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## AVIATION INSURANCE EXCLUSIONS

TOM H. DAVIS\*

ALL PERSONS connected with aviation insurance should be in favor of certainty of coverage. It is desirable for the insurance company and for the insured to know before the loss occurs what is covered and what is not covered. In the following article, the author will attempt to point out the problems of uncertainty.

### I. MEDICAL CERTIFICATE

Once one obtains a pilot's certificate, it does not expire. However, as a matter of general knowledge to all pilots and owners, before he is authorized to use his pilot's certificate, he must have a current medical certificate.<sup>1</sup> Therefore, it would seem that the question "Am I covered if my medical certificate isn't current?" would be simple to answer. Yet the answer is usually not that simple.

In *Royal Indemnity Co. v. John F. Cawrse Lumber Company, Inc.*<sup>2</sup> an aviation insurance policy's provisions referred to a "valid and current" pilot's certificate. The insurance company took the position that without a current medical certificate the pilot's certificate was not "valid and current," and, therefore there was no coverage. The court held that a current medical certificate was not required by this language. "Flown by a licensed pilot" was held, in *Berlanti v. Underwriters at Lloyd's*<sup>3</sup> not to require a current medical certificate. However, "properly certified and qualified" under the current regulations does require a current medical certificate under the holding in *Glades Flying Club v. American Aviation & Marine Ins. Co.*<sup>4</sup> and *Baker v. INA.*<sup>5</sup> Similar language, "while holding proper certificates as required" by regulations was assumed in *Ohio Casualty Ins. Co. v. Heaney*<sup>6</sup> to include a current medical certificate.

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<sup>1</sup> 14 C.F.R. §§ 61.3(c), 61.43 (1971).

<sup>2</sup> 245 F. Supp. 707 (D. Ore. 1965).

<sup>3</sup> 9 Av. Cas. ¶ 17,420 (N.Y. Sup. Ct. 1964).

<sup>4</sup> 235 So. 2d 18 (Fla. Dist. Ct. App. 1970).

<sup>5</sup> 10 N.C. App. 605, 179 S.E.2d 892 (Ct. App. 1971).

<sup>6</sup> 229 F. Supp. 30 (N.D. Ill. 1964).

Provisions found in other policies which have not yet been interpreted by the courts as far as the author is aware are:

(1) "valid and effective pilot certificate." This raises the question, does the word "effective" mean that one must have a current medical certificate?

(2) "[i]n violation of the terms and limitations of his FAA pilot's certificate or medical certificate." This raises the same question. While this phrase at least uses the term, "medical certificate," if the medical certificate is out of date, is that "in violation of its terms and limitations"? If one doesn't have one, can he be "in violation of its terms and limitations"? Or, if one, hypothetically, has a commercial pilot's certificate, a medical certificate over a year old, and is carrying passengers for hire, is that "in violation of the terms and limitations" of his pilot's certificate or his medical certificate? This situation is open to interpretation.

Examples of other provisions are:

(1) "valid and effective pilot and medical certificate" and

(2) "with ratings as required by the FAA for the flight involved," both reasonably clear in meaning; but consider

(3) "All flights shall be within the limitation of the operating privilege of the pilot's certificate and ratings," and

(4) "The pilot must have a pilot's certificate and current medical certificate required by FAA Regulation for the flight involved." The latter is perhaps the most precise and unambiguous. Courts have often reasoned that if the insurance company intends to exclude coverage when the pilot does not have a current medical certificate, why not at least use those words? It has been effectively argued, "if that's what the insurance company meant, it was easy enough to say, and since it didn't, it obviously wasn't intended at the time the policy was written."

The student pilot carrying passengers is a frequently occurring situation. In *Bequette v. National Insurance Underwriters*<sup>7</sup> the court held that a student carrying passengers was not covered under the policy provision: "with appropriate ratings required for the flight involved." Likewise, "duly licensed or certificated pilot" was held in *Mang v. The Travelers Insurance Co.*<sup>8</sup> to deny coverage to a student carrying passengers since under the circumstances he was not "duly licensed" nor a "certificated pilot."

In *Fireman's Fund Ins. Co. v. McDaniel*<sup>9</sup> the policy in question contained the phrase "in violation of the terms of any FAA pilot certificate." There a student carrying passengers in a multi-engine aircraft

<sup>7</sup> 429 F.2d 896 (9th Cir. 1970).

<sup>8</sup> 412 S.W.2d 672 (Tex. Civ. App. 1967, writ ref.).

<sup>9</sup> 187 F. Supp. 614 (N.D. Miss. 1960).

was held by the court to be in violation of the terms of his certificate on two counts, but the court held there was coverage because he was a named pilot in the pilot warranty clause.

In a recent case, *Ranger Ins. Co. v. Culberson*,<sup>10</sup> the terminology was "holding proper pilot certificate with appropriate ratings as required by the FAA." Here a student pilot was carrying passengers in IFR conditions, however, he was a named pilot under the pilot warranty clause and the court held there was coverage.

The phrase "[n]ot properly certified for such operation or in violation of such certificate during such operation," was involved in *Insurance Company of North America v. Butte Aero Sales and Service*.<sup>11</sup> There the court assumed that a man holding a commercial rotor-craft-helicopter certificate but who was flying a single-engine aircraft without an airplane rating was in violation of the policy, but since he was a named pilot coverage was sustained.

From these cases it appears that regardless of the language the policy has, where the pilot flying was a named pilot, the courts hold that there is coverage for the named pilot and have not given binding effect to the other terms of the policy.

In *Roach v. Churchman*<sup>12</sup> the clause "[i]n violation of the terms and limitations of his" pilot or medical certificate was involved. In this case, the contention was made that a violation of FAR 61.47, which requires that any pilot, no matter what his experience, must have had, within the last 90 days, five take-offs, five landings to a full stop, between the hours commencing one hour after sunset and one hour before sunrise before he can carry a passenger at night in any type of airplane, was "in violation of the terms and limitations of his pilot's certificate." In other words, the insurance company wanted to read all of the FAR's into the pilot certificate. The court held to the contrary, that an FAR was not a "term, condition, or limitation" on a pilot's certificate.

## II. USE OR PURPOSE

Another area in which there is a great deal of controversy, if not confusion, is under the "business and pleasure" definition, which excludes "an operation for which a charge is made." To date there are two reported cases on this point, *Houston Fire & Casualty Insurance Company v. Ivens*,<sup>13</sup> and *Fidelity & Casualty Company of New York v. Crist*.<sup>14</sup> In the *Ivens* case a third party had agreed to pay to the owner

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<sup>10</sup> 11 Av. Cas. ¶ 18,074 (N.D. Ga. 1970).

<sup>11</sup> 243 F. Supp. 276 (D. Mont. 1965).

<sup>12</sup> 431 F.2d 849 (8th Cir. 1970).

<sup>13</sup> 338 F.2d 452 (5th Cir. 1964).

<sup>14</sup> 455 S.W.2d 904 (Ark. 1970).

and pilot of an aircraft \$10.00 an hour in connection with a certain flight. After the crash the insurance company took the position that this was a "charge" and therefore in violation of the terms of the policy. The opinion says that the evidence showed that \$10.00 an hour would barely cover the gasoline and oil and that the normal customary rental rate or charter rate for this particular type of aircraft was approximately \$30.00 an hour. The court held under those circumstances that the \$10.00 an hour for gas and oil was not a "charge" and that in order for there to be a "charge" there must be something paid for the use of the aircraft itself. In other words, just for its use, not for its cost. It is clear from this opinion that unless there is a profit, something more than just getting back the cost of operating the aircraft, there is not a "charge."

*Crist* was somewhat similar. There it was \$15.00 an hour for a single-engine aircraft. Again, the testimony was that the customary rental or charter rate on this particular type aircraft was \$30.00 an hour, and the Supreme Court of Arkansas, following *Ivens*, held that this was not a "charge," but only a partial recoupment of the cost of operating the aircraft.

These cases raise some very interesting questions that are not necessarily answered. What did the court mean by the word "cost"? There are "operating or direct costs" and there are "fixed or indirect costs."<sup>15</sup> If the test is the customary rental fee for a particular type of aircraft in a commercial operation, then \$30.00 an hour includes not only the "operating cost" but also includes the "fixed cost." This \$30.00 an hour is the total cost plus an anticipation of profit based upon a minimum use of 300 to 500 hours a year.

As long as the payment covers the "operating cost" only, the gas, oil and reserve for maintenance and overhaul, there is no problem. There is no profit and the cases are clear.

Suppose, however, one begins to recover some of the "fixed costs," the depreciation on the aircraft, the interest paid on the money owed on the aircraft, the hangar rent and the insurance. Is this a profit to an individual?

When that individual bought an airplane, he incurred those costs whether he flies it or not. If he lets another individual use his airplane and in addition to the "operating costs," he gets something toward his "fixed costs," the "profit" question is raised. In one sense those costs are already incurred and anything the owner gets above his "operating costs" is to some extent, a profit.

The reason that this is a recurring problem is that an airplane is an expensive piece of equipment, and there are very few people who will

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<sup>15</sup> Davis, *To Buy or Not to Buy*, 32 TEX. B.J. 691 (1969).

just lend an airplane to a friend and say, "Here, George, you just go use it as long as you want to, doesn't make any difference to me, just charge the gas and everything to me, and have fun." One might let someone use his car for a while; but anytime he lets someone use his aircraft, he expects some of the expenses to be paid. It is very seldom that there is not something that changes hands, and that is why this is such a problem, especially since "business and pleasure" is probably the biggest stated use in light aircraft.

#### CONCLUSION

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 cleaner, 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.

