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## AERONAUTIC RISK EXCLUSION IN LIFE INSURANCE CONTRACTS\*

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### I. INTRODUCTION.

Since its advent into the field of private and commercial travel, aviation has presented an ever changing problem to those interested in life insurance.<sup>1</sup> Though the revolutionary developments in both the art and mechanics of flying have been reflected in corresponding

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\* This is the first installment of a thesis submitted to the faculty of Northwestern University School of Law in partial fulfillment of the requirements for the degree of Master of Laws.

The author's preface reads, in part, as follows: "Hand in hand with the phenomenal development of aviation during the last decade and its general acceptance by the public as a commercial mode of transportation, has been a marked numerical increase in the fatalities resulting from aeronautical flight. The fact that the lives of a large percentage of those meeting death in plane casualty were insured for varying amounts by policies which in themselves contained provisions excluding aeronautic risk from coverage, has, of necessity made the problem of the judicial interpretation of these aeronautical risk exclusions one of major importance to both the insured and the insurer.

The diametrically opposed decisions, which mark the result to date of litigation interpreting these exclusions, have resulted in the necessary classification of any prediction as to the validity or non-validity of any particular exception as nothing more than conjecture. Faced, under these conditions, not only with the problem of ascertaining liability under policies now in effect, but also of phrasing aeronautical clauses in policies currently issued in such a manner as to conclusively and precisely state the exact risk covered and the risk excepted, the topic is one of ever-increasing interest to insurers. It was on the recommendation of this topic by several outstanding men in the legal phase of life insurance as one of great importance and timeliness, and in need of thorough research and presentment, that this study was begun.

The chief sources of information have been the reported cases, and policy contracts written by American and Canadian Life Insurance Companies from 1913 to 1936. The author wishes, however, to acknowledge his indebtedness to the legal departments of a number of insurance companies, particularly the Connecticut General Life Insurance Company, The Travelers Insurance Company, Aero Insurance Underwriters, and the Equitable Life Assurance Society of the United States. Helpful suggestions have also been made by Prof. Harold C. Havighurst and Prof. Fred D. Fagg, Jr. of the Northwestern University School of Law, Mr. Ralph H. Kastner, Mr. Maurice E. Benson, and Miss Mildred Hammond of the American Life Convention, Mr. Henry Minor Fraser, Jr., of the Penn Mutual Life Insurance Company, and Mr. J. E. Hoskins of the Travelers Insurance Company.

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1. See *Leonard Aae*, *Aviation Insurance* (1931) p. 7: "The development and progress of aviation insurance is a story of the struggle of insurance underwriters to cope with a new insurance problem."

liberalization of risk coverage by underwriters,<sup>2</sup> these same developments have led to a great increase in aviation's acceptance by the general public<sup>3</sup>—a policy holding public—and made the problem one of immediate concern to the insurer.<sup>4</sup>

The ineffectiveness of the policy provisions generally used to protect insurers from liability for death resulting from aerial flight was early demonstrated in a decision,<sup>5</sup> during 1910, wherein the court refused to recognize the broad "hazardous occupation" clause<sup>6</sup> as a defense to liability in the fatal injury of an insured railroad employee, sustained by him as the result of a single balloon ascension. Not only did the more or less standard provisions fail to protect the insurer against aeronautical risks in a satisfactory manner, but the widely used contract provisions for double indemnity in cases of insured's accidental death while riding in a *common carrier*,<sup>7</sup> obviously needed only a judicial determination of an airplane as being included in such a category to expose the insurer to even this additional liability. Inconsistent decisions as to such question in relation to private planes carrying passengers for hire,<sup>8</sup> and nu-

2. See *infra*, Part V. (To be published in the October issue).

3. Indicative of the marked growth in the use of aviation as a means of transportation, are the following figures as to commercial air lines operating in the United States during the last seven years, compiled from statistics published by the United States Department of Commerce, in the *Air Commerce Bulletin*:

Year	Passengers Carried	Miles Flown	Passenger Miles Flown
1929	173,405	25,141,499	83,859,705
1930	374,935	31,992,634	106,442,375
1931	468,981	42,868,922	127,038,797
1932	474,279	45,606,354	173,492,119
1933	493,141	48,771,553	225,267,559
1934	561,370	50,506,470	313,905,508
1935	746,946	55,380,353	

The statistics of this same department show that from July to December, 1935, the accident rate was 1,054,882 miles per accident.

4. "The subject (life insurance aviation risks) is one which has been widely discussed this year and will become of still greater importance as air travel becomes a more accepted means of business occupation." *The Eastern Underwriter*, Fri., Dec. 6, 1935, p. 1.

5. *Pacific Mutual Life Ins. Co. of Cal. v. Van Fleet*, 47 Col. 401, 107 P. 1087, 14 A. L. R. 986 (1910).

6. Typical of such provisions is the one involved in the *Pacific Mutual Life Ins. Co. v. Van Fleet* case (*ibid*): "while following any occupation or in any exposure or performing acts parallel in hazard to the characteristic acts of any occupation classed by the company as more hazardous than is specified in the application for this policy, the principal sum and weekly indemnity shall be for such amount as the premiums paid will purchase at the rates fixed for such more hazardous occupation."

7. Typical of such provisions are:

"If such injuries are sustained (1) while a passenger is in or on a public conveyance provided by a common carrier for passenger service (including the platform, steps or running board of railway or street cars) . . . the company will pay double the amount otherwise payable." (Clause involved in *Bew v. Travelers Insurance Co.*, 95 N. J. L. 533, 112 A. 859, 14 A. L. R. 983 (1921); and *Brown v. Pacific Mutual Life Ins. Co.*, 8 F. (2d) 996 (C. C. A. 5th 1925)).

" . . . while actually riding as a passenger or otherwise in a place regularly provided for the transportation of passengers within a surface or elevated railroad or subway car, steamboat or other public conveyance, provided by a common carrier for passenger service only." (Clause involved in the case of *Cummings v. Great American Casualty Co.*, 183 Minn. 112, 235 N. W. 617 (1931)).

8. The contention was argued in the case of *Bew v. Travelers Ins. Co.* (*ibid*) though the court disposed of the case on another point and purposely

merous determinations of commercial air lines as being of such a status,<sup>9</sup> serve to indicate conclusively the unsatisfactory use of such terms in the absence of further contract provisions.

The procedure of requiring a *warranty*<sup>10</sup> answer to direct queries contained in the written application form, as to whether or not the prospective insured was taking or intended to take part in aeronautics, was, of course, available to insurers. However, the results of a movement on foot for many years directed toward the prevention of forfeitures for breach of immaterial warranties<sup>11</sup> that "crouched unseen in a jungle of printed matter,"<sup>12</sup> began to slowly appear in the form of statutes greatly reducing the effectiveness of the *warranty* as a matter of law,<sup>13</sup> and thus obviously rendering of

passed over the argument without opinion. Planes carrying passengers for hire were construed as not being common carriers in the cases of *Brown v. Pac. Mut. Life Ins. Co.* (ibid) and *North American Accident Ins. Co. v. Pitts*, 213 Ala. 102, 104 So. 21, 40 A. L. R. 1171 (1921), while the opposite view was reached in *Smith v. O'Donnell*, 5 P. (2d) 691 (Cal. 1932). In both the *Pitts* and *Brown* cases the pilots owning the planes flew at such times as they desired, discriminated as to passengers, and did not pretend to keep regular schedules. The court in the *Smith* decision distinguished between that case and the former decision on the ground that in the *Smith* case the pilot maintained a regular place of business for the express purpose of carrying those who desired to fly, while such was not the case in the *Brown* and *Pitts* decisions. See also *Hutchinson*, *Law of Carriers* (3rd Ed. 1906) Sec. 64: "It is wholly immaterial in what kind of vessel or vehicle or for what distance the carrying is done."

9. See *Hotchkiss*, *A Treatise on Aviation Law* (1928) p. 62, Sec. 52. *Curtiss-Wright Flying Service, Inc. v. Glose*, 66 F. (2d) 710 (C. C. A. 3rd, 1933), cert. denied, 290 U. S. 696 (1933); *McCusker v. Curtiss-Wright Flying Service, Inc.*, 269 Ill. App. 502 (1933); *Ziser, Admr. v. Colonial Airways, Inc.*, 162 A. 266 (N. J. 1932); *Conklin, Admr. v. Canadian-Colonial Airways*, 266 N. Y. 244, 88 S. W. (2d) 976 (1935).

10. See *Vance*, *Handbook of the Law of Insurance* (2d ed., 1930) p. 384: "A warranty is a statement or promise set forth in the policy, or by reference incorporated therein, the untruth or non-fulfillment of which in any respect, and without reference to whether the insurer was in fact prejudiced by such untruth or non-fulfillment, renders the policy voidable by the insurer, wholly irrespective of the materiality of such statement or promise." See also *Aetna Life Ins. Co. v. France*, 91 U. S. 510, 23 L. Ed. 401 (1875); *Jeffries v. Life Ins. Co.*, 89 U. S. 47, 22 L. Ed. 833 (1874); *Davey v. Aetna Life Ins. Co.*, 20 F. 482 (D. C. N. J. 1884); *Kelly v. Life Ins. Clearing Co.*, 113 Ala. 453, 21 So. 361 (1896): "When once it is ascertained that the statement is a warranty, and that it is false and the policy expressly provides for a forfeiture in that event, the contract must be so enforced, although it concerns a matter of slight importance and may not in any manner seriously affect the risk"; *Germier v. Springfield Fire & Marine Ins. Co.*, 109 La. 341, 33 So. 361 (1903); *Cobb v. Covenant Mut. Ben. Assn.*, 153 Mass. 176, 26 N. E. 230, 10 L. R. A. 666, 25 Am. St. Rep. (1891); *Hoose v. Prescott Ins. Co. of Boston*, 84 Mich. 309, 47 N. W. 587, 11 L. R. A. 340 (1890); *Ripley v. Aetna Life Ins. Co.*, 30 N. Y. 136, 86 Am. Dec. 362 (1864); *Mod. Order of Praetorians v. Davidson*, 203 S. W. 379 (Tex. Civ. App. 1918); *Fluppen v. State Life Ins. Co.*, 30 Tex. Civ. App. 362, 70 S. W. 787 (1902); *Hartford Life & Annuity Co.*, 39 S. W. 325 (Tex. Civ. App. 1897); *Metropolitan Life Ins. Co. v. Rutherford*, 98 Va. 195, 35 S. E. 361 (1900); *Hoeland v. Western Union Life Ins. Co.*, 58 Wash. 100, 107 P. 866 (1910).

11. *Vance*, *Insurance*, op. cit. note 10, at 31.

12. See "Statutes Affecting Representations in Insurance Contracts (1932)" 32 Col. Law Rev. 522; *Vance*, op. cit. note 10, at 359-406; *Eastern Dist. Piece Dye Works v. Travelers Ins. Co.*, 234 N. Y. 441, 133 N. E. 401 (1923); *Van Schoick v. Niagara Fire Ins. Co.*, 68 N. Y. 434, 438 (1877). In the absence of statute, the falsity of insured's statement, if rendered a warranty by adequate contractual provisions, avoided the policy irrespective of its materiality. If a representation merely, it was generally necessary and sufficient that the false statement influence the insurer either in accepting the risk or in fixing the premium.

13. *Ala. Code Ann.* (1928) §8364; *Ariz. Rev. Code* (1928) §1847(3) (life); *Gen. Laws Cal.* (1932) c. 145, §10113; *Col. Ann. Stat.* (Mills 1930) §3606j(c) (group life only); *Laws Del.* (1921) §606; *Dist. of Col. Pub. Act* 436, c. 5, §3(3); *Code Ga.* (1933) §56911; *Idaho Code Ann.* (1932) §40-1303(3); *Ind. Ann. Stat.* (Burns 1933) §39-801(5) (life only); *Code Iowa* (1935) c. 399-E1.

little general importance any answers to such aeronautical inquiries contained in policy applications.

Though statements made in answer to application queries were still classified as *representations* under statutory provisions, the practical efficacy of reliance thereon was even further removed by judicial recognition of such representations as being without legal effect if not material,<sup>14</sup> which thus of necessity cast upon the insurer the very unsatisfactory burden of proving such representation to have been fraudulent or material<sup>15</sup> in event reliance was made thereon in subsequent litigation arising out of the death of an insured from aeronautical casualty. As recently pointed out by legal writers, in view of the later statutes making the policy incontestable after a certain time,<sup>16</sup> such a statement on the part of the prospective insured denying any intent to engage in aviation, even if a *warranty*, could not be operative after the period fixed by the provisions of the particular incontestability clause therein involved.<sup>17</sup>

§8684-e5(2); *Kan. Rev. Stat. Ann.* (1933) §40-420(2); *Ky. Stat.* (1930) §639; *La. Gen. Stat.* (Dart. 1933) §4113; *Ann. Code Md.* (1924) Art. 48a, §87; *Ann. Laws Mass.* (1932) c. 176, §186; *Mich. Comp. Laws* (Cahill 1929) §12427 (life), §12434 (group life); *Minn. Stat.* (Mason 1927) §3402(4); *Rev. Stat. Mo.* (1929) §5732; *Neb. Comp. Stat.* (1929) §44-602(4); *N. J. Comp. Stat.* (1910) §2869-94(4) (life), *Cum. Supp.* (1930) §99-95a(2) (group life); *N. M. Ann. Stat.* (1929) §71-161(4); *N. Y. Ins. Laws*, §58 (life), §101b(2) (group life); *N. C. Code* (1935) §6466b (group life); *N. D. Comp. Laws Ann.* (1913) §6625; *Ore. Code Ann.* (1930) §§46-131, 46-506 (life); *Pa. Stat. Ann.* (Purdon, 1930) c. 40, §532 (group life); *Tenn. Ann. Stat.* (Williams, 1934) §6126 (life); *Tex. Rev. Civ. Stat. Ann.* (Vernon, 1925) Art. 4732; *Utah Rev. Stat.* (1933) §43-3-24(4); *Va. Code Ann.* (1930) §4420; *Wash. Rev. Stat. Ann.* (Remington, 1932) §7242-2.

14. See *Boyer v. United States Fidelity and Guaranty Co.*, 206 Cal. 273, 279, 274 P. 57, 60 (1929); *National Life & Acc. Ins. Co. v. Fisher*, 211 Ky. 12, 15, 276 S. W. 981, 982 (1925): "If a representation is untrue and material, it taints the contract whether fraudulent or not and if untrue and fraudulent, it taints the contract whether material or not": cf. *Penn. Mutual Life Ins. Co. v. Mechanics Savings Bank & Trust Co.*, 72 F. 413 (C. C. A. 6th, 1896); *Fitzgerald v. Metropolitan Life Ins. Co.*, 90 Vt. 291, 98 Atl. 498 (1916).

15. See *Southern Surety Co. v. Farrell*, 79 Col. 53, 55, 244 P. 475, 476 (1926); *Security Life Ins. Co. v. Brimmer*, 36 F. (2d) 176 (C. C. A. 8th, 1929); *Grand Lodge v. Mass. Bonding and Ins. Co.*, 324 Mo. 938, 949, 25 S. W. (2d) 783, 787 (1930); *Montana Auto Finance Corp. v. Federal Security Co.*, 278 P. 116, 121 (Mont. 1929); *Waynarowski v. Metropolitan Life Ins. Co.*, 3 N. J. Misc. 1066, 1068, 130 Atl. 544, 545 (1925); *Rahov v. Bankers Life Ins. Co.*, 164 App. Div. 645, 150 N. Y. Supp. 55 (3rd Dept. 1915), aff'd on opinion of Smith, J., 176 App. Div. 918, 162 N. Y. Supp. 539 (1916), aff'd without opinion, 225 N. Y. 721, 122 N. E. 888 (1917); *Brown v. Inter-State Business Men's Assn.*, 57 N. D. 941, 948, 224 N. W. 894, 896 (1929); *Continental Casualty Co. v. Owen*, 38 Okla. 107, 116, 131 Pac. 1084, 1088 (1913); *Mutual Life Ins. Co. v. Chandler*, 120 Ore. 694, 252 P. 559 (1927); *Kuhne et. al. v. N. Y. Life Ins. Co.*, 297 Penn. 418, 423, 147 A. 76, 77 (1929) (criticized in *Vance*, op. cit. note 10, at 363); *Waco Mutual Life Ins. Association v. Alford*, 289 S. W. 93, 95 (Tex. Civ. App. 1926); See also *Vance*, op. cit. note 10, at 366. Several courts apparently have assumed that at common law a representation was ineffective unless material and made with intent to deceive. See *Security Life Ins. Co. v. Brimmer*, *ibid.* at 179; *Enid v. National Casualty Co.*, 122 Ore. 547, 555, 259 P. 902, 907 (1927).

16. See note 174.

17. See *Patterson, Essentials of Insurance Law* (1st. Ed. 1935) p. 364: "If the insured was asked in his application: 'Do you intend to engage in aviation?' and answered 'No,' it seems clear that the insurer could not avoid liability merely by proving that after the policy was issued the insured did engage in aviation. This conclusion follows from the language of the statutes 'and not warranties.' Hence such a statement is only a representation of expectation or belief, which, is without legal effect if honestly made. It may be added that, in view of the statutes making the policy incontestable after a certain time, such a statement, even if a warranty, could not be operative after the period fixed."

**Specific Aeronautical Exception Provisions:**

Though the date of the advent of aviation into the United States as a generally recognized mode of travel could hardly be set as far back as 1913, it was nevertheless in that year that the ineffectiveness of these general policy provisions to cope with such obvious risks materialized in the adoption by insurers of specific aviation clauses in the effort to define the exact coverage granted in regard to aeronautic risks.

**Nature and Status of Exceptions (1913-1918)**—Varying only in apparent trivial detail, these early exclusion clauses were to the effect that *participation in aviation* or *engaging in aviation* was to be excepted from the coverage elsewhere provided for in the particular contract. Occasionally the words *aviation* and *aeronautics* were interchanged in expressing the *activity* though *participating* and *engaging* were almost exclusively used as the expression of the *action* intended to be excluded. Little, if any, effect was felt by insurers from this new enterprise for some years, however, due to the comparatively limited number of individuals taking part in aviation.

**Increased Importance Subsequent to 1918**—From the beginning of the World War, however, the potential possibilities of aviation were evident, and spurred by wartime demands, the development of the science of flying and construction of the planes themselves brought aviation from its rank of experimentation to one of general public practicability. The close of the war resulting in the sale of thousands of army planes, chiefly to discharged veteran pilots, saw a phenomenal spread of aviation over the entire nation<sup>18</sup> and its relationship with insurance became one of immediate and practical importance. Without statistics of any kind on which to base actuarial figures,<sup>19</sup> insurers obviously could not accept such risks; while on the other hand to deny the public coverage altogether because of such activity would be self-denial of a great business market. The business policy of the continued acceptance of such risks under contracts containing these exclusions thereupon adopted, only serves to emphasize the importance of the construction of such clauses.

## II. ENGAGE AND PARTICIPATE EXCEPTIONS.

**Airplane Passengers:**

**In General**—In considering these aeronautical exceptions

18. See Leonard H. Aæ, *Aviation Insurance* (1931) p. 7.

19. See J. E. Hoskins, *Aviation and Life Insurance*, National Aeronautic Magazine, April, 1936, p. 18.

employing *engage* or *participate* as expressive of the *action*, used in conjunction with various *activity* expressions, it is of interest to note that with but very few exceptions,<sup>20</sup> decisions to date deal exclusively with passenger death,<sup>21</sup> though little, if any attention has been paid by the courts to the seemingly important items of whether the passenger met death while flying in a private or commercial plane, or whether he was fare-paying or gratuitous. However, in cases involving clauses specifically permitting recovery in the case of death as a *fare-paying passenger* such limitation on the exclusion has been strictly construed.<sup>22</sup>

Generally, the *participating* cases, until very recently, have been construed as being inclusive of everyone in the plane during flight,<sup>23</sup> while the *engaging* clauses have been interpreted as extending only to one actively taking part in the flight of the plane, and as not extending to a passenger.<sup>24</sup> A lone decision involving *engaged* in connection with *aeronautic operations* construed such clause as not covering a casual passenger and as being ambiguous,<sup>25</sup> though with the further addition of *as passenger or otherwise* the

20. *Irving v. Prudential Ins. Co. of Amer.*, 5 F. Supp. 382 (E. D. Mich. 1933); *Taylor v. Prudential Ins. Co. of Amer.*, 253 N. Y. S. 55, 1931 U. S. Av. Rep. 41 (1931); *Price v. Prudential Life Ins. Co. of Amer.*, 98 Fla. 1044, 124 So. 817 (1929); *Charette v. Prudential Ins. Co. of Amer.*, 202 Wis. 470, 232 N. W. 848 (1930).

21. *Day v. Equitable Life Assur. Co. of U. S.*, 83 F. (2d) 147, 235 C. C. H. 509 (C. C. A. 10th, April 7, 1936); *Gregory v. Mutual Life Ins. Co. of N. Y.*, 78 F. (2d) 522 (C. C. A. 8th, 1935); cert. denied, 56 Sup. Ct. 157, 80 L. Ed. 126 (1935); *Mayer v. N. Y. Life Ins. Co.*, 74 F. (2d) 118 (C. C. A. 6th, 1934); *Goldsmith v. N. Y. Life Ins. Co.*, 69 F. (2d) 273 (C. C. A. 8th, 1934), cert. denied, 292 U. S. 650, 54 Sup. Ct. 860, 78 L. Ed. 1500 (1934); *First Nat. Bank of Chattanooga v. Phoenix Mutual Life Ins. Co.*, 62 F. (2d) 681 (C. C. A. 6th, 1931); *Head v. N. Y. Life Ins. Co.*, 43 F. (2d) 517 (C. C. A. 10th, 1930); *Gits v. New York Life Ins. Co.*, 32 F. (2d) 7 (C. C. A. 7th, 1929); *Pittman v. Lamar Life Ins. Co.*, 17 F. (2d) 270 (C. C. A. 5th, 1927); *Martin v. Mutual Life Ins. Co. of N. Y.*, 189 Ark. 291, 70 S. W. (2d) 694 (1934); *Missouri State Life Ins. Co. v. Martin*, 188 Ark. 907, 69 S. W. (2d) 1081 (1934); *Benefit Ass'n of Ry. Employees v. Hayden*, 175 Ark. 565, 299 S. W. 995 (1927); *Travelers Ins. Co. v. Peake*, 82 Fla. 128, 89 So. 418 (1921); *Tierney v. Occidental Life Ins. Co.*, 89 Cal. App. 779, 265 P. 400 (1928); *Murphy v. Union Indemnity Co.*, 172 La. 383, 134 So. 256 (1931); *Masonic Accident Ins. Co. v. Jackson*, 200 Ind. 472, 164 N. E. 628 (1929); *Flanders v. Benefit Assn. of Ry. Employees*, 226 Mo. App. 143, 42 S. W. (2d) 973 (1931); *Wendorff v. Missouri State Life Ins. Co.*, 318 Mo. App. 363, 1 S. W. (2d) 99 (1927); *Meredith v. Business Men's Acc. Assoc.*, 213 Mo. App. 688, 252 S. W. 976 (1923); *Bew v. Travelers Ins. Co.*, 95 N. J. Law 533, 112 A. 859 (1921); *Sneddon v. Mass. Protective Assn., Inc.*, 39 P. (2d) 1023 (N. M. 1935); *Gibbs v. Equitable Life Assur. Soc.*, 256 N. Y. 208, 176 N. E. 144 (1931); *Peters v. Prudential Ins. Co. of Amer.*, 133 Misc. Rep. 780, 233 N. Y. S. 500 (1929); *Provident Trust Co. of Phila. v. Equitable Life Assur. Soc. of U. S.*, 316 Pa. St. Rep. 121, 172 A. 701 (1934); *Blonski v. Bankers Life Ins. Co.*, 209 Wis. 5, 143 N. W. 410 (1932).

22. *Metropolitan Life Ins. Co. v. Amos Halcomb, as Adm. of the Estate of George R. Halcomb, deceased*, 79 F. (2d) 788 (C. C. A. 9th, 1935); *Padgett v. Metropolitan Life Ins. Co.*, 206 N. C. 365, 173 S. E. 903 (1934).

23. *Head v. N. Y. Life Ins. Co.*, note 21; *Travelers Ins. Co. v. Peake*, note 21; *Meredith v. Business Men's Acc. Assoc.*, note 21; *Bew v. Travelers Ins. Co.*, note 21; *Sneddon v. Massachusetts Protective Assn.*, note 21; *Contra: Gregory v. Mutual Life Ins. Co.*, note 21; *Martin v. Mutual Life Ins. Co. of N. Y.*, note 21 ("We grant that our conclusion thus announced seems to be in conflict with respectable authority on this question, but such must be the inevitable result so long as courts think and act independently of each other").

24. *Benefit Assoc. of Ry. Employees v. Hayden*, note 21; *Masonic Assoc. Ins. Co. v. Jackson*, note 21; *Flanders v. Benefit Ass'n of Ry. Employees*, note 21; *Peters v. Prudential Ins. Co. of Amer.*, note 21.

25. *Gits v. New York Life Ins. Co.*, note 21.

effectiveness of the clause in covering a passenger has been approved.<sup>26</sup> Conflicting decisions have marked similar litigation involving *engaging as passenger or otherwise* when used in connection with aeronautic *expedition*,<sup>27</sup> though the more recent authority denies effectiveness to the exception in such connection.<sup>28</sup>

*Aeronautic operations* when used in connection with *participate* have been construed as not including a passenger,<sup>29</sup> though the contrary is true when the insured shows some degree of action in directing the flight, even though admittedly flying in the role of a passenger.<sup>30</sup> The courts have never been faced with an exception involving *as passenger or otherwise* used in connection with *participating in aeronautical operations* though general effectiveness has been accorded such an exception in the absence of the (operations) limitation.<sup>31</sup> No appreciable variations are to be found between the decisions of federal and state courts.

**"Participate" Exceptions**—The case of *Bew v. Travelers Insurance Co.*<sup>32</sup> handed down by the New Jersey court in 1921 construing a *participation in aeronautics* exception clause as covering a casual passenger in a plane, for many years served the dual role of a landmark decision as to aviation exception clauses in general and authority for consistently identical constructions of similar clauses. However, with the launching of transcontinental airlines in 1926, aviation definitely assumed the status of a business or occupation,<sup>33</sup> and passenger litigation involving *participation in aeronautics* exceptions subsequent to that date has, with but two exceptions,<sup>34</sup> reversed the construction of the *Bew* case on the

26. *Mayer v. N. Y. Life Ins. Co.*, note 21; *Goldsmith v. N. Y. Life Ins. Co.*, note 21.

27. *Gibbs v. Equitable Life Assur. Soc. of U. S.*, note 21; *Provident Trust Co. of Philadelphia v. Equitable Life Assur. Soc. of U. S.*, note 21; *Day v. Equitable Life Assur. Soc. of U. S.*, note 21.

28. *Provident Trust Co. of Phila. v. Equitable Life Assur. Soc. of U. S.*, *ibid.*, *Day v. Equitable Life Assur. Soc. of U. S.*, *ibid.*

29. *Missouri State Life Ins. Co. v. Martin*, note 21.

30. *First Nat. Bk. of Chattanooga v. Phoenix Mutual Life Ins. Co.*, note 21.

31. *Head v. New York Life Ins. Co.*, note 21.

32. 95 N. J. L. 533, 112 Atl. 859, 14 A. L. R. 983, 1928 U. S. Av. Rep. 151; Comment (1929) 1 Air Law Rev. 152 (Bew was killed in the crash of a sight-seeing plane in which he was flying as a passenger at Atlantic City, N. J. His insurance policy written in the sum of \$3000 contained a condition that it did not cover injuries fatal or non-fatal sustained while *participating or in consequence of having participated in aeronautics*. Held: that Bew met death while *participating in aeronautics* and that the exception in the policy barred recovery).

33. Illustrative of this transition is the case of *Masonic Assoc. Ins. Co. v. Jackson*, note 21, where the Indiana Appellate Court in 1925 held a non-fare-paying passenger to be "engaging in aviation" because of the *non-occupational* status of aviation, and the Indiana Supreme Court reversed this opinion in 1929 because of the *occupational* status of aviation.

34. *Sneddon v. Mass. Protective Assn., Inc.* ... N. M. ... 39 P. (2d) 1023 (1935); Note (1935) 6 Air Law Rev. 193 (Sneddon was killed in the crash of a plane in which he was riding with a friend as a casual invitee. The crash occurred Nov. 27, 1932 in Gallup, N. M. The policy on which the suit is here based contained a clause excepting from coverage death *sustained as the result of participation in aviation, aeronautics or subaquatics*. Held: Flying in an airplane is *participation in aviation or aeronautics* and complaint is dismissed).

*Head et al v. N. Y. Life Ins. Co.*; *Head v. Hartford Acc. & Indemnity Co.*,



basis of the changed meaning of *aeronautics* since the advent of the occupational era.<sup>35</sup> Particularly important in this respect is the recent highly publicized 1935 *Gregory v. Mutual Life Ins. Co. of N. Y.* decision.<sup>36</sup>

It is interesting to note the marked similarity in the reasoning of the courts in the *Bew* and *Gregory* decisions even though obviously directly contra results were reached. Unequivocally rejecting a prior judicial construction of *participate* in connection with an alleged violation of a banking statute as requiring active conduct or an affirmative knowledge of the fraud committed,<sup>37</sup> the New Jersey court in the early *Bew* case turned to dictionary definitions of *participate* as meaning "to receive or have a part of; to partake of; experience in common with others; partake, as to partake in a discussion,"<sup>38</sup> and of *aeronautics* as meaning "the art or practice of sailing or floating through the air."<sup>39</sup> The latter was distinguished from *aviation* which was described as being limited to "problems dealing with artificial flight by means of flying machines heavier than air."<sup>40</sup>

In combining these definitions of *participate* and *aeronautics*, the conclusion was reached that "partaking of the art or practice of sailing or floating through the air" was the proper construction of the clause and therefore a passenger was included within such

43 F. (2d) 517 (C. C. A. 10th 1930), 1930 U. S. Av. Rep. 235; Note (1930) 1 Air Law Rev. 488 (Head was an insurance salesman, and took a flight in a plane in 1929 for the purpose of inspecting the plane before writing a policy on it. The plane crashed, killing Head. He was insured by the N. Y. Life Ins. Co. under a policy containing a *participation as a passenger or otherwise in aviation or aeronautics* exception in the double indemnity provision, and by the Hartford Acc. & Indem. Co. under a policy containing a *while participating or in consequence of participating in aeronautics* exception. Held: There is no substantial difference in the two exceptions and both cover the death of the insured. Judgment for defendants.)

35. *Martin v. Mutual Life Ins. Co. of N. Y.*, 189 Ark. 291, 71 S. W. (2d) 694 (1934); Note (1934) 5 JOURNAL OF AIR LAW 661; Note (1934) 6 Air Law Rev. 193 (Martin was killed in the crash of a plane in which he was riding as the guest of friends on a flight from Augusta, Ark. to St. Louis, Mo. This suit is based upon an exception in the Double Indemnity provision of a life policy excluding liability where death resulted from *participation in aeronautics*. Held: *Participate* connotes to have an active share in the management, and therefore insured did not come within the ambit of this exception. Court stated "We grant, that our conclusion thus announced seems to be in conflict with respectable authority on this question, but such must be the inevitable result so long as courts think and act independently of each other." Judgment for plaintiff.)

*Gregory et al v. Mutual Life Ins. Co. of N. Y.*, 78 F. (2d) 522 (C. C. A. 8th 1935) Cert. denied 56 Sup. Ct. 157, 80 L. Ed. 126; Note (1935) 6 JOURNAL OF AIR LAW 626; Note (1936) 30 Ill. L. Rev. 672 (Gregory was killed in the same crash as Martin in the case of *Martin v. Mutual Life Ins. Co. of N. Y.* (*ibid.*). He was the father of the pilot of the plane and had purchased the plane. The policies here involved contained provisions that the insurance company should not be liable for double indemnity for death resulting from *participation in aeronautics*. Held: The terms must be considered in the light of known revolutionary changes and development in the art of aviation and a passenger on a transport plane is not *participating in aeronautics*. The exception is ambiguous. Judgment for plaintiff.)

36. *Ibid.*

37. *Mason v. Moore et al*, 73 Ohio St. 275, 76 N. E. 932, 4 L. R. A. (N. S.) 597, 4 Ann. Cas. 240 (1906).

38. Standard Dictionary (1920).

39. *Ibid.*

40. *Bew v. Travelers Ins. Co.*, note 32, 95 N. J. L. at 534, 112 Atl. at 860 (1921).

categorical definition. However, obiter on the part of the court to the effect that "*aeronautics* does not describe a business or occupation like engineering or railroading, but an art which may be practiced for pleasure or profit, and is indulged in by all who ride whether as pilots or passengers"<sup>41</sup> left open a wide loophole for a directly contra conclusion subsequent to the advent of aviation into the occupational field. Seizing the implications of this statement, the *Gregory* case reached the contrary conclusion in combining the *Bew* construction of *participate* as meaning "to take part in," and the occupational connotation of *aeronautics* as of the time of interpretation in 1935, to mean "taking part in actual flying"<sup>42</sup> and as therefore not covering a casual passenger. Such conclusion in favor of the insured was, however, as has likewise been true in every decision adopting such viewpoint, further substantiated by declaring the exception ambiguous and as therefore invoking the well known legal truism that any ambiguity in an insurance contract is to be construed against the insurer.<sup>43</sup>

Of assistance only in clearing doubts as to any alleged variance between *aviation* and *aeronautics*, which alleged variation it termed as "hairsplitting distinctions," was the early case of *Meredith v. Business Men's Accident Association*,<sup>44</sup> while other cases involving

41. *Ibid.*

42. *Gregory v. Mutual Life Ins. Co. of N. Y.*, note 35, 87 F. (2d) at 524 (1935).

43. *Aschenbrenner v. U. S. Fid. & Guar. Co.*, 292 U. S. 80, 54 Sup. Ct. 861, 78 L. Ed. 1474 (1933); *Mutual Life Ins. Co. v. Hurni Packing Co.*, 263 U. S. 167, 44 Sup. Ct. 90, 68 L. Ed. 235, 31 A. L. R. 102 (1923); *MacMaster v. N. Y. Life Ins. Co.*, 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64 (1901); *Thompson v. Phoenix Ins. Co.*, 136 U. S. 287, 10 Sup. Ct. 1023, 34 L. Ed. 413 (1890); *Northwestern Nat. Life Ins. Co. v. Banning*, 63 F. (2d) 736 (C. C. A. 10th, 1933); *Gorman v. Fid. & Casualty Co.*, 55 F. (2d) 4 (C. C. A. 8th, 1932); *Wharton v. Aetna Life Ins. Co.*, 48 F. (2d) 37 (C. C. A. 8th, 1931); *Chase v. Business Men's Assur. Co. of Amer.*, 51 F. (2d) 34 (C. C. A. 10th, 1931); *East & West Ins. Co. v. Fidel.*, 49 F. (2d) 35 (C. C. A. 10th, 1931); *Graham v. Bus. Men's Ass'n of Amer.*, 43 F. (2d) 673 (C. C. A. 10th, 1930); *Schamps v. Fidelity & Casualty Co. of N. Y.*, 259 F. 55 (C. C. A. 6th, 1919); *Philadelphia Casualty Co. v. Fecheimer*, 220 F. 401, Ann. Cas. 1917D64 (C. C. A. 6th, 1915); *O'Brien v. North River Insurance Co.*, 212 F. 102, L. R. A. 1917C 727 (C. C. A. 4th, 1914); *Illinois Automobile Ins. Exchange v. Southern Motor Sales Co.*, 207 Ala. 265, 92 So. 429, 24 A. L. R. 734 (1922); *Kelly v. Brotherhood of Railway Trainmen*, 308 Ill. 508, 140 N. E. 5, 29 A. L. R. 243 (1923); *Hesaler v. Federal Casualty Co. of Detroit, Mich.*, 190 Ind. 68, 129 N. E. 325, 14 A. L. R. 1329 (1921); *American Surety Co. v. Pangburn*, 182 Ind. 116, 105 N. E. 769, Ann. Cas. 1916E 1126 (1914); *Maddox et al. v. Mutual Life Ins. Co. of N. Y.*, 193 Ky. 38, 234 S. W. 949, 22 A. L. R. 1276 (1921); *General Acc. Fire & Life Assur. Corp. v. Louisville Home Telephone Co.*, 175 Ky. 96, 193 S. W. 1031, L. R. A. 1917D 952 (1917); *Williams v. Southern Surety Co.*, 211 Mich. 444, 179 N. W. 272, 15 A. L. R. 1234 (1920); *MacDonald v. Metropolitan Life Ins. Co.*, 304 Pa. 213, 155 Atl. 491, 77 A. L. R. 353 (1931); *Bank of Commerce and Trust Co. v. Northwestern National Life Ins. Co.*, — Tenn. —, 26 S. W. (2d) 135, 68 A. L. R. 1380 (1930); *Volunteer State Life Ins. Co. v. Richardson*, 146 Tenn. 589, 244 S. W. 44, 26 A. L. R. 1270 (1922); *Newsome v. Commercial Casualty Co.*, 147 Va. 471, 137 S. E. 456, 52 A. L. R. 363 (1927); *Beil v. American Ins. Co.*, 173 Wis. 533, 181 N. W. 733, 14 A. L. R. 179 (1921); *Graham v. London Guarantee Co.*, 56 Ont. L. Rep. 494, 2 Dom. L. Rep. 1037, 15 Brit. Rul. Cas. 397 (1925). For numerous further citations adopting and affirming this rule see 14 R. C. L. 926, Sec. 103, n. 9; R. C. L. Perm. Supp. p. 3708, Sec. 103, n. 9; R. C. L. 1935 Pcket. Supp., p. 1106, sec. 103, n. 9.

44. 213 Mo. App. 688, 252 S. W. 976, 1928 U. S. Av. Rep. 159 (1923) (*Meredith* was killed in the crash of a plane in which he was riding as a

the point have either been identical with the *Bew* or *Gregory* decisions.<sup>45</sup>

Though the construction of an aeronautical exception clause has never as yet been directly passed upon by the United States Supreme Court,<sup>46</sup> the 1934 decision of this court in the case of *Travelers Protective Association of America v. Primson*<sup>47</sup> involving the construction of a "participating in the moving or transportation of explosive substance or substances" proviso tends to support the reasoning employed by the *Bew* case in reaching the conclusion that a casual airplane passenger came within the bounds of a *participation in aeronautics* exception. Speaking through Justice Cardozo,<sup>48</sup> the court in the *Primson* case recognized the conflict between various state and federal courts as to whether or not there is the necessity of any causal nexus between the injury or death and the forbidden forms of conduct in a *participate* exception,<sup>49</sup> and in concluding against such necessity, sustained the exception there involved as embracing the death of an insured due to the explosion of dynamite caps being carried in a truck on which he was riding as a business invitee.

passenger for hire at Breckenridge, Mo. Policy held by Meredith excluded death while *participating in aeronautics* from coverage, but contained another provision granting coverage to insured while doing any act pertaining to a hazardous occupation *while insured is engaged in games or sports for recreation*. Held: The risk exception provision governs, and as Meredith was *participating in aeronautics* at the time of his death, judgment rendered for insurer).

45. *Travelers Ins. Co. v. Peake*, 82 Fla. 128, 89 So. 418, 1928 U. S. Av. Rep. 156 (1921); note (1921) 31 Yale L. J. 217 (Peake was seriously injured in the crash of a plane at the Alabama State Fair in which he was riding as a passenger for hire. This suit is brought on an accident policy excepting from coverage injuries fatal or nonfatal sustained by the insured *while participating or in consequence of having participated in aeronautics*. Held: "A passenger in an airplane flying in the air, whether he takes part in the operation of the airplane or not is *participating in aeronautics* within the intent and meaning of the provision specifically excepting such a risk from the indemnity contract contained in the policy herein"). (Italics are the authors.) *Head et al. v. New York Life Ins. Co.*; *Head v. Hartford Acc. & Indemnity Co.*, note 34; *Sneddon v. Massachusetts Protective Assn., Inc.*, note 34; *Martin v. Mutual Life Ins. Co. of N. Y.*, note 35.

46. Cert. denied, *Goldsmith v. N. Y. Life Ins. Co.*, note 21; Cert. Denied, *Gregory v. Mutual Life Ins. Co.*, note 35.

47. 291 U. S. 576, 54 Sup. Ct. 502, 78 L. Ed. 999 (1933).

48. Mr. Justice Stone wrote a dissenting opinion.

49. Courts construing that there must have been an aggravation of the hazard to which death or injury was owing: *Matthes v. Imperial Acc. Assn.*, 110 Iowa 223, 81 N. W. 484 (1900); *Bradley v. Mutual Benefit Life Ins. Co.*, 45 N. Y. 422 (1871); cf. *Jones v. United States Mutual Acc. Assn. of City of N. Y.*, 92 Iowa 652, 61 N. W. 485 (1894); *Accident Ins. Co. v. Bennett*, 90 Tenn. 258, 16 S. W. 723 (1891); *Murray v. N. Y. Life Ins. Co.*, 96 N. Y. 614 (1884); *Benham v. American Central Life Ins. Co.*, 140 Ark. 612, 217 S. W. 462 (1919); *Kelly v. Fid. Mut. Life Ins. Co.*, 169 Wis. 274, 276, 172 N. W. 152 (1919); *Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478 (1884).

Courts holding that in policies so phrased there is no need of any causal nexus between the injury or death and the forbidden forms of conduct: *Order of United States Commercial Travelers v. Greer*, 43 F. (2d) 499 (C. C. A. 1930); *Flannagan v. Provident Life & Acc. Ins. Co.*, 22 F. (2d) 136 (C. C. A. 4th, 1927); *Murdie v. Md. Casualty Co.*, 52 F. (2d) 888 (Dist. Ct. Nev. 1931); *Shader v. Railway Passenger Assur. Co.*, 66 N. Y. 441 (1876); *Conner v. Union Automobile Ins. Co.*, 122 Cal. App. 105, 9 P. (2d) 863 (1932); *Bradshaw v. Farmers & Bankers Life Ins. Co.*, 107 Kan. 681, 193 P. 332 (1920); *Order of United Commercial Travelers v. Tripp*, 63 F. (2d) 37 (C. C. A. 5th, 1933); cf. *United States Fidelity & Guaranty Co. v. Guenther*, 281 U. S. 34, 50 Sup. Ct. 165, 74 L. Ed. 683 (1929); *Met. Life Ins. Co. v. Conway*, 252 N. Y. 449, 169 N. E. 642 (1930).

**"Engage" Exceptions**—Dictum in the early *Bew* decision to the effect that "if it had been intended to confine the application of this provision to those who pilot and manage the physical operations of such vessels, it probably would have been expressed by using some language as *engaging* . . ." <sup>50</sup> sufficed to indicate, even before the first decision involving an *engaging in aeronautics* clause was handed down, the strong possibility of such exception being judicially construed as not covering a casual passenger. And indeed, though bitterly condemned by insurance counsel as a "distinction in form which did not exist in substance," <sup>51</sup> litigated decisions have consistently rejected such passenger coverage under an *engaged* exception. <sup>52</sup>

Unlike the courts in *participation* decisions, no strictly etymological analysis of the word *engage* has been employed by courts in construing such clauses, but rather a tendency has been demonstrated of looking to prior litigated decisions involving analogous situations for authority.

Illustrative of this tendency was the initial case involving an *engaged* aeronautical exception clause, *Benefit Association of Railway Employees v. Hayden*, <sup>53</sup> where entire reliance was placed upon an insurance case interpreting an *engaged in military or naval service in time of war* exception clause as not covering death from influenza while in the wartime military service, because "in order to exempt the company from liability the death must have been shown to have been caused while the insured was doing something connected with the military service, in contra-distinction to death while in the service due to causes entirely or wholly unconnected with such service." <sup>54</sup> The necessity of taking affirmative action before the connotation of *engaged* was met is obvious.

50. *Bew v. Travelers Ins. Co.*, note 32 at 534, 112 Atl. at 860.

51. Vaughn Miller, "Validity and Construction of Aeronautic Clauses in Policies of Life Insurance." Address delivered before the Association of Life Insurance Counsel, May, 25, 1931, at White Sulphur Springs, West Virginia. Mr. Miller is General Counsel of the Volunteer Life Ins. Co., Chattanooga, Tenn. Sec. L.I.C. Vol. 5, p. 74.

52. *Benefit Assn. of Ry. Employees v. Hayden*, note 21; *Masonic Assn. Ins. Co. v. Jackson*, note 21; *Peters v. Prudential Ins. Co. of Amer.*, note 21; *Flanders v. Benefit Assn. of Ry. Employees*, note 21; *Gits v. N. Y. Life Ins. Co.*, note 21.

53. 175 Ark. 565, 299 S. W. 995, 57 A. L. R. 622, 1929 U. S. Av. Rep. 79 (1927) (Insured killed in the crash of a plane in which he was taking a short pleasure trip at the Stuttgart, Ark., Rice Carnival. Insured's policy contained the following proviso: "This policy does not cover disability or fatal injury received by the insured . . . (3) while *engaged in aeronautics or underwater navigation.*" Held: The exception here merely was an inhibition against insured engaging in the *business* and did not apply to a single flight. Judgment for plaintiff). (Italics are the authors.)

54. *Benham v. Amer. Cent. Life Ins. Co.*, 140 Ark. 612, 217 S. W. 462 (1919). This case has been approved and followed in the following decisions: *Nutt v. Security Life Ins. Co.*, 142 Ark. 29, 218 S. W. 675 (1920); *Barnett v. Merchants Life Ins. Co.*, 87 Okla. 42, 208 Pac. 271 (1922); *Boatwright v. Amer. Life Ins. Co.*, 191 Iowa 253, 180 N. W. 321, 11 A. L. R. 1085 (1920); *Long v. St. Joseph Life Ins. Co.*, 225 S. W. 106, affirmed, 248 S. W. 923 (1923).

Immediately subsequent litigation of passenger claims under such exception,<sup>55</sup> however, placed a still further necessity of *continuity of action* before the categorical requisites of *engaged* when used in connection with *aviation* were met. Prior judicial interpretations of the expression in connection with other activity, formed the authority for the construction in the cases of *Peters v. Prudential Life Ins. Co.*<sup>56</sup> and *Masonic Accident Ins. Co. v. Jackson*<sup>57</sup> to the effect that the expression gave the connotation of "participation as an occupation, with the impression being the same when *engaged* was used in connection with *aeronautics* as if it had been used in connection with engineering or *any other occupation* or profession."<sup>58</sup>

It is interesting to note that in these citations of prior authority only one insurance decision, other than the military case<sup>59</sup> cited in the *Hayden* decision, is to be found; that being a Vermont decision holding insured not to have been *engaged* in the sale of intoxicating liquor even though the evidence showed that he had made occasional sales while working at a hotel bar.<sup>60</sup> Great reliance was placed on two criminal cases, one a North Carolina decision holding the defendant not guilty of "engaging in the business of procuring laborers for work outside the state" because of the necessity of proving the doing of more than one act in the line of such occupation before the requirements of the word *engaged* were met,<sup>61</sup> and the other a New York decision construing an *engaging in gambling* statute as requiring more than occasional participation and as connoting some continuity or practice.<sup>62</sup>

Though consistently argued by respondent beneficiaries in every case, the New York Court in *Peters v. Prudential Ins. Co. of*

55. *Masonic Acc. Ins. Co. v. Jackson*, 200 Ind. 472, 164 N. E. 628, 61 A. L. R. 840, 1929 U. S. Av. Rep. 84 (1929); Note (1929) 4 Ind. L. Jour. 416; Note (1929) 2 So. Cal. L. Rev. 498; *Peters v. Prudential Ins. Co. of Amer.*, 233 N. Y. S. 500, 133 Misc. Rep. 780, 1929 U. S. Av. Rep. 67 (1929).

56. *Ibid.* (Plaintiff's husband was killed in the crash of a plane in which he was riding as a passenger. His life was insured by a policy issued by defendant insurer containing a clause excepting from coverage death resulting from *having been engaged in aviation or submarine operations or military or naval service in time of war*. Held: The clause does not include death resulting to a passenger in an airplane in time of peace. The clause was further found to be ambiguous).

57. Note 55 (Joseph L. Jackson was killed April 29, 1923, in the crash of a plane in which he was flying as a passenger. His accident insurance policy issued by the insurer defendant contained a provision excepting the company from liability if death or disability resulted *while engaging in aviation or ballooning*. Held: *Aviation* means the art of flying, especially the management of aeroplanes, and *engaged* means to carry on, conduct, or employ oneself, and not relating to single acts. Therefore, insured was not *engaged in aviation* at the time of his death. Judgment for plaintiff).

58. *Peters v. Prudential Ins. Co. of Amer.*, notes 55 and 56, 233 N. Y. S. at 502, 133 Misc. Rep. 782. (Italics are the authors.)

59. *Benham v. Amer. Cent. Life Ins. Co.*, note 54.

60. *Guilman v. Met. Life Ins. Co.*, 69 Vt. 469, 38 A. 315 (1897).

61. *State v. Roberson*, 136 N. C. 587, 48 S. E. 595 (1904).

62. *People v. Bright*, 203 N. Y. 73, 96 N. E. 362, Ann. Cas. 1913A, 771 (1911).

*Amer.*<sup>63</sup> has been the only judiciary to declare an *engaged in aviation* exception, when construed in relation to a casual passenger as being ambiguous and therefore to be construed against the insurer.<sup>64</sup> The clauses were consistently, however, construed in the light of the connotations of the expressions as of the time of such construction rather than of the time the contract was written.<sup>65</sup>

**Effect of "Activity" Expression Used**—A strict construction of the word *operations* as tending to indicate a continuous and occupational relation when used in conjunction with *aeronautics* in both *participating* and *engaging* exceptions has apparently definitely established the ineffectiveness of such clauses in covering death of an insured while flying either as fare-paying or gratuitous passenger,<sup>66</sup> though evidence of action on the part of a passenger of even less degree than actual handling of the mechanism of flight will suffice to constitute an exception to this general rule.<sup>67</sup> Effectively demonstrating this latter tendency is the Federal case of *First National Bank of Chattanooga v. Phoenix Insurance Company*<sup>68</sup> involving the death of a passenger in the crash of his private plane while insured under a policy containing an *aeronautic opera-*

63. Notes 55 and 56.

64. An "engaged in aeronautic operations" exception was declared ambiguous when construed in relation to the death of a casual passenger in the case of *Gits v. New York Life Ins. Co.*, note 21, while an "engaging in aviation or submarine operations or in military or naval service in time of war" exception was similarly construed in the case of *Charette v. Prudential Ins. Co. of Amer.*, note 20, involving the death of an insured while piloting a plane.

65. See *infra* pages 330-332.

66. *Gits v. New York Life Ins. Co.*, 32 F. (2d) 7 (C. C. A. 7th 1929), 1929 U. S. Av. Rep. 70, cert. denied, 280 U. S. 564, 50 Sup. Ct. 35, 74 L. Ed. 633 (1929); Note (1929) 1 Air Law Rev. 151 (A. M. Gitts, wealthy Oak Park, Ill., manufacturer was killed in the crash of a plane in which he was taking a short pleasure flight at Estes Park, Col. The Double Indemnity Benefit Provision of a \$10,000 policy issued on his life by defendant contained an *engaging in submarine or aeronautic operations* liability exception. *Held*: The word *operations* tends to indicate an intended continuous and occupational relation, and the exception does not include the death of Gitts. Further the exception is ambiguous. Judgment for plaintiff).

*Missouri State Ins. Co. v. Martin*, 188 Ark. 907, 69 S. W. (2d) 1081 (1934); Note (1934) 5 Air Law Rev. 661; Note (1934) 5 JOURNAL OF AIR LAW 504 (George W. Martin was killed April 18, 1933, in the crash of a private plane in which he was riding as a gratuitous passenger. His life was insured by a \$1,000 policy issued by defendant which contained a Double Indemnity provision for accidental death. Among the exceptions listed in this provision was *death resulting from participating in aviation or submarine operations*. *Held*: Though the word *participate* standing alone might denote activities not included in the narrow compass of *engaged in* when the effect of *operations* is considered (which can only mean the management and control of the airplane) it becomes more apparent that *participation* is to be considered in its active sense and viewed as the equivalent of *engaged in*. Judgment for plaintiff).

67. *First Nat. Bank of Chat. v. Phoenix Mut. Life Ins. Co.*, 62 F. (2d) 681 (C. C. A. 6th, 1933) (Suit brought to recover on Double Indemnity benefit provisions of policies issued on the life of one Patten. Each of these provisions contained "directly or indirectly, wholly or partly from *participation in aeronautic operations*" liability exceptions. Patten was killed in the crash of a plane belonging to his company, though piloted by a licensed pilot. The evidence showed that he was flying to Florida to see his wife who was ill and ordered the pilot to take off, though the latter objected because of inclement weather. *Held*: The facts disclosed that though insured was not personally piloting the plane, the venture was his initiative and undertaking, and was solely for his purposes. Under such circumstances he was *participating in aeronautic operations*. Judgment for defendant).

68. *Ibid.*

tion exception used in connection with *participation*. Evidence to the effect that the insured ordered the pilot to begin the flight in spite of the latter's objection because of poor visibility, led the court to conclude, on the basis of a construction of the contract as of the time of issuance, that one who imposes and enforces his judgment in the venture is effectively participating in the operation of the plane and included within the ambit of such exception.

The application of such clauses to passenger death has led in every case involving the question, with the exception of the *First Nat. Bk. of Chattanooga v. Phoenix Mut. Life Ins. Co.* decision,<sup>69</sup> to the declaration of such exclusions as being ambiguous.<sup>70</sup> However, the Federal decision, *Gits v. New York Life Ins. Co.*,<sup>71</sup> laid a precedent for important subsequent litigation in declaring the ambiguity of such exception as being emphasized by the "facility with which the insurer could have included passengers within the exception were it so intended."

**"As Passenger or Otherwise"**—As was indicated in the implication of the dictum in the *Gits* decision, the addition of the phrase *as passenger or otherwise* has been generally recognized as making any exception clause in which it is used all-inclusive of every person riding in the plane, regardless of whether the insured at the time of the fatal crash was a fare-paying<sup>72</sup> or non-fare-

69. Note 67.

70. *Gits v. New York Life Ins. Co.*, note 66; *Missouri State Ins. Co. v. Martin*, note 66.

71. Note 68.

72. *Gibbs v. Equitable Life Assurance Soc. of U. S.*, 256 N. Y. 208, 176 N. E. 144 (1931); Note (1932) 3 JOURNAL OF AIR LAW 135 (Harold Gibbs was killed in the crash of a passenger plane operated by the Coastal Airways, Inc., between Albany and New York, while riding as a fare-paying passenger. He was insured by a policy issued by the defendant, which contained a double indemnity provision issued to cover accidental death. Among the exclusions from such coverage was death resulting directly or indirectly from *engaging as a passenger or otherwise in submarine or aeronautic expeditions*. Held: The intent of the parties to the insurance contract (written in 1924) grew out of and reflected the general belief that presence on a trip or journey in a vessel or machine of this type in regular transit constituted such a momentous adventure and was accompanied by such unusual danger and extraordinary hazard that neither party expected the policy to cover the risk of casualty. Judgment for defendant).

*Mayer v. New York Life Ins. Co.*, 74 F. (2d) 118 (C. C. A. 6th, 1934) Note (1935) 6 JOURNAL OF AIR LAW 278 (Insured met death in the crash of a plane while flying as a fare-paying passenger on a regular air line. The policy issued on his life by insurer defendant excepted from the Double Indemnity Benefit death resulting from *engaging as a passenger or otherwise in submarine or aeronautic operations*. Held: The words *as a passenger or otherwise* define and modify the words *engaging in aeronautic operations* and are unlimited in scope. The death of the insured is covered by the exception. Judgment for defendant).

*Goldsmith v. New York Life Ins. Co.*, 69 F. (2d) 273 (C. C. A. 8th, 1934); Note (1934) 5 AIR LAW REV. 213; Digest (1934) 5 JOURNAL OF AIR LAW 504 (Bernie M. Goldsmith was killed March 19, 1932, in the crash of a plane on which he was riding as a casual fare-paying passenger. He was insured by the defendant insurer for \$30,000 in two policies, both of which contained double indemnity for accidental death provisions with death from *engaging as a passenger or otherwise in submarine or aeronautic operations* being excepted therefrom. Held: While without the words *as passenger or otherwise* there would be room for doubt as to the meaning and scope of the expression *engaging in aeronautic operations*, the addition of those words does away with any ambiguity and shows that the phrase *engaging as a passenger or otherwise in aeronautic operations* is intended to cover one who is temporarily occupied in being a

paying passenger,<sup>73</sup> or whether he was riding in a private plane<sup>74</sup> or on an established air line.<sup>75</sup> Peculiarly enough this all-inclusive construction has even been unanimously adopted in cases involving an *engaged in aeronautic operations* exception clause in connection with death of an insured while a casual passenger,<sup>76</sup> in spite of consistent decisions that such an exception, without the *as passenger or otherwise* addition, can refer only to those actively operating the machine,<sup>77</sup> and that ambiguity is always present when the application of such exception to passenger death is attempted.<sup>78</sup> Two recent opinions interpreting the phrase as not covering a casual passenger when used in connection with *engaged in aeronautic expeditions*<sup>79</sup> constitute the exceptions to the above general rule, though in placing a different construction on the intent of the parties in the use of the word *expeditions* a result entirely consistent with the majority ruling has been reached in a New York decision involving identical facts.<sup>80</sup> It must be pointed out,

passenger in a plane as well as one who takes an active part in the operation and makes aeronautics his business. Judgment for defendant).

73. *Head v. New York Life Ins. Co.*, note 34.

74. *Head v. New York Life Ins. Co.*, *ibid.*

75. *Gibbs v. Equitable Life Assurance Soc. of U. S.*, note 72; *Mayer v. N. Y. Life Ins. Co.*, note 72; *Goldsmith v. N. Y. Life Ins. Co.*, note 72.

76. *Goldsmith v. New York Life Ins. Co.*, *ibid.*

77. *Irwin v. Prudential Ins. Co. of America*, note 20; *Gits v. New York Life Ins. Co.*, note 66; *Taylor v. Prudential Ins. Co. of America*, note 20; *Price v. Prudential Ins. Co. of America*, 98 Fla. 1044, 124 So. 817, 1930 U. S. Av. Rep. 118 (1930); Note (1929) 1 Air Law Rev. 277 (1930), 16 Va. L. Rev. 505 (John W. Price was killed Jan. 2, 1927, in Duval County, Fla., when a plane which he was piloting crashed to the ground. He was insured for \$50,000, with the policy containing a Double Indemnity for Accidental Death provision which, among other things, excepted *engaging in aviation or submarine operations or in military or naval service in time of war* from coverage. *Held*: The *in time of war* phrase refers only to the next preceding phrase *military or naval service*, and not also to the more remote phrase *aviation or submarine operations*. The provision *engaged in aviation operations* means that the death of the insured must have resulted from having taken part in aviation operations other than by merely being in an airplane when it fell to the ground and caught fire, thereby fatally injuring the insured. The declaration filed in the suit failed to allege that deceased insured was piloting the plane at the time of the crash and the court considered the case on the pleadings.)

78. *Gits v. New York Life Ins. Co.*, note 66.

79. *Provident Trust Company of Philadelphia v. Equitable Life Assurance Soc. of U. S.*, 316 Pa. St. Rep. 121, 172 Atl. 701 (1934). (The insured, Francis R. Ehle, was killed Nov. 5, 1931, while riding as a fare-paying passenger on a plane operated by the Ludington Line which crashed between Newark and Camden, N. J. Ehle was insured by the defendant insurer by policies containing double indemnity provisions for accidental death, which excepted, among other things, *engaging as a passenger or otherwise in submarine or aeronautic expeditions*. *Held*: A passenger in an aeroplane expedition would seem to be one having some part in the conduct and operation of the expedition. So far as it appears the parties used the words in their commonly understood sense and so intended them to measure their obligation. Judgment for plaintiff.)

*Day v. Equitable Life Assurance Soc. of the U. S.*, 83 F. (2d) 147, 235 C. C. H. 509 (C. C. A. 10th, Apr. 7, 1936); Digest (1936) 7 JOURNAL OF AIR LAW 420 (Day was flying as a gratuitous invitee in the plane owned and piloted by one Reed, a friend, who had fifty hours of flying to his credit at the time of the fatal flight. The plane crashed on the outskirts of Denver, Colo., killing Day. He was insured by the defendant insurer with a \$5,000 policy which contained a double indemnity provision for accidental death. Excepted from the coverage of this provision was death caused indirectly or directly by *engaging as a passenger or otherwise in submarine or aeronautic expeditions*. *Held*: Contract words will be given the meaning that common speech imports, and as it is not believed that anyone, in common speech, would ever refer to an ordinary short trip in a plane as an *expedition*, the flight in which the insured was killed is not covered by the exclusion. Judgment for defendant reversed.)

80. *Gibbs v. Equitable Life Assurance Soc. of U. S.*, note 72.



however, that the more recent status of the *Day* and *Provident Trust Co.* opinions,<sup>81</sup> and the use of authority appearing subsequent to the New York case as substantiating this contra conclusion<sup>82</sup> seems to indicate an extreme likelihood that such exceptions will be held equally ineffective in future litigation if used in connection with *expedition*.

It is interesting to note at this point the "boomerang" effect of the *as passenger or otherwise* dictum in the *Gits* case.<sup>83</sup> Listed in this 1929 decision as clearly removing ambiguity from all exception clauses, it was subsequently unanimously approved as having that effect.<sup>84</sup> However, in 1935, the court in the *Gregory v. Mutual Life Ins. Co.* decision interpreted this practice of adding *as passenger or otherwise* to ordinary expedition clauses subsequent to the *Gits* case, as *an admission on the part of insurers* of the ambiguity of such exceptions in the absence of the addition.<sup>85</sup> The irony of such construction is emphasized when the fact is taken into consideration that the policy involved in the *Gregory* case, which did not contain the *as passenger or otherwise* addition to the aeronautical exception clause, was issued in 1925, four years prior to the time when the effect of such addition was even first suggested.

**"Except as a Fare-Paying Passenger"**—Though, as has been previously pointed out, the payment or non-payment of fare by an insured riding in a plane is recognized as being of no consequence whatsoever in the determination of the applicability or non-applicability of liability exception clauses as to death resulting from such flight,<sup>86</sup> the courts have, nevertheless, in cases involving an *except as a fare-paying passenger* limitation to the exception clause, given full recognition to such phrase.<sup>87</sup> A Federal decision in 1935

81. *Provident Trust Co. of Philadelphia v. Equitable Life Assurance Soc. of U. S.*, note 79; *Day v. Equitable Life Assurance Soc. of U. S.*, note 79.

82. *Restatement of the Law of Contracts* (American Law Institute, 1932), Sec. 235 (a): "The ordinary meaning of language throughout the country is given to words unless circumstances show that a different meaning is applicable." *Aschenbrenner v. United States and Guaranty Co.*, note 43.

83. *Gits v. New York Life Ins. Co.*, note 66.

84. *Head v. New York Life Ins. Co.*, note 34; *Gibbs v. Equitable Life Assurance Soc. of U. S.*, note 72; *Goldsmith v. N. Y. Life Ins. Co.*, note 72; *Mayer v. New York Life Ins. Co.*, note 72.

85. *Gregory v. Mutual Life Ins. Co. of N. Y.*, note 35 at 524.

86. See *supra* p. 309ff.

87. *Padgett v. Metropolitan Life Ins. Co.*, 206 N. C. 365, 173 S. E. 903 (1934) (Walton E. Padgett was killed in the crash of a plane in which he was flying from Lincolnton, N. C., to Charlotte, N. C., with a friend who was piloting the plane. There was no evidence whatsoever tending to show that Padgett paid or contemplated paying any fare for the trip. The Double Indemnity for Accidental Death clause of the insured deceased's policy contained the following exception: *while participating in aviation or aeronautics except as a fare-paying passenger*. Held: All the evidence showed that the insured was riding with his employer, upon the latter's invitation, and that no fare was paid or contemplated by either. Hence recovery is barred under the terms of the exception. Judgment for defendant).

*Metropolitan Life Ins. Co. v. Amos Halcomb, as Adm. of the Estate of George R. Halcomb, deceased*, 79 F. (2d) 788 (C. C. A. 9th, 1935); Note (1936) 7 JOURNAL OF AIR LAW 143 (Insured killed in the crash of a private plane

involving an accident policy granting aeronautical coverage to insured while flying as a fare paying passenger,<sup>88</sup> even went so far as to construe an agreement on the part of the insured to pay fare as a contract *malum prohibitum* and as therefore not permitting the classification of the insured within the bounds of the "fare-paying passenger" proviso, where the pilot's license did not permit of carrying passengers for hire,<sup>89</sup> and a statute of the particular state made it a misdemeanor for a pilot to operate a plane in any manner except that for which he had been licensed by the government.<sup>90</sup>

### Airplane Pilots:

On only two occasions have the courts been faced with the death of an insured under a policy containing an aeronautical exception clause while actively piloting a plane,<sup>91</sup> and though identical exception clauses and substantially identical facts were involved in both cases, directly contra and irreconcilable decisions mark the result of the litigation. Tersely rejecting any ambiguity contention and citing only the *Price* case<sup>92</sup> as authority for the rule that "being engaged in aviation operations means taking part in the operations

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owned and flown by the holder of a federal private pilot's license, which permitted the licensee to pilot a plane in private flight but specifically prohibited the flying of aircraft for hire. A California (over which state flight was made) statute made it a misdemeanor for a pilot to operate a plane in any manner except that for which he had been licensed by the government. Insured paid no fare before the flight, but respondent argued on trial of the case that there was an implied contract between the insured and pilot for payment of such fare and that this implication constituted insured a fare-paying passenger, thus bringing his death within the coverage of a policy issued on his life by defendant insurer which contained the following exception: *death shall not have resulted from bodily injuries sustained while participating in aviation or aeronautics except as a fare-paying passenger.* Held: No contract can be created by an attempted agreement for the services of a person required to be licensed under California Law for the protection of the person to be served, nor implied from a request for an acceptance of such unlicensed services. Therefore as insured was not a fare-paying passenger he cannot recover under the policy. Judgment for defendant.)

88. *Met. Life Ins. Co. of N. Y. v. Halcomb*, *ibid.*

89. The pilot of the plane held the following Federal license: "This certifies that the pilot whose photograph and signature appear hereon is a private pilot of aircraft of the United States. The holder may pilot all types of licensed aircraft, but may not for hire transport persons or property nor give piloting instruction to students."

90. *California Civil Statutes* (1929) p. 1875, Sec. 5: "It shall be lawful for any person to operate or participate in the operation of any aircraft within the State of California or to act as an airman in connection therewith if such person is licensed and registered under the laws of the United States or any regulation made pursuant thereto, but it shall be unlawful for any person to act as an airman in any capacity except that for which he is licensed under the laws of the United States or any regulation adopted pursuant thereto."

Sec. 8: "Any person, firm, association or corporation violating any of the provisions of this act, which violation is not herein declared to be a felony, shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined not more than one thousand dollars, or imprisoned for not more than six months, or be subject to both such fine and imprisonment."

91. *Taylor v. Prudential Ins. Co. of Amer.*, 142 Misc. Rep. 94, 253 N. Y. S. 55, 1931 U. S. Av. Rep. 41 (1931); *Charette v. Prudential Ins. Co. of America*, 202 Wis. 470, 232 N. W. 848, 1931 U. S. Av. Rep. 48 (1931). The insured in the case of *Price v. Prudential Ins. Co. of Amer.*, note 77, was also piloting the plane at the time of his death, but faulty pleading failed to bring this fact before the court and the case was considered as though insured was a casual passenger.

92. *Price v. Prudential Ins. Co. of Amer.*, note 77.

of an airplane in some direct way," a New York court concluded in the case of *Taylor v. Prudential Ins. Co. of America*<sup>93</sup> that recovery was precluded by an *aviation or aeronautic operations* exception clause where insured met death while actively piloting a plane.

The Wisconsin court, however, in the *Charette v. Prudential Ins. Co. of America*<sup>94</sup> case involving a similar situation refused to accept the clear implication of consistent aeronautical exception clause litigation to the effect that one actively piloting a plane was *engaged in aeronautic operations*, but instead placed great emphasis on the inconsistencies of cases interpreting the word *engaged* and on this basis concluded the clause to be ambiguous. Even viewing as evidentiary of this ambiguity the fact that the judges of the Wisconsin bench could not agree on the exact meaning of the exception, the court goes far afield of litigated insurance cases to further sustain its opinion. Typical of the decisions cited in the substantiation of this ambiguity conclusion was an Alabama case to the effect that *engaged in* implies occupation or continuous activity *distinguished from a single act*,<sup>95</sup> and another decision interpreting the same phrase when used in connection with an ordinance imposing a penalty against a person who is *engaged in shooting as applying to a single act*.<sup>96</sup>

### Members of Airplane Crew—Other Than Pilot:

**In General**—Since the advent of aviation into the business field in the form of commercial airlines, the query as to whether or not an ordinary aeronautical exception clause would cover the death of an insured whose employment calls for constant flying under the same hazards as the pilot himself, but who neither takes part in the actual operation of the plane nor rides in the passive

93. *Taylor v. Prudential Ins. Co. of Amer.*, note 91 (Gordon A. Taylor was killed in the crash of a small two-seated monoplane which he was piloting. The evidence showed Taylor to be a member of the 'Taylor Brothers Aircraft Corp.' and that the plane in which he was killed was one of the products of this corporation, and known as the 'Taylor Chummy.' Taylor was insured under a policy containing an *aviation or submarine operations or military or naval service in time of war* exception clause. *Held*: The *in time of war* phrase refers only to the last antecedent, and as insured was piloting the plane, he was *engaged in aviation operations* and insurer is not liable. Judgment for defendant).

94. *Charette v. Prud. Ins. Co. of Amer.*, note 91 (Charette witnessed a solo landing of one Rollins, and after criticizing same, offered to show him how to improve it. Taking over the controls, Charette took off and a few minutes later the plane went into a tailspin, and crashed into Milwaukee Bay drowning Charette. Deceased was insured by defendant insurer by a \$2,000 policy which contained a Double Indemnity for Accidental Death provision excluding from coverage death resulting from having been *engaged in aviation or submarine operations or in military or naval service in time of war*. *Held*: The clause is ambiguous when applied to the death of a casual passenger and therefore is to be interpreted most favorably to the insured. Judgment for plaintiff).

95. *Nashville, C. & St. L. Ry. v. City of Attalla*, 118 Ala. 362, 24 So. 450 (1898).

96. *Smith v. State of Ala.*, 50 Ala. 159 (1873).

manner of a casual passenger, has been of ever-increasing importance. Mechanics, radio experts, stewardesses, etc., have become indispensable to the commercial feasibility of successful aeronautical operations, yet such employees cannot be said to follow aviation as an occupation even though they find their employment in flying.

**Dicta of Decisions Interpreting Other Aeronautical Risks—**

Complete lack of litigation on the point makes any conclusions as obviously nothing more than speculation, though dicta and implications involving other aeronautical risks suffice to indicate what in all likelihood will be the judicial attitude if and when the question is litigated.

Prior to the recent *Gregory* decision<sup>97</sup> there apparently would be little doubt as to the efficacy of a *participation in aeronautics* exception clause as extending to and covering members of the crew, and though force and effect of this exception as applying to a casual passenger was denied in this decision, dictum is to be found in the reasoning of the court indicating that such construction would not be followed in the case of a crew member. Evidence of this possibility is to be observed in the court's statement to the effect that "those who ride in the plane for some purpose connected with its operation . . . may well be indulging in some branch of activity connected with aeronautics; but one who rides the plane for the sole purpose of going some place . . . is not . . . participating in aeronautics. He does not belong to the same craft or class as those skilled artisans who participate in the construction, *management*, or operation of the plane."<sup>98</sup> More direct implication could hardly be desired.

A more recent interpretation of *participate* as having the same connotation as *engage*<sup>99</sup> suffices to indicate that the above construction would also likely be adopted in a situation involving an *engaging in aeronautics* exception, though the continued strict construction of clauses involving *aeronautical operations* as referring only to one actively piloting a plane<sup>100</sup> rather suggests the ineffectiveness of a clause involving such *operations* in covering a member of the crew. However, as was demonstrated in the *First Nat. Bk. of Chattanooga v. Phoenix Mut. Life Ins. Co.* case,<sup>101</sup> if it can be shown that the

97. *Gregory v. Mutual Life Ins. Co.*, note 35.

98. Note 35, 78 F. (2d) at 523.

99. *Martin v. Mutual Life Ins. Co. of N. Y.*, note 35.

100. *Irwin v. Prudential Ins. Co. of Amer.*, note 20; *Gits v. N. Y. Life Ins. Co.*, note 66; *Missouri State Ins. Co. v. Martin*, note 66; *Price v. Prudential Ins. Co. of Amer.*, note 77; *Taylor v. Prudential Life Ins. Co. of Amer.*, notes 91 and 93.

101. *First National Bk. of Chattanooga v. Phoenix Mutual Life Ins. Co.*, note 67.

plane is being operated according to the command or directions of one flying therein other than in the capacity of a pilot, such party in command is considered as taking part in the *operations* and covered by the exception.

Since the 1934 *Mayer v. New York Life Ins. Co.* federal decision interpreted an *engaged in aviation operations as a passenger or otherwise* exception as being so general as to include everyone in a plane "whether an airplane employee, pilot, mechanic or executive, whether a fare-paying passenger or one traveling on a pass or under a license whose death results from his presence on a plane at the time of the accident,"<sup>102</sup> little doubt has been felt as to the all-inclusive effectiveness of every exclusion containing an *as passenger or otherwise* addition. That clauses involving *aeronautic expedition* constitute an important exception to this general statement, however, was clearly pointed out in the *Day v. Equitable Life Assurance Soc. of U. S.* decision<sup>103</sup> handed down in April, 1936, by the Tenth Circuit Court of Appeals.

The precise problem, however, is one for the future, and will have to remain open until such day as progress and human catastrophe bring it into the courts.

### The Insured While Not Actually in Flight:

**In General**—The inherent dangers connected with airplanes before takeoffs, after landings, and during forced landings have naturally served to raise the important inquiry as to whether or not death resulting from injury sustained under any of these circumstances would be included in the exception clauses generally considered as referring only to accidents arising while the plane is in actual flight. Five decisions<sup>104</sup> involving generally this point have sufficed to lay down the general rule that the aeronautic activity of one who takes an airplane trip includes not only the flight itself but the approach to and departure from the plane, as well as activities incident to landings necessitated by emergencies arising before completion of a contemplated flight.

**Before and After Flight**—Illustrative of this generally ac-

102. Note 72.

103. Note 79.

104. *Pittman v. Lamar Life Ins. Co.*, 17 F. (2d) 370 (C. C. A. 5th, 1927), 1928 U. S. Av. Rep. 188; *Cert. Denied*, 274 U. S. 750, 47 Sup. Ct. 764, 71 L. Ed. 1331 (1927); *Tierney v. Occidental Life Ins. Co.*, 89 Cal. App. 779, 265 P. 400, 1928 U. S. Av. Rep. 191 (1928); Note (1932) 3 JOURNAL OF AIR LAW 321; *Murphy v. Union Indemnity Co.*, 172 La. 383, 134 So. 256, 1931 U. S. Av. Rep. 35 (1931); Note (1931) 3 JOURNAL OF AIR LAW 321; *Wendorf v. Missouri State Life Ins. Co.*, 318 Mo. App. 363, 1 S. W. (2d) 99, 57 A. L. R. 615, 1928 U. S. Av. Rep. 168 (1927); Note (1928) 16 Georgetown L. Rev. 496; *Blonski v. Bankers Life Ins. Co.*, 209 Wis. 5, 243 N. W. 410, 1932 U. S. Av. Rep. 57 (1932); Note (1932) 17 Minn. L. Rev. 334; Note (1932) 3 JOURNAL OF AIR LAW 661 (1932).

cepted rule is the Federal case of *Pittman v. Lamar Life Ins. Co.*<sup>105</sup> where *participating in aeronautic activity* was construed as covering the death of insured resulting from being struck, while walking away, by the propeller of a plane in which he had just made a flight. A marked tendency toward strict construction of such exception clauses has been demonstrated by the courts, however, with a striking illustration of such tendency being afforded in a recent California case<sup>106</sup> permitting recovery, under a statement of facts identical with the *Pittman* case cited above, because of the use of the phrase *in consequence of* in connection with the usual *participating in aeronautics* exception clause. Construing such phrase as necessitating conclusive proof that the flight was the proximate cause of death before the applicability of the exception clause could be permitted, the court placed great emphasis on evidence to the effect that the insured talked to friends for several moments before walking into the path of the propeller and on this evidence concluded that death was not *in direct consequence* of the flight and therefore not within the bounds of the aeronautical exception.

Actual intention of the parties has proved to be an element of primary importance where construction involved death prior to actual takeoff. Illustrative of the importance of this *intent* is a recent Wisconsin decision<sup>107</sup> holding an *engaged in aeronautics*

105. *Ibid.* (Pittman owned a plane in partnership with one Baily. After the two had made a flight one day they landed at Love Field near Dallas, Tex. Baily got out to get a dolly to put under the ship, and while he was gone insured got out of the plane and was walking toward his car in front of the plane when he was struck by the turning propeller and killed. His policy, issued by defendant, contained a *participation in any submarine or aeronautic expedition or activity, either as a passenger or otherwise* exception. *Held*: The term *aeronautic activity* is broad enough to cover what is ordinarily incident to an airplane trip. The aeronautic activities of one who takes such a trip do not begin or end with the actual flight, but include his presence or movements in or near to the machine incidental to beginning or concluding the trip. Judgment for defendant).

106. *Tierney v. Occidental Life Ins. Co. of Cal.*, note 103 (Tierney flew as a passenger in a plane near Venice, Cal. On landing at the destination, insured answered questions put to him in an ordinary tone of voice, acknowledged introductions to two officers, stepped from the cockpit onto the left wing of the plane, then to the ground. He bent over to avoid a drift wire and as he straightened up was struck and killed by the turning propeller. His accident policy contained the following exception clause: *This policy does not cover any injury, fatal or nonfatal, sustained by the insured while participating or in consequence of having participated in aeronautics.* *Held*: When the machine clears the earth and returns successfully to the earth and is resting securely upon the ground the 'aeronautics'—the flight—is completed. Therefore insured was not *participating in aeronautics* at the time of his death. As the facts further show that the pilot was not the proximate cause of insured's death but there was the intervening act of deceased in poor judgment in so conducting himself after climbing out of the machine as to be struck by the propeller. Therefore his death was not *in consequence of having participated in aeronautics.* Judgment for plaintiff).

107. *Blonski v. Bankers Life Ins. Co.*, note 104 (Plaintiff was injured when struck by the propeller of an airplane which he was spinning to start the motor. The evidence showed that he was preparing to taxi the plane across the field, take on gas, and then take off on a flight. Insured was a licensed pilot. His insurance policy issued by the defendant contained the following proviso: 'The disability benefits herein provided shall not be granted if the disability shall result from *engaging or participating as a passenger or otherwise in aviation or*

exception to cover the death of insured while spinning the propeller of a plane preparatory to taking off, because it was shown that insured *intended* to actively pilot same after he had started the motor; and a Louisiana decision<sup>108</sup> construing a *while in or on a device for mechanical navigation* exception clause<sup>109</sup> as covering death of a passenger killed while boarding a plane, on the basis of evidence showing insured was boarding with the *intent* of flying in such plane. As to whether or not the exception clause in the Wisconsin case<sup>110</sup> would have been given effect had the evidence shown insured intended merely to fly as a passenger in the plane, is, of course, conjectural, though the innuendo of the opinion negatives any such likelihood.

**During Forced Landings**—The broadest scope yet to be accorded the general theory that aeronautic activities of one who takes a plane trip do not begin or end with the actual flight but include also movements or presence in or near the machine incidental to the beginning or conclusion of the trip, was the result of a Missouri decision<sup>111</sup> construing a *while in or on any mechanical device for aerial navigation* exception clause<sup>112</sup> as covering death of insured as the result of drowning when thrown from a seaplane by the

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aeronautics. *Held*: Plaintiff, in starting the motor incidental to beginning a trip, was engaging in performing an act which was so immediately connected with and incidental to the trip on which he was about to embark, that he was then engaging in aviation or aeronautics within the meaning and intention of the exemption provision of the policy. Judgment for defendant.)

108. *Murphy v. Union Indemnity Co.*, note 104. (The deceased insured, with some friends, chartered a seaplane for a trip across Lake Pontchartrain. After flying across the lake they alighted in the Tchefuncta river alongside the shore. Insured landed, and after conversing with friends, returned to the plane, which was still alongside the shore, and stepped on the wing thereof to get aboard. While in the wing he stepped within the path of the moving propeller and was fatally injured. His accident insurance issued by defendant, contained the following provision: *This insurance does not cover . . . injuries, fatal or otherwise, sustained by the Insured while in or on any vehicle or mechanical device for aerial navigation, or in falling therefrom or therewith, or while operating or handling any such vehicle or device.* *Held*: It is clear that the clause meant very distinctly that the defendant would assume no risk connected with aerial navigation. In this case the insured was in the very act of embarking on an aerial trip, and was injured and killed as a direct result of his said effort to embark thereon. Judgment for Defendant.)

109. See entire aeronautical exclusion clause italicized in above note (*ibid.*).

110. *Bionski v. Bankers Life Ins. Co.*, note 104.

111. *Wendorff v. Mo. State Life Ins. Co.*, note 104. (The insured met his death while a passenger en route from Miami, Fla., to Biami in the Bahama Islands on an aircraft of a type called a seaplane. Because of engine trouble the plane was forced to alight at sea, and shortly thereafter was capsized by the waves. A few minutes later the lifeless body of the insured was seen floating in the water close by. At the time of his death, insured held a policy issued by defendant, which contained as an exception to a \$10,000 coverage provision for accidental death the following clauses: 'The insurance hereunder shall not cover injuries fatal or nonfatal . . . sustained by the insured . . . while in or on any vehicle or mechanical device for aerial navigation, or in falling therefrom or therewith, or while operating or handling any such vehicle or device.' *Held*: If a flight is interrupted by mechanical trouble necessitating an involuntary or forced landing, the interval during which the craft is supported by the watery element instead of the air is as much a part of the flying trip as the other. We are clearly of the opinion that the clause in controversy applies to aircraft in the situation shown to have existed in this case." Judgment for defendant.)

112. See entire aeronautical clause italicized in above note (*ibid.*).

impact of high waves while the machine was resting on the water during a forced landing.

**While Flying in a Glider or Motorless Craft**—Nor is it necessary for an insured to be flying in a plane in order to come within the scope of aeronautical exception clauses. This conclusion was reached in one of the most novel cases yet to arise,<sup>113</sup> wherein was involved the death of a physical director as the result of the crash of a glider in which he was riding as the sole occupant purely for recreation and pleasure. In construing these facts in relation to an *engaged in aviation operations* exception clause, a Michigan Federal District Court ruled that such clause was not to be construed as referring only to aviation operations *as an occupation or for profit* but to aerial flight of any character whatsoever, and concluded on the adopted rule of strict construction of operations exceptions, that beneficiary could not recover in the instant case.<sup>114</sup>

### Judicial Construction of Aeronautical Exceptions:

**"In Time of War" Clause Limitation**—Though insurers obviously incurred no small amount of liability by the choice of *engage* as expressive of the *action* intended to be excepted under an aviation exclusion clause, their position has been on four occasions<sup>115</sup> placed in double jeopardy by not only using *engage* but in adding *or in military or naval service in time of war* to the aviation exception, without punctuation of any kind. Twice this situation has occurred in litigation involving passenger death<sup>116</sup> and twice involving death of a pilot.<sup>117</sup>

Seizing the opportunity of greatly limiting the aviation exception or in the alternative having the clause declared ambiguous and thus to be construed against the insurer, beneficiaries have con-

113. *Irwin v. Prudential Ins. Co. of Amer.*, 5 Fed. Supp. 382 (E. D. Mich. 1933); Note (1933) 5 Air Law Rev. 382 (Suit to recover under a policy issued on the life of one Harold C. Young. Evidence showed that Young, who was a Y. M. C. A. Physical Director, had been interested for some time in the flying of gliders, had organized glider clubs, and given instructions in the operation of the crafts. On Oct. 23, 1931, while flying alone at Bay City, Mich., the glider crashed to the ground killing him. At the time of his death, he was insured by defendant insurer under a policy which contained the following exception to the Double Indemnity provision for accidental death: 'No accidental death benefit shall be payable if the death of insured resulted from suicide, whether sane or insane; from having been engaged in military or naval service or in aviation or submarine operations' (italics are the author's). Held: Giving to the words of the exception clause, their plain, popular, ordinary meaning, it seems quite clear that the act of operating aircraft through the air is an *aviation operation* and that the person who is so operating such aircraft is *engaged in an aviation operation*. Judgment for defendant.

114. *Id.* at 384.

115. *Price v. Prudential Ins. Co. of Amer.*, note 77; *Peters v. Prudential Ins. Co. of Amer.*, notes 55 and 56; *Charette v. Prudential Ins. Co. of Amer.*, notes 91 and 94; *Taylor v. Prudential Ins. Co. of Amer.*, notes 91 and 93.

116. *Price v. Prudential Ins. Co. of Amer.*, note 77 (see also note 91); *Peters v. Prudential Ins. Co. of Amer.*, notes 55 and 56.

117. *Charette v. Prudential Ins. Co. of Amer.*, notes 91 and 94; *Taylor v. Prud. Ins. Co. of Amer.*, notes 91 and 93.



sistently contended that the omission of punctuation causes the exception to have effect only in time of war insofar as aviation or submarine operations and military or naval service are concerned. This argument, however, has been adopted on only one occasion,<sup>118</sup> with the remaining decisions taking the directly contra view.<sup>119</sup> The most frequently cited authority for this latter construction is the familiar rule to the effect that qualifying words, phrases and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote, unless such extension is clearly required by a consideration of the entire text.<sup>120</sup> Such an extension was, of course, unnecessary on the interpretation of the policy text as having the connotation of excluding extremely hazardous risks, and in the classification of aviation and submarine operations as being risks of such nature at all times, as distinguished from military and naval service which were to be classified in the hazardous category only in time of war.

**Ambiguity**—Widespread recognition of the legal platitude that where insurance contracts are so drawn as to be ambiguous or require interpretation or are fairly susceptible of two different constructions so that reasonable intelligent men on reading them would honestly differ as to their meaning, the courts will adopt that construction most favorable to the insured,<sup>121</sup> has led to varied and irreconcilable viewpoints on the part of both state and federal courts in aeronautical exception clause litigation.<sup>122</sup> The explana-

118. *Peters v. Prudential Ins. Co. of Amer.*, notes 55 and 56. The court said in part, "It is inconsistent to say that the author of the provision had in mind the risk from aviation and submarine operations in time of peace, as well as in time of war, and the risk from military and naval service, which involves aviation and submarine operations, only in time of war. If he limited the risk from military and naval service, which includes aviation and submarine operations, to time of war, he must have had the same limitations in mind when he used the terms aviation and submarine operations, particularly since these terms are not set off by commas."

119. Note 115.

120. 2 *Sutherland*, *Statutes and Statutory Construction* (2nd ed. 1904) §§420 and 421; *Black*, *Handbook on the Construction and Interpretation of the Law* (2nd ed. 1911), c. 5, §73; 36 *Cyc.* 1123. *Cf. Holmes v. Phenix Ins. Co. of Brooklyn*, 98 F. 240 (C. C. A. 8th, 1899); *Pudget Sound Electric Railway et al. v. Benson*, 253 F. 710 (C. C. A. 9th, 1918); *Cushing et al. v. Worrick*, 9 Gray (75 Mass.) 332 (1857); *Traverse City v. Blair Tp.*, 190 Mich. 313, 157 N. W. 81, Ann. Cas. 1918E, 81 (1916); *State v. Scaffer*, 95 Minn. 311, 104 N. W. 139 (1905); *Nebraska State Railway Commission v. Alfalfa Butter Co. et al.*, 104 Neb. 797, 178 N. W. 766 (1920); *Summorman v. Knowles*, 33 N. J. Law 202 (1868); *Wood v. Baldwin*, 56 Hun. 647, 10 N. Y. S. 195 (1890); *People v. Salter*, 191 App. Div. 723, 182 N. Y. S. 252 (1920); *Chestnut Hill & Spring House Turnpike Road Co. v. Montgomery County*, 228 Pa. 1, 76 A. 726 (1910); *Jorgensen et al. v. City of Superior*, 111 Wis. 561, 87 N. W. 565 (1901); *Zwietuschy et al. v. Village of East Milwaukee*, 161 Wis. 519, 154 N. W. 981 (1915); *Dagan v. State of Wisconsin*, 162 Wis. 353, 156 N. W. 153 (1916).

121. See citation of numerous authorities as to this rule, note 43.

122. *Peters v. Prud. Ins. Co. of Amer.*, notes 55 and 56 (*engaged in aviation operations* construed as ambiguous as relating to death of casual passenger); *Gits v. N. Y. Life Ins. Co.*, note 66 (*engaged in aeronautic operations* construed as ambiguous as relating to death of casual passenger); *Charette v. Prud. Ins. Co. of Amer.*, notes 91 and 94 (*engaged in aviation operations* construed as ambiguous as relating to death of casual passenger); *Missouri State Ins. Co. v.*

tion for the marked frequency with which courts treat the question in such cases is apparent when consideration is given to the fact that the plaintiff beneficiaries had everything to gain and nothing to lose in the consideration of such contention by the judiciary, and therefore have argued the point in practically every case yet to arise.

Only on one occasion since the transition of aviation into the occupational category,<sup>123</sup> has *participating in aeronautics* exception clauses been considered as unambiguous,<sup>124</sup> though, with unanimity, cases arising before such occupational era adopted the contra view.<sup>125</sup> Failure of insurers to add *as passenger or otherwise* to the exception has been construed in more recent decisions as emphasizing ambiguity.<sup>126</sup>

Grounds for adoption of ambiguity in the various decisions vary from a simple statement to the effect that "the language is inept"<sup>127</sup> to lengthy citation and detailed explanation of authorities construing in various ways expressions used in the particular exception clause.<sup>128</sup> Failure of the judges of the appellate court rendering the decision to agree as to the exact meaning of the exception has even been cited in one case as illustrative of ambiguity in the particular clause therein involved.<sup>129</sup>

Though, as has been stated on one occasion, "the court will not do any fine or precise balancing of reasons or splitting of hairs to uphold its contention,"<sup>130</sup> the court can yet resort to the construction of ambiguity only when, after using such helps as are proper to arrive at the intent of the parties, some of the language used or

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*Martin*, note 66 (*participating in aviation operations* construed as ambiguous as relating to death of casual passenger); *Martin v. Mutual Life Ins. Co.*, note 35 (*participating in aeronautics* construed as ambiguous relating to death of casual passenger); *Gregory v. Mutual Life Ins. Co.*, note 35 (*participation in aeronautics* construed as ambiguous as relating to death of casual passenger); *Travelers Ins. Co. v. Peake*, note 45 (*participating in aeronautics* construed as not ambiguous as relating to death of casual passenger); *Masonic Acc. Ins. Co. v. Jackson*, notes 55 and 57 (*engaged in aviation* construed as not ambiguous as relating to death of casual passenger); *Goldsmith v. New York Life Ins. Co.*, note 72 (*engaging as passenger or otherwise in aeronautic operations* construed as not ambiguous in relating to death of a casual passenger); *Taylor v. Prudential Ins. Co.*, notes 91 and 93 (*aviation or submarine operations* construed as not ambiguous as relating to death of pilot); *Irwin v. Prud. Ins. Co. of Amer.*, note 113 (*engaged in aviation operations* construed as not ambiguous as relating to pilot of glider); *Sneddon v. Mass. Protective Ass'n.*, note 34 (*participation in aeronautics* construed as not ambiguous as relating to death of casual passenger); *Day v. Eq. Soc. of U. S.*, note 79 (*engaging as a passenger or otherwise in aeronautic expedition* construed as not ambiguous as relating to death of casual passenger).

123. See *infra* page 331.

124. *Sneddon v. Mass. Protective Assn., Inc.*, note 34.

125. *Bew v. Travelers Ins. Co.*, note 32; *Travelers Ins. Co. v. Peake*, note 45; *Meredith v. Business Men's Acc. Ass'n.*, note 44.

126. *Gits v. N. Y. Life Ins. Co.*, note 66; *Mo. State Life Ins. Co. v. Martin*, note 66; *Gregory v. Mutual Life Ins. Co.*, note 35.

127. *Peters v. Prud. Ins. Co.*, notes 55 and 56.

128. *Gits v. N. Y. Life Ins. Co.*, note 66; *Charette v. Prud. Ins. Co. of Amer.*, notes 91 and 94.

129. *Charette v. Prud. Ins. Co. of Amer.*, note 91.

130. *Id.*, 232 N. W. at 850.

phrases inserted in the policy are still of doubtful import.<sup>131</sup> The ambiguity construction cannot apply where the language is unequivocal and unambiguous and sufficiently plain and clear as to express the intent of the parties.<sup>132</sup> Nothing can be read into a policy which is not there by action of such contracting parties.<sup>133</sup> Nor is the fact that the intent might have been better expressed of any serious import, as it is ambiguity and not awkwardness of language which opens the door for such construction in favor of the insured.<sup>134</sup> As to the formulation of any sort of definite criterion as to the ambiguity or non-ambiguity of any particular exception clause, only a study of the bases used and attitudes expressed by the courts in the various decisions involving such contentions, is needed to conclusively show the impossibility of any such achievement.<sup>135</sup> Connotations of words and groups of words vary according to the opinions and reactions of the particular individual, and this element of human discretion is, of course, beyond the realm of categorical fixation.

**Time**—One of the most noticeable tendencies on the part of courts construing the various aeronautical exception clauses is the utter disregard, in the majority of cases, of the time when the contract was formulated between the parties and of the meaning of the particular terms used in expressing the exception at such time.

Particularly illustrative of this arbitrary tendency as meaning the difference between recovery and non-recovery under a policy containing an aeronautical exception clause, is the case of *Masonic Accident Ins. Co. v. Jackson*.<sup>136</sup> Faced with a statement of facts showing insured to have been killed in 1923 while flying in a plane as a non-fare-paying passenger, and while insured under a policy containing a clause to the effect that death or disability of the insured while *engaged in aviation* was not covered by such policy, the Appellate Court of Indiana, deciding the case in 1925,<sup>137</sup> held:

"Suppose the policy had provided it should not apply to anyone 'engag-

131. See *Foot v. Aetna Life Ins. Co. of Hartford, Conn.*, 61 N. Y. 571, 585 (1875).

132. 32 C. J. 1158, Sec. 265 (c).

133. *Irwin v. Prud. Ins. Co. of Amer.*, note 113.

134. *Goldsmith v. N. Y. Life Ins. Co.*, note 72.

135. Illustrative of two diametrically opposed views as to ambiguity interpretations in cases involving identical facts and aviation exceptions, is the following statement in the recent *Day v. Equitable Life Assur. Soc. of U. S.*, note 79, case referring to *Gibbs v. Equitable Life Assur. Soc. of U. S.*, note 72 (both cases involving *engaging as passenger or otherwise in aeronautic expeditions* construed in relation to death of an insured while flying as a casual passenger). "Although entertaining the highest respect for the Court of Appeals of N. Y., we do not agree that there is a necessary ambiguity or conflict in a clause embracing passengers on expeditions . . ."

136. Notes 55 and 57.

137. 147 N. E. 156.

ing in tobogganing,' could it be asserted with any degree of plausibility that one riding on the sled, but who had no part in the management or steering of the sled, was not engaged in tobogganing? If we engaged the owner of a row-boat to take us for a pleasure ride on a river, we most certainly would be engaging in boating."

However, on appeal to the Supreme Court of Indiana, the decision handed down in 1929,<sup>138</sup> subsequent to the definite establishment of aeronautics as an occupation, rejected this mere *action* criterion of *engaged* as related to a non-occupational activity, and adopted that of *continuity of action*, basing its conclusions on the following premise:

"To say that one is 'engaged' in an *occupation* signifies much more than the doing of one act in the line of such *occupation*."<sup>139</sup>

Other cases adopting substantially the same mode of interpretation as the above case are: *Benefit Association of Railway Employees v. Hayden* (decided 1927; date of policy not shown; insured killed in 1926);<sup>140</sup> *Price v. Prudential Ins. Co. of Amer.* (decided 1929; policy issued in 1925; insured killed in 1927);<sup>141</sup> *Gits v. New York Life Ins. Co.* (decided 1929; policy issued in 1920; insured killed in 1923);<sup>142</sup> *Missouri State Life Ins. Co. v. Martin* (decided 1934; policy issued in 1921; insured killed in 1933);<sup>143</sup> *Goldsmith v. New York Life Ins. Co.* (decided 1934; policy issued in 1925; insured killed in 1932);<sup>144</sup> *Mayer v. New York Life Ins. Co.* (decided 1934; policy issued in 1921; insured killed in 1931);<sup>145</sup> *Gregory v. Mutual Life Ins. Co.* (decided 1935; policy issued in 1925; insured killed in 1933.)<sup>146</sup>

As late as 1935, in the argument on the *Gregory* case,<sup>147</sup> insurers have unsuccessfully contended that neither lapse of time nor extrinsic nor intrinsic changes in science, art, or mechanical development can possibly change the meaning that must be judicially given to contractual language, which at the time of its adoption by the parties excluded a certain risk, so as to make that very language mean such a different thing as to include in 1933 the very risk, which in 1925 the parties agreed by such language should be excluded.

And in the rejection of such contention, the not unimportant

138. Notes 55 And 57.

139. Note 55, 164 N. E. at 631 (italics in text are the author's).

140. Note 53.

141. Note 77.

142. Note 66.

143. *Ibid.*

144. Note 72.

145. *Ibid.*

146. Note 35.

147. *Ibid.*

query is raised as to whether the courts are following the familiar rule that "contracts must be construed with reference to the intention of the parties at the time of entering into the contract"<sup>148</sup> and are not in obvious effect violating the principle laid down by the United States Supreme Court in the case of *Commonwealth of Virginia v. West Virginia*<sup>149</sup> that "the contract is still to be interpreted according to its true intent, though altered conditions may have varied the form of fulfillment." Truly suggestive is such language of another interesting inquiry as to just what is the *true intent* of a contract of life insurance with respect to risks that in their nature are likely to change during the expected life of the policyholders.

**Intent**—Illustrative of the conflicting views of courts as to this *intent* are the decisions involving *expeditions* as expressive of the activity to be excepted from coverage.<sup>150</sup> One construes the use of such word in the contract made prior to the occupational era of aviation as expressive of the *intent* to exclude every flight made by insured in a plane;<sup>151</sup> while another interprets the use of the word in a policy also issued during the preoccupational era of aviation, as being indicative of *intent* to exclude a certain extraordinary hazard which at that time made flight in a plane an expedition, and that if conditions change and travel by airplane is no longer subject to such hazards, the exception was not intended to apply.<sup>152</sup> In still another and more recent *expedition* decision, the court further confuses the situation in presenting the reasoning that "if it were *intended* when the policy was drafted and offered for sale to exclude from coverage every loss resulting from an airplane trip or flight, it is believed that counsel drafting the clause could have found

148. See 13 C. J. 523, §482. *Commonwealth of Virginia v. West Virginia*, 238 U. S. 202, 236; 35 S. Ct. 795, 809; 59 L. Ed. 1272, 1288 (1915); *McNaughton v. Stephens*, 8 Ga. App. 545, 70 S. E. 61 (1911); *Batchelder v. Batchelder*, 220 Mass. 42, 107 N. E. 455 (1914).

149. *Ibid.*

150. *Gibbs v. Equitable Life Assurance Soc. of U. S.*, note 72; *Provident Trust Co. of Philadelphia v. Equitable Life Assurance Soc. of U. S.*, note 79; *Day v. Equitable Life Assurance Soc. of U. S.*, note 79.

151. *Gibbs v. Equitable Life Assur. Soc. of U. S.*, *ibid.*: "We conclude, therefore, that, in excluding from the benefit of a double indemnity death resulting to a passenger in a submarine or aeronautic expedition, the intent of the parties to the insurance contract grew out of and reflected the general belief that presence on a trip or journey in a vessel or machine of this type in regular transit constituted such a momentous adventure and was accompanied by such unusual danger and extraordinary hazard that neither party expected the policy to cover the risk of casualty."

152. *Prov. Trust Co. of Philadelphia v. Equitable Life Assurance Soc. of U. S.*, note 79: "Appellant notes that, in 1926, aviation was extremely hazardous and not generally recognized as a method of transporting passengers, and suggests that the parties for that reason intended to include in the words *aeronautical expeditions* all flights by airplane; that is, that all travel by airplane in the conditions then existing would be excepted, because any flight might perhaps be considered an *expedition*. In spite of that arbitrary understanding, if conditions change and travel by airplane is no longer subject to the extraordinary hazard which once made flight an *expedition*, the exception cannot be held to have been intended to apply."

language less apt to mislead the buying public than such a redoubtable phrase as this."<sup>153</sup>

Life insurance contracts, unlike most contracts which contemplate performance at a reasonably definite time or times, usually so near in the future that language will have the same meaning when the time for performance arrives that it has when the contract is executed, always involve the possibility that performance may extend over a long period of years—long enough for changing conditions to change the meaning of words. And, as observed by Mr. Justice Holmes while on the bench of the United States Supreme Court "a word is not a crystal, transparent, and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."<sup>154</sup>

If this seemingly adopted view of construing aeronautical exceptions as of the time of interpretation without regard to the time of the issuance of such policy seems to warp the recognized theories of contracts, it must be remembered that insurance is gradually evolving away from the law of contracts. Typical of the recognition of such fact is the statement of Dean Pound of the Harvard School of Law in his Lecture on Judicial Empiricism,<sup>155</sup> to the effect that

"our courts have taken the law of insurance practically out of the category of contract, have taken the law of surety companies practically out of the law of suretyship and have established that the duties of public service companies are not contractual."<sup>156</sup>

#### Present Status of Policies Relying on "Engage" and "Participate" Aviation Risk Exclusions:

Obvious lack of any appreciable degree of consistency in the numerous interpretations and constructions of the varied aeronautical exception clauses gives rise to the query as to whether there is really any distinction between *engage* and *participate* or have the courts created, as was suggested recently in an address before the Association of Life Insurance Counsel,<sup>157</sup> a "distinction in form that does not exist in substance?" Certainly lengthy and detailed decisions drawing narrow lines of distinction between the two

153. *Day v. Equitable Life Assurance Soc. of U. S.*, note 79.

154. *Towne v. Eisner*, 245 U. S. 418, 425; 38 Sup. Ct. 158, 159; 62 L. Ed. 372, 376 (1917).

155. Pound, *The Spirit of the Common Law* (1921) p. 186.

156. See also *Patterson*, *Essentials of Insurance Law* (1st Ed. 1935) p. 44: "The general law of contracts has been warped almost beyond recognition in applying it to insurance controversies."

157. *Vaughn Miller*, General Counsel, Volunteer Life Ins. Co., Chattanooga, Tenn., speaking before Association of Life Ins. Counsel, May 25, 1931. Address reprinted in L. I. C., v. 5, p. 74.

action expressions,<sup>158</sup> bear evidence of opinion, at least on behalf of some federal and state courts, that variation does in reality exist in substance, though such decisions themselves contain evidence of the interchange of the words as conveying a similar idea when the courts abandon the role of precisionist and discuss the issues involved.

Among the more definite classifications of the words as being expressive of the degree of activity excepted from the coverage of the policy were judicial interpretations to the effect that "*engage* means that one must take part in the operations of the plane in some way other than *participating* in flying,"<sup>159</sup> and "*participate* denotes activity not included in the narrower compass of the word *engage*."<sup>160</sup> Other decisions, however, have added the necessity of continuity of action to the above,<sup>161</sup> arriving at the conclusion that "the word *engage* gives the impression of meaning something more than occasional *participation*,"<sup>162</sup> while the real meaning of *engage* has been suggested, in another jurisdiction, to be entirely dependent on the particular activity with which it is used, varying from the meaning of simple singular action in the case of non-occupational activity to that of continuity of action of such a degree as to approach a vocation in the case of an activity of occupational status.<sup>163</sup>

Such distinctions, however, have been flayed in more recent cases as being "hairsplitting and subtle" and as being based on meanings understood by scholars and not as used in the ordinary speech of the people.<sup>164</sup> Such denunciations have ultimately resulted in the conclusion that "*participate* has the meaning and effect of *engaging* in and other words of similar import and meaning,"<sup>165</sup> though it is to be particularly noted that in this abolition of distinction between the two expressions, both have been thrown, when used in connection with aviation, into the *continuity of action* category, long recognized as demanded by the occupational status of such activity.<sup>166</sup>

Though admittedly well founded in authority and reason when construed in such manner where the particular policy involved was issued subsequent to the recognized advent of aviation into the

158. *First Nat. Bk. of Chattanooga v. Phoenix Mut. Life Ins. Co.*, note 67; *Flanders v. Benefit Ass'n. of Ry. Employees*, note 21; *Goldsmith v. N. Y. Life Ins. Co.*, note 72; *Gits v. N. Y. Life Ins. Co.*, note 66; *Price v. Prudential Ins. Co. of Amer.*, note 77; *Peters v. Prudential Ins. Co. of Amer.*, notes 56 and 55.

159. *Flanders v. Ben. Ass'n. Ry. Emp.*, note 21.

160. *First Nat. Bk. of Chattanooga v. Phoenix Mut. Life Ins. Co.*, note 67.

161. *Ibid.*; *Peters v. Prud. Ins. Co. of Amer.*, notes 55 and 56; *Gits v. N. Y. Life Ins. Co.*, note 66.

162. *Peters v. Prud. Ins. Co. of Amer.*, *ibid.*

163. *Goldsmith v. N. Y. Life Ins. Co.*, note 72.

164. *Mo. State Life Ins. Co. v. Martin*, note 66, 69 S. W. (2d) at 1084.

165. *Ibid.*; *Gregory v. Mutual Life Ins. Co.*, note 35.

166. *Supra* pp. 312-313.

occupational field, such a construction of *participate* and *engage* obviously tends to work an unreasonable hardship on the insurer when litigation involves a contract entered into at a time when aviation was recognized as only an art or sport<sup>167</sup> and as not requiring more than mere presence in the instrumentality to classify one as being both *participating* and *engaging*. Numerous opinions, however, promulgated by highly respectable courts, are to be found adopting such mode of construction.<sup>168</sup>

It is submitted, in the light of these authorities, that insurance companies will in all likelihood be held liable in cases involving any of the millions of insured persons holding policies containing these *engaging* and *participating* exception clauses where death results from riding as a casual passenger in either a private or transport plane.<sup>169</sup> Pilots and members of the crew, however, will be included within the exclusion,<sup>170</sup> while, with the exception of clauses involving *aeronautic expedition* as expressive of the activity,<sup>171</sup> if the exclusion contains an additional *as passenger or otherwise* phrase, the casual passenger will also be covered.<sup>172</sup>

(To be concluded)

167. Adopting the strict construction theory of the numerous *engage* and *participate* cases (see *supra* note 21), ample authority for identical construction of the two words is to be found even in dictionary definitions. *Webster's*, New International Dictionary (1932) defines both words as meaning "to take part." See *Bew v. Travelers Ins. Co.*, note 32, as to "pre-occupation" interpretation.

168. See pp. 330-332 *Benefit Ass'n. Ry. Employees v. Hayden*, note 53; *Price v. Prud. Ins. Co. of Amer.*, note 77; *Gits v. N. Y. Life Ins. Co.*, note 66; *Mo. State v. Martin*, note 66; *Goldsmith v. N. Y. Life Ins. Co.*, note 72; *Mayer v. N. Y. Life Ins. Co.*, note 72; *Gregory v. Mutual Life Ins. Co.*, note 35.

169. See petition for certiorari to U. S. Sup. Ct. in *Gregory v. Mutual Life Ins. Co.*, note 35, p. 2 (Cert. denied).

170. *Gregory v. Mut. Life Ins. Co.*, note 35, 78 F. (2d) at 523: "One who rides the plane for the sole purpose of going some place, of being transported by it as a passenger, is not, we think, in the absence of words requiring such construction, *participating in aeronautics*. He does not belong to the same craft or class as those skilled artisans who participate in the construction, *management, or operation of the airplane*" (italics are the author's).

171. See *Day v. Eq. Life Assur. Soc. of U. S.*, note 79.

172. See *Mayer v. N. Y. Life Ins. Co.*, note 72, 74 F. (2d) at 119: "But the addition of the words *as passenger or otherwise* makes the phrase (*engaging in aeronautic operations*) all-inclusive. It covers every one, whether an airplane employee, pilot, mechanic, or executive, whether a fare-paying passenger or one traveling on a pass or under a license, whose death results from his presence on a plane at the time of the accident" (italics are the author's).