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“ . . . to inform you that our aviation policy does not afford coverage . . . ”

BY TOM H. DAVIS†

ACCORDING to the Texas Aeronautics Commission, there were about 14,000 private planes based in Texas as of June, 1969. This number has doubled since 1964, and should continue to increase during the coming years. With this number of private planes in Texas, it is not surprising that Texas was ranked with California and Pennsylvania as having the highest number of general aviation accidents.

The Federal Aviation Administration says that “there are several general aviation accidents nearly every day of the year with an average of more than two deaths every 24 hours.” It is apparent from these statistics that claims resulting from the damages suffered in light plane¹ crashes will continue to increase and represent a greater number of litigated cases. Since some planes are quite expensive and the persons who fly in these planes are usually in the highest income brackets, these suits involve considerable sums of money.

While practically all light planes are covered by insurance, these policies are not regulated by the Texas State Board of Insurance or any other governmental agency. There are no “standard form” policies and each company is free to write coverage under such conditions as it sees fit in each particular instance. Although competition has created some uniformity, there still remains a wide variety of forms in use.

In over 50% of the light aircraft crashes the insurance companies are denying coverage under one or more policy provisions. No one explanation for this high percentage is apparent, but there are several factors contributing to this result.

In comparison to automobiles, aviation insurance underwriting is relatively new and many companies have little or no aviation risk experience. The lack of governmental regulation and legal precedent has also contributed to the uncertainty in this field. Additionally, the risks in aviation are more complex, individualistic and are not as susceptible to classification as automobile risks. For example, there is a greater difference between the capabilities of pilots than between drivers, and therefore a wider variance in the risk. Judgment and experience, important in driving, are much more important in flying because the consequences of errors are more catastrophic.

Everyone would agree that more certainty in knowing the nature and extent of aviation insurance coverage would be desirable. This would prove

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¹ Aircraft of less than 12,500 lbs. maximum gross takeoff weight.

less costly to the insurer, as well as to the policyholder and the public in general. Whether this will develop as the result of litigated cases, governmental regulation, or through voluntary uniformity and clarity of wording within the aviation insurance industry remains to be seen.

The subdivisions of an aviation policy under which coverage is most often questioned are the declarations relating to: (1) pilot qualification, (2) purpose of use; and (3) the exclusions. To completely understand the complex problems involved in construing these policies, it is essential that we examine some of the leading cases which have construed these provisions in light of the proof that must be offered to establish one or more of these defenses.

BURDEN OF PROOF

Under any of these provisions the party with the burden of proof may be severely handicapped. For instance, under the "pilot warranty" clause it may be impossible to prove that the pilot involved had the minimum number of hours necessary to afford coverage. Many pilots do not keep an accurate up-to-date log book of their flying time, while others carry their log book with them, where it is destroyed or lost in the crash. In these situations resort must be had to other evidence,³ such as the time stated by the pilot on his pilot or medical certificate application. Testimony from the pilot's spouse or acquaintances may be valuable to establish how much he flew. If the pilot was also the owner of the aircraft, the hours the aircraft was flown would be some measure of his flying time. Other sources might be invoices or checks paid for rental of an aircraft. In any event, these latter sources are only approximations and may not offer the certainty of proof required by the judge or jury, thus placing the person with the burden of proof at a substantial disadvantage.

In proving policy exclusions, it is almost universally accepted that if the insurer relies on an exclusionary clause of the policy, the burden of proof is on it to establish facts that would avoid coverage. In other words, if the plaintiff proves a prima facie case, the defendant insurer has the burden of proving any affirmative defense.

In *American Casualty Co. of Reading, Pa. v. Mitchell*, 393 F.2d 452, 455 (8th Cir. 1968), [applying Nebraska law] the decedent was killed while acting as an observer on a Civil Air Patrol flight. His life insurance policy excluded liability if the insured was killed while performing duties as a member of the crew of an aircraft. The court held that the burden of proof was on the insurer to prove facts to establish an exception to liability.

Underwriters at Lloyds, London v. Cherokee Laboratories, Inc., 288 F.2d 95, 98 (10th Cir. 1961), [applying Oklahoma law] was a case where the hull insurance policy stated that the aircraft would be operated by a named pilot or any unnamed pilot with a minimum of 1000 flight hours.

³ Where the pilot's log books were lost or destroyed, the court in *Schroeder v. Federal Insurance Company*, 179 N.E.2d 328 (Mass. 1962), held that secondary evidence could be resorted to.

After the crash, an unnamed pilot, without the necessary 1000 hours, was found in the left front seat, and the named pilot was found in the center front seat. The court held that the plaintiff did not have the burden of affirmatively showing that the named pilot was operating the aircraft, and that the insurer had the burden to establish no coverage because an unauthorized pilot was in control.

Similarly in *National Ins. Underwriters v. Matthews*, 418 S.W.2d 391, 393 (Ark. 1967), the hull insurance policy had an exception voiding liability if the accident occurred while the aircraft was proceeding in IFR conditions while being piloted by a non-instrument rated pilot. The insurer conceded that it had the burden of proof to establish that the non-instrument rated pilot was operating under IFR conditions. The burden was not met since there was no evidence indicating that the aircraft was in the clouds or that the visibility was otherwise reduced below VFR-prescribed minimums.

Harman v. Northwestern Mutual Life Ins. Co., P.2d 849, 850-51 (Idaho 1967), held that the burden of proof was on the insurer to prove an exclusion where a life insurance policy excluded liability for death in an aircraft accident if the insured had "any duties" aboard the aircraft.

In *Webb v. Zurich Ins. Co.*, 205 So.2d 398, 409 (La. 1967),³ the aviation liability policy excluded coverage if the aircraft was being operated in violation of federal regulations. There was no evidence at the trial as to the flight visibility before the crash or that the aircraft was being flown under IFR conditions. The court there held that the insurer failed to meet its required burden of proof to establish a violation of regulations.

Non-aviation cases from most jurisdictions would also support this rule.⁴ However, the law in Texas as it now stands is to the contrary. In *Sberman v. Provident American Ins. Co.*, 421 S.W.2d 652 (Tex. 1967), [hospitalization policy], the Supreme Court held that the plaintiff had the burden of negating all policy exclusions and limitations raised by the defendant insurer in its pleadings. To a similar effect is *Hardware Dealers Mutual Ins. Co. v. Berglund*, 393 S.W.2d 309 (Tex. 1965), ["all risks" policy], although this case may be distinguishable on the basis of the policy language. cf: *R.B. Company, Inc. v. Aetna Ins. Co.*, 299 F.2d 753, 756 (5th Cir. 1962), [applying Texas law].

³ See also *Tison v. Fidelity & Casualty Co. of N.Y.*, 181 So.2d 835 (La. Ct. App. 1965).

⁴ *Great-West Life Assurance Co. v. Levy*, 382 F.2d 357, 359 (10th Cir. 1967) [applying Colorado law]; *Milliken v. Fidelity & Cas. Co. of N.Y.*, 338 F.2d 35, 41 (10th Cir. 1964) [applying Kansas law]; *Beaver v. Fidelity Life Ass'n.* 313 F.2d 111, 114 (10th Cir. 1963) [applying Kansas law]; *Jewelers Mutual Ins. Co. v. Balogh*, 272 F.2d 889, 892 (5th Cir. 1959) [applying Kansas law]; *Bankers Fire & Marine Ins. Co. v. Contractors Equipment Rental Co.*, 159 So.2d 198, 201 (Ala. 1963); *Bankers Fire & Marine Ins. Co. v. Bukacek*, 123 So.2d 157, 164 (Ala. 1963); *Hanover Fire Ins. Co. v. Pruitt*, 2 S.E.2d 123, 125 (Ga. Ct. App. 1939); *Wilson v. State Farm Mutual Automobile Ins. Co.*, 128 N.W.2d 218, 220 (Iowa 1964); *Leiker v. State Farm Mutual Ins. Co.*, 396 P.2d 264, 268 (Kan. 1964); *Braly v. Commercial Cas. Ins. Co.*, 227 P.2d 571, 579 (Kan. 1951); *Bolduc v. New York Fire Ins. Co.*, 69 N.H.2d 660, 665 (Minn. 1955); *Drummond v. Hartford Fire Ins. Co.*, 343 S.W.2d 84, 85 (Mo. Ct. App. 1960); *Nationwide Mutual Ins. Co. v. McAbee*, 150 S.E.2d 496, 497 (N. C. 1966); *Abernathy v. Hospital Care Ass'n., Inc.*, 119 S.E.2d 1, 2 (N.C. 1961); *Fallins v. Durham Life Ins. Co.*, 100 S.E.2d 214, 216 (N.C. 1957); see also 44 Am.Jur.2d, Insurance § 967; 46 C.J.S., Insurance § 1316(6); 21 Appelman, Insurance Law and Practice § 12095 (1947).

Following the *Sberman* case the court in *Schwad v. Ranger Insurance Company*, 438 S.W.2d 121 (Tex. Civ. App. 1969), held that where the insurer pleaded that the pilot operating the aircraft at the time of the crash did not meet the provisions of the pilot warranty, the burden was on the plaintiff owner to prove the pilot's qualifications.

"PILOT WARRANTY" AND DUAL CONTROLS

Another problem created by the "pilot warranty" provision involves the fact that with the possible exception of some Beech models, practically all light planes have dual controls. While some Beech aircraft have only one control wheel, it can be adjusted for flight from either the left or right front seat. In either case, where all occupants of the aircraft are killed, the dual control capabilities create a problem in establishing who was flying the plane at the time of the crash. This problem can become even more involved when there are several licensed pilots among the plane's occupants. These problems arise under the hull coverage provisions as well as under the liability protection, since a violation of the "pilot warranty" provision would void the entire policy.

As in other cases this can be established by circumstantial evidence, the only requirement being proof as to who was *probably* flying the airplane at the time. Circumstances tending to prove who was piloting the plane are: (1) the alleged pilot is also the owner, (2) the possession of a license by the alleged pilot with no license being possessed by the other occupants, (3) the flying experience of the alleged pilot as contrasted with the experience of the other occupants, (4) the mechanical arrangement of the controls in the plane in question may prohibit take-offs or landing by persons in the right front seat, (5) the seating arrangements of the occupants, the seat on the left side customarily occupied by the pilot operating the plane, (6) voice communications received from the pilot requesting instructions from the tower or other FAA facility, (7) position of the bodies after the crash, (8) the condition of the control wheels after the crash, (9) agreements with the owner not to permit others to pilot the plane or not to give flight instruction and, (10) if a flight plan was filed, who was designated as pilot. These are only some of the circumstances that may be used to establish by a preponderance of the evidence who was flying the airplane at the time of the crash.⁵

In the past sufficient proof to allow a case to go to the jury in the above situation has been a difficult stumbling block. Some courts have required a complete negation of the possibility that other occupants were operating the plane at the time of the crash.⁶ Fortunately the recent cases take a more realistic appraisal of the problem,⁷ and at least one state has partially

⁵ For more detailed information see 2 Proof of Facts, Aviation (1969 Supplement).

⁶ The unrealistic "beyond any doubt" attitude is best exemplified by *Hayden v. Boyle*, 174 Kan. 140, 254 P.2d 813 (1953); 36 A.L.R.2d 1290.

⁷ *Underwriters at Lloyds, London v. Cherokee Lab., Inc.*, 288 F.2d 95 (10th Cir. 1961); *Lange v. Ryan-Nelson Flight Service, Inc.*, 259 Minn. 460, 108 N.W.2d 428 (1961); *Bruce v. O'Neal Flying Service*, 231 N.C. 181, 56 S.E.2d 560, A.L.R.2d 647 (1949); *Insurance Company of North America v. Butte Aero Sales & Service*, 243 F. Supp. 276 (Mont. 1965); *Kullberg v. United States*,

eliminated it by statute.⁸

In the early days of aviation, the mysteries and uncertainties of flight coupled with unfamiliarity of the subject by the courts might have justified a cautious approach to the problem. However, today with the vast technological changes and improvements in airplanes and safety in flight and with the mass production of light airplanes which are being used by an ever-increasing percentage of our population, no justification exists for requiring a party to establish who was flying the airplane "beyond a reasonable doubt." This element of an airplane crash case should be no different nor should it require a greater degree of proof than any other element in the case or in any other kind of case. The party with the burden of proof should only be required to prove this element by a preponderance of the evidence. There is no reason why circumstantial evidence and legal presumptions as used in other types of cases⁹ should not be sufficient to establish who was probably flying an airplane at the time it crashed.

THE "PURPOSE AND USE" PROVISION

The purpose for which an aircraft is to be used is also an important consideration. Policies on most light aircraft designate in the declaration that the aircraft is to be used for "Business and Pleasure." Under the definition of "Business and Pleasure," or elsewhere in some policies, flights for which a "charge" is made are excluded. This provision provides a fertile field for disagreement when one or more of the passengers is making a payment to the owner in connection with a flight, or the owner allows someone else to fly his aircraft.

Besides the problems related to burden of proof already discussed,¹⁰ the

271 F. Supp. 788 (W.D. Pa. 1964); *Vander-Loan v. Educators Mutual Ins. Co.*, 97 N.W.2d 6 (Mich. 1959).

⁸ Ohio Rev. Code Anno. § 4561.23 (1961):

"In the event of an airplane crash involving personal injuries, death, or property damage, it is rebuttably presumed that the airplane was being flown at the time of the crash, and immediately prior thereto, by the pilot-in-command of such airplane when the airplane is occupied by more than one person.

"The 'pilot-in-command' is rebuttably presumed to be:

(A) The occupant of the left front seat in airplanes having side-by-side and fore-and-aft seating;

(B) The occupant of the left seat of an airplane which has only one traverse seat;

(C) In a tandem seated airplane, the occupant of the seat recommended by the manufacturer of such airplane when the airplane is flown solo.

(D) Notwithstanding divisions (A), (B), and (C) of this section, the occupant of the airplane possessed of an instructor's rating is rebuttably presumed to be the pilot-in-command when any part of the flight is for the purpose of instructing another in any phase of flying or navigating

(E) Notwithstanding divisions (A), (B), (C), and (D) of this section, in all flights conducted under instrument flight rules the pilot-in-command is rebuttably presumed to be the pilot whose name appears on the flight plan.

(F) In the event that the occupants and their positions in the airplane at the time of the crash cannot be established otherwise from the evidence with reasonable certainty, it is presumed that the airplane was being flown at the time of the crash, and immediately prior thereto, by the person occupying the pilot-in-command seat, as designated above, during or immediately before take-off."

⁹ Annot., 32 A.L.R. 2d 988 (1953).

¹⁰ With all occupants of the aircraft dead, there is often a lack of direct proof as to the financial arrangements involved. Resort may have to be made to prior dealings, check stubs, records, bills, invoices, conversations overheard by others and other similar evidence.

real purpose or intent of the underwriting use of the term "charge" is not clear.

Seldom, if ever, will an owner allow anyone to fly his airplane without some reimbursement of expenses. This may include only the gas, or may contain an estimate of the per hour charges for maintenance and overhaul.¹¹ However, the full cost of operating an aircraft also includes the cost of hangar rental, insurance, interest on loan or investment and depreciation.¹² If the term "charge" meant any payment of money, then nearly every time an owner loaned his plane, or a passenger paid for a portion of the costs, there would be no coverage.

Realizing that this was probably not the real intent of such provision, the United States Court of Appeals for the Fifth Circuit in *Houston Fire & Casualty Ins. Co. v. Ivens*, 338 F.2d 452 (1964),¹³ held that where a payment for the cost of the gasoline used was made, no "charge" was being made under the terms of the policy, since the payment did not approach the commercial rate for the rental of a similar aircraft. This implies that in order for there to be a "charge," there must be a profit. However, this case leaves unanswered the question of whether the owner is entitled to recoup both his direct and fixed cost before a profit is involved, or whether it would be a profit to him if the payment exceeded the direct cost, since his fixed cost is already incurred. This becomes particularly troublesome since even direct cost can only be estimated,¹⁴ and since fixed cost is directly related to the hours the aircraft is flown, it is even more difficult to estimate.¹⁵

EXCLUSIONS

Probably the most serious problem to an attorney representing the beneficiaries of those killed or injured in a light plane crash, as well as the attorney for the owner or pilot, lies in the various exclusions that have been written into some of the aviation policies. Many of these policies have a serious limitation upon liability and present a dangerous trap for the inexperienced.¹⁶

¹¹ Gasoline, oil, reserve for maintenance and engine overhaul are usually referred to as the "direct operating cost."

¹² "fixed operating cost."

¹³ See also *Thompson v. Ezell*, 379 P.2d 983 (Wash. 1963). Some non-aviation cases interpreting "charge" and "consideration" are *Rowe v. U.S.F.&G.Co.*, 375 F.2d 215 (4th Cir. 1967) and *Ocean Accident & Guaranty Corp. v. Olson*, 87 F.2d 465 (8th Cir. 1937).

¹⁴ It is only after the actual maintenance and overhaul costs are known that an accurate cost per hour can be calculated.

¹⁵ Fixed cost can be accurately calculated only after it is known how many hours the aircraft flew during the past year. This calculation is always retrospective and the present fixed cost per hour is always an estimate.

¹⁶ For cases dealing with the insurer's defense based on a regulatory violation, see *Globe Indemnity Co. v. Hansen*, 231 F.2d 89 (5th Cir. 1956); *Bruce v. Lumbermens Mutual Casualty Co.*, 222 F.2d 642 (4th Cir. 1955); *United States v. Eagle Star Insurance Co.*, 196 F.2d 317 (6th Cir. 1952); *Bankers Indemnity Ins. Co. v. Green*, 181 F.2d 1 (5th Cir. 1950); *National Ins. Underwriters v. Matthews*, 418 S.W.2d 391 (Ark. 1967); *Visco Flying Co. v. Hansen & Rowland, Inc.*, 7 Cal. Repr. 853 (Cal. Ct. App. 1960); *Webb v. Zurich Ins. Co.*, 205 So.2d 398 (La. 1967); *Tuohey v. National Ins. Underwriters*, 369 S.W.2d 421 (Mo. Ct. App. 1963); *Prasker v. United States Guarantee Co.*, 136 N.E.2d 871 (N.Y. 1956); *Thompson v. Ezell*, 379 P.2d 983 (Wash. 1963).

While all policies exclude coverage "while the aircraft is (1) maintained or used for any purpose other than as stated in the Declarations or (2) operated, while in flight, by other than the pilot or pilots as stated in the Declarations or . . ." there are a variety of other exclusions found in these policies. Some policies provide disclaimers of liability in the exclusion clauses as follows:

This policy does not apply;

(h) to the liability of any insured who operates or who permits the operation of the aircraft;

(i) in violation of its Federal Aviation Agency Airworthiness Certificate or operational record; (ii) in violation of any regulation of the Federal Aviation Agency applicable to acrobatic flying, instrument flying, repairs, alterations and inspections, night flying, minimum safe altitudes and student instruction . . . (iii) for any unlawful purpose or for the purpose of crop dusting, spraying, seeding or any form of hunting.

This policy does not apply;

(a) . . . to any insured who operates or permits the aircraft to be operated, . . . (3) Instrument Flight Rule (s) (IFR) conditions unless the pilot possesses a valid Instrument Rating and is proceeding in accordance with Instrument Flight Rules, . . .¹⁷

This policy does not apply;

. . . while, with the knowledge and consent of an insured—(a) the aircraft is being operated by an approved pilot who commences a flight in violation of the terms and limitations of his Federal Aviation Agency Pilot Certificate or Medical Certificate; . . .

To any operation of the aircraft, with the permission of the Named Insured, in violation of the limitations of the operating privilege of the pilot's certificates and ratings.

It is obvious from these exclusionary clauses that some of the language is so broad as to give the insurance company an opportunity to deny liability in many crashes. Those exclusions relating to violations of governmental regulations require a knowledge of a multitude of specific rules covering various phases of aviation. It is apparent how easy it would be for the inexperienced to plead or prove himself into a trap and thereby allow the insurance carrier to escape leaving the insured or his estate to pay for the very liability which they thought they were protected against. Such exclusions have prompted some states to prohibit them by statute.¹⁸

¹⁷ This wording probably resulted from *Weissman v. Prashker*, 405 Pa. 226, 175 A.2d 63 (1961), where the court held that a non-instrument rated pilot who flew into IFR conditions was in violation of the VFR regulations and not the IFR regulations since he was not authorized to fly under the IFR regulations.

¹⁸ "No policy of insurance issued or delivered in this State covering any loss, expense or liability arising out of the ownership, maintenance or use of an aircraft shall exclude or deny coverage because the aircraft is operated in violation of civil air regulations pursuant to Federal, State or local laws or ordinances.

"This section does not prohibit the use of specific exclusions or conditions in any such policy which relate to any of the following:

(a) Certification of an aircraft in a stated category by the Federal Aviation Administration.

(b) Certification of a pilot in a stated category by the Federal Aviation Administration.

(c) Establishing requirements for pilot experience.

(d) Establishing limitations in the use of the aircraft." Ga. Code Ann. § 56-2439 (1968).

See also Minn. Stat. Ann. § 60A.081 (1967), New Hampshire Rev. Stat. Ann. §412.21 (1969);

A. *The "Pilot Certificate" Exclusion*

Many aviation liability policies contain an express exclusion from coverage if the insured pilot "violates the terms and conditions of his FAA pilot's certificate," or words to that effect. Exclusions of a similar nature frequently appear in other type policies, such as accident and life insurance, requiring the pilot to hold a "valid and current pilot's certificate" or be "properly certificated and rated for the flight."

Such an exclusion properly applies only in limited circumstances. As an example, if a pilot was rated only for single-engine aircraft, but was flying a multi-engine plane, he would be violating the "terms and conditions" of his certificate. Similarly, if the FAA had taken action suspending the pilot's certificate, he would then not be "properly certificated and rated for the flight." These situations are relatively rare, and the circumstances are easily recognizable as coming within the policy exclusion.¹⁹ However, insurers have sometimes sought to broaden the scope of the exclusionary provision by an artfully woven argument that would exclude coverage in almost every case.

This defense theory is that the FAA flight regulations are all packaged into the FAA-issued pilot's certificate and, for that reason, if any FAA regulation is violated there is also a violation of the pilot's certificate. If this argument were adopted by the courts, the pilot's insurance coverage would be virtually non-existent since in almost all crashes there is evidence of some regulatory infraction.

Only three reported decisions have considered this defensive theory, and in each case the defense arguments were rejected. The leading case is *Royal Indemnity Co. v. John W. Cawrse Lumber Co.*, 245 F. Supp. 707 (D. Ore. 1965). There the policy provided coverage only if the aircraft was flown by a pilot with a "valid and current" pilot's certificate. The pilot did not possess a current medical certificate and thus was operating in violation of FAA regulations. The insurance company contended that the pilot's certificate was not "valid" because of the regulatory infraction. The court rejected this argument, holding that the pilot's certificate was not invalidated because of this violation.

The essential facts and holding of *Berlanti v. Underwriters at Lloyd's, London*, 9 Av. Cas. 17,420 (N.Y. Sup. Ct. 1964), are almost identical to that of *Royal Indemnity*.

A consistent result was also reached in *Insurance Co. of North America v. Butte Aero Sales & Service*, 243 F. Supp. 276 (D. Mont. 1965), where the policy excluded coverage if the pilot was operating "in violation of

Virginia, Chap. 227, Laws 1970, effective 66/26/70, enacts Sec. 38.1-389.2 and Wis. Stat. Ann. § 204.295 (1963).

¹⁹ In a suit under a double indemnity provision by the heirs of a deceased passenger, the court in *Mang v. Travelers Insurance Company*, 412 S.W.2d 672 (Tex. Civ. App. 1967), held that the term "duly licensed or certificated pilot" necessarily referred to a pilot who held a Federal Aviation Agency license or certificate which authorized him to operate an aircraft carrying passengers and that a person holding a student certificate was not such a pilot. *But see* *Marshall v. The Peerless Insurance Company*, 428 S.W.2d 190 (Ky. Ct. App. 1968), where the court held that a duly licensed pilot who was in the aircraft was the pilot in command of a flight with a student pilot carrying passenger since the student could not be pilot in command with passengers aboard.

[his FAA pilot's] certificate." There the pilot probably was in violation because he was flying a type aircraft in which he had no rating, but there nevertheless was no applicability of the exclusion because the pilot had been specifically named and authorized in the policy.

Although the only reported cases thus far have rejected this spurious theory that a regulatory infraction is tantamount to a license violation, the insurance companies' defense attempts to establish no-coverage remain undaunted and the argument continues to be asserted. A typical situation arose in a declaratory judgment action in regard to policy coverage in *American Home Assurance Company v. Roach*, Civil No. 19946, S.D. Iowa, 1969 (unreported). There the policy excluded coverage if the pilot had violated the "terms and conditions" of his certificate. The evidence was that the pilot may have violated FAR 61.47 by not having made at least 5 nighttime takeoffs and landings prior to his flight on the night of the accident. Because of this regulatory infraction, the court held that there was a license violation and that the policy exclusion avoided all coverage during the flight. The court cited no authority for its novel—and astonishing—conclusion. The case is now on appeal to the Eighth Circuit.

B. "Unlawful Purpose" Exclusion

Aviation policies historically have included an express exclusion from coverage if the aircraft was being operated in violation of government regulations.²⁰ This standard provision has proved to be quite helpful to the insurance companies' defense of claims. The government regulations are so broad and comprehensive that in almost every accident there is evidence of some infraction of one or more of the myriad requirements. One court expressly recognized this fact of aviation life, stating "it may be virtually impossible to have a crash without a violation of at least one of those regulations." *Thompson v. Ezell*, 379 P.2d 983, 988 (Wash. 1963). Such broad provisions affords the insured pilot or owner virtually no protection at all.

After the aviation public became aware of the regulatory-violation exclusion, and the illusory coverage provided by a policy containing such a provision, many companies began omitting the "broad form" clause from their policies. However, notwithstanding the omission of the "broad form" regulatory-violation exclusion, resourceful defense counsels in some cases under the new policies have continued to make the same arguments of no coverage if evidence is shown that the pilot breached some FAA regulatory requirements.

The villain is a little-noticed provision of all aviation policies excluding coverage if the aircraft was being "used for an unlawful purpose." Hardly anyone paid much attention to this clause, and it was almost never raised as a defense. If anyone, counsel or the insured, had given this particular provision any thought, it would seem almost obvious that it referred to a

²⁰ Older policies containing the "broad form" exclusionary clause voided coverage if any regulation was violated. However, the later policies are restricted to certain categories or groups of regulations.

use of the aircraft for some criminal endeavor or other illegal activity. Thus, coverage probably would be excluded if the flight was undertaken to illegally smuggle narcotics into the country. Or perhaps a flight where the aircraft was used as a "get-away" vehicle to escape from a crime or pursuit of law enforcement officers would be excluded from coverage because of the provision. Common sense reading of the policy leads to the inescapable conclusion that the "unlawful purpose" exclusion must have been intended to apply only to limited circumstances of such a criminal nature.

As long as the "broad form" regulatory-violation exclusion was in the policy, arguments were never raised by the insurer as to the "unlawful purpose" provision. A detailed search of the opinions cited above, all interpreting the exclusions of aviation policies, fails to disclose any mention of a defense based on "unlawful purpose." But as soon as the "broad form" regulatory-violation exclusion was omitted, the "unlawful purpose" exclusion long forgotten, was dug up and given a new, vigorous lease on life. Insurers then asserted the novel argument that if the pilot violated an FAA regulation, his flight was illegal and, *ipso facto*, the aircraft was "being used for an unlawful purpose." Thus, no coverage.

The first reported case of the "unlawful purpose" exclusion in an aviation policy was *Hall's Aero Spraying, Inc. v. Underwriters at Lloyd's, London*, 274 F.2d 527 (5th Cir. 1960). There the evidence was that the pilot, who was conducting crop-dusting operations, had violated regulations of the Texas Department of Agriculture in failing to obtain a permit and an equipment license. Liability claims were asserted against the insurance carrier because of damage caused by the pilot's negligent spraying operations. The carrier's defense was based on the "unlawful purpose" exclusion. The Fifth Circuit, in a well-reasoned opinion, held that the breach of the state regulations did not come within the "unlawful purpose" exclusion. The purpose of the pilot was to conduct aerial spraying operations, a lawful act; a regulatory infraction of the pilot did not render his use of the aircraft unlawful or for an unlawful purpose.

The *Hall's Aero Spraying* decision is unimpeachable and most certainly reached the correct result. But the next court to interpret the "unlawful purpose" provision went awry. In *Hedges Enterprises, Inc. v. Fireman's Fund Ins. Co.*, 225 N.Y.S. 2d 779 (1962), the New York Supreme Court, a trial-level court, had before it an aircraft property damage claim brought by the aircraft owner against his insurance carrier. The insurer raised an "unlawful purpose" defense on two grounds. First, it was alleged that the pilot of the aircraft held only a student's license and, contrary to FAA regulations governing student pilots, was carrying a passenger in the aircraft. Second, it was contended that the aircraft was purchased on July 3, the accident occurred on July 4, and the FAA was not notified of the change of ownership until July 6, contrary to the regulations which require a new owner to notify FAA upon purchase of the aircraft and prior to making any flight. On these two grounds the argument was asserted that

the flight of the aircraft was for an unlawful purpose and the court followed the defense argument. As to the student pilot violation, the court stated in dicta that if a passenger were on board the aircraft, the flight was for an unlawful purpose, but that the evidence failed to establish that a passenger was in fact on board. The court then held that because the insured owner was three days late in filing his ownership registration papers with the FAA—which, of course, had nothing to do with the accident—there was no insurance coverage because the flight was for an unlawful purpose. There is no reported appeal of the *Hedges Enterprises* case, and thus the New York appellate courts apparently did not have the opportunity to correct this astounding decision.

So far the “unlawful purpose” contention has not been discussed in any other reported case, but has appeared in an unreported trial-court decision. In *American Home Assurance Co. v. Roach*, Civil No. 19946 (S.D. Iowa, 1969),²¹ the exclusion was asserted as a defense based on the contention that the pilot had not made “at least five takeoffs and five landings to a full stop” at nighttime during the preceding 90 days prior to his flight²² and that he therefore had violated an FAA regulation governing nighttime takeoff and landing proficiency. The evidence was that the pilot was well-trained, skilled, and experienced, that the accident occurred en route between Oklahoma City, Oklahoma, and Omaha, Nebraska, and that in no conceivable manner could the regulatory takeoff and landing proficiency requirement have in any manner contributed to the accident. Nevertheless, the District Court held that because of the regulatory infraction the flight was for an “unlawful purpose” and therefore was not covered by the pilot’s liability policy. The court expressly relied upon *Hedges Enterprises* and rejected *Hall’s Aero Spraying*.

Cases in analogous areas have sometimes been urged as precedent for interpreting the “unlawful purpose” exclusionary provision. However, these other decisions are obviously distinguishable and not particularly helpful.

The most closely related line of cases concerns fire insurance policies, common in the 1800’s and the early part of this century, that avoided coverage if the insured property was used or occupied for an unlawful purpose. These cases generally arose where the insurance company alleged, following a fire, that whiskey was illegally manufactured or stored in the insured building. See, e.g., *Milonczyk v. Farmers’ Mut. Fire Ins. Co.*, 227 N.W. 873 (Wis. 1929), and *Kelley v. Worcester Mutual Fire Ins. Co.*, 97 Mass. 284 (1867). Other allegations pertain to gambling, *Concordia Fire Ins. Co. v. Johnson*, 45 P. 722 (Kan. Ct. App. 1896), prostitution, and the like.

Two observations are pertinent as to the old fire insurance cases. First, it was generally recognized by the courts in those cases that, in order to avoid coverage, the asserted illegal activity must have been conducted on

²¹ On appeal to the 8th Cir. Ct. of Appeals.

²² The facts were he had made six touch and go night landings within the last 120 days and came closer to abiding by this archaic regulation than about 95% of the general aviation pilots.

a business basis or have been a habitual or permanent condition. Thus, in *Concordia Fire Ins. Co. v. Johnson, supra*, the court expressly stated at page 724: "We do not think the mere fact of occasional gambling in the building, could, of itself, be said to be making an unlawful use thereof, within the meaning of this condition of the policy. Something of a more habitual or permanent character is doubtless contemplated." Second, the unlawful conduct alleged in those cases was of a criminal or at least extremely serious nature. A more appropriate comparison with an infraction of one of the numerous government regulations of flight activities, such as were considered in the *Hall's Aero Spraying*, *Hedges Enterprises*, and *Roach* cases, would be if the insured had unknowingly violated some technical requirement of the city building code, without serious consequence and certainly without any contribution to a later fire. It hardly seems conceivable that any court would hold that such a minor flaw in the insured's compliance with all the requirements of the law would amount to use of his property "for an unlawful purpose."

Another related area is the cases concerning accident insurance policies that exclude coverage if the loss occurred while the insured was engaged in some unlawful act. See 45 C.J.S., Insurance Sec. 786 and cases cited therein. These cases are quite distinguishable, however, and not in point. This standard accident policy provision, excluding coverage if the insured was doing some illegal act at the time of the occurrence, is far different from an exclusion for use of an aircraft for an "unlawful purpose." Even though an illegal act may have occurred during the course of the flight, whether knowingly or unknowingly, this is certainly not decisive as to whether the purpose of the flight was unlawful.

In the final analysis, this interpretation of the "unlawful purpose" exclusionary provision must rest on the plain meaning of the words of the exclusion. The aircraft must have been "used for an unlawful purpose." Common sense dictates that such a phrase means that the flight was intended to carry out some illegal scheme or criminal endeavor. The key word in the phrase is "purpose," and this term indicates an actual design or intention to carry out the crime. To have such a design means that there must have been a deliberate determination made to conduct the flight in order to accomplish the intended illegal mission. It does *not* mean a mere infraction of some FAA regulation during the course of an otherwise legal flight.

The "unlawful purpose" exclusion has been distorted by the insurer, and by the trial courts in *Hedges Enterprises* and *Roach*, to mean no more than an inadvertent breach of any FAA regulation. If this had been the true intent of the provision, the policy draftsmen could very easily have said just that instead of using the phrase "unlawful purpose." In fact, the original "broad form" regulatory violation exclusion, which specifically referred to a violation of any government regulation, also contained the "unlawful purpose" provision. It is evident that the insurance companies did not intend for the "unlawful purpose" exclusion to contemplate a

mere regulatory infraction, or both provisions would not have been used in the same policy. The courts should not permit the attempted broadening, and distortion, of the "unlawful purpose" exclusion to mean something that it obviously does not.

C. *The Problem of Causal Relation*

The cases frequently state that if there is a violation of a provision of the policy, there will be no coverage, even though there is no causal relationship between the violation and the loss. The reasoning is that the policy is a contract that expressly provides that if certain events occur, there is no liability of the insurer; and when such an event does occur, the exclusion then applies, period.

This harsh traditional view was followed by the Eighth Circuit and Fourth Circuit courts in *Globe Indemnity v. Hansen*, 231 F.2d 895, 897 (8th Cir. 1956), and *Bruce v. Lumbermens Mutual Casualty Co.*, 222 F.2d 642, 645 (4th Cir. 1955). In each of these cases the evidence was that the pilot had been engaged in aerobatics immediately before crashing his aircraft into the ground. The FAR's permit a pilot to conduct such maneuvers while carrying passengers only if the passengers are equipped with parachutes. The passengers were not so equipped, and thus in each case there was a showing of a regulatory violation. The policy carried by each of the pilots contained the usual exclusion as to violation of government regulations, and courts held that for that reason there was no coverage. The plaintiffs argued that the required parachutes would not have saved the lives of the passengers, and thus there was no causal connection between the regulatory infraction and the loss; but the courts in both cases held that there was no necessity of showing such a causal relationship.

Another frequently-cited case, reaching the same result in a non-aviation accident is *Myers v. Ocean Accident & Guarantee Corp.*, 99 F.2d 485, 491 (4th Cir. 1938).

Happily, there are a number of state court cases (all non-aviation) indicating that the courts will not blindly follow a literal, strict interpretation of an insurance policy under such circumstances. These decisions seem to apply an approach of "reasonableness," using language such as "substantial compliance" with the policy requirements or breach of "matters of substance" or compliance is "to be determined by reasonableness."

Some examples of these more enlightened cases are:²⁸

California Compensation & Fire Co. v. Industrial Acc. Com'n, 399 P.2d 381, 383 (Cal. 1965). The court stated: "Forfeitures on technical grounds which bear no substantial relationship to an insurer's risk are disfavored. . . ." Although there may have been a technical violation of the

²⁸ See also: *Kindervater v. Motorists Casualty Ins. Co.*, 199 A. 606, 608 (N.J. Ct. Err. & App. 1938); *Johnson & Stroud v. Rhode Island Ins. Co.*, 90 S.E. 124, 126 (N.C. 1916); *Northern Ins. Co. v. Morris*, 165 N.E. 506 508-09 (Ohio Ct. App. 1929); *Butler Candy Co. v. Springfield Fire & Marine Ins. Co.*, 146 A.2d 135, 138 (Pa. 1929); *Karp v. Fidelity-Phoenix Fire Ins. Co.*, 4 A.2d 529 (Pa. Super. 1939); *McGillicuddy v. New Brunswick Fire Ins. Co.*, 217 P. 1000, 1001 (Wash. 1923).

policy terms, "the risk of the insurer under the policy is commensurate with the premiums paid. . . ."

Leach v. Farmer's Automobile Interinsurance Exchange, 213 P.2d 920, 923 (Idaho 1950). Where the insured gave oral, rather than written, notice to the insurance company 92 days after the accident, the court held that there was a "substantial compliance with the policy." Further "Violations of conditions by the assured will not release the insurer unless it is prejudiced by the violation."

Continental Ins. Co. v. Tbrash, 78 So.2d 344, 348 (Miss. 1955). The Court rejected the insurer's disclaimer based on a violation of a fire policy "iron safe" clause. "[C]ourts do not favor forfeiture of policies for purely technical reasons . . . [A] substantial compliance [with the policy condition] is all that is necessary."

Some states by statute require that a policy exclusion can be asserted as a defense only if causation is shown. For example, Article 6.14 of the Texas Insurance Code provides:

No breach or violation by the assured 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.* (Emphasis added).

Most statutes of this nature, like Texas, apply only to fire insurance. However, some states have statutes of general applicability. The Nebraska statute, for example, provides (Neb. Rev. Stat. 44-358):

. . . The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability, unless such breach shall exist at the *time of the loss and contribute to the loss*, anything in the policy or contract of insurance to the contrary notwithstanding. (Emphasis added).

In summary, it seems a harsh rule which allows an insurance carrier to prove an exclusion in a policy and thus avoid coverage when that exclusion has no relationship to the crash. It would seem more appropriate to first, either require the insurance carrier to prove a causal relationship between the facts which establish the exclusion and the crash, or second, when an exclusion has been established the insured should be allowed to come forward with evidence which establishes that there is no causal relationship between the facts establishing the exclusion and the crash.

By the same token, in those jurisdictions where the insured is required to negate the policy exclusions, he should be allowed to retain coverage by proving that there was no causal relationship if he cannot negate the claim of a policy violation. There may be some instances in which an insured cannot specifically negate the existence of a policy exclusion. However, he can come forward with evidence which would establish that there was no relationship between the facts which would establish that exclusion and the crash.

In those instances where the courts have refused to void coverage and

hold that there was "substantial compliance" with the terms of the policy or that there was not a "breach of matters of substance" in the policy, what they are really doing is saying indirectly that there was no causal relationship between the facts relied upon by the insurance company to show an exclusion and the facts which caused the crash. A more meaningful approach would be to meet the issue head-on and hold that proof of facts which establish a policy exclusion will not serve to defeat coverage unless those same facts have a causal relationship with the crash.

CONCLUSION

In the foregoing pages we have examined some of the problems which are currently plaguing the general aviation pilots, owners and other insureds. The ever increasing number of light aircraft being manufactured and flown in this country indicates that these problems will not decrease in the near future. As the aviation insurance purchasing public becomes more sophisticated in their understanding of these problems, we can expect more clarity, more purpose, and more meaningful provisions to become a part of aviation policies.

By the same token, the design, maintenance and flight of aircraft are becoming more complicated. This ever increasing complexity will provide more and more insurance pitfalls. Armed with a thorough understanding and knowledge of aviation policies and the applicable law, these traps can be avoided.