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ANALYSIS OF AVIATION LIABILITY COVERAGE EXCLUSIONS —A RECENT CASE SURVEY—

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INTRODUCTION

CONTRARY TO THE belief held by many insureds and all plaintiffs' counsel, exclusions are not the product of a collusive effort by underwriters and claim-managers to attempt to delete, in fine print, all coverage provided by insurance agreements under every set of facts that could possibly result in a loss. Exclusions do, however, play a vital role in the aviation policy and serve a number of purposes. One such purpose is to assure that the risk undertaken by the insurer is commensurate with the premium charged the insured. Since extrahazardous risks must command an increased premium, one way to avoid charging all insureds for extrahazardous activities undertaken by only a few is to exclude coverage for such activities. A premium surcharge can then be demanded of those few who wish to eliminate the exclusion from their individual policy.

Other purposes of exclusions are to prevent multiple indemnification of a claimant through overlapping coverage in the same or separate policies and to avoid shifting the loss from one insurer to another where one has received a premium to cover the loss which it attempts to avoid and which it should reasonably be expected to pay. Exclusions also serve the function of regulation. By excluding coverage for certain activities altogether, or by excluding coverage when the pilot in command is not currently qualified to undertake the activity, psychological pressure is exerted

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on the insured to refrain from engaging in those activities by subjecting him to the risk of personal liability should a loss occur. In this way, exclusions can serve a vital public policy role.

There is no standardized aviation policy in use as of this date. Due to the competitive nature of the insurance market, however, most policies necessarily exclude the same basic activities and many policies contain identical language. Based upon this premise, this article will review six common exclusions in light of holdings in aviation cases from 1976 through 1978. Only current aviation cases will be discussed, and only six basic exclusions will be covered, although more or less may exist in any one insurer's policy. The exclusions will not be given exhaustive treatment because the analysis of any one exclusion could be the subject of an extensive study in itself. This paper is intended to cover only recent decisions involving the six "basic" exclusions. It does not delve into the statutory regulation of exclusionary language and restrictions states may impose through the use of "anti-technical" statutes or through outright bans on certain exclusions.

ASSUMED LIABILITY EXCLUSION

A typical assumed liability exclusion provides: "This policy does not apply . . . Under Coverage A [Liability], to liability assumed by any insured under any contract or agreement. . . ."[1] The basic purpose of this exclusion is to limit the liability of the insurer to that risk which is the basis of the insurance contract. The insurer assesses the potential loss of a prospective insured and calculates a premium that will be adequate to undertake insuring the risk. If an insured were able to assume liability by contract that he would not have had otherwise, the insurer's risk would increase proportionately, making the previously calculated premium inadequate.

The general rule regarding the assumed liability exclusion can be summarized as follows:

> A provision in a liability policy specifically excluding from coverage liability assumed by the insured under a contract not defined in the policy is operative—in the sense that it relieves the insurer of liability otherwise existing under the policy—only in situations

[1] Avemco Insurance Co. Policy Forms Series AVP (7-71), Exclusions § (a).

> where the insured would not be liable to a third party except for the fact that he assumed liability under an express agreement with such party, but does not relieve the insurer from liability under the policy where the liability of the insured assumed by the insured under an express contract with a third party is coextensive with the insured's liability imposed upon him by law. In other words, where the express contract actually adds nothing to the insured's liability, the contractual liability exclusion clause is not applicable, but where the insured's liability would not exist except for the express contract, the contractual liability clause relieves the insurer of liability.[2]

In *Lebow Associates & Detroit Bank & Trust Co. v. Avemco Insurance Co.*,[3] the court dealt with a denial of coverage by Avemco to its insured Lebow Associates based upon the assumed liability exclusion. Lebow leased a Beech Bonanza from Southfield Leasing and purchased from Avemco a policy of liability insurance on the aircraft. Southfield was endorsed onto the policy as an additional insured. The lease between Southfield and Lebow contained the following provision:

> Indemnity: Lessee [Lebow] agrees to and does hereby indemnify Lessor [Southfield] and hold Lessor, its agents and employees, harmless of and from any and all losses, damages, claims, demands or liability of any kind or nature whatsoever, including legal expenses arising from the use, condition . . . or operation of said aircraft, and by whomsoever used or operated during the terms hereof. . . .[4]

The aircraft crashed on January 17, 1974, killing pilot Lebow and passenger/employee of Lebow, Charles Storey.

In state court the passenger/employee's estate, unable to sue Lebow Associates directly due to the workmen's compensation laws, sued Southfield on the grounds that it had provided a defective aircraft. Southfield immediately sought indemnity from Lebow under the lease agreement and Lebow tendered the defense of the indemnity action to Avemco. Avemco declined to defend because the claim by Southfield had arisen out of contractual liability assumed by Lebow which was excluded from coverage.

A declaratory judgment was started in the United States district

[2] Annot., 63 A.L.R.2d 1114, 1123 (1959).

[3] 439 F. Supp. 1288 (E.D. Mich. 1977).

[4] *Id.* at 1290.

court by Lebow to determine coverage. In a memorandum opinion and order on a motion for summary judgment, the court found for the plaintiff Lebow. Citing 63 A.L.R.2d 1114, 1123 (1959), the court held that the exclusion for assumed liability was inapplicable:

> A major rationale underlying the principle that assumed liability exclusion clauses are inoperative when the liability assumed is coextensive with the insured's liability imposed by law is that the insured's assumption of liability does not expand the insurance company's element of risk, upon which the insured's premium amounts are predicated, beyond the original contractual agreement of the parties. To allow an insurance company to avoid payment of its insured's liability to a third party, which otherwise exists by operation of law, merely because the insured contractually assumed the same liability to the third party would be to judicially condone a unilateral alteration of the substantive terms of the contract in favor of the insurance company on the grounds which are not even relevant to the element of risk which underlies each party's bargaining position. . . .
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> . . . .
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> Both Lebow Associates and Southfield were insured parties under Avemco's policy. Avemco agreed . . . to pay all sums which the insureds became legally obligated to pay as damages because of bodily injury . . . arising out of the ownership, maintenance, or use of the aircraft . . . Thus, payment of Lebow Associates' legal expenses and any judgment in favor of Southfield . . . is within the risk originally undertaken by Avemco in consideration for the premiums paid by Lebow Associates and Southfield.
>
> The assumption of Southfield's liability by Lebow Associates under the terms of an aircraft lease does not affect the degree of risk undertaken by Avemco since that risk also included liability incurred by Southfield. . . .
>
> In keeping with the principal that an insurance policy clause excluding contractually assumed liability from coverage is inoperative when contractually assumed liability adds nothing to the insured's liability, Avemco's exclusions clause (a) is hereby held to be inoperative with respect to the liability assumed by Lebow Associates in their lease agreement with Southfield.[5]

It can be seen from this decision that the assumed liability exclusion will be given effect where the insured assumes liability that he would not otherwise have had in the absence of the assumption

[5] *Id.* at 1291-92.

agreement. When the assumption creates no additional risk for the insurer, however, the exclusion will be ineffective.

Insurers may allow the insured to assume liability under a contract provided the liability assumed can be ascertained by the insurer at the time of premium calculation. Most aviation policies specifically allow a named insured to assume liability under an airport contract, which is commonly defined as "a written agreement required by statute or ordinance or by any rule or regulation promulgated by any Federal, State, County or Municipal Authority as a condition to the use of an airport or airport facility."[6] The named insured usually has no choice with regard to airport contracts. Either he signs the assumption agreement or he cannot use the airport facilities. Insurers can take into consideration this increase in liability because it is known and fixed. The premium can be adjusted accordingly when the policy is issued.

Leases for the use of airport facilities and for the rental of aircraft increasingly are being drafted by attorneys whose standard practice is to include a hold-harmless and indemnification provision for the benefit of the lessor. By agreeing to such a term, the lessee/insured does not invalidate what liability coverage he has under his owner's or non-owner's aircraft policy, but he does assume liability under the agreement which he otherwise would not have incurred. The cure for this "coverage gap" is to have the lessor properly insure himself for his own negligent activities and to eliminate this liability-transferring provision from the lease.

Exclusion for Property in Care, Custody or Control of Insured

A standard exclusion of liability coverage for property in the care, custody or control of the insured provides: "This policy does not apply . . . under Coverage A [Liability] to injury to or destruction of property owned or transported by the insured or property rented to or in charge of the insured. . . ."[7] This exclusion serves two purposes. It limits the liability of the insurer to that risk contemplated at the inception of the policy and for which a premium was charged. It also denies coverage for damages that should be

[6] Avemco Insurance Co. Policy Forms Series AVP(7-71), Definitions § 6.

[7] Avemco Insurance Co. Policy Forms Series AVP(7-71), Exclusions § (b).

covered under first-party hull insurance on the insured's aircraft or under some other non-aviation policy. Analysis shows the exclusion to be composed of four parts: liability is excluded for injury to or destruction of property owned by the insured, property transported by the insured, property rented to the insured and property in charge of the insured.

Property owned by the insured is not the proper object of liability coverage. Such property should be covered under first-party coverage rather than third-party liability. If the insured damages his aircraft, compensation for that claim should be the object of hull and not liability coverage. The insured is not legally obligated to pay for a loss of his own property because a person cannot be obligated to pay himself. Should the damaged aircraft be subject to a lien, however, the insured still would be legally obligated to pay the amount of the loan. If the insured is carrying personal effects or other property owned by himself, that property should be covered under a homeowner's, business or other applicable first-party policy.

Property which the insured rents, is in charge of or which he is transporting, other than his own personal property, is properly the subject of third-party liability coverage. As a general rule it will be unknown at the time of setting the premium what property of others will be in the care, custody or control of the insured at any given time. Thus, because the risk cannot be assessed and an adequate premium cannot be charged, the risk necessarily must be excluded. An example of this unforeseen risk would be an insured who, as a favor, transports valuable cargo for a friend, such as diamonds or furs, and negligently causes a loss of the cargo. The carriage of precious or other goods can be insured under a policy other than an aircraft policy, and the insurer can assess a proper premium based upon the value of the goods carried on the particular trip along with the probability of loss.

This exclusion also disallows coverage for damage to a rented or borrowed aircraft hull. An insurer will not know what type of aircraft an insured may use under the "use of other aircraft" provision contained in most aviation policies. An insured may borrow or rent anything from a $3,500 Champ to a $250,000 Aerostar. Thus, there is the need for the exclusion because the unknown

nature of the risk precludes the establishment of a proper premium. Any insured who wishes to have coverage for damage to a rented or borrowed aircraft can either apply for a waiver of subrogation on the owner's policy, or he can specify a hull value and have his policy specifically endorsed to cover such a loss for an additional premium charge. It would be uneconomical for insureds and insurers alike to do otherwise.

A recent aviation case involving this exclusion is *Benningfield v. Avemco Insurance Co.*[8] Plaintiff insured a 1965 Cessna Skyhawk with Avemco. The policy provided indemnity to the plaintiff/insured for sums she might become legally obligated to pay for damage to property arising out of her use of the aircraft. The policy contained a standard care, custody or control exclusion, allowed the policyholder to use aircraft other than the insured aircraft and permitted her liability insurance to transfer to other aircraft which she might use.

Mrs. Benningfield borrowed a 1963 Musketeer and damaged it. Suit was filed by the owner against Mrs. Benningfield. Avemco refused to defend, claiming that the damaged hull was property which fell within the care, custody or control exclusion. In a suit brought by Mrs. Benningfield after Avemco's refusal, the court stated:

> [A]ny extension of liability insurance to other aircraft afforded no coverage for damage to the substitute aircraft itself. Applicable is the quoted exclusion of damage to property in charge of the insured. In construing similar language used in an automobile policy this court has previously held in *Northwestern Mutual Insurance Co. v. Haglund*, 387 S.W.2d 230 (Mo. App. 1965), that the exclusion of damage to property in charge of the insured is clear and unambiguous and excludes liability under the policy for collision damage to the property while in the custody and being operated by the named insured as a permissive user. . . . the 1963 Musketeer was being operated by appellant Theda Benningfield at the time of the accident and, hence, was property in charge of the insured not covered under the policy.[9]

WORKMEN'S COMPENSATION EXCLUSION

A typical workmen's compensation exclusion for liability and/or

[8] 561 S.W.2d 736 (Mo. Ct. App. 1978).

[9] *Id.* at 737.

medical payments coverage reads: "This policy does not apply and no coverage is afforded: . . . Under Coverages A, C and D (Bodily Injury) . . . To bodily injury to, sickness, disease or death of any employee of the insured while engaged in the employment of the insured. . . ."[10] A basic function of this exclusion is to exclude coverage for a loss which is or should be covered by other insurance, such as workmen's compensation, and for which a premium is being paid to the other insurance carrier to undertake such loss. Little litigation arises from the application of this exclusion except where the loss involves more than one potential insured. Litigation is almost guaranteed to ensue in these situations.

The most recent case involving the application of this exclusion by an insurer is *Utica Mutual Insurance Co. v. Emmco Insurance Co.*[11] In that case Emmco insured Investments Dynamics Corporation (IDC) as owner of a Lockheed Super Ventura. IDC contracted with International Jet Division of Investors Growth Industry (JET) to provide pilots. The policy was then endorsed to name Jet as an additional insured. Jet furnished a captain and copilot on a flight carrying three employees of IDC. The aircraft crashed, injuring the IDC employees in the course of their employment.

The IDC employees brought claims against Jet. Emmco denied coverage and defended on the grounds that claimants were employees of the insured and, thus, excluded under the workmen's compensation exclusion clause. The court disagreed with Emmco stating:

> The problem in interpretation posed by this exclusion is, who is 'the insured' for the purpose thereof?
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> . . . .
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> There appears to be a general unanimity among the courts that where either a named insured or an additional insured seeks coverage for injury to his own employee, the exclusion does apply. On the other hand, the courts generally agree that where one named insured seeks coverage for injury to an employee of another named insured, the exclusion does not apply.
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> The Minnesota cases are consistent with these holdings. No case of this court has allowed coverage under a policy containing an

[10] Utica Mut. Ins. Co. v. Emmco Ins. Co., 309 Minn. 21, 243 N.W.2d 134, 138 (1976).

[11] 309 Minn. 21, 243 N.W.2d 134 (1976).

employee exclusion clause where an employee claims against his own employer. On the other hand, two Minnesota cases held that claims against a named insured for injury to an employee of another named insured were not barred from coverage by employee exclusion clauses.[12]

PURPOSE OF USE EXCLUSION

A basic pleasure and business aircraft policy excludes coverage when a "charge" is made to others for use of the insured aircraft. The language used in this exclusion varies but each variation has as its purpose the elimination of increased risk for which a premium is not being charged. One typical exclusionary clause contained in policy issued by Eagle Star Insurance Company, Ltd., reads that coverage is excepted when the insured is "operating the aircraft under the terms of any agreement which provides any remuneration for the use of said aircraft."[13] This exclusion was interpreted in an action brought by American Casualty Company of Pennsylvania (American) against Eagle Star Insurance Co., Ltd. (Eagle).[14] In that action American sought a declaratory judgment that it had no liability in a plane crash which killed four persons because its policy covering passengers was secondary, while Eagle's was primary. Eagle asserted that its coverage was excluded because its insured, the Silco Corporation, was being "remunerated" under the terms of the exclusion by the C. W. Silver Company, which paid all expenses of operation, maintenance, storage and a pro rata share of insurance premiums on the aircraft in return for its use.

In addressing the question presented, the court stated:

> [T]here is a difference between defendant's policy and policies which use various language such as an operation for which "a charge is made" or, "a fare is charged". The language used is defendant's policy, which we assume was used advisedly, seems to be of broader import in saying "under the terms of *any* agreement which provides for *any remuneration* for the use of said aircraft." A primary meaning of the term "remuneration" is to pay an equivalent for, i.e., in the sense of reimbursing for a service, loss or expense. But it is also sometimes used in the broader sense of simply paying something for such a service, loss or expense.

[12] *Id.* at 21, 243 N.W.2d at 138-39.

[13] American Cas. Co. v. Eagle Star Ins. Co., 568 P.2d 731, 733 (Utah 1977).

[14] *Id.* at 732.

But this does not mean that a profit must be realized.

On the problem here involved, it is important to consider the purpose of the exclusionary clause. . . . The insurance risks are rated in accordance with the amount of exposure reasonably to be expected in such usage. But if in permitting others to use it the owner acquires any advantage to himself, he is more apt to permit such usage and thus increase the number of flights, and accordingly increase the insurer's risk. In this connection there is also to be considered the difference in liability in a gratuitous usage, as compared to a compensated one, under an aircraft guest statute.

On the basis of what has been said in this opinion our conclusion is that: that if "remuneration" be understood as merely an equivalent, there is no question whatsoever but that the use of the plane was so "remunerated". Further, that even under the broader meaning of paying something for such service, that inasmuch as the C. W. Silver Company was paying for the entire maintenance of the airplane, including mechanical repairs and engine overhaul and for the hangar fees for storage, there was substantial material benefit to the owner of Silco Corporation, which amounted to "remuneration" within the meaning of the policy.

. . . .

[T]he exclusionary clause in the policy of defendant Eagle Star Insurance Company is applicable and thus exempts it from liability in connection with the plane crash.[15]

In applying this exclusion one must look at the specific policy term or phrase used, coupled with the facts and surrounding circumstances. More than with any other exclusion, courts tend to "go all over the board" with their interpretations of this exclusion.

NONAPPROVED PILOT EXCLUSION

All policies of aircraft insurance restrict liability coverage when the aircraft is "in-flight" while being operated by a pilot not meeting the requirements set forth in the declarations. Pilot qualification requirements (pilot warranties) are tailored to meet the needs of the named insured. Generally, the greater the number of pilots who are allowed to fly the aircraft, the greater the risk of loss to the insurer. The lower the flight experience of the approved pilots, the greater the chance of loss becomes. Premiums must be tailored accordingly.

A representative non-approved pilot exclusion reads: "This poli-

[15] *Id.* at 733-34. (footnotes omitted, emphasis in original).

cy does not apply . . . to any aircraft while in flight . . . being operated by a pilot not meeting the requirements set forth in Item 7 of the declarations. . . ."[16] Item Seven of the Declaration provides: "This policy applies when the aircraft is in flight, only while being operated by one of the following pilots . . . who, (1) holds a valid and effective Pilot and Medical Certificate, (2) has a current biennial flight review and (3) if carrying passengers, has completed at least three Take-Offs and Landings within the preceding 90 days in an aircraft of the same make and model as the insured aircraft."[17] Item Seven then will proceed to either list approved pilots by name (closed pilot warranty) or to set forth minimum pilot experience requirements (open pilot warranty) for those who will be operating the aircraft. Item Seven may contain both open and closed pilot warranty provisions.

The purpose of this exclusion, as with others, is to allow the insurance carrier to assess its risk at the inception of the policy and to charge an appropriate premium. A policy warranty that permits only one named person to fly the aircraft allows the insurer to ascertain its risk based on this one pilot's qualifications and experience. On the other hand, if a named insured wants to have an open pilot warranty, allowing any person with a specified minimum number of pilot hours to fly the aircraft, the premium charged must necessarily reflect the increased chance of loss.

The nonapproved pilot exclusion, in conjunction with the "Item Seven" pilot listing, can be breached in at least four separate ways. Where the policy contains a closed pilot warranty, an unnamed pilot operating the aircraft in flight will cause a breach. Where the policy contains an open pilot warranty, a pilot operating the aircraft in flight without the required minimum hours of experience will cause a breach. Given that the pilot is either named or meets the policy's experience requirements, the warranty can be breached if the pilot is not "current," *i.e.*, he does not have a valid and effective medical certificate and biennial flight review. A pilot who otherwise qualifies may be disqualified because he does not possess the necessary rating or certificate (*e.g.*, instrument ticket, multiengine rating, private pilot certificate) to undertake a specific

[16] Avemco Insurance Co. Policy Form AVP(7-71)-4, Exclusions § (g)(3).

[17] Avemco Insurance Co. Policy Form AER(5-77), Declarations Item 7.

flight. Each of these possible breaches of the nonapproved pilot exclusion are examined separately below.

Pilot Not Named or Not Having Minimum Required Experience

A recent case involving the nonapproved pilot exclusion is *Benton Casing Service, Inc. v. Avemco Insurance Co.*[18] Benton Casing insured a Cessna 185 seaplane, naming their employee Sam Whately as their sole pilot. Billy Kirkpatrick was added later as a named pilot by endorsement. A loss occurred on take-off while the aircraft was being operated by Harry Roth, who was not named in the closed pilot warranty in the policy. Avemco denied coverage.

Reversing a lower court decision, the appellate court held for the insurance carrier stating: "We are well aware that the general rule in Louisiana is that an insurance policy is a contract between the insured and the insurer, and thus, like all contracts it is the law between the parties. If the policy is clear and free from ambiguity, it must be enforced as written."[19] The court went on to state: "However, the trend of modern authority is to hold that there is no forfeiture if the breach of condition or warranty did not contribute to the loss, or did not increase the risk at the time of the loss."[20]

The court did not go any further with the "modern trend," stating that it felt constrained to intrude into the area in which the legislature has refrained from establishing an anti-technical rule for breach of an inconsequential condition. The court, however, stopped short of requiring the insurer to prove a causal connection between the breach and the cause of loss, leaving that for the Louisiana legislature which had already required the same where the loss involved a policy of fire insurance.[21]

Non-Current Pilot

No reported cases are available regarding the lack of biennial flight review as grounds for a valid denial of coverage. There are two recent irreconcilable cases, however, involving a denial of coverage based upon the lack of a required current medical certificate.

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[18] 366 So.2d 938 (La. Ct. of App. 1978).

[19] *Id.* at 939.

[20] *Id.* (citing APPLEMAN, INSURANCE LAW & PRACTICE § 4146 at 439 (1972)).

[21] *Id.* at 940.

In *South Carolina Insurance Co. v. Collins*,[22] the court dealt with a policy that specifically required that the pilot have a "valid and effective . . . medical certificate." At the time of loss, the named pilot was operating the aircraft under an expired medical certificate and the insurer denied coverage. The named insured brought a declaratory judgment action in which both parties stipulated that no causal connection existed between the lack of a current medical certificate and the loss of the aircraft. The court held that in order to avoid liability under an aircraft insurance policy, the insurer is required to demonstrate a causal connection between the crash of the aircraft and the insured's failure to have a valid and effective medical certificate as provided by the terms of the policy.[23]

A different result was reached in a recent case from Tennessee. *Insurance Co. of North America v. Lynpal, Inc.*[24] involved a denial of coverage to the insured based upon the lack of a current medical certificate. The policy required the pilot have "certificates appropriate for the flight . . . as required by the Federal Aviation Administration."[25] The court stated:

> We agree with the proposition that the time honored rule of insurance contract construction . . . will be construed more strictly against the insurer. However, we do not find that the language of the contract which is questioned here is ambiguous. The language of the policy states perfectly clearly that the coverage provided thereby shall not apply while the aircraft is in flight unless the pilot maintains a valid pilot's certificate "with ratings and certificates appropriate for flight and the aircraft as required by the Federal Aviation Administration."
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> When we look to the regulations it is clearly stated that: "No person may act as pilot in command under a certificate issued to him . . . unless he has in his personal possession an appropriate current medical certificate. . . ."
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> . . . .
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> We do not conceive that the law requires a causal connection between the language of an exclusion and the cause of a loss.[26]

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[22] 237 S.E.2d 358 (S.C. 1977).

[23] *Id.* at 362.

[24] Insurance Co. of N. America v. Lynpal, Inc., 14 Av. Cas. 18,067 (Tenn. Ct. App. 1977).

[25] *Id.* at 18,068.

[26] *Id.* at 18,070-71 (citation omitted).

Pilot Not Appropriately Rated

In *Schepps Grocer Supply, Inc. v. Ranger Insurance Co.*,[27] Ranger Insurance Company's denial of coverage was tested under the provision in its policy which required pilot Masterson to obtain a multi-engine rating. At the time of crash, Masterson had been recommended by his flight instructor for the rating. He possessed the necessary skills to pass the test and the only reason for Masterson's not having the rating was his inability to locate an FAA examiner to administer the test. In its statement of the case the court said:

> This is a suit certaining [*sic*] an interpretation of an aviation insurance contract. The principal question presented is 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. The exclusionary clause in question provides for no coverage unless the named pilot has a multi-engine rating. . . . [W]e hold that no proof of causal connection is necessary, . . .[28]

A decision going the other way with respect to a required rating is *Glover v. National Insurance Underwriters*.[29] This declaratory judgment action involved denial of coverage based upon the lack of an appropriate rating on the part of the pilot, a Visual Flight Rules (VFR) pilot who flew into Instrument Flight Rules (IFR) conditions without an instrument flight rating. The applicable policy provision stated that coverage would not apply "to any aircraft, while in flight, . . . whenever the pilot operating the aircraft is not qualified in accordance with the requirements specified in Item 6. . . ."[30] Item Six provided: "PILOTS: This policy applies when the aircraft is in flight: (a) (only when being operated by Rogers) . . . (b) while holding an FAA pilot certificate . . . and *while properly rated for the flight* and the aircraft, . . ."[31]

National Insurance Underwriters argued that pilot Rogers was not properly rated for the flight because of his lack of an instrument rating. The court disagreed, however, deciding that the phrase "the flight" was ambiguous. The majority stated: "The

[27] 545 S.W.2d 13 (Tex. Civ. App.—Dallas 1976, writ. ref'd n.r.e.).

[28] *Id.*

[29] 545 S.W.2d 755 (Tex. 1977).

[30] *Id.* at 757.

[31] *Id.*

flight is to be characterized at its inception; therefore, if the pilot's knowledge is important, the knowledge that he will be flying in IFR weather must exist at the flight's inception. . . . Rogers did not *know* when he took off that he was flying into IFR weather."[32] The majority went on to say:

> Our holding may seem harsh to the insurer because we have held this insurance policy applicable even though it is undisputed that the non-instrument rated pilot was flying in IFR conditions when the crash occurred. We note that our construction of this pilot clause was necessary, however, only because National chose to phrase the insurance policy in the ambiguous manner heretofore discussed. Language was available, to and known to, National which would have clearly and plainly excluded from coverage a non-instrument rated pilot who operated his aircraft in IFR weather conditions.[33]

A strong dissent by Justice Johnson criticized the logic of the majority opinion. One important factor which the majority ignored in resolving the alleged ambiguity was that the term "in flight" was defined in the policy as being "the time the aircraft moves forward in taking off, while in the air, and until the aircraft completes its landing."[34] Justice Johnson stated:

> The policy language makes it clear that the flight contemplated is the entire travel, from the beginning to the end, and that the pilot is therefore required to be properly rated for all segments of the flight. According to the stipulation here, the pilot flew directly into IFR weather, a condition of which he had been advised before the flight began and a condition of which he had full knowledge. . . . Under the circumstances of this case the pilot was not 'properly rated for the flight.'[35]

It is a standard feature of an aircraft insurance policy to exclude liability coverage, as well as hull coverage and medical payments, when the insured aircraft is being operated in flight by a student pilot carrying passengers. The exclusion is usually found in one of two forms—the "direct" exclusion and the "appropriately rated for the flight involved" or "indirect" exclusion. An example of the "direct" language is: "This policy does not apply: . . . to any

[32] *Id.* at 763.

[33] *Id.* at 763-64.

[34] *Id.* at 764.

[35] *Id.* at 764-65.

aircraft, while in flight, . . . operated by a Student Pilot carrying passenger(s), . . ."[36]

In *Macalco Inc. v. Gulf Insurance Co.*,[37] a denial of coverage under the "indirect" language was put to the test. A policy issued by Gulf Insurance Company (Gulf) to Macalco Incorporated (Macalco) provided: "This policy does not apply: . . . while the aircraft is in flight . . . operated by a Student Pilot unless such flight . . . is with the specific advance approval of and under the supervision and control of an F.A.A. Certificated Commercial Instructor Pilot."[38] The pilot clause in the policy's declarations provided that:

> '7. Pilots: It is a condition hereof that such 'Flight' coverage as is provided by the policy applies only while the aircraft is being operated by the following specified Pilot(s) while holding proper Certificate(s) and Rating(s) as required by the Federal Aviation Agency for the flight involved:
> (a) (x) Orville McDowell or Jack D. Cotton . . .'[39]

The aircraft crashed, killing pilot McDowell and two passengers. Upon investigation, Gulf determined that McDowell possessed only a student pilot certificate. Coverage was denied by Gulf because McDowell was carrying passengers and was not properly rated and certificated for the flight involved. Additionally, but not directly relevant to this issue, there was a charge of misrepresentation against McDowell because his signed application for insurance stated that he was a private pilot. In its decision upholding the coverage denial by Gulf the court stated:

> [W]hile McDowell's certificate and rating may have been proper for flights authorized for student pilots by FAA, it was not proper *for the flight involved* because, under FAA regulations, McDowell's student certification did not authorize him to act as a pilot in command of an aircraft that was carrying passengers. Exclusion 6(d) does not conflict with the Pilot Clause. The exclusion, recognizing the possibility of extension of coverage to flights made by student pilots, simply restricts coverage to such flights only if they be made 'with the specific advance approval of and under the

[36] Avemco Insurance Co. Policy Form AVP(7-71)-1, Exclusions § (f)(2).
[37] 550 S.W.2d 883 (Mo. Ct. App. 1977).
[38] *Id.* at 886.
[39] *Id.*

supervision and control of an F.A.A. Certificated Commercial Instructor Pilot.'[40]

The court went on to state that, in its judgment, a showing of a causal connection between the breach of the pilot warranty and the cause of the loss was not necessary and that an insurer could deny coverage based on the breach alone.[41]

Insurer's Duty To Investigate Pilot Qualifications

An argument has been made that an insurer has a duty to investigate pilot qualifications and, if it does not, it should be liable for the loss or injury to a third party. In *Fireman's Fund Insurance Co. v. Superior Court*,[42] the court struck down this argument, saying that aircraft liability insurance can be issued to any aircraft owner and that the insurer has no duty to investigate the owner's qualifications as a pilot, absent a showing of participation by the insurer in the conduct resulting in injury.[43]

PASSENGER COVERAGE EXCLUSION

Depending on the needs and desires of the insured, an aviation policy may or may not provide liability insurance protection for injury to or death of certain persons in the insured aircraft. Once an insured and his insurer have decided to exclude liability coverage for persons injured in the insured's aircraft, the end result of non-coverage can be arrived at in a number of different ways. Individual insurers use different language to accomplish the result intended. If an insurer's policy provides coverage for persons whom the insured decides to exclude, a specific exclusion will be required to delete it. If an insurer, however, never provides for this coverage in the insuring agreement, no exclusion is logically mandated. One need not take away what one has never given.

A cautious and common approach to this contractually bargained for end is for an insurer to indicate in the insuring agreement that the policy may or may not provide coverage for passengers, depending on which is indicated in the policy's declaration page. The policy will then go on to exclude passenger coverage in

[40] *Id.* at 890.

[41] *Id.* at 892.

[42] 75 Cal. App. 3d 627, 142 Cal. Rptr. 249 (1977).

[43] 75 Cal. App. 3d at 637, 142 Cal. Rptr. at 255-56.

its exclusion section if the declaration page does not indicate that the insured has purchased it. By cross-referencing the insuring agreement, the declaration and the exclusion, there can be little doubt of the policy's intent. Thus, no room is left for an argument that the policy is ambiguous. The policy's length, however, is necessarily increased.

Depending on the insurer, the policy may exclude coverage for "passengers" or it may exclude coverage for "occupants," or both. The term "occupant" leaves little room for interpretation, even absent a definition in the policy. The term "passenger" could prove troublesome, absent a policy definition, since a distinction must be made between such a person and a pilot or crew member. Absent a statute specifically requiring that an insurer provide "passenger" or "occupant" coverage, however, courts have upheld this exclusion where it was clear and unambiguous.

Manny v. Avemco Insurance Co.[44] is a case which arose out of a suit by the parents of a student pilot who was killed while receiving dual flight instruction. The instructor pilot, an Avemco insured, purchased a policy which excluded liability coverage for injury to occupants or passengers in the insured aircraft. The policy's relevant portions read:

* * * * * *

EXCLUSIONS

'The insurance provided by this Certificate does not apply:

* * * * * *

3. To bodily injury, sickness, disease or death of any occupant or passenger in the aircraft . . .

* * * * * *

DEFINITIONS

* * * * * *

(d) Passenger—shall mean any person while in, on or boarding the aircraft for the purpose of riding therein or alighting therefrom following a flight or attempted flight therein, including any person piloting the aircraft or acting as pilot-in-command.'[45]

The court agreed with Manny that a student pilot was not a passenger as defined in the policy. The court went on to state, however, that the policy excluded in a clear and specific manner not

[44] 121 Ariz. App. 221, 589 P.2d 464 (1978).

[45] 121 Ariz. App. 221, 589 P.2d at 465.

only coverage for "passengers," but also coverage for an "occupant."

The plaintiff argued further that the policy allowed "limited commercial" use of the aircraft, which included "Student Instruction," and that the policy, therefore, was ambiguous in allowing student instruction in one section yet denying coverage for injury to a student pilot-occupant in another. The court responded to this argument in two sentences: "While it may be true that a flight instructor's primary concern is his student pilot, the flight instructor contracted with AVEMCO for an insurance policy which clearly did not included occupants of the plane. We cannot rewrite the policy for appellants."[46]

Where a policy clearly excludes "passenger" coverage, an alternative to the argument that the exclusion is ambiguous has been constructed by the plaintiffs. This alternative can be termed the "public policy approach." In *Grubb v. Ranger Insurance Co.*,[47] appellants contended that the provision excluding coverage for passengers was in violation of public policy, a contention analogous to that which has recognized in cases involving automobile liability insurance. The court responded to this argument by stating:

> In contrast to the statutory scheme . . . [involving automobile liability insurance] there was no statutory expression of a public policy mandating insurance coverage for aircraft passengers at the time of the airplane crash. To the contrary, at the time of accident, . . . the Legislature had already passed and the governor had signed the bill adopting the Uniform Aircraft Financial Responsibility Act. . . .[48]

Of paramount importance, although the court did not specifically so state in its opinion, was the fact that this Act, which was soon to go into effect, specifically permitted exclusion of coverage for non-paying passengers in liability policies. The court went on to state that:

> Under these circumstances, it is apparent that there has never been legislative or other policy requiring that insurance be furnished to cover the aircraft owner's or operator's liability for damages for injury or death suffered by a passenger riding in the

[46] 121 Ariz. App. 221, 589 P.2d at 466.

[47] 77 Cal. App. 3d 526, 143 Cal. Rptr. 558 (1978).

[48] 77 Cal. App. 3d at 532, 143 Cal. Rptr. at 561.

> aircraft. It is therefore not appropriate to rewrite the policy here in issue to create such a liability.[49]

The appellants argued in the alternative that a municipal ordinance existed at the time the contract of insurance was negotiated and that such an ordinance was required by law to be reflected in the policy. Appellants stated that the law required minimum bodily injury insurance for passengers in the amount of $100,000.[50] The court rejected this argument, stating that the ordinance did not on its face require bodily injury coverage and that there was no evidence that the county interpreted the ordinance cited to impose such a requirement. Its only purpose was to benefit and protect the county, not the users of the airport. Furthermore, the ordinance was intended only to cover accidents occurring within the state, while the loss in this case occurred outside the state.[51]

Even though the court rejected appellants' arguments, it made two extremely significant statements. First, it said:

> Generally, all applicable laws in existence when an agreement is made necessarily enter into the contract and form a part of it, without any stipulation to that effect, as fully as if they were expressly referred to and incorporated in its terms. (Citation omitted) This principle embraces local ordinances as well as state statutes.[52]

Secondly, the court stated that: "[The argument that] the ordinance was directed at aircraft owners, and therefore does not bind the insurance company that issued the policy . . . is without merit."[53]

CONCLUSION

It is evident from the cases reviewed that no two jurisdictions, when interpreting the same or a similar exclusion, will necessarily agree on its application. The only generality that safely can be made is that each case stands on its own, based upon its unique factual situation.

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[49] *Id.*

[50] 77 Cal. App. 3d at 529, 143 Cal. Rptr. at 559.

[51] 77 Cal. App. 3d at 530, 143 Cal. Rptr. at 559-60.

[52] 77 Cal. App. 3d at 529, 143 Cal. Rptr. at 559.

[53] *Id.*

Perhaps each case should stand on its own. Two facts, however, cannot be escaped: uncertainty for the insurer means corresponding uncertainty for the insured and uncertainty costs an insurer by way of unexpected loss and expense payments. Therefore, premiums charged an insured must be raised commensurately to cope with this "anticipated unexpected."

One basic principle behind all liability policies is often overlooked. These policies were not designed to compensate injured claimants. They were designed to indemnify insureds, and then only within the risks contemplated.

Why not eliminate exclusions altogether? Tom Davis answered in his article, *Aviation Insurance Exclusions*,[54] stating:

> Some insurance companies are in the process of rewriting their policies, or have rewritten them in an attempt to make them better than their existing policies. They say of their new policy, 'it's clearer, it's got less exclusions, it has similar language, it's easy to understand, it's going to eliminate a lot of problems.' For this we should be pleased. However, if such a policy comes out eliminating all exclusions and other problem areas, perhaps one of the last paragraphs in such a policy may provide: Notwithstanding any of the above provisions, it is hereby agreed that due to the inadequacy of the premium charge, no claims will be paid for any loss occurring under the terms of this policy. However, in lieu thereof, upon notification of any such loss, the underwriter will extend to the insured his deepest sympathy.[55]

[54] 37 J. AIR L. & COM. 337 (1971).

[55] *Id.* at 341.