the burden of proof of causation on the insurer?

For several reasons, the inconsistency might not trouble the Texas courts as much as it did the Fifth Circuit. First, the rule requiring the insured to negate exclusions pled by the insurer does not appear to implicate important public policies.<sup>80</sup> In *Hardware Dealer's Mutual Insurance Co. v. Berglund*,<sup>81</sup> a party asked the Texas Supreme Court to overturn the rule. The court declined to do so, not to protect some cherished value, but merely because it did not wish to disturb a long line of precedent supporting the rule.<sup>82</sup> However, in light of the radical changes the Texas Supreme Court made in *Puckett*, the rule of stare decisis might not be as influential as in 1965, the year of the *Berglund* decision. The Texas Supreme Court might be willing to overrule *Berglund*, at least for aviation insurance policies, since the rules relating to such policies are currently in flux.<sup>83</sup>

Second, the rule set forth in *Berglund* has generally been

---

<sup>79</sup> See *id.*

<sup>80</sup> The court in *Last Days* sets out in a footnote the justification for the rule, quoting from an old Texas case also cited by *Berglund*:

Those courts which treat the contracts as being general, and the clauses declaring what they shall not cover as "stipulations added to the principal contract to avoid the promise of the insurer by way of defeasance or excuse," hold that these clauses are defensive, and must be pleaded and sustained by the insurer; while the courts which construe the exception clauses as "taking something out of the general portion of the contract, so that the promise is to perform only what remains after the part excepted is taken away," place the burden of pleading and proof upon the assured to negative them by showing that his cause of action does not come within the exception.

In view of the decisions by our Supreme Court, and the indication made in granting the writ in this case, we are of the opinion that the burden rests upon the plaintiff to show that her cause of action does not fall within the excepting clause.

*Id.* at 1240 n.8 (quoting *Travelers' Ins. Co. v. Harris*, 212 S.W. 933 (Tex. Comm'n App. 1919)).

<sup>81</sup> 393 S.W.2d 309 (Tex. 1965).

<sup>82</sup> *Id.* at 315.

<sup>83</sup> The *Berglund* court justified adherence to the rule on the grounds that businessmen require a great deal of stability in contract law. *Id.* It is difficult to see how an insurance company would rely on a rule of pleading in entering insurance

ignored in Texas cases applying article 6.14 of the Insurance Code, requiring that breaches of certain fire insurance policies contribute to the loss for the insurance company to avoid liability.<sup>84</sup> For instance, in *Austin Building Co. v. National Union Fire Insurance Co.*,<sup>85</sup> the insurer pled an exclusion because the building destroyed by fire had been occupied in violation of the policy.<sup>86</sup> The Texas appellate court reversed and remanded a lower court decision for the insurance company because there was "no evidence whatever that occupancy of the extension contributed to the fire."<sup>87</sup> Thus, the court implicitly placed the burden of proving causation on the insurer. Other cases applying article 6.14 have done so explicitly.<sup>88</sup> None of these Texas courts even mentioned the inconsistency with the longstanding rule affirmed in *Berglund*.

Third, all the authorities cited by the Texas Supreme Court in *Puckett* as persuasive, if they address the issue at all, place the burden of proving causation on the insurance company rather than the insured.<sup>89</sup> For instance, *South Carolina Insurance Co. v. Collins*,<sup>90</sup> cited twice in the *Puckett* opinion,<sup>91</sup> so held. Even though Justice Spears would not follow these cases on the burden of proof issue, they might influence other justices. In fact, there appear to be only two jurisdictions, other than the Fifth Circuit in *Last Days*, which place on the insured party the burden of proving that the breach of an aviation insurance policy did

---

contracts. However, the business reliance justification for keeping the rule becomes less persuasive given the disruptive holding of *Puckett*.

<sup>84</sup> See *supra* notes 35 and 36 for the text of the statute and a list of cases applying it.

<sup>85</sup> 403 S.W.2d 499, 505 (Tex. Civ. App. 1966).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> See *supra* note 36 and accompanying text for cases applying the statute and putting the burden of proof on the insurer.

<sup>89</sup> See *supra* note 33 for cases which place the burden of proof on the insurance company. These cases were cited in *Puckett*, with the exception of the *Florida Power & Light* decision.

<sup>90</sup> See *supra* notes 24-31 and accompanying text.

<sup>91</sup> See *supra* note 33; *Puckett*, 678 S.W.2d at 937-38.



not contribute to the loss.<sup>92</sup> In practical terms, the Fifth Circuit has predicted that the Texas Supreme Court would defy the weight of authority on this issue.<sup>93</sup>

### B. *Practical Implications*

The decision in *Last Days* first applies the rule of *Puckett* and first decides who will bear the burden of proof of causation.<sup>94</sup> Of course, the opinion will have effect only until the Texas Supreme Court addresses the issue. Until that time, the Fifth Circuit's opinion will bind lower federal courts in Texas.<sup>95</sup> *Last Days* will also be persuasive in lower Texas state courts and might influence the Texas Supreme Court's ultimate decision on the burden of proof issue.

Generally, the decision will require insured parties involved in litigation to prove what caused a particular aircraft crash, or at least what did not cause it. In remanding this case for trial, the Fifth Circuit held that "[Last Days] must prove that pilot error was not a cause of the crash."<sup>96</sup> Since, to bar recovery, pilot error need only be one of several causes of the crash, proving that there was a mechanical malfunction, or even that the wings fell off, might not meet the insured's burden of proof.<sup>97</sup>

This burden might not be too onerous for a large airline or airplane manufacturer. In such cases, the company would probably test for the cause of the crash regardless of the litigation.<sup>98</sup> However, for an insured individual, the

<sup>92</sup> See *supra* note 22 for a discussion of *O'Connor v. Proprietors Ins. Co.*, 696 P.2d 282 (Colo. 1985) and IOWA CODE ANN. § 515.101 (West 1949).

<sup>93</sup> See *supra* note 33 for a list of five cases placing the burden of proof on the insurer as opposed to two jurisdictions placing it on the insured.

<sup>94</sup> *Last Days*, 783 F.2d at 1240-41.

<sup>95</sup> See, e.g., *Russell v. Hathaway*, 423 F. Supp. 833, 835 (N.D. Tex. 1976) (even a three-judge district court bound by circuit court opinions).

<sup>96</sup> *Last Days*, 783 F.2d at 1241.

<sup>97</sup> See *Puckett*, 678 S.W.2d at 938 ("[A]n insurer cannot avoid liability under an aviation liability policy unless [the breach] is either the sole or one of several causes of the accident.").

<sup>98</sup> See, e.g., *A Grisly Triptych of Disasters*, TIME, Sept. 27, 1982, at 43 (McDonnell Douglas experts study cause of crash); Hill, *U.S. Air Carrier Accident Investigation Procedure*, 36 J. AIR L. & COM. 414 (1970). National Transportation Safety Board

costs of gathering evidence to prove that exclusions pled by the insurance company did not contribute to the crash might discourage risking such expenses to pursue litigation. In some cases, insurance companies may escape paying out on policies where coverage actually exists. However, even after *Last Days*, insured parties remain in a better position than they occupied before *Puckett*.<sup>99</sup> An insured party who has breached some technical policy provision still has a chance to recover, since *Last Days* requires the trial court to find that the policy breach contributed to the crash before the insurance company can avoid coverage.<sup>100</sup>

Where the cause of an accident cannot be determined,<sup>101</sup> *Last Days* will allow an insurer to avoid liability on any applicable exclusion, because the insured party will be unable to prove the breach did not contribute to the crash. Essentially, if the cause of the crash remains a mystery, the *Puckett* causation requirement will not benefit the insured party.<sup>102</sup> In closely contested cases, the burden of proof also carries with it the risk of nonpersuasion, and insured parties will lose when a court cannot decide between the causation analyses of the litigants.<sup>103</sup>

### III. CONCLUSION

Arguably, the Fifth Circuit may have erred in its prediction of what the Texas Supreme Court will do with the

---

regulations make it possible for parties involved in an accident to participate in the official post-accident investigation. 49 C.F.R. § 831.9(a) (1986).

<sup>99</sup> See *supra* notes 37-49 and accompanying text for a discussion of *Puckett*.

<sup>100</sup> See *supra* notes 60-65 and accompanying text for a discussion of the Fifth Circuit's holding in *Last Days* that the *Puckett* decision required reversal of the initial judgment for *Ideal*.

<sup>101</sup> See, e.g., *Trihey v. Transocean Air Lines*, 255 F.2d 824, 826 (9th Cir. 1958) (neither party able to prove cause of crash); *Kelley v. Central Nat'l Bank*, 345 F. Supp. 737, 741 (E.D. Va. 1972) (no evidence to show cause of crash).

<sup>102</sup> Where the cause of the crash remains undetermined, the insurer can just plead various exclusions under the policy and the insured party will not recover unless it can show the exclusions do not apply. This matches the state of Texas law before *Puckett*.

<sup>103</sup> See, e.g., 32B AM. JUR. 2D, *Federal Rules of Evidence* § 58 (1982) which treats "burden of proof" and "risk of nonpersuasion" as synonyms.

causation burden of proof. Strong arguments exist for either position, and the court ruled on what appeared to it the best evidence. Indeed, the opinion suggests that the court might have preferred to hold otherwise.<sup>104</sup> Thus, commendably, the Fifth Circuit panel placed fidelity to the law over personal preference. The Texas Supreme Court's actual holding on the burden of proof issue will provide the ultimate test of the Fifth Circuit's analysis.

Regardless of what the Texas Supreme Court eventually holds, the Fifth Circuit in *Last Days* has, for the present, limited the benefits of *Puckett* for parties insured under aviation policies.<sup>105</sup> Where the cause of a crash cannot be determined, the holding in *Puckett* will be entirely annulled by the Fifth Circuit's opinion, because the insurance company can avoid liability by pleading any relevant exclusion.<sup>106</sup> Until the Texas Supreme Court rules on the issue, counsel representing the insured party under an aviation insurance policy should assume that they will have to prove that any exclusion pled by the insurance company either does not apply or did not contribute to the accident.

*J. Randy Beck*

---

<sup>104</sup> See *supra* note 14.

<sup>105</sup> See *supra* notes 94-103 and accompanying text for a discussion of the practical implications of the decision.

<sup>106</sup> See *supra* note 102 and accompanying text.

# **Current Literature**

