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Coverage of Non - Scheduled Airlines by Airline Trip Insurance

JUDICIAL AND REGULATORY DECISIONS

COVERAGE OF "NON-SCHEDULED" AIRLINES BY AIRLINE TRIP INSURANCE

IN ILLUSTRATION of special problems that have arisen from the extension of insurance coverage to commercial airline passengers[1] is found in the case of *Lachs v. Fidelity and Casualty Co. of New York.*[2] The decedent purchased from one of the defendant's insurance vending machines airline trip insurance which, by its terms, was to cover her only if she were injured or killed while boarding, riding as a passenger in, or alighting from a plane operated by a *scheduled* airline.[3] The court denied defendant insurance company's motion for a summary judgment even though the decedent had been killed while riding as a passenger in a plane operated by a non-scheduled airline.[4] Denial of the motion was primarily based on the finding that the term "scheduled airline" as used in the policy was ambiguous.

Turning to the Civil Aeronautics Act we find no mention of the term "scheduled airline." However, in speaking of those airlines required to obtain a certificate of public convenience and necessity,[5] the act exempted airlines "not engaged in scheduled air transportation."[6] This, itself, may not give meaning to the term "scheduled airline" in the policy, but it does give a basis for the Civil Aeronautics Board's classification of airlines into "scheduled" and "non-scheduled." This was carried out in the Code of Federal Regulations when the CAB ruled that all "scheduled" airlines must obtain certificates of public convenience and necessity,[7] while under authority of Section 416 of the Act[8] it ordered exemption from certificate requirements of "non-scheduled airlines." The terms "scheduled" and "non-scheduled" were also used by the

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[1] Note, *Judicial Interpretation of Aviation Risk Exclusion Clauses*, 25 Notre Dame Law. 695 (1950); Kremlick, *Adjudicated Aviation Clauses in Life and Accident Insurance Contracts*, 25 Mich. State Bar J. 37 (1946). See also note 17 A.L.R. 2d 1040 (1951).

[2] 306 N.Y. 357, 118 N.E. 2d 555 (1954).

[3] The coverage clause reads in part "This insurance shall apply to such injuries sustained following the purchase by or for the Insured of a transportation ticket from . . . a Scheduled Airline . . . in consequence of: (a) boarding, riding as a passenger in, alighting from or coming in contact with any aircraft operated on a regular or special chartered flight by a *Civilian Scheduled Airline* (emphasis supplied) maintaining regular published schedules and licensed for interstate, intrastate or international transportation of passengers by the Governmental Authority having jurisdiction over Civil Aviation. . . ."

[4] The airline upon which decedent flew had been catagorized by the Civil Aeronautics Board as non-scheduled. However, it did offer more or less regular service between Miami and New York, so as to appear to the average person as a scheduled airline; that is, there were regularly four or five flights per week but the exact departure time was not known.

[5] 52 Stat. 987 (1938), 49 U.S.C. §481 (1952). In order to obtain a certificate of public convenience and necessity the airline must meet certain requirements as to its financial position, the community's need for its service, and its operation on a designated standard. (e.g. pilots must meet certain requirements, certain safety equipment must be used, and planes must be periodically inspected.)

[6] 52 Stat. 1005 (1938), 49 U.S.C. §496 (1952). This section also exempts certain other airlines that were "engaged in scheduled air transportation."

[7] 14 Code Fed. Regs. §61 (Cum. Supp. 1952). It was the defendant's major contention that this was the controlling distinction between "scheduled" and "non-scheduled" airlines and that only passengers riding on airlines that held certificates of public convenience and necessity were to be insured. The court did not accept this as conclusive.

[8] See note 6, *supra.*

CAB when it issued requirements[9] and rules[10] governing airline operations. The classification of "non-scheduled airlines" was originally created to handle the many diverse activities, such as sale and service of aircraft and accessories, flight instruction, field dusting, private flights, barnstorming, and the operation of airports, that could not be managed effectively by scheduled airlines. These regulations and rulings of the CAB, until the post war period, had given some content to the term "scheduled airline."

CAB Tests of "Scheduled"

Since the postwar period, however, the CAB has developed two tests to determine whether an airline is "scheduled" or "non-scheduled"; that is, whether or not it is required to obtain a certificate of public convenience and necessity. By the use of an objective test[11] the CAB will deem a non-scheduled airline to be giving scheduled service, in the eyes of the general public, if: (1) it involved the flight of one or more planes from a take off point in the United States or its possessions to some other landing point either in or out of the United States; (2) the air carrier held itself out to the public, by its operations or its advertising, as operating one or more planes regularly or with a reasonable degree of regularity between two such points; and (3) it allowed the public to believe that any applicant for transportation would be accepted as a passenger. In another ruling,[12] the CAB outlined a subjective test that it would use to determine in which category the airline operated. This test involves in large part the state of mind of both passenger and operator. If both feel that the flight was merely a one time affair with no thought of the trip reoccurring then it is non-scheduled. On the other hand, if the passenger and operator have made this trip many times and it is not looked upon as a special flight by either, then it is characterized as a regularly scheduled flight.[13]

A "scheduled" airline, therefore, may be defined as one that represents itself to the public by its operations and advertisements as offering regular service to all those who request it. Consequently it would appear possible, using either of the CAB's tests, for an airline to be thought of by the public as "scheduled" but to remain "non-scheduled" within the terms of the various administrative rulings because the CAB has not yet changed its classification.[14]

Although the courts have used the term "scheduled airline," for the most part they have failed to define it. However, in the majority of these cases,[15] the interested parties in the suits were well acquainted with the Civil Aeronautics Act, and administrative decisions of the CAB concerning the qualifications of a scheduled airline.[16] In cases in which the courts have attempted

[9] 14 Code Fed. Regs. §40 (Cum. Supp. 1952) establishes requirements for scheduled airlines while §292.1 (B) (1930) establishes the requirements for non-scheduled airlines.

[10] 14 Code Fed. Regs. §40 (Cum. Supp. 1951) outlines rules for scheduled airlines, while §42 controls non-scheduled airline operations.

[11] *Large Irregular Carriers, Exemptions*, 11 CAB 609, 612 (1950).

[12] 6 CAB 1049 (1946).

[13] *Id.* at 1054.

[14] In accord with this definition is *Weisman v. Guardian Life Insurance Co. of America*, 67 N.Y.S. 2d 604 (not officially reported). *affirmed without opinion* by the App. Div., 75 N.Y.S. 2d 273 App. Div. 761 (1st Dept. 1948), where the court thought that it was of little importance to construe the nature of the flight in accordance with the provisions of the Civil Aeronautics Act, 49 U.S.C.A. §401, as the average man could scarcely be required to interpret his insurance policy in the light of the Civil Aeronautic Law.

[15] *S.S.W., Inc. v. Air Transport Ass'n.*, 191 F. 2d 658 (D.C. Cir. 1951); *United States v. Eagle Star Ins. Co.*, 196 F. 2d 317 (9th Cir. 1952); Apgar *Travel Agency v. International Trans. Ass'n.*, 107 F. Supp. 706 (S.D.N.Y. 1952); *Putnam v. Air Transport Ass'n. of America*, 112 F. Supp. 885 (S.D.N.Y. 1953).

[16] See note 5, *supra*.

to define these terms, no consistency can be found. In a case quite similar to the principal one,[17] the deceased was insured as ". . . a fare paying passenger in a licensed commercial aircraft operated on a published schedule by an incorporated common carrier for passenger service . . . on a regular . . . air route. . . ." Recovery was granted even though decedent was riding in a plane registered by the CAB as "non-scheduled." The court rejected the insurance company's contention that since it was not operating on a published schedule, it was "non-scheduled." Although it is possible to interpret the words "operated on a published schedule" as meaning "operated on a schedule of times of flights" or "time table," the court stated that it was equally possible to interpret the phrase as meaning a "schedule of rates." [18] It was then held that this ambiguity in meaning should be resolved in favor of the insured. In another case[19] "scheduled trip," a term analogous to "scheduled airline," was held in view of its ambiguity, to mean a trip planned in advance, and not a trip described in a time table.

Similarities Now Weaken The Distinction

This classification of airlines into "scheduled" and "non-scheduled" categories would appear to be justified in light of past operations. However, because of the rapid growth of the air industry, an increasing similarity has arisen between the operations of these two groups. This similarity has materially weakened the distinct lines that the CAB had drawn to differentiate between the two classifications. Both are now required to obtain a certificate of operations,[20] both carry passengers, and both use the same kind of planes although the non-scheduled carriers have more seats in their planes. The large non-scheduled airlines, by pooling their resources, by advertising, and by special operations have offered an integrated service of regular flights to the public. By use of a common ticket agent they are able, if not individually, at least collectively to offer regular service. Another method used by non-scheduled airlines to give scheduled service is by the use of "route" operations.[21] These carriers have concentrated their operations to flights between relatively few large cities and as a result have been actually furnishing regular service[22] over such heavy traffic-generating routes as New York, Chicago, and Los Angeles; New York, Chicago, and San Francisco; and New York, Miami, and

[17] *Treide v. Commercial Casualty Co.*, 1950 U.S. Av. R. 161.

[18] *Id.* at 167.

[19] *Little v. Globe Indemnity Co.*, 1949 U.S. Av. R. 353.

[20] After the Second World War the growth of the non-certificated air carriers (non-scheduled) was tremendous, and as a result the CAB completely revised their exemption regulations and all carriers permitted to operate there-under were redesignated as "irregular air carriers." These carriers were required to obtain a certificate similar to that required of "scheduled airlines" in order to bring the level of operations and performance up to that of scheduled air carriers. 11 CAB 609, 612 (1950).

Prior to this time only scheduled airlines were required to hold any kind of certificate. Now a certificate of operations is required of non-scheduled airlines as well, describing the operations authorized and prescribing such operating specifications and limitations as may be reasonably required in the interest of safety. 14 Code Fed. Regs. §42.2 (Cum. Supp. 1952).

[21] By "route operations" the CAB refers to a pattern of operations which shows a concentration of relatively frequent and regular flights between a limited number of pairs of points.

[22] In *Civil Aeronautics Board v. Modern Air Transport*, 79 F. 2d 622 (1950), the defendant operated flights regularly between New York, N. Y., and San Juan, P. R., three or four times each week on Monday, Wednesday, Friday, and Saturday. The court held that this could not be classified as irregular service and enjoined the defendant from continuing such operations. The Miami Airlines, upon which the decedent flew in 1951, conducted an average of four flights a week from New York to Miami and return. Many times five or six flights per week were conducted.

Puerto Rico.[23] Consequently, though the average person uses the terms "scheduled" and "non-scheduled" airline,[24] it is doubtful whether he understands the technical difference between the two types of flights.

The court in the *Lachs* case found the language employed by the defendant in the insurance contract ambiguous, and ruled that this ambiguity be resolved against the insurance company.[25] The court further indicated that the method employed to sell the insurance materially added to the ambiguity of the terms of the policy. On the vending machine in small letters, and in the policy itself, was the statement that only passengers riding on a "scheduled" airline were covered.[26] On a wall in a waiting room near the ticket counter was a large sign listing all the non-scheduled airlines, including that of the defendant. However, the court felt that a jury could find the defendant was inviting non-scheduled airline passengers to insure themselves since the defendant had placed one of its automatic vending machines in front of the ticket counter which serviced non-scheduled airlines and the vending machine had the words "airline trip insurance," in large letters prominently lighted on it.

It is clear that the plaintiff should not recover if the deceased had (1) known that she was riding on a non-scheduled airline; (2) known the difference in the meaning of the words "scheduled" and "non-scheduled" airlines; and (3) read the insurance policy. On the other hand, if the deceased had not been aware of these three factors, it is equally clear that the plaintiff should be allowed recovery. If the deceased had read the policy without knowing the type of airline she was riding on or without knowing the difference between scheduled and non-scheduled airlines, the ambiguity would still be present and it would seem to follow that the plaintiff should recover.

While the problems of the preceding situations are readily resolved, the *Lachs* decision may offer no easy solution under other circumstances. For example, the deceased may have known she was a passenger on a non-scheduled airline and also the meaning of the two terms but may not have read the policy.

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[23] Table showing the degree of route operations of large irregular operations for the last two quarters of 1949. It is assumed that in recent years this type of operation has greatly increased with the ever increasing use of airline passenger transportation.

Pairs of Points	*Number of Carriers*	*Total one-way flights*
New York - Miami	21	1,017
New York - Los Angeles	18	753
New York - Chicago	26	688
New York - Detroit	9	638
Chicago - Los Angeles	20	585
Los Angeles - San Francisco	18	443

[24] For example, the following magazine titles: Cosmopolitan Magazine, March, 1951 "Don't fly the Unscheduled Airlines"; Harpers Magazine, May, 1949, letters to the editor; Time Magazine, May 2, 1949, "Death Sentence"; Time Magazine, April 9, 1951, "Death Edict"; Coronet Magazine, May, 1951, "Death Rides the Bargain Airlines."

[25] The great weight of authority supports this ruling. *Travelers Indem. Co. v. Pray*, 204 F. 2d 821 (6th Cir. 1953); *Boney v. Citizens Mut. Auto Ins. Co.*, 333 Mich. 435, 53 N.W. 2d 321 (1953); *Bellish v. C. I. T. Corp.*, 142 Ohio St. 36, 50 N.E. 2d 147 (1943); *Kenyon v. Knights Templar and Masonic Mut. Aid Ass'n.*, 122 N.Y. 247, 25 N.E. 299 (1890).

[26] In letters ten times the size of any others in prominent lighting and position appeared the words, "Airline Trip Insurance," below that on a placard appeared the words, smaller than those above but many times the size of the other words of the same placard;

DOMESTIC
AIRLINE TRIP INSURANCE
25¢ for each $5,000 Maximum $25,000

Below in much smaller print on the placard it was stated that this policy covered scheduled airlines only. Lachs v. Fidelity & Casualty Co., 306 N.Y. 357, 118 N.E. 2d 555 (1954).

Or the deceased may have been aware of the distinction between "scheduled" and "non-scheduled" and may have read the policy but may not have realized that she was a passenger on a "non-scheduled" airline. In either case it is arguable that the policy was not ambiguous because the deceased knew the difference in the meaning of these terms and therefore recovery should be denied. In the first factual situation, although the deceased may not have read the policy, it is possible to assume that she was under a duty to do so. In the second example, it can be further assumed that she had a duty to discover the classification of the airline on which she was riding. In reference to both these situations however, the court pointed out that the deceased may not have been remiss in her duty in view of the circumstances under which the insurance was sold.[27]

Contracting By Machine

In dealing with vending machine insurance generally, there would seem to be a question of determining at what point in the transaction the contract came into force. It would be either at the time of assent to the terms in the policy itself or at the time of assent to the writing on the face of the machine. The insured could not obtain the policy to read until she put her money into the machine and once the money was put into the machine she could not regain it.[28] Therefore, the insured was forced to rely on the writings on the face of the machine and it can be said that the contract came into force sometime before the insured had an opportunity to examine the policy. Under any other view the insurance company would be able to retain the premium without giving any consideration in return.

From the foregoing it appears that the decision in the *Lachs* case was justified. Denial of summary judgment was proper since a valid question of fact presented itself in that a jury could find that the term "scheduled airline" does have more than one meaning. The jury could also find that the defendant's action could have been taken as an invitation to all air passengers to insure themselves with the defendant insurance company. One way to prevent future occurrences of this nature would be to have uniform rules established for the sale of airline trip insurance through vending machines. The CAB might receive its authority for such action from Section 2, the "declaration

[27] While the insured would normally be expected to read the policy and have the burden of knowing the terms of the contract, the court stated at 118 N.E. 2d 557, "There is also an envelope in the machine to mail to the beneficiary, for the insured is not expected to read the policy on the plane." The court further stated at 559, "If the rule here was not made strict when machines are utilized it would mean that in this large terminal *all* persons who put money into the machines there and then, thinking they were insured, went off on one of the ten so-called 'non-scheduled air carriers,' would have no insurance for their beneficiaries and the company would be in receipt of contributions for which no service was ever rendered."

Generally it is the duty of the airline passenger to discover what type of plane she is flying in, but the court pointed out, at 558-9, that ". . . since defendant put one of its automatic vending machines in front of the ticket counter of the Consolidated Air Service which, according to an affidavit submitted by defendant, was utilized by all non-scheduled airlines operating out of the Newark Airport, as a processing point for their passengers, and before any passenger on a non-scheduled airline could receive his ticket he was required to present his 'exchange order' at said counter we think a jury might find that the defendant was inviting those passengers to insure themselves by its 'Airline Trip Insurance.'"

[28] There was a sharp dispute as to whether there was a specimen policy on the machine that the decedent used as there were policies on some but not all of the machines at the airport. The specimen policy entered into evidence by the defendant had the words "scheduled airline" obliterated by bold face print stamped on the policy to the effect that, "This policy is limited to aircraft accidents, Read it carefully."

of purposes section" of the Act.[29] However, recent legislation[30] would preclude the CAB from taking such action since Congress has provided that the control of insurance is to be left to the states and that no federal statute will supercede state law unless the federal act relates specifically to the business of insurance.

It may be argued that the insurance company should not be allowed to make the distinction between "scheduled" and "non-scheduled" airlines. When these classes were first established there was a real difference between the operations and the attendant hazards of the two. But, now with the evolution of the air industry, these distinctions cannot validly be made because the level of operations and the risks encountered are quite similar. Three alternatives which may be used to avoid the situation of the *Lachs* case would be: (1) to list on the face of each machine, in a prominent position, each airline using that particular airport whose passengers the insurer intends to cover, (2) to make no distinction between "scheduled" and "non-scheduled" airline, or (3) to require the insurance company to remove all the machines and replace them with insurance agents.

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[29] 52 Stat. 980 (1938), 49 U.S.C. 402 (1952).

[30] 61 Stat. 448 (1947), 15 U.S.C. 1012 (1952). This statute was enacted after the Supreme Court held in *United States v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533 (1943), *rehearing denied* 323 U.S. 811 (1944), that the business of insurance was subject to the Sherman Act.