The Deception about the Inception Rule: Coverage for VFR Pilots in IFR Conditions

Michael G. McQuillen
THE DECEPTION ABOUT THE INCEPTION RULE:
COVERAGE FOR VFR PILOTS IN IFR CONDITIONS

MICHAEL G. McQUILLEN*

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IN 1992 a total of 1662 general aviation aircraft accidents occurred with an average of one fatal accident per day.  

The phrase “general aviation” refers to “[a]ll civil aviation operations other than scheduled air services and nonscheduled air transport operations for remuneration or hire.” Federal Aviation Administration, Airmen’s Information Manual G-1, May 27, 1993 [hereinafter AIM]. (Pilots are required to have obtained instruction on the use of the AIM during their private pilot training. 14 C.F.R. § 61.105(a)(1) (1993)).

Recent legislation proposing a federal statute of repose defines a “General Aviation Aircraft” as an aircraft with a maximum seating capacity of fewer than 20 passengers that was not, at the time of the accident, engaged in scheduled passenger-carrying operations. H.R. Rep. No. 3087, 103d Cong., 1st Sess. § 6 (1993).

Although the causes of the accidents were numerous, weather-related accidents accounted for at least forty percent of the general aviation fatalities. The leading weather-related cause was "VFR flight into IMC." A National Transportation Safety Board (NTSB) report concluded that VFR (Visual Flight Rules) flight into IMC (Instrument Meteorological Conditions) was a factor in 361 general aviation accidents between 1983 and 1987 that resulted in 583 fatalities. These statistics indicate that most VFR-into-IMC accidents yield disastrous results.

When a non-instrument rated pilot is involved in this type of accident, a dispute frequently develops between the pilot (or his estate) and his insurer on the issue of whether liability coverage exists for the occurrence.

This article analyzes the judicial decisions that discuss the issue of whether a non-instrument rated pilot, who is allowed to fly only under Visual Flight Rules, is properly rated for a flight when he suffers an accident after flying into
weather conditions requiring the application of Instrument Flight Rules (IFR). During the past twenty years, only a handful of cases have discussed the issue. As demonstrated below, some of those cases have held that where the insurance policy denies coverage if the pilot is not properly rated for “the flight” involved, the weather conditions prevailing at the time and place of departure will determine whether the pilot was properly rated for the flight. Courts have reached this conclusion even where the pilot, after a VFR takeoff, encountered and crashed in IFR conditions. This rule is known as the “inception rule.”

The purpose of this article is to illustrate why the inception rule is an unsatisfactory resolution of the interpretational problem faced by the courts determining whether the pilot is appropriately rated for the flight involved. The article then proposes a different test for determining whether the pilot was appropriately rated for the flight.

II. AVIATION RULES AND TERMINOLOGY

A brief discussion of some basic aviation regulations is essential to understand the points raised in this article.

There are two primary sets of flight rules that govern civil aviation operations in the United States: Visual Flight Rules (VFR) and Instrument Flight Rules (IFR). A pilot flying under VFR is basically limited to flying in weather conditions that allow one to navigate by visual references outside of the cockpit, subject to federal regulations that set forth certain minimum ceilings, distance from clouds, and visibility requirements for a given type of airspace. Weather

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10 The phrase “Visual Flight Rules” is defined as “[r]ules that govern the procedures for conducting flight under visual conditions. The term ‘VFR’ is also used in the United States to indicate weather conditions that are equal to or greater than minimum VFR requirements. In addition, it is used by pilots and controllers to indicate type of flight plan.” AIM, supra note 1, at V-2. See infra note 12.

11 See infra notes 20-26 and accompanying text.

12 Federal Aviation Regulations provide:

(a) Except as provided in paragraph (b) of this section and § 91.157, no person may operate an aircraft under VFR when the flight visibility is less, or at a distance from clouds that is less, than that
conditions equal to or better than the minimum for flight
prescribed for the corresponding altitude and class of airspace in the
following table:

<table>
<thead>
<tr>
<th>Airspace</th>
<th>Flight visibility</th>
<th>Distance from clouds</th>
</tr>
</thead>
<tbody>
<tr>
<td>Class A</td>
<td>Not Applicable</td>
<td>Not Applicable</td>
</tr>
<tr>
<td>Class B</td>
<td>3 statute miles</td>
<td>Clear of Clouds</td>
</tr>
<tr>
<td>Class C</td>
<td>3 statute miles</td>
<td>500 feet below, 1,000 feet above, 2,000 feet horizontal</td>
</tr>
<tr>
<td>Class D</td>
<td>3 statute miles</td>
<td>500 feet below, 1,000 feet above, 2,000 feet horizontal</td>
</tr>
<tr>
<td>Class E: Less than 10,000 feet MSL</td>
<td>3 statute miles</td>
<td>500 feet below, 1,000 feet above, 2,000 feet horizontal</td>
</tr>
<tr>
<td>Class E: At or above 10,000 feet MSL</td>
<td>5 statute miles</td>
<td>1,000 feet below, 1,000 feet above, 2,000 feet horizontal</td>
</tr>
<tr>
<td>Class G: 1,200 feet or less above the surface</td>
<td>1 statute mile</td>
<td>Clear of clouds</td>
</tr>
<tr>
<td>Class G: 1,200 feet or less above the surface</td>
<td>3 statute miles</td>
<td>500 feet below, 1,000 feet above, 2,000 feet horizontal</td>
</tr>
<tr>
<td>Class G: 1,200 feet or less above the surface</td>
<td>1 statute mile</td>
<td>500 feet below, 1,000 feet above, 2,000 feet horizontal</td>
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</tr>
<tr>
<td>Class G: 1,200 feet or less above the surface</td>
<td>5 statute miles</td>
<td>1,000 feet below, 1,000 feet above, 1 statute mile horizontal</td>
</tr>
</tbody>
</table>

(b) *Class G Airspace.* Notwithstanding the provisions of paragraph (a) of this section, the following operations may be conducted in Class G airspace below 1,200 feet above the surface:
under VFR are known as VFR conditions. The minimum weather conditions for VFR flight may vary with the type of airspace in which the pilot flies. For example, in most controlled airspace, flight visibility for the general aviation pilot must be three statute miles and the ceiling must be 1000 feet or greater for the pilot to operate under VFR. An exception to this rule allows certain flight in controlled airspace to be conducted in weather conditions less than the minimums required for flight under VFR. This excep-

(1) Helicopter. A helicopter may be operated clear of clouds if operated at a speed that allows the pilot adequate opportunity to see any air traffic or obstruction in time to avoid a collision.

(2) Airplane. When the visibility is less than 3 statute miles but not less than 1 statute mile during night hours, an airplane may be operated clear of clouds if operated in an airport traffic pattern within one-half mile of the runway.

(c) Except as provided in § 91.157, no person may operate an aircraft beneath the ceiling under VFR within the lateral boundaries of controlled airspace designated to the surface for an airport when the ceiling is less than 1,000 feet.

(d) Except as provided in § 91.157 of this part, no person may take off or land an aircraft, or enter the traffic pattern of an airport, under VFR, within the lateral boundaries of the surface areas of Class B, Class C, Class D, or Class E airspace designated for an airport-

(1) Unless ground visibility at that airport is at least 3 statute miles; or

(2) If ground visibility is not reported at that airport, unless flight visibility during landing or takeoff, or while operating in the traffic pattern is at least 3 statute miles.

(e) For the purpose of this section, an aircraft operating at the base altitude of a Class E airspace area is considered to be within the airspace directly below that area. 14 C.F.R. § 91.155 (1993).

The above rules must also be read in conjunction with the regulations that provide the minimum safe altitudes for flights over congested areas or other than congested areas. See 14 C.F.R. § 91.119 (1993). See also 14 C.F.R. § 91.515 (1993) (certain large and turbojet powered aircraft may not be operated under VFR at less than 1000 feet above the surface, or 1000 feet from any mountain, hill, or other obstruction to flight, for day operations, unless necessary for takeoff or landing).

13 AIM, supra note 1, at V-1. VFR conditions are also known as Visual Meteorological Conditions or VMC. Id. at V-3.

14 Controlled airspace is that airspace designated as Class A, B, C, D, or E airspace within which some or all traffic may be subject to air traffic control. AIM, supra note 1, at C-4.

15 See supra note 1. This article is designed to address the coverage issues facing the general aviation pilot operating under 14 C.F.R. § 91. Note that the VFR requirements for commercial and air taxi operators are different and are governed by 14 C.F.R. § 135.205, but the analysis is similar. Air carrier operations are governed by the plethora of regulations found at 14 C.F.R. § 121.

16 14 C.F.R. § 91.155(a), (c) (1993).
tion is known as "special VFR weather minimums." In uncontrolled airspace, however, the pilot must maintain at least one statute mile flight visibility and remain clear of the clouds to fly under VFR during the day.

Weather conditions that do not satisfy the minimum criteria for flight under VFR are referred to as IFR conditions. For example, flight in clouds is almost always considered to be IFR conditions because there are virtually no visual references outside of the cockpit. Essentially, a person may not pilot an aircraft in weather conditions less than the minimum prescribed for VFR flight unless he holds an instrument rating. Pilots who have a valid and current instrument rating may operate aircraft in weather conditions which preclude flight under VFR. An instru-

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17 Special VFR weather minimums allow a non-instrument rated pilot to fly within the lateral boundaries of controlled airspace during the day with at least one statute mile flight visibility (1) so long as he has received a clearance from air traffic control to do so, and (2) so long as he remains clear of the clouds. Special VFR at night requires the pilot to possess an instrument rating. See 14 C.F.R. § 91.157 (1993). Regarding the effect of special VFR weather minimums on the coverage issues raised in this article, see Dale Electronics, Inc. v. Federal Ins. Co., 286 N.W.2d 437 (Neb. 1979), wherein the court interpreted the phrase "Visual Flight Rules" in the insurance policy to include basic and special VFR conditions.

18 Uncontrolled airspace is essentially that airspace that has not been designated as controlled airspace and within which air traffic control has neither the authority nor the responsibility for exercising control over air traffic. AIM, supra note 1, at U-1.

19 14 C.F.R. § 91.155(a) (1993). Note that VFR flight in uncontrolled airspace at night requires three statute miles visibility and requires the same ceiling and visibility requirements as VFR flight in controlled airspace during the day under 10,000 feet mean sea level.

20 14 C.F.R. § 1.1 (1993). IFR conditions are also referred to as Instrument Meteorological Conditions (IMC). IMC are "conditions expressed in terms of visibility, distance from cloud, and ceiling less than the minima specified for visual meteorological conditions." AIM, supra note 1, at I-2.

21 14 C.F.R. § 61.3(e) (1993).

22 Federal Aviation Regulations provide that:

   No pilot may act as pilot in command under IFR, nor in weather conditions less than the minimums prescribed for VFR, unless he has, within the past 6 calendar months—

   (i) In the case of an aircraft other than a glider, logged at least 6 hours of instrument time under actual or simulated IFR conditions, at least 3 of which were in flight in the category of aircraft involved, including at least 6 instrument approaches, or passed an instrument competency check in the category of aircraft involved.

ment-rated pilot has received certain additional training which allows her to maneuver the aircraft solely by reference to instruments and gauges inside the cockpit. 23 Flight

This article does not address whether an instrument-rated pilot who flies in IFR conditions is appropriately rated for the flight if he fails to comply with the above requirements.

23 Federal Aviation Regulations provide:
(a) General. To be eligible for an instrument rating (airplane) or an instrument rating (helicopter), an applicant must—
(1) Hold at least a current private pilot certificate with an aircraft rating appropriate to the instrument rating sought;
(2) Be able to read, speak, and understand the English language; and
(3) Comply with the applicable requirements of this section.
(b) Ground instruction. An applicant for the written test for an instrument rating must have received ground instruction, or have logged home study in at least the following areas of aeronautical knowledge appropriate to the rating sought.
(1) The regulations of this chapter that apply to flight under IFR conditions, the Airman’s Information Manual, and the IFR air traffic system and procedures;
(2) Dead reckoning appropriate to IFR navigation, IFR navigation by radio aids using the VOR, ADF, and ILS systems, and the use of IFR charts and instrument approach plates;
(3) The procurement and use of aviation weather reports and forecasts, and the elements of forecasting weather trends on the basis of that information and personal observation of weather conditions; and
(4) The safe and efficient operation of airplanes or helicopters, as appropriate, under instrument weather conditions.
(c) Flight instruction and skill—airplanes. An applicant for the flight test for an instrument rating (airplane) must present a logbook record certified by an authorized flight instructor showing that he has received instrument flight instruction in an airplane in the following pilot operations, and has been found competent in each of them:
(1) Control and accurate maneuvering of an airplane solely by reference to instruments.
(2) IFR navigation by the use of the VOR and ADF systems, including compliance with air traffic control instructions and procedures.
(3) Instrument approaches to published minimums using the VOR, ADF, and ILS systems (instruction in the use of the ADF and ILS may be received in an instrument ground trainer and instruction in the use of the ILS glide slope may be received in an airborne ILS simulator).
(4) Cross-country flying in simulated or actual IFR conditions, on Federal airways or as routed by ATC, including one such trip of at least 250 nautical miles, including VOR, ADF, and ILS approaches at different airports.
(5) Simulated emergencies, including the recovery from unusual attitudes, equipment or instrument malfunctions, loss of communica-
in IFR conditions in controlled airspace is conducted under Instrument Flight Rules, and requires the pilot both to file an IFR flight plan and to receive a clearance from an air traffic control facility. No clearance is required for most domestic flights under VFR. With the exception of certain minimum weather requirements for landing, there are virtually no ceiling or visibility requirements for the typical general aviation pilot flying en route under IFR.

The VFR-to-IFR accident typically occurs when the pilot loses outside visual references upon encountering adverse weather conditions, is unable to control the aircraft solely by reference to his instruments, and becomes spatially disoriented.

... 

(e) Flight experience. An applicant for an instrument rating must have at least the following flight time as a pilot:

(1) A total of 125 hours of pilot flight time, of which 50 hours are as pilot in command in cross-country flight in a powered aircraft with other than a student pilot certificate. Each cross-country flight must have a landing at a point more than 50 nautical miles from the original departure point.

(2) 40 hours of simulated or actual instrument time, of which not more than 20 hours may be instrument instruction by an authorized instructor in an instrument ground trainer acceptable to the Administrator.

(3) 15 hours of instrument flight instruction by an authorized flight instructor, including at least 5 hours in an airplane or a helicopter, as appropriate.

(f) Written test. An applicant for an instrument rating must pass a written test appropriate to the instrument rating sought on the subjects in which ground instruction is required by paragraph (b) of this section.

(g) Practical test. An applicant for an instrument rating must pass a flight test in an airplane or a helicopter, as appropriate. The test must include instrument flight procedures selected by the inspector or examiner conducting the test to determine the applicant's ability to perform competently the IFR operations on which instruction is required by paragraph (c) or (d) of this section.

14 C.F.R. § 61.65 (1993)


However, certain commercial, air taxi, and air carrier flights may have some visibility restrictions for takeoff. See, e.g., 14 C.F.R. § 121 and § 135.
Since an understanding of the weather is essential for pilots, federal regulations require pilots to obtain instruction before they receive a license on how to procure and use aeronautical weather reports and forecasts. Pilot applicants also must receive instruction regarding the recognition of critical weather conditions both from the ground and in flight. Federal regulations also require a pilot to obtain a weather briefing before each flight. Thus, to determine whether the weather conditions at departure, en route, or at the destination will require the flight to be conducted under IFR or VFR, the pilot typically obtains a pre-flight weather briefing from a Federal Aviation Administration Flight Service Station (FSS) briefer. Weather briefings are available from a FSS twenty-four hours a day through the use of a toll-free telephone number, and personal visits to a FSS for a briefing are possible at some airports. Various computer software now enables pilots to obtain their briefings through personal computers.

28 Id.
29 14 C.F.R. § 91.103(a) (1993).
30 Flight Service Stations are air traffic facilities that "provide pilot briefing, en route communications and VFR search and rescue services, assist lost aircraft and aircraft in emergency situations, relay [air traffic control] clearances, originate Notices to Airmen, broadcast aviation weather and NAS information, receive and process IFR flight plans, and monitor [navigational facilities]." Selected FSSs provide En route Flight Advisory Service, known as Flight Watch, take weather observations, issue airport advisories, and advise Customs and Immigration of transborder flights. AIM, supra note 1, at F-3.

More than half of the pilots involved in the 361 VFR-to-IFR accidents between 1983 and 1987 obtained a weather briefing from a Flight Service Station. NTSB Report, supra note 8, at 24.
31 The nearest FSS can be reached at 1-800-WX BRIEF (1-800-992-7433).
32 One such program is the Contel DUATS (Direct User Access Terminal System). This program allows a pilot to obtain weather briefings via personal computer for a route or destination, including current and forecast conditions as well as pilot reports (PIREPS), Significant Meteorological Information (SIGMETS), see infra note 75, and a host of color weather graphics including radar displays for virtually any location in the United States.
Though not authorized to make original forecasts, FSS specialists are qualified and certificated by the National Weather Service as Pilot Weather Briefer and are authorized to translate and interpret available weather data and forecasts in terms of describing weather conditions a pilot might expect along the route and at the destination. The FSS briefer obtains his weather information from the National Weather Service in Kansas City, Missouri. The weather briefer typically provides a pilot with current and forecast weather conditions for the departure, en route, and destination areas. Information on upper air winds, satellite imagery, and radar data for precipitation location and intensity is also available. If the current or forecast weather conditions for the flight are at or below VFR minimums, the FSS briefer may issue a "VFR Not Recommended" advisory to the pilot.

Pilots also have the ability to obtain weather information en route by communicating with a FSS briefer on one of the many frequencies listed on the navigational chart typically used by the VFR pilot. Flight Service Stations also provide En route Flight Advisory Service (EFAS), also known as "Flight Watch," specifically designed to provide en route aircraft with updated weather advisories pertinent to the flight. All EFAS facilities have equipment to access the radar displays directly from each of the fifty-six National Weather Service radar sites which detect the coverage, in-

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53 Aviation forecasts are prepared by 52 Weather Service Forecast Offices (WSFOs), which prepare terminal and route forecasts. Terminal forecasts are issued three times daily for specific airports in the 50 states and are valid for 24 hours. The last six hours of the 24-hour period are given in a categorical outlook as either LIFR (Low IFR), IFR, MVFR (Marginal VFR), or VFR. Route forecasts are issued in the morning and mid-day and are valid for 12 hours. Area forecasts, issued by the National Aviation Weather Advisory Unit in Kansas City, are issued three times daily. AIM, supra note 1, ¶ 7-1(b).

54 AIM, supra note 1, ¶ 7-3(a).

55 AIM, supra note 1, at V-1. Such an advisory does not abrogate the pilot's authority to make his own decision. Id.

56 AIM, supra note 1, ¶ 7-4. Flight Watch can be contacted by pilots in flight by selecting 122.0 mhz on the pilot's communication radio, id., while standard Flight Service Stations are usually available on 122.2 mhz or as otherwise indicated on the navigational chart for the particular geographic location.
tensity and movement of precipitation. Furthermore, selected FSS locations provide Transcribed Weather Broadcast (TWEB), which is tape-recorded meteorological and aeronautical data broadcast continuously over selected low-frequency navigational aids accessible on the pilot’s navigation radios.

III. POLICY LANGUAGE

With this basic aviation background in mind, we next look to the language of the typical aviation liability insurance policy. Though policy language varies among insurers, the following policy language is similar to that found in many of today’s aviation liability policies and is typical of the varied provisions that have been the subject of “inception rule” decisions: “This policy applies when the aircraft is in flight and only when being operated by pilots holding an FAA pilot certificate while properly rated for the flight and the aircraft . . . ” or, as stated in some policies, “with ratings as required by the FAA for the flight involved.”

There can be little dispute that, in general, the above provision conveys the insurer’s intent to provide coverage only when the pilot flies in conditions for which he is “properly rated.” Insurers, therefore, typically argue that a non-instrument rated pilot is not “properly rated” if he flies into weather conditions below those required for VFR flight. Insureds, on the other hand, argue that the phrase “the flight” is ambiguous because the phrase is usually defined in the policy as the point when the takeoff roll begins until the point when the landing roll has been completed. Insureds argue that insurers cannot assume that one was not properly rated for a segment of the flight if the policy defines flight as a whole and if the pilot commenced the takeoff roll in VFR conditions. As demonstrated below, some courts have agreed with the insureds and have held that the weather conditions existing at the time of take-off are dis-

57 AIM, supra note 1, ¶ 7-11(a),(c).
58 AIM, supra note 1, ¶ 7-8. The typical TWEB contains specially prepared NWS forecasts, in-flight advisories, winds aloft, and current weather reports. Id.
positive; as long as the pilot is duly qualified to fly in take-
off conditions, the courts will be consider him "properly
rated for the flight."

IV. CASES DISCUSSING THE RATED-FOR-FLIGHT
ISSUE

Relatively few cases have discussed whether a pilot was
properly rated for the flight. A chronological review of
each of the most relevant cases appears below to provide
some insight on how courts have handled the issue, and a
39

and a
table summarizing the holdings of each case appears in Ap-
pendix A.

A. THE KING CRAFT CASE

In National Insurance Underwriters v. King Craft Custom
Products, Inc. the aircraft crashed shortly after the non-in-
strument rated pilot received an IFR clearance to land in
IFR conditions. The insurer argued that no coverage ex-
isted for the loss because of the policy's requirement that
the pilot be "properly rated for the flight." The court noted
that the weather was VFR for the entire first leg of the trip
(Miami to Panama City), that the pilot was told when de-
parting Miami that the weather at his ultimate destination
(Mobile) was VFR, that his landing at and subsequent take-
off from Panama City was VFR, that the pilot responded
"negative" to the Mobile tower controller's inquiry whether
the pilot was IFR, and that the pilot did not file an IFR
flight plan. Rejecting the insurer's argument, the court
held that the pilot was properly rated for the flight despite
the court's apparent acknowledgment that the pilot was at-

39 This article does not purport to contain an exhaustive compilation of the deci-
sions which discuss whether a non-instrument rated pilot was covered for flight into
IFR conditions. Rather, the article is meant to analyze the cases that discuss the
inception rule and/or the issues associated with the policy language at issue in this
article. The notes contain cites of additional cases related to the IFR/VFR issue that
contain policy language different from that discussed in Parts III and IV of the text.
See infra notes 44 and 128. The author apologizes for omitting any relevant case not
disclosed by research.

tempting to land in weather conditions for which he was not properly rated.41

The court observed that if the insurer's argument were accepted, the court would have to "break a flight into segments and treat the abortive attempt to land under unfavorable emerging weather conditions as a 'flight' requiring (for coverage) an instrument rating."42 In order to avoid "coverage during a particular flight flickering on and off as particular weather conditions were encountered," the court refused to segment the flight in that manner.43 More importantly, the court noted that the insurer in another policy had used language that presumably excluded coverage under IFR conditions unless the pilot possessed an instrument rating.44

The court also refused to consider the insurer's evidence that the pilot knowingly attempted to land in IFR conditions when other options were available to the pilot. The reason for such refusal was that otherwise the court would have been forced to interpret the policy to except from coverage any loss that occurs under circumstances beyond the pilot's control. Consequently, the court held that the pilot was properly rated for the flight and coverage was afforded under the policy.45

B. THE GLOVER TEST

Four years later, the inception rule was announced by a Texas court finding that coverage applied where a non-instrument rated pilot departed in VFR conditions, encoun-

41 Id. at 478;
42 Id.
43 Id. at 479.
44 Id. The language referred to by the court was chosen by the same insurer in other policies. The exclusion in those policies stated that the policy does not apply "under Instrument Flight Rule(s) (IFR) conditions unless the pilot possesses a valid Instrument rating . . . ." This language was discussed by the courts in Tuohey v. National Ins. Underwriters, 369 S.W.2d 421 (Mo. Ct. App. 1963) and National Ins. Underwriters v. Matthews, 418 S.W.2d 391 (Ark. 1967). In each of those cases, the court held that the insurer failed to meet its burden of proving that the pilot flew into IFR conditions.
45 King Craft, 368 F. Supp. at 478, 480.
tered IFR conditions during the last one-third of the flight, and crashed in IFR conditions. In *Glover v. National Insurance Underwriters* the pilot was told during his weather briefing one hour before take-off that the weather at his destination was IFR but was forecast to improve to VFR conditions. Like the policy in *King Craft*, the *Glover* policy stated that coverage would not apply unless the pilot was "properly rated for the flight and the aircraft." The insurer argued that "the flight" at issue was an IFR flight for which the pilot was not properly rated.

To determine whether the pilot was properly rated for the flight, the *Glover* court focused on the phrase "the flight" in the policy. The court found that the phrase was ambiguous because the insurer knew of certain language not used in the policy that clearly would have excluded coverage for non-instrument rated pilots who fly in IFR conditions.

The court also found the phrase "the flight" to be ambiguous because it was subject to several interpretations. One interpretation of the phrase would determine that the flight was VFR or IFR depending upon the conduct of the pilot. If the pilot used her vision to maintain the attitude of the aircraft, the flight was VFR; but if she used her instruments to maintain altitude, attitude, velocity, and course, the flight was IFR. In other words, if the pilot was attempting to fly the aircraft visually, presumably by looking outside the aircraft, then the flight was VFR even if visibility outside the aircraft was zero. This logic is contrary to the definitions of VFR flight contained in the Federal Aviation Regulations.

Another interpretation, according to the court, was that the flight is considered IFR if conducted in accord with ins-

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46 545 S.W.2d 755 (Tex. 1977).
47 *Id.* at 756 (emphasis added).
48 Although the court did not elaborate on the specific language the insurer knew but failed to select, the court was likely referring to the same language referred to by the *King Craft* court, in *supra* note 44.
49 *Glover*, 545 S.W.2d at 761-62.
instrument flight rules. Presumably, if a pilot flew at IFR altitudes\textsuperscript{51} or filed an IFR flight plan, the flight was IFR. Yet another interpretation was that the flight was VFR if conducted pursuant to visual flight rules. If the flight was conducted in violation of visual flight rules, the flight was an IFR flight.

After considering these various interpretations, the \textit{Glover} court embraced the interpretation adopted in \textit{King Craft}. The \textit{Glover} court held that "the flight" refers "to the entire time the aircraft is in flight; and 'the flight' must be looked at as a whole, rather than in segments, in determining its IFR or VFR character."\textsuperscript{52} Mysteriously, and without analysis, the court held that the flight should be characterized as of its inception; the weather conditions that exist at the beginning of the flight govern whether the flight is a VFR or an IFR flight.\textsuperscript{53} Noting that the parties stipulated that the first one-third of the flight, including the departure, was conducted in VFR conditions, the court held that coverage applied because the pilot embarked on a VFR flight and was properly rated to fly VFR.\textsuperscript{54}

In dicta, the court refused, for two reasons, to consider as \textit{controlling} the pilot’s knowledge at takeoff of the en route or destination weather conditions in determining whether the flight was IFR or VFR. First, the court surmised that few pilots actually know at the time of departure the weather conditions they will encounter later in the flight.\textsuperscript{55} Second, the court was concerned that placing at issue the pilot’s knowledge of the destination weather conditions would cause the court to question the reasonableness of the pilot’s actions that, in the court’s opinion, “might best be ignored

\textsuperscript{51} When flying in cruise flight under IFR in uncontrolled airspace below 18,000 feet, pilots are required to fly at odd-thousand foot mean sea level altitudes (such as 5000, 7000, etc.) on magnetic courses from 0 to 179 degrees, and even thousand-foot mean sea level altitudes on magnetic courses from 180 to 359 degrees. 14 C.F.R. § 91.179(b) (1993).
\textsuperscript{52} \textit{Glover}, 545 S.W.2d at 762.
\textsuperscript{53} \textit{Id.} at 763.
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{Id.}
INCEPTION RULE

in determining the coverage of an insurance policy designed to protect one from the consequences of one’s own negligence . . . .” 

The court noted that, even if the pilot’s knowledge of the weather conditions were considered, the facts showed that the pilot was not aware when he departed that he would encounter IFR conditions. 

The two dissenting justices questioned the majority’s logic of looking at the flight as a whole based upon the weather conditions at the inception of the flight in light of the policy’s definition of “flight.” Since the policy defined “flight” as occurring from the time the aircraft moves forward in taking off until the aircraft completes its landing, the dissenters concluded that the policy required the pilot to be rated for all segments of the flight. They noted that the pilot flew into IFR conditions of which he had been previously advised, continued his flight in those conditions instead of turning back to better weather, and crashed in IFR conditions. Consequently, the dissenting justices would have held that the pilot was not properly rated for the flight.

C. The Jim Hawk Case

Not all courts confronting the IFR/VFR issue have adopted Glover’s inception rule. Almost two years after Glover, the Supreme Court of Iowa decided Jim Hawk Chevrolet-Buick, Inc. v. Insurance Co. of North America, wherein the student pilot crashed one-half mile from the airport after

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56 Id.
57 Id.
58 Id. at 765.
59 Id.
60 270 N.W.2d 466 (Iowa 1978).
61 The requirements for issuance of a student pilot certificate are set forth in 14 C.F.R. §§ 61.81-61.95 (1993). In general, the student pilot certificate differs from the private pilot certificate in that the student pilot cannot carry passengers (14 C.F.R. § 61.89(a)(1)), must have a minimum of three statute miles surface visibility during the day (five statute miles at night) in any airspace (14 C.F.R. § 61.89(a)(6)), must maintain visual contact with the surface (14 C.F.R. § 61.89(a)(7)), and may not fly beyond a 25-mile radius of the departure airport without a flight instructor’s endorsement (14 C.F.R. § 61.93). Other limitations are described in 14 C.F.R. §§ 61.81-61.95.
departing into a rainy and foggy night with a 600-foot ceiling. The policy at issue required the pilot to have "a valid pilot's certificate with ratings and certificates appropriate for the flight and the aircraft as required by the Federal Aviation Administration . . . ." The court observed that the above language "plainly states" that insurance does not apply unless the pilot is appropriately rated. Noting that the pilot was not rated for IFR flight, the court held that when the pilot flew within his ratings, the aircraft was insured, but when he flew beyond his ratings, the aircraft was not insured. The court reasoned that an insurer does not act unreasonably if it limits its risk to flight within the pilot's ratings and requires its insured to fly within those ratings for insurance coverage to apply. Thus, the court held that the policy did not apply at the time of the crash. In reaching its decision, the court made no reference to the inception rule, presumably because it found no ambiguity in the policy language.

D. THE NORTHWESTERN FLYERS CASE

Despite its acknowledgment that federal regulations require flight above 18,000 feet to be conducted under IFR, the court in Northwestern Flyers, Inc. v. Olson Bros. Manufacturing Co., Inc. held that the non-instrument rated pilot was

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62 Jim Hawk, 270 N.W.2d at 467.
63 Id. at 468.
64 Id.
65 Id.
66 It is likely that the court would have reached the same result had it applied the inception rule because the evidence suggested, although it is not entirely clear from the case, that the conditions were IFR at the time and place of departure. The court's acknowledgement of clear policy language, however, coupled with the court's comment that no coverage applies when the pilot flies beyond his ratings, suggests that the court would not have accepted the inception rule, even if the aircraft had crashed much later in the flight.
67 Federal Aviation Regulations define airspace within 12 nautical miles of the coast of the 48 contiguous States between 18,000 feet MSL to and including 60,000 feet MSL to be Class A airspace. 14 C.F.R. § 71.33(a) (1993). In general, persons flying in Class A airspace must conduct the flight under instrument flight rules. 14 C.F.R. § 91.135 (1993).
68 679 F.2d 1264 (8th Cir. 1982) (apparently applying Nebraska law, id. at 1279 n.19).
appropriately rated for the flight in which he crashed after losing control of the aircraft at an altitude of 23,000 feet. After distinguishing *Jim Hawk* by pointing out that the pilot in that case departed in IFR conditions, the court followed the *King Craft* and *Glover* rationale and concluded that the flight was a VFR flight because the flight began in VFR conditions. The court rejected the insurer’s argument that the pilot chose to fly in, as opposed to inadvertently encountered, airspace that required an instrument rating.

The policy language at issue in *Northwestern Flyers* was similar to the language construed in *King Craft* and *Glover*. Recognizing that an insurer has a duty to use clear and explicit language, the court held that the insurer knew how to exclude coverage for this type of occurrence but failed to use the requisite language in the policy.

E. THE MARR'S SHORT STOP TEST

Two years after *Northwestern Flyers*, one of the dissenting justices in *Glover* authored the majority opinion in *United States Fire Insurance Co. v. Marr's Short Stop* with predictably different results. In *Marr's*, the aviation liability policy applied only to occurrences while the aircraft was operated by "pilots holding valid and effective pilot and medical certificates with ratings as required by the Federal Aviation Administration for the flight involved." After receiving at least two weather briefings advising him of the existence of IFR conditions along his flight route, the non-instrument rated pilot filed an IFR flight plan. As the pilot was taxiing to the runway, air traffic control broadcast a convective

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69 Id. at 1274.
70 Id. at 1273.
71 Id. at 1273-74. The court suggested that an exclusion for flights conducted in violation of the Federal Aviation Regulations governing instrument flight would be clearer. Id. at 1273 n.23.
72 680 S.W.2d 3 (Tex. 1984).
73 Id.
74 Regulations prohibit a pilot from flying in controlled airspace under IFR unless that person has filed an IFR flight plan and received an appropriate clearance from air traffic control. 14 C.F.R. § 91.173 (1993).
SIGMET that covered the pilot's intended flight path. The aircraft departed into a 1000-foot overcast ceiling with one mile visibility in heavy rain and fog, and then crashed fifteen miles from the airport prior to reaching its assigned altitude. The weather at the time and place of the accident was overcast and rainy.

Even though the jury refused to find that IFR conditions existed at the flight's inception, the trial court entered judgment in favor of the insurer on the basis of the jury's finding that the pilot knew at the beginning of the flight that he would be flying in IFR conditions. The court of appeals, after applying Glover's inception rule to the jury's finding that VFR conditions prevailed at the time and place of departure, reversed the trial court's judgment.

The Supreme Court of Texas held that the court of appeals erred in applying Glover by ignoring the jury's finding that the pilot knew he would be flying in IFR conditions. The court noted that the pilot's act of "filing the [IFR flight] plan is a believable circumstance that he knew the weather conditions were IFR." The court, therefore, found that the pilot was not appropriately rated for the flight. The court apparently distinguished the case from Glover on the grounds that, in applying the inception rule, the Glover court acknowledged that the pilot "did not know when he took off that he was flying into IFR weather." Thus, Marr's implies that the pilot's knowledge of the impending weather conditions is a factor to consider in applying the inception rule.

75 A SIGMET (Significant Meteorological Information) is a weather advisory concerning weather significant to the safety of all aircraft. SIGMET advisories cover severe and extreme turbulence, severe icing, and widespread dust or sandstorms which reduce visibility to less than three miles. A convective SIGMET is issued for tornadoes, lines of thunderstorms, embedded thunderstorms of any intensity level, areas of level four or greater thunderstorms with an area coverage of 40% or more, and hail 3/4 inch or greater. AIM, supra note 1, at C-5, S-2.


77 Marr's Short Stop, 680 S.W.2d at 6.

78 Id. at 5.

79 Id. at 6 (quoting Glover, 545 S.W.2d at 763).
The concurring opinion in *Marr's* proposed the following test to resolve the confusion over whether the flight is IFR or VFR:

The determination of whether a flight is IFR or VFR should be made by the trier of fact on the basis of weather reports and forecasts of the expected weather conditions along the entire plan of flight which were *available* to the pilot at the time and place of departure. If the forecasts indicate that the pilot must fly through IFR conditions to reach his destination, it is an IFR flight.

Obviously, if there is an expected IFR thunderstorm at the time and place of destination and this information is available at the time of departure, the flight should not be categorized as VFR, irrespective of what the weather is at departure. The pilot’s knowledge should not be the controlling factor because the conditions of the flight are controlled by the weather and not by the pilot’s beliefs.\(^8^0\)

F. The *Andersen* Case

The *Marr's* concurring opinion was adopted by the court in *Security Insurance Co. v. Andersen*,\(^8^1\) wherein the non-instrument rated pilot departed in VFR conditions but later crashed in IFR conditions (500-foot ceiling, one quarter-mile visibility). The policy in *Andersen* required the aircraft to be piloted by a person “properly certificated, rated, and qualified under the current applicable Federal Air Regulations for the operation involved.” Based on the *Glover* inception rule, the trial court ruled that the pilot was appropriately rated for the flight because he took off in VFR conditions. On appeal, however, the court adopted the concurring opinion in *Marr’s Short Stop* which requires the trier of fact to consider the weather reports and forecasts available to the pilot at the time and place of depar-

\(^8^0\) *Marr's Short Stop*, 680 S.W.2d at 6-7 (Spears, J., concurring). The concurring opinion also stated that the claimant should have the burden of proving that his failure to comply with the terms of the contract did not contribute to the loss. *Id.* at 7.

ture. The appellate court believed that the Marr's concurrence avoids the injustice of characterizing a flight as VFR based on weather conditions at the inception of flight when the pilot could reasonably have anticipated IFR conditions en route.82 The court reversed and remanded the case for a determination of whether the pilot could reasonably have anticipated IFR conditions en route.83 The Supreme Court of Arizona vacated portions of the court of appeals' opinion for reasons unrelated to the IFR/VFR issue.84

G. THE IDEAL MUTUAL CASE

The Fifth Circuit confronted the issue in Ideal Mutual Insurance Co. v. Myers.85 In Ideal Mutual the pilot and his passenger were killed when their aircraft crashed shortly after takeoff. The policy at issue did not apply to any occurrence unless the pilot held a valid certificate "with ratings as required by the Federal Aviation Administration for the flight involved."86 On the basis of eyewitness testimony that fog restricted visibility to less than a quarter of a mile at the departure airport, and the pilot's failure to hold an instrument rating, the insurer moved for summary judgment on the grounds that the pilot was not properly rated for the flight. The trial court ruled in favor of the insurer.

The court of appeals opined that Glover and Marr's require the court to consider pilot knowledge of the weather conditions as a factor in determining whether the flight was VFR or IFR under the inception rule.87 Looking at the evidence before it, the court held that the trial court should

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82 763 P.2d at 261.
83 Id. at 262.
84 Security Ins. Co. v. Andersen, 763 P.2d 246 (Ariz. 1988). The Supreme Court of Arizona vacated the court of appeals' opinion only to the extent that it required proof of a causal connection between the accident and the pilot's failure to have a valid medical certificate in order for the insurer to avoid coverage. The appellate court opinion is cited in the text to provide the reader with the court's analysis of the rated-for-flight issue, which presumably remains good law. Id. at 249.
85 789 F.2d 1196, 1198 n.4 (5th Cir. 1986).
86 Id. at 1203-04.
87 Id. at 1204.
have discredited the eyewitness testimony because none of those witnesses were at the airport at the precise time of departure and crash.\textsuperscript{88} Somewhat inconsistently, however, the court then observed that, during his weather briefing over one hour before takeoff, the pilot was told that VFR weather conditions would exist for the flight. The court concluded that a genuine issue of fact existed as to the weather conditions and the pilot’s knowledge of those conditions, and, therefore, reversed the order of summary judgment.\textsuperscript{89}

H. THE \textit{TRANSPORT INDEMNITY} CASE

In \textit{Transport Indemnity Co. v. Sky-Kraft, Inc.}\textsuperscript{90} the pilot obtained a preflight weather briefing indicating that the weather conditions near his place of departure were “marginal VFR.” After filing a VFR flight plan, the non-instrument rated pilot departed but crashed shortly after takeoff, at which time the weather conditions just four miles from the place of departure had deteriorated to IFR conditions. The decedent’s estate filed a wrongful death action against the fixed base operator (FBO) who had rented the aircraft to the pilot. The FBO’s insurer then sought a declaration that no coverage existed for the loss under its aircraft liability policy. The policy at issue in the case stated that “coverage shall not apply while the aircraft is operated in flight by other than the following pilots . . . who are properly rated for the flight involved.” The insurer claimed the pilot was not properly rated for the IFR flight because he did not have an instrument rating. The pilot’s estate claimed coverage applied because the weather conditions were suitable for VFR flight at the time of takeoff. The trial court granted summary judgment in favor of the insured.

The appellate court noted that the dispositive issue was whether the flight should be characterized as IFR or VFR.\textsuperscript{91}

\textsuperscript{88} \textit{Id.} at 1205.
\textsuperscript{89} \textit{Id.}
\textsuperscript{90} 740 P.2d 319 (Wash. App. 1987).
\textsuperscript{91} \textit{Id.} at 323.
The court reviewed and accepted the *King Craft* and *Glover* inception rule rationale because it provides "a means to determine the character of a flight without resort to [the] speculation or conjecture [associated with the] segmented flight analysis."92 Rejecting the *Marr's* consideration of pilot knowledge of the weather conditions, the court refused to characterize the flight based on the pilot's knowledge of the weather conditions existing along his flight path or at his destination, holding that such a test "would require this court to adopt the precepts of negligence law for a cause of action arising out of contract construction, without any showing of causation between the pilot's knowledge or lack of knowledge and the crash."93 The court then held that the flight should be characterized solely by the weather conditions existing at the departure point.94

The puzzling aspect of the *Transport Indemnity* logic is that the court reversed the trial court's summary judgment in favor of the insured and remanded the case for trial on the issue of whether the weather conditions existing at the point of departure were VFR or IFR.95 The record on appeal failed to establish the weather conditions that prevailed over the departure airport at the time of departure. All of the available weather data apparently was from the Portland International Airport, but the aircraft departed the Pearson Airpark. The difference is that the Portland airport had its own weather observation facility based at the airport; the Pearson Airpark did not.96 Thus, there was probably little, if any, chance of establishing the precise weather conditions existing at the time and place of departure without forcing the trial court, on remand, to resort to

92 Id. at 324.

93 Id. at 326.

94 Id.

95 *Transport Indemnity*, 740 P.2d at 326.

96 The significance of the distinction is discussed infra at notes 111-16 and accompanying text.
the very "speculation or conjecture" the court hoped to avoid by following the *King Craft* and *Glover* decisions.97

### I. The *Zuver* Case

*Transport Indemnity* was the foundation for the Supreme Court of Washington's decision in *National Union Fire Insurance Co. v. Zuver*.98 In *Zuver* another non-instrument rated pilot crashed in IFR conditions.99 The policy in *Zuver* contained a clause excluding coverage if the aircraft was flown by a pilot not properly rated "for the *operation* involved." The policy also contained a pilot warranty endorsement stating that the policy applies only when the pilot possesses the ratings appropriate "for the *flight* involved." Both the trial court and the court of appeals found in favor of the insurer on the grounds that the pilot was not properly rated for the flight.100

Concluding that the phrase "operation involved" was ambiguous and construing the phrase to relate to the entire flight as a whole from its inception, the Supreme Court of Washington found solace in the *Transport Indemnity* decision101 and adopted the "inception rule" of *King Craft* and *Glover*. Noting that the pilot departed in VFR conditions, the court reversed the court of appeals and found coverage in favor of the pilot's estate.102

Observing that weather forecasts are not absolute, the *Zuver* court sensed that unfairness would occur if a VFR pi-

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97 In reaching its decision to remand the case, the court also noted that the record established only that the pilot "knew" the weather at the time of his preflight briefing was marginal VFR; the record did not demonstrate that the pilot received any information describing the Portland weather as IFR. That the court deemed this information noteworthy is interesting in light of its earlier questioning of the relevance of the pilot's knowledge of the weather conditions.
99 Apparently, no witnesses testified to the exact weather conditions at the time and place of the accident. The trial court, however, held that, more probably than not, the pilot crashed in IFR conditions. *Id.* at 1249.
101 The fact that *Zuver* relied heavily on *Transport Indemnity* is not surprising since *Transport Indemnity* was authored by a Washington supreme court justice sitting as judge pro tempore of the Washington Court of Appeals.
lot lost coverage after suddenly encountering IFR conditions during a flight from Bellingham to Olympia, Washington. The court held that "it is the weather conditions at the time and place of departure which are controlling."\(^{103}\)

In a concurring opinion written by Justice Goodloe, four justices disputed the majority's exclusion from consideration the pilot's knowledge prior to takeoff about the weather conditions to be expected en route.\(^{104}\)

J. The *Mark* Case

The most recent case discussing the IFR/VFR issue is *National Insurance Underwriters v. Mark*,\(^{105}\) in which the non-instrument rated pilot and his passenger suffered fatal injuries after departing into an indefinite ceiling with one quarter mile visibility restricted by heavy fog. The policy language at issue, identical to the language used by the same insurer in the *King Craft* and *Glover* decisions, required the pilots to be "properly rated for the flight and aircraft."\(^{106}\) Unlike the court in *King Craft* and *Glover*, however, the *Mark* court held that the clear, plain, and unambiguous policy language did not provide coverage for VFR pilots in IFR conditions.\(^{107}\)

V. ANALYSIS OF THE INCEPTION RULE

An analysis of the above cases demonstrates that the inception rule is suspect because its rationale is flawed, the rule leads to arbitrary results, and the rule has been neither uniformly applied nor universally accepted.

A. The Inception Rule's Rationale

The cases discussed in Part IV above indicate that the courts adopting the "inception rule" have ruled that the

\(^{103}\) *Id.* at 1250.

\(^{104}\) See infra Part V(C)(2) for discussion of the concurring opinion.


\(^{106}\) *Id.* at 1034.

\(^{107}\) *Id.*
phrase "the flight" requires the flight at issue to be considered as a whole. Using that ruling as a basis, the courts have justified the inception rule for several reasons: 1) The rule is easy to use because it allows a court to make a decision without resort to speculation or conjecture of what kind of weather conditions the pilot may have encountered en route; 108 2) The rule provides some security for pilots whose coverage might flicker on and off as they pass in and out of IFR conditions; 109 3) The insurer has the ability to draft unambiguous language in the policy. 110

Proper analysis of the inception rule requires a review of this supporting rationale. The following discussion demonstrates that aviation realities and the arbitrariness of results under the inception rule undermine the first two reasons. The third reason should not prevent the adoption of an interpretation compelled by universally understood aviation practice.

B. AVIATION REALITIES COUNSELLING AGAINST THE RATIONALE

1. The Difficulty of Establishing Inception Weather

At least one case has stated that the inception rule allows the court to determine the character of a flight without resort to the speculation or conjecture associated with determining whether the pilot actually encountered IFR conditions in flight. 111 Citing Transport Indemnity, the Zuver court noted:

The analysis in King Craft and Glover provides the court with a means to determine the character of a flight without resort to speculation or conjecture . . . . Generally, in aviation accidents there is very little, if any, physical evidence or eyewitnesses to assist the court in making a segmented analysis.

108 Zuver, 750 P.2d at 1250; Transport Indemnity, 740 P.2d at 324.
109 King Craft, 368 F. Supp. at 479.
110 See, e.g., King Craft, 368 F. Supp. at 478; Glover, 545 S.W.2d at 761; Transport Indemnity, 740 P.2d at 323-24.
111 Transport Indemnity, 740 P.2d at 324.
Thus, a court would be forced into a process of formulating conclusions founded upon mere probabilities.\textsuperscript{112}

The flaw with this rationale is that it assumes the weather at the time and place of departure can be determined without speculation, conjecture, or mere probabilities. The practical reality, however, is that determining the actual weather conditions existing at the time and place of departure, as required by the rule, is often difficult, if not impossible. While such difficulty should not, by itself, call for the abolition of the rule, it compromises the rule's stated purpose of predictability.

Although many of the larger airports in the United States have weather observation facilities on site, there is virtually no way for the trier of fact to determine the precise weather conditions at the majority of general aviation airports in the United States. There are over 12,904 airports for general aviation aircraft in the United States,\textsuperscript{113} yet surface weather observations are taken only at approximately 690 locations, and an even smaller number of airports have weather forecasts prepared for them.\textsuperscript{114} Though weather reports and forecasts for a "nearby" airport may be available, such infor-

\textsuperscript{112} Zuver, 750 P.2d at 1250 (quoting Transport Indemnity, 740 P.2d at 324).

\textsuperscript{113} Aircraft Owners and Pilots Association 1993 Aviation Fact Card [hereinafter AOPA Fact Card]. The fact card consists of 1991 data from the Federal Aviation Administration, the National Transportation Safety Board, and the General Aviation Manufacturers Association. Actually, in 1991 there were 17,581 aircraft landing facilities in the United States: 12,904 airports, 4199 heliports, 70 short takeoff and landing ports, and 408 seaplane bases. Id. Approximately 5090 were publicly owned while the remaining 12,491 were privately owned. Air carriers served 666 of the airports. Id.

\textsuperscript{114} But see infra note 118. The 690 locations referenced in the text are composed of the approximately 600 locations at which NWS or FAA personnel actually take a manual observation of the weather (AIM at § 7-10(a)), and the approximately 90 locations at which Automated Meteorological Observing Stations (AMOS) exist. AIM, supra note 1, § 7-10(b)(1). The National Weather Service (NWS) has one state forecasting office in each of the 50 states. Generally, that office prepares the forecasts for airports which have commercial or scheduled IFR operations. In Illinois, for example, there are approximately 1091 aircraft landing facilities. The NWS state forecasting office based at the Lewis University near Lockport, Illinois, prepares forecasts for only 10 airports in Illinois although approximately 21 airports in Illinois have weather observation reporting capability. NWS, Rosemont, Illinois office, (708) 298-1413. See also supra note 33. Many airports which have an air traffic control-tower generate weather observation reports, but not all tower controlled air-
mation may not be dispositive of the weather conditions at the precise time and place of departure.

Accordingly, in virtually every case in which a flight begins in a locale without its own weather observation facility, the determination of the weather conditions at the time and place of departure will almost always present a question of fact that will typically require eyewitness or expert meteorological testimony. Such testimony inevitably injects the very speculation or conjecture that the inception rule was designed to avoid. Where no eyewitnesses exist and the occupants of the aircraft have perished, the weather conditions at the time and place of departure will be difficult, if not impossible, to determine with any real certainty.

The *Ideal Mutual* and *Transport Indemnity* decisions are classic examples of the inception rule's failure to eliminate speculation or conjecture. In each case, the court had to remand the case on the issue of weather conditions existing at the time and place of departure. The reason necessitating the remands in those cases belies the evidential security courts have found in the inception rule. Neither the Pearson Airpark nor the Rockwall Texas Airport, the airports of departure in *Transport Indemnity* and *Ideal Mutual*, respectively, had any weather reporting facilities located at the airport. Consequently, the courts had virtually no means of determining the precise weather conditions at the airport of departure. The transparent simplicity of the inception rule did not support its application in either case. Herein lies a major problem with the inception rule.

Even where weather observation facilities do exist at the airport of departure, the weather at the time of departure may be different from the weather at the time the observation was made. The National Weather Service usually records surface weather observations at an airport approxi-

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115 See supra text accompanying notes 85-97.
116 This fact was confirmed by conversations with "JP" at the Federal Aviation Administration Flight Service Station in Kankakee, Illinois, on November 9, 1993, at 3:35 p.m.
mately ten minutes before every hour. The pilot who departs thirty minutes past the hour may face weather conditions that have improved or deteriorated dramatically during that forty-minute period. As a result, unless the pilot departs at the very moment the weather observation is taken, a question of fact will almost always exist as to the weather conditions at the precise time and place of departure.

Thus, the difficulty of establishing the weather at the time and place of departure counsels against the lack of "speculation or conjecture" rationale upon which the inception rule relies.

117 AIM, supra note 1, ¶ 7-11(b). The hourly surface weather observation typically includes the time of the report, the sky and ceiling conditions, the visibility and any obstruction to vision such as rain, fog, or haze; the sea level pressure (barometer reading) temperature and dew point, wind conditions, and any noteworthy remarks. A "special" or "record special" weather observation may be made when significant meteorological changes occur between hourly reports. AIM, supra note 1, ¶ 7-27.

118 The FAA has recently installed Automated Weather Observation Systems (AWOS) at various airports in the United States. These systems consist of various sensors, a processor, a computer-generated voice subsystem, and a transmitter to broadcast local, minute-by-minute, real-time weather data directly to the pilot over a discrete radio frequency. AIM, supra note 1, ¶ 7-10(d)(1). The message is typically accessible within 25 nautical miles of the AWOS site. AIM, supra note 1, ¶ 7-10(d)(4). The AWOS are classified in four basic levels. The AWOS-A only reports the current altimeter setting. The AWOS-1 reports the altimeter setting, wind data, temperature, dewpoint, and density altitude. The AWOS-2 provides the same information as the AWOS-1 plus visibility, and the AWOS-3 reports the same information as the AWOS-2 plus cloud and ceiling data. AIM, supra note 1, ¶ 7-10(d)(3). The problem from an evidentiary standpoint is that, presently, most of the transmitted data is neither recorded nor stored by the FAA. The primary surface weather observing system will ultimately be the Automated Surface Observation System (ASOS). The ASOS program is a joint effort of the National Weather Service, the Federal Aviation Administration, and the Department of Defense to install and operate up to 1700 systems throughout the United States. AIM, supra note 1, ¶ 7-10(f). The ASOS information relayed to the pilot is similar to, but may be more comprehensive than, that of the AWOS-3, especially if the ASOS report is augmented by a personal weather observer. (Such an observation is identified as "AO2A," whereas the unaugmented observation is identified as "AO2." AIM, supra note 1, ¶ 7-10(f)(4)(b)(4)). ASOS reports also have data collection packages that allow the preparation of hourly surface weather observations that are transmitted and collected by the NWS for dissemination to pilots. Id.
2. The Fortuity of the Airport’s Location and Time of Day

Another drawback associated with the inception rule is that, in cases where the accident is remote in time and location from the place of departure, the question of whether the flight was IFR or VFR may depend on the fortuitous location of the airport from which the flight departed.

For purposes of this hypothetical, refer to the aeronautical chart for the Chicago area attached as Appendix B to this article. Pilots who fly VFR typically refer to such a chart for navigation. Assume there are two identically qualified, non-instrument rated private pilots who intend to depart at the same time in identical airplanes to the same destination. Assume further that we are able to determine, without speculation or conjecture, that the weather at the time and place of departure is an 800-foot ceiling with two miles visibility. The only difference in our two flights is that one pilot will depart from the DuPage airport and one will depart from Olson airport approximately ten miles to the northwest of DuPage. Both pilots unfortunately crash three hours later after penetrating the same area of thunderstorms, and both pilots have identical insurance policies which require the pilot to be properly rated for the flight. The insurer then files a complaint for declaratory judgment claiming neither pilot was properly rated for the flight, and the case is heard by the same judge who applies the same law to both cases.

Given the above scenario, one would assume the coverage result would be the same for both pilots. But if the court applies the inception rule, the pilot who departed the Olson airport will be covered; the pilot who departed Dupage will not.

According to the chart in Appendix B, the Dupage airport lies in “Class D” (controlled) airspace. Federal Aviation Regulations provide that no person may take off under

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119 These charts are known as Sectional Charts and are published by the U.S. Department of Commerce, National Oceanic and Atmospheric Administration.

120 14 C.F.R. § 71.61 (1993).
VFR in Class D airspace unless the ground visibility is three statute miles\textsuperscript{121} and the ceiling is at least 1000 feet.\textsuperscript{122} Since the weather in our example was an 800-foot ceiling and two miles visibility, less than the minimum required for VFR flight in controlled airspace, IFR conditions existed, and the pilot needed an instrument rating to be rated properly for the flight, assuming the pilot did not obtain a special VFR clearance to depart from the airport.\textsuperscript{123}

Despite being only ten miles from the Dupage Airport, the Olson Airport lies in "Class G" (uncontrolled) airspace. The basic weather minimums for VFR flight in Class G airspace are one mile visibility and the pilot must remain clear of the clouds.\textsuperscript{124} Thus, the weather conditions at Olson, though identical to those at Dupage, were above the minimum weather conditions for VFR flight from that airport, and the VFR pilot was perfectly legal in making the flight without an instrument rating.

Change the facts of the above scenario and assume that (1) both pilots were taking off from the Olson airport, and (2) night officially begins at 5:00 p.m.\textsuperscript{125} One pilot takes off at 4:55 p.m. and the other departs ten minutes later. In this example, the pilot who departs later is not covered under the inception rule because flight from an airport in Class G airspace at night requires three statute miles visibility instead of the one mile required for day operations.\textsuperscript{126}

\textsuperscript{121} 14 C.F.R. § 91.155(a),(d)(1) (1993).
\textsuperscript{122} 14 C.F.R. § 91.155(c).
\textsuperscript{123} See supra note 17 (discussing Special VFR clearance).
\textsuperscript{124} See supra note 12.
\textsuperscript{125} Night is defined as the hours between the end of evening civil twilight and the beginning of morning civil twilight, as published in the American Air Almanac. AIM, supra note 1, at N-i. Civil twilight ends in the evening when the center of the sun's disk is six degrees below the horizon and begins in the morning when the sun's disk is six degrees below the horizon. Id.
\textsuperscript{126} 14 C.F.R. § 91.155(a). Note that if both pilots make a nighttime departure from the Olson airport at the same time in the same weather conditions described in the hypothetical, but one pilot wants to fly to a different airport and the other intends to stay in the airport traffic pattern to practice his night landings, and both pilots have an accident during their respective flights, the pilot who stayed in the airport traffic pattern would be covered under the inception rule while the other pilot would not. The reason is that the Federal Aviation Regulations allow a pilot to
These examples are just two of many showing that when the inception rule is applied, the determination of whether the flight was VFR or IFR can depend solely on the fortuity of the airport’s location or the time of day. There is no logical reason to justify differing coverage results where the occurrence is remote in time and location from the time and place of departure.

3. The Fallacy that the “Ambiguity” of “the Flight” Limits Inquiry to the Flight’s Inception

Because of the policy definition of the phrase, it may be difficult to quarrel with the courts’ literal reading of “the flight” to require a single characterization. The rub comes with the characterization the “inception rule” courts choose. Accepting the necessity of considering the flight as a whole, the question becomes: What is the most reasonable way to do so? This question takes us directly to the “inception rule” courts’ reliance on the existence of ambiguity and the approaches to a better solution.

At the outset, it should be noted that courts have not been unanimous in deciding whether the policy language referred to in Part III is ambiguous. As noted above, at least one court has indicated that the phrase “with ratings and certificates appropriate for the flight” is plain and therefore not ambiguous,127 and at least one court has found the phrase “properly rated for the flight” to be clear, plain, and unambiguous.128

Other courts, however, have held that the phrase “the flight” is ambiguous.129 Courts which have found the phrase “the flight” to be ambiguous have suggested that an exclusion prohibiting flight in IFR conditions unless the pilot holds a valid instrument rating may cure the ambiguity

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127 Jim Hawk, 270 N.W.2d at 468.
128 Mark, 704 F. Supp. at 1034.
129 Glover, 545 S.W.2d at 761-62.
problem. Yet another court has held that an exclusion for losses occurring as a result of operation "in violation of any governmental regulations for civil aviation applying ... to instrument flying" was unambiguous. This resulted in no coverage for a pilot who crashed just one-half mile after departing into fog that limited the ceiling and visibility to 50 and 150 feet, respectively. Another court allowed the insurer to deny coverage to a non-instrument rated pilot who crashed in IFR conditions where the policy required the pilot to be properly rated for "all segments of the flight involved." But it does not follow that the existence of more authoritative policy language necessarily means the present language is ambiguous.

The mandates imposed upon VFR pilots provide two approaches to challenging the findings upon which the courts premise their "inception of flight" rulings. First, it seems clear that Federal Aviation Regulations (FARs) referred to in Part II above, along with well-defined aviation customs, provide standards which leave little doubt among pilots about the meaning of the rated-for-flight provision. This approach challenges the very assumption of ambiguity which is the foundation of the "inception rule" solution. Second, given the expectations concerning pilots, including standards imposed by the FARs, a persuasive argument can be made that the inception of flight does not constitute a reasonable interpretation of the policy language under discussion. This approach is less difficult than the first because it accepts that there may be some theoretical ambiguity, but it proceeds to demonstrate that the interpretation favoring the insured is, in the words of the Glover court, in-

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132 Id.; see Tison v. Fidelity and Cas. Co. of New York, 181 So. 2d 835 (La. App. 1966) (policy language similar to Arnold but holding that insurer failed to meet burden of proving flight in IFR conditions). Because the policy language in Arnold and Tison differs from the language found in the cases cited in Part IV of the text, the cases were not considered in the inception rule analysis. See also Northwestern Flyers v. Olson Bros. Mfg. Co., Inc., 679 F.2d 1264 (8th Cir. 1982).
Indeed "unreasonable." Following is a brief review of the elements supporting these challenges.

Insurance companies do not generally insure risks which, for fundamental safety reasons, the insureds are forbidden to undertake. Specifically, the policies' focus on the pilot's ratings and qualifications leaves no doubt of the insurer's intent to protect itself from liability for accidents occurring when the VFR pilot risks conditions in which he is forbidden to fly. As Jim Hawk observed, the plain language of the policy provision at issue "pertains to increasing the hazard by flying beyond ratings." At least one other court has held "[i]nsurance coverage must not be afforded aircraft owners who ignore or refuse to comply with established certification requirements commonly part of policy exclusions." Indeed, the fact that courts have created the inception rule acknowledges the significant difference in risk between flight in IFR and VFR conditions.

This mandate that the pilot avoid weather for which he is not qualified applies just as categorically to conditions encountered during flight as to those existing at the time of take-off. It is inconsistent to hold that coverage exists for the non-instrument rated pilot who crashes in IFR conditions at his destination, a result compelled by the inception rule where VFR conditions existed at takeoff, when, even under the inception rule, no coverage exists for the non-instrument rated pilot who crashes in IFR conditions at takeoff, as in Jim Hawk. The "inception rule" standard violates basic common sense because it implicitly assumes it is reasonable for a VFR insured to conclude, as he takes off in VFR conditions, that he may later fly into IFR conditions without losing coverage. Indeed, the "flickering on and off" concern demonstrates the courts' assumption that a VFR pilot's flight might casually pass in and out of IFR conditions for which the pilot is unqualified.

134 Glover, 545 S.W.2d at 761.
135 Jim Hawk, 270 N.W.2d at 468.
137 See 14 C.F.R. § 61.03(e) (1993).
These assumptions are unfounded. As the *Glover* court acknowledged, pilots are *forbidden* to fly in IFR conditions unless they hold an instrument rating.\(^{138}\) Accordingly, the FARs make it plain that VFR pilots are expected to avoid IFR conditions.\(^ {139}\) In the vast majority of instances, this expectation can be fulfilled as pilots are trained to obtain and interpret weather data from the ground and in the air.\(^ {140}\) Pilots can update weather information in flight by communicating with Air Traffic Control or Flight Service Stations on the various frequencies referenced on the navigational charts used by VFR pilots.\(^ {141}\)

These realities demonstrate that, contrary to the assumption of the "inception rule" courts, it is *not* reasonable to characterize a flight by reference to a segment in which the pilot did no more than adhere to his basic qualifications when, in a later segment, he invited the very sort of accident against which his VFR-only limitation was designed to protect.

Insurance policies should not be interpreted in a vacuum; they should be construed in the context of the particular subject of insurance.\(^ {142}\) The application of this principle would not conflict with the rule properly favoring the insured in cases of ambiguity created by the insurer. Rather, it would merely aid the court in determining whether ambiguity in fact exists. In the *King Craft* and *Glover* circumstances, in which the pilots chose not to obey the mandate to avoid the weather that brought them ruin, there can be no legitimate doubt that the ambiguity princi-

\(^{138}\) *Id.*  
\(^{139}\) See 14 C.F.R. §§ 61.3(c), 91.155 (1993).  
\(^{140}\) See supra text accompanying notes 27-29.  
\(^{141}\) See supra notes 30, 36-38 and accompanying text.  
\(^{142}\) Although courts are reluctant to rely on custom and usage, they may, in limited circumstances, resort to it to explain insurance provisions which are ambiguous. See 13 JOHN A. APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 7388 (1992). It would appear the mandate that a VFR pilot avoid IMC is perhaps one of those customs which is "so well settled and generally known that all persons engaged in such trade may be considered as contracting with reference to it that it [may be] regarded as forming a part of a contract of insurance entered into to protect risks in such trade." *Id.* at 189.
ple does not properly apply. Since the aviation precepts reviewed above establish that the pilot who is rated only for VFR must avoid IFR conditions, a mandate which can be obeyed in most instances, it seems only sensible and fair to interpret the exclusion at issue in a way which does not stand these principles on their heads. Indeed, the very distinction between VFR and IFR ratings would be meaningless if VFR pilots were permitted to lapse into IFR flight. Since the "inception of flight" interpretation under the circumstances of King Craft and Glover is in complete conflict with the VFR pilot's training and responsibility to avoid IFR conditions and with the policy's obvious intent to limit the pilot's coverage to risks he is qualified to undertake, it should be discarded.

The above rationale is consistent with the general law of contracts. The Restatement (Second) of Contracts provides that "a condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under the contract becomes due."\textsuperscript{143}

Since the typical policy language states that coverage does not apply "while" the aircraft is flown by pilots other than those who are properly rated for the flight, and because such language usually is not a specific exclusion to the policy, one could argue that flight by non-instrument rated pilots in VFR conditions is a condition of the insurer's duty to pay under the policy. To resolve doubts as to whether flight in VFR conditions is made a condition of the insurer's duty to pay, an interpretation is preferred which will reduce the insured's risk of forfeiture.\textsuperscript{144} The Restatement provides, however, that if a condition is within a party's control, that party assumes the risk that its non-occurrence will discharge the insurer's duty to pay under the contract.\textsuperscript{145} Because pilots are trained to obtain and interpret weather data, and because they may choose not to make the flight or to avoid adverse weather conditions, it is

\textsuperscript{143} Restatement (Second) of Contracts § 224 (1981).
\textsuperscript{144} Id. § 227(1).
\textsuperscript{145} Id. § 227(1), (2).
difficult to argue that the condition of flight in VFR conditions is not within the non-instrument rated pilot's control. Thus, it does not seem unfair to say that a pilot under those circumstances assumes the risk that flight in IFR conditions will cause forfeiture of his coverage.

Insureds might argue that a disproportionate forfeiture occurs where the insurer's obligation to pay is discharged on the basis of the non-occurrence of a condition of VFR flight. The non-occurrence of the condition can be excused, however, "unless its occurrence was a material part of the agreed exchange." A comment to the Restatement provides "if the term that requires the occurrence of the event as a condition is expressed in unmistakable language, the possibility of forfeiture will not affect the interpretation of that language."

Most aviation insurers ask in the insurance application for the pilot's hours, ratings, and experience and, given that information, compute the premium applicable for the risk. The insurer then issues an endorsement or declaration page which sets forth the persons who are allowed to fly the airplane. The fact that insurers ask for and rely upon this information, coupled with general aviation knowledge that flight by non-instrument rated pilots in IFR conditions increases the insurers' risk, demonstrates that the condition of VFR flight by VFR pilots is not only expressed in unmistakable language, but is also a material part of the agreed exchange. Consequently, there appears to be little justification for a court to use forfeiture as a rea-

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146 "In determining whether the forfeiture is 'disproportionate,' a court must weigh the extent of the forfeiture by the obligee against the importance to the obligor of the risk from which he sought to be protected and the degree to which that protection will be lost if the non-occurrence of the condition is excused to the extent required to prevent forfeiture. The character of the agreement may, as in the case of insurance agreements, affect the rigor with which the requirement is applied." Id. § 229 cmt. b.

147 Id. § 229.

148 Id. § 229 cmt. a.
son to create an ambiguity or to excuse the condition of VFR flight.\textsuperscript{149}

\section*{C. Inconsistency of Results Caused by the Non-Uniform Application of the Pilot Knowledge Factor}

Another problem with the "inception rule" is that it has not been uniformly applied. Essentially, only four state jurisdictions have considered the IFR/VFR issue. Although three of the four states have adopted the inception rule, each of those states applies it differently. Washington, in \textit{Zuver} and \textit{Transport Indemnity}, did not consider a pilot's knowledge of the weather conditions in applying the inception rule.\textsuperscript{150} Texas, however, in Marr's \textit{Short Stop}, held that a pilot's knowledge of the weather conditions at takeoff (presumably as opposed to knowledge gained in flight) is a factor to consider in applying the inception rule.\textsuperscript{151} Notwithstanding Marr's \textit{Short Stop}, at least one Texas case has ignored strong evidence that the pilot knew before takeoff that he would encounter IFR conditions enroute.\textsuperscript{152}

\footnotesize
\textsuperscript{149} The court in \textit{Andersen} noted "because Federal law requires pilots to hold valid, current medical certificates to fly their planes legally, [the insurer] could justifiably have taken it as a given that [the pilot] would have such a [medical] certificate before operating the insured aircraft." 763 P.2d at 258. Similarly, because federal regulations require pilots to hold instrument ratings to fly in IFR conditions legally, insurers should be justified in assuming that pilots will have such a rating before flying into such conditions. Thus, forfeiting insurance coverage does not necessarily defeat the parties' reasonable expectations.

\textsuperscript{150} See supra notes 90-104 and accompanying text.

\textsuperscript{151} See supra notes 72-80 and accompanying text.

\textsuperscript{152} In Ranger Ins. Co. v. Robertson, 707 S.W.2d 135 (Tex. App.—Austin 1986, writ ref'd n.r.e.), the policy required the pilot to hold licenses and ratings as required by the FAA for the flight involved. The non-instrument rated pilot's plane crashed in weather conditions of an indefinite sky obscuring cloud ceiling of 200 feet with visibility of a half mile in rain, fog and haze. The trial court noted that VFR conditions prevailed at the time and place of takeoff and held that the pilot did not know at the time of departure that he would encounter IFR conditions. \textit{Id.} at 139. The court of appeals noted that: (1) the area forecast warned the pilot of possible IFR conditions along the route; (2) the FSS briefer advised the pilot that VFR flight was not recommended; and (3) the NTSB investigator and two pilot experts testified that the weather briefings given to the pilot advised him of the potential for IFR conditions en route. \textit{Id.} at 140-41. Based on that record, the court would have found the pilot not appropriately rated for the flight. \textit{Id.} at 142. But because the court would not
Assuming that the *Andersen* court of appeals' decision is still good law, Arizona has modified the inception rule by allowing courts to consider weather forecasts (as opposed to weather reports of existing conditions) available to the pilot at the time and place of departure. The fourth state, Iowa, presumably would not adopt the inception rule because the *Jim Hawk* court found no ambiguity in the policy language which required the pilot to be appropriately rated for the flight.

The federal decisions reflect a similar split of authority. In *King Craft*, the Fifth Circuit affirmed the district court's refusal to consider a pilot's knowledge of the weather conditions, while in *Ideal Mutual* the same court held that a pilot's knowledge of the weather conditions at takeoff must be considered by the court in applying the inception rule. The Eighth Circuit would probably reject the pilot's knowledge of the weather conditions because the court paid little attention to the insurer's argument in *Northwestern Flyers* that the pilot voluntarily chose to fly above 18,000 feet. If the court in *Ideal Mutual* had ignored pilot knowledge as *King Craft* suggests, or in hindsight as *Zuver* suggests, then there would have been no reason to place any weight on the statement during the pilot's preflight briefing that VFR conditions were expected for the flight. Even if pilot knowledge were a relevant inquiry, the inception rule required the court in *Ideal Mutual* to ignore that statement because it was over one and a half hours old and therefore did not contain evidence indicative of the weather at the time and place of departure.

The application of the inception rule clearly differs from one jurisdiction to another thereby resulting in inconsistent decisions. These differences in approach reflect varying de-

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153 *Andersen*, 763 P.2d at 261; see *supra* note 81 and accompanying text.
154 *Jim Hawk*, 270 N.W.2d at 468. See *supra* notes 60-66 and accompanying text.
155 See *supra* notes 40-45 and accompanying text.
156 See *supra* notes 85-89 and accompanying text.
degrees of understanding concerning aviation realities rather than any basic difference in considered theory.

I. Why Courts Reject Pilot Knowledge

Having established that the rationale for the inception rule is weak at best, perhaps it is appropriate to question whether there is any reason to reject pilot knowledge of the weather conditions in determining whether the pilot was properly rated for the flight.

The case most often cited for the refusal to consider the pilot's knowledge of the weather conditions is Glover. Glover, however, indicated only that the pilot's knowledge of the weather conditions was not controlling. The stated reasons for rejecting evidence of the pilot's knowledge of the weather conditions are that (1) it forces the court to question the reasonableness of the pilot's actions when the pilot purchased insurance to protect himself from the consequences of his own negligence, and (2) it forces the court to adopt the precepts of negligence law without requiring any causation between the pilot's knowledge and the cause of the crash.

In an earlier case, the Pennsylvania Supreme Court, albeit dealing with different exclusionary wording, expressed this concern in more detail:

[The VFR pilot's] culpability lay in the fact that he crossed over to the nonvisual world when he was certificated to fly only in the visual world. If he transgressed any rule of the CAA, it was in the area covering visual flying. But this circumstance does not help the [insurer's] case because violation of the rules of visual flying does not exclude liability under the policy. It would be quite illogical if it were otherwise. If an insurance policy would not indemnify a visual flight pilot for losses incurred by an infraction of visual flight rules, there would be little purpose in purchasing a policy. Obviously the only reason why one undertakes to

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157 Glover, 545 S.W.2d at 763.
158 Id.
159 Transport Indemnity, 740 P.2d at 326.
pay a stated sum for protective insurance is to be saved harmless in the event he does something wrong. If an accident occurs when he is doing what is right, he would not be liable in any event.\textsuperscript{160}

This statement may illuminate the essential problem raised by the policy language under discussion: finding the proper balance between the insured pilot's desire to purchase insurance against her own negligence and the common-sense conclusion that neither the insurer nor the VFR pilot should expect coverage to apply where the aviation mandates are disobeyed by acts known by all VFR pilots and aviation insurers to increase the risk of loss.

\section*{2. Why Pilot Knowledge Should Be Considered}

At the outset, it should be noted that courts' unwillingness to consider the pilot's knowledge or state of mind is not compelled by insurance law in general. In other types of insurance coverage disputes, evidence of the insured's knowledge or state of mind is relevant and essential. For example, courts may consider the insured's knowledge where the insured allegedly commits misrepresentation or fraud,\textsuperscript{161} knowingly misrepresents his prior medical history\textsuperscript{162} or contests the applicability of the "intentional act" exclusion in a policy.\textsuperscript{163} Thus, the blanket statement that an insured's knowledge is not relevant to actions sounding in contract has no basis in the law.

The concurring opinion by Justice Goodloe in \textit{Zuver} summarizes the problems associated with blind application of

\textsuperscript{160} Weismann v. Prashker, 175 A.2d 63, 68 (Pa. 1961). Though its ultimate decision is suspect, \textit{Weismann} is required reading for anyone remotely interested in aviation-related literary entertainment. Contained among numerous pearls of wisdom is the court's observation that the non-instrument rated pilot in IFR conditions "could only grope and hope." \textit{Id.} at 66.


\textsuperscript{162} \textit{Appleman & Appleman, supra} note 161, § 277.

\textsuperscript{163} See \textit{Western States Ins. Co. v. Kelley-Williamson Co., 569 N.E.2d 1289, 1292-93 (Ill. App. Ct. 1991) (considering insured's mental capacity in determining whether insured intended to drive vehicle into building).}
the inception rule by observing that under the majority’s analysis:

[C]lear weather at the time and place of takeoff guarantees insurance coverage for a VFR pilot for the entire flight, even if the pilot deliberately chooses to violate the Federal Aviation Regulations (FARs) requiring VFR pilots to fly only under weather conditions allowing specified ranges of visibility. Therefore . . . a VFR pilot could take off from an airport in Yakima or Spokane under clear skies, knowing that poor weather conditions exist over the mountains; that pilot could continue west and, upon encountering conditions under which he is not qualified to fly, continue onward, deliberately entering cloud banks which obscure his view, all without disrupting his insurance coverage.¹⁶⁴

As the above excerpt suggests, the decision to penetrate IFR conditions, or to continue flight therein, usually will be a knowledgeable one. It is perhaps this quasi-intentional policy violation which results in the same unfairness to the insurer as that caused by misrepresentation.

As stated above, some courts have expressed concern that consideration of the pilot’s knowledge of the weather conditions forces a court to adopt the precepts of negligence law without considering whether the pilot’s knowledge was causally related to the loss. However, especially in states which do not impose the causal connection requirement,¹⁶⁵

¹⁶⁴ Zuver, 750 P.2d at 1251 (emphasis added).
one should remember that the reason for inquiring into the pilot's knowledge is not to determine whether he was at fault for the occurrence. Rather, the inquiry is conducted solely to search for available evidence of the weather conditions that the pilot encountered. The answer to the question will determine whether a breach of the contract or the failure to comply with a condition has occurred. If the court determines that a breach has occurred by flying into IFR conditions, then no coverage should be afforded under the policy. Such a result would be perfectly consistent with cases denying coverage without requiring a causal connection between the accident and the pilot's failure to have a

valid medical certificate,\textsuperscript{166} a biennial flight review,\textsuperscript{167} an aircraft type rating,\textsuperscript{168} or a valid aircraft airworthiness certificate.\textsuperscript{169} In states which require the breach of the policy term or condition to be causally related to the loss in order for the insurer to avoid coverage,\textsuperscript{170} a court should not be reluctant to apply the "precepts of negligence" law because it will apply those precepts when determining whether the policy breach contributed to the cause of the loss.

The second fault with the "precepts of negligence" argument is that it assumes that the insured is the only party who benefits from the rejection of the pilot's knowledge of the weather conditions. Though one might argue that the inception rule is designed to protect the insured to the detriment of the insurer, the following example, similar to the facts in \textit{Ideal Mutual}, demonstrates that ignoring evidence of the pilot's knowledge of the weather conditions can be unfair to the insured as well as the insurer.

Suppose, for example, Pilot A is intending to depart from an airport which requires the minimum weather conditions for VFR flight to be one mile visibility and requires the pilot to remain clear of the clouds. The pilot telephones the FSS from the airport of intended departure and the following conversation takes place:

\begin{quote}
FSS: We don't have any weather information for your airport, but Smith Field five miles north is reporting visibility
\end{quote}


\textsuperscript{167} See, \textit{e.g.}, Edmonds v. United States, 642 F.2d 877, 883 (1st Cir. 1981).


\textsuperscript{169} See, \textit{e.g.}, Avemco Ins. Co. v. White, 841 P.2d 588, 589 (Okla. 1992).

of 4 miles, and Jones Field five miles south is reporting one-half mile visibility with light rain and fog.

Pilot: Well it looks to me here at the airport that the visibility is about two miles because I can see the trees at the end of the farm next to the airport.

The pilot then departs and later has an accident. Suppose that a witness later testifies that he was in the airport lobby at the same time that the pilot departed the airport and is adamant that the visibility could not have been greater than one-half mile at takeoff.

Because the inception rule requires the court to look only at the weather conditions existing at the time and place of departure, the court must reject the evidence of the weather at the Smith and Jones airports. Likewise, because the inception rule requires the court to exclude from consideration the pilot’s knowledge of the weather conditions, his statement to the FSS briefer is inadmissible. Consequently, the only admissible evidence is the testimony of the ground witness who testified that IFR conditions existed at the time and place of departure. This would likely result in summary judgment in favor of the insurer when, if the pilot’s statement were admitted, the trier of fact could weigh the evidence and possibly find that the pilot’s perception of the weather was more accurate than that of the ground-based witness. The inception rule prohibits such a balancing test. The rule also prevents the court from using the weather data at Smith and Jones Fields as circumstantial evidence of the weather conditions at the place of departure. Another example of how the insured can suffer from a court’s failure to consider his knowledge of the weather conditions appears in the next section.

3. How Much Knowledge Should Be Considered

The Texas Supreme Court’s decision in *Marr’s Short Stop*171 and the Arizona court of appeals’ decision in *Ander-
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seek a balance between aviation realities and the insured pilot's legitimate purpose in obtaining coverage. As discussed above, *Marr's* held that no coverage applied because the pilot received pre-flight weather reports that supported a finding that he actually knew he would be flying into IFR conditions. The court also ruled that the VFR pilot's request for and receipt of an IFR clearance for take-off could support a finding by the jury that the pilot actually knew at the inception of the flight that he would be flying into IFR conditions. Although the *Marr's* test (and the concurring opinion's test therein) and *Andersen* are a step in the right direction, neither case goes far enough. Each has several shortcomings that flow from the inherent restriction to weather reports and forecasts available to the pilot at the time and place of departure.

The problem with such a restriction is that it does allow consideration of the recency or accuracy of a forecast and does not acknowledge a pilot's ability to obtain updated weather information in flight. Although area and terminal forecasts are issued by the National Weather Service (NWS) three times daily, the NWS may amend the forecasts as conditions change or stabilize. As previously discussed, pilots have the ability to communicate in flight with various facilities to update stale weather information, to obtain real time weather data, and to determine whether the weather conditions en route or at the intended destination are in accord with the forecast.

The concurring opinion in *Marr's Short Stop*, later adopted in *Andersen*, unfortunately would require a court to ignore evidence a pilot obtains in flight. The failure to consider such information can result in unfairness either for the insured or for the insurer. For example, assume that a pilot's pre-flight weather briefing indicates that VFR conditions prevail at the time and place of departure, that IFR conditions currently exist at the destination airport, and

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173 *Marr's Short Stop*, 650 S.W.2d at 5.
174 *See supra* note 33.
that IFR conditions are forecast to exist at the time of arrival at the destination airport. The pilot makes a legal departure in VFR conditions, contacts a Flight Service Station en route who advises him that the weather at the destination airport has dramatically improved to VFR conditions, and later has an accident. Under the Marr's Short Stop concurrence, the pilot would be deemed not properly rated for the flight because the reports and forecasts at the time of departure indicated that IFR conditions did and would prevail at the destination. This result would be unfair to the insured where there is little additional information known about the weather conditions that the pilot encountered en route.

If one agrees with the Marr's Short Stop court that a pilot should not expect to be covered if she takes off knowing that she will fly into conditions for which she is not rated, then perhaps the scope of this assumption-of-the-risk rationale should not be limited to conditions of which the pilot is aware at the inception of the flight. Furthermore, the question remains as to what constitutes the kind of knowledge which will suffice to prevent coverage.

In regard to both the weather conditions and the pilot's knowledge of them, it seems illogical to choose the conditions prevailing at the inception of flight on the basis of practicalities. As demonstrated in the previous section, the lack of specific data concerning many points of take-off may make it no less difficult to characterize accurately the "inception of flight" conditions and pilot knowledge than to characterize conditions and knowledge arising later in the flight.175

The court in Marr's Short Stop emphasized pointedly that the pilot in Glover "did not know when he took off that he was flying into IFR weather."176 Thus, although Marr's Short

175 See supra notes 111-18 and accompanying text (discussing difficulties in determining weather conditions at the time and place of departure).

176 Marr's Short Stop, 680 S.W.2d at 6. The pilot in Glover did know that at the time he took off IFR conditions existed in his projected flight path, but it was forecast that VFR conditions would exist at the time of his arrival. Id.
Stop looks beyond the weather conditions prevailing at the time and place of take-off, it limits the consideration of the pilot’s knowledge to the period before and at take-off. But if the pilot’s request for an IFR clearance to depart in Marr’s Short Stop was sufficient evidence of intent, then so should have been the King Craft pilot’s request for an IFR clearance to land. Furthermore, the King Craft tower controller’s statement minutes before the accident that IFR conditions prevailed at the airport of intended destination certainly had the same degree of trustworthiness as the pre-takeoff statements of the Marr’s Short Stop tower controller.

Accordingly, there is no persuasive practical reason why the knowledge that the Marr’s Short Stop court and Justice Goodloe’s concurrence in Zuver found so persuasive should be limited to that which the pilot possesses at the beginning of the flight. Rather, the fairness motivating the Marr’s Short Stop court and Justice Goodloe can be honored only by considering knowledge later acquired during the flight as well. It seems only reasonable to extend the Marr’s Short Stop rationale to any situation in which the VFR pilot acquires knowledge of impending IFR conditions requiring changes in altitude or course. Unfortunately, Andersen specifically refused to reach the issue of a pilot’s duty once he becomes aware of information during the flight which suggests that the conditions en route have become IFR. The question then becomes: What kind of knowledge will invoke this responsibility?

Presumably, in most cases the VFR pilot’s entering IFR conditions will constitute a knowledgeable undertaking. But it is possible that occasionally the VFR pilot may unexpectedly encounter IFR conditions. In such a case, it would appear reasonable to argue that the VFR-only pilot’s mandate to obtain and interpret weather data and avoid IFR conditions imposes upon him constructive knowledge of weather conditions developing along the route and that this constructive knowledge should prevent coverage under

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177 For a general discussion of the VFR-into-IFR accident, see Horne, The VFR-Into-IMC Accident, supra note 9.
the exclusion at issue. If a pilot discovers en route that two airports within ten miles of his intended destination are reporting IFR (VFR) conditions, the pilot arguably has constructive knowledge that IFR (VFR) conditions may, though not necessarily must, exist at his destination.

The tenet of granting coverage absent clear wording to the contrary would appear to permit, at the least, that constructive knowledge of such an extreme sort as to constitute, in and of itself, an assumption of the risk should be grafted onto the exclusion under discussion. Such a high degree of constructive knowledge could be likened to the "wilful and wanton disregard" which, like intentional acts, supports punitive damages awards in some jurisdictions. The strong mandate that the VFR-only pilot must avoid IFR conditions suggests that constructive knowledge in the present context must also include knowledge that the reasonable pilot in her shoes would have had or acquired in similar circumstances.

VI. A PROPOSED SOLUTION

Having established that (1) the inception rule's rationale does not justify its application, (2) the rule has been applied differently by different jurisdictions, (3) at least one jurisdiction has largely rejected the rule, (4) most IFR/VFR issues are unlikely to be decided by summary judgment, and (5) consideration of the pilot's knowledge of the weather conditions both before and during the flight is neither unfair nor contrary to any rule of law, it seems appropriate to propose a different test for determining whether a pilot was properly rated for the flight involved.

\footnote{Since constructive knowledge is knowledge that a reasonable person would have or acquire in the same circumstances, a VFR-only pilot would presumably not be held to have knowledge which those circumstances placed beyond his reach.}

\footnote{In Illinois, for example, the first prerequisite to a jury's imposition of punitive damages is that the defendant's conduct "was wilful and wanton." "Wilful and wanton" conduct is defined as "a course of action which shows actual or deliberate intention to harm or which, if not intentional, shows an utter indifference to or conscious disregard for a person's own safety and the safety of others." Illinois Pattern Jury Instructions, Civil, Nos. 14.01 and 35.01 (2d Ed. 1971).}
This author's suggested test for courts faced with the IFR/VFR coverage issue discussed herein is as follows:

In determining whether a non-instrument rated pilot was properly rated for the flight, the trier of fact should examine all evidence tending to establish the weather conditions encountered by the pilot during the flight at issue. Evidence relevant to the weather conditions encountered should include: (1) the type of airspace through which the pilot flew, (2) surface weather observations, (3) any weather forecasts including area and terminal forecasts which were available to the pilot before or during the flight, (4) preflight weather briefings (most of which are recorded by the FAA), (5) any inflight weather information given to or requested by the pilot, (6) satellite or radar images of the weather, (7) statements of other pilots in the area, (8) any statements by the pilot, (9) statements of any ground-based occurrence witnesses, and (10) expert testimony, if necessary. If, based on what is known about the routes and altitudes flown by the pilot, an examination of such evidence establishes that, more likely than not, the pilot did not encounter weather conditions less than the minimum weather conditions required for VFR flight, then the pilot is properly rated for the flight.

The proposed rule is consistent with the policy language at issue in inception rule decisions because it can be used to look at the flight as a whole. If, given the above evidence, the entire flight as a whole (i.e., from takeoff to landing, or as otherwise defined in the policy), could not have been

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180 The route and altitudes are important because a pilot may have flown above the area of adverse weather. For example, even if all of the weather reporting stations along the middle third of the route show that IFR conditions prevailed at those locations, other weather data such as pilot reports (PIREPS) might establish that the cloud tops along that portion of the route were 3000 feet above the ground. Additional evidence such as air traffic control radar data or transcripts may establish that the pilot actually flew the aircraft along that route at an altitude of 4500 feet and therefore clear of the adverse weather. So long as the pilot complies with the visibility and distance-from-cloud requirements for VFR flight as set forth in 14 C.F.R. § 91.155(a), see supra note 12, the private pilot is not required to maintain visual contact with the ground during an otherwise VFR flight. Thus, it is possible for a private pilot to fly in VFR conditions above, or "on top" of, an area of IFR conditions. Student pilots, however, must maintain visual contact with the ground. See 14 C.F.R. § 61.89(a)(7) (1993).
conducted in VFR conditions, there is no coverage for the loss. A pilot's knowledge of what the weather is or might be should be neither dispositive nor totally ignored in determining whether the flight was IFR or VFR. In other words, if a pilot is told by the FSS briefer during his weather briefing that IFR conditions exist along his route of flight, the court's inquiry should not terminate.\(^{181}\) By the same token, however, such evidence should not be ignored, because it is relevant, not to the issue of the reasonableness of the pilot's conduct, but to the issue of the weather conditions which may have existed during the flight. Thus, a court should neither affirm nor deny coverage solely on the basis of the pilot's knowledge of the weather conditions, but should consider such evidence along with any other relevant evidence presented on the issue of the weather conditions encountered during the subject flight.

VII. ANTICIPATED PROBLEMS WITH THE PROPOSED TEST

As with any proposed rule for determining such an issue, one can expect several arguments against the test.

A. THE PRINCIPLE OF INTERPRETING CONTRACT PROVISIONS IN LIGHT OF ESTABLISHED PRECEDENT

In *Parker v. Provident Life and Accident Insurance Co.*,\(^{182}\) the Tennessee Supreme Court stated:

> It is true that . . . "there is no judicial duty but to give the language its usual and ordinary meaning." We adhere to that view; but a corollary rule of construction is also applicable, i.e., when the courts have repeatedly interpreted certain words in legal documents as having a particular meaning and the drafters of such legal documents continue to use such words with knowledge of the interpretation placed upon them by the courts it will be assumed that the drafts-

\(^{181}\) See *supra* note 178.

\(^{182}\) 582 S.W.2d 380 (Tenn. 1979).
men in using such words did so knowingly with the intention that such judicial gloss will be placed upon them.\textsuperscript{183}

Despite the few cases implicating the kind of provision at issue, one could argue that the "inception rule" appears to be well entrenched. As the courts in \textit{King Craft} and \textit{Glover} noted,\textsuperscript{184} insurers have the ability to write exclusions of unassailable clarity. Thus, courts which earlier might have been receptive to the rule proposed above might arguably still apply the "inception rule" at this late date, especially since it appears that many of the policies in existence today continue to use the same language that some courts have construed as ambiguous. It would appear, however, that the relatively small number of cases and jurisdictions espousing the "inception rule," coupled with the inconsistent application of the rule, do not amount to a body of precedent sufficient to create an effective gloss on the policy language under discussion.

\textbf{B. The Well-Established Principle Favoring the Existence of Coverage}

Perhaps the greatest obstacle to the proposed rule — the one that was no doubt pivotal in creating the inception rule — is the courts' general desire to rule in favor of insurance coverage whenever possible. There is no need to recite here the multitude of ways the courts express this desire.\textsuperscript{185} As fair as the proposed test may be, lawyers will continue to argue, and courts will continue to hold, that insurers have the means to write exclusions of absolute clarity concerning pilots who have accidents in weather conditions for which they are not rated. Perhaps this article and some of the cases cited herein have established that the policy language at issue is neither ambiguous nor in need of redrafting.

\textsuperscript{183} 582 S.W.2d at 383; \textit{see also} Rafiero v. American Employer's Ins. Co., 85 Cal. Rptr. 701, 706 n.4 (Cal. Ct. App. 1970) (stating that it is not necessary to apply rules of construction when policy provisions like the one at issue have been amply treated in precedent).

\textsuperscript{184} \textit{See Glover}, 545 S.W.2d at 764; \textit{King Craft}, 368 F. Supp. at 479.

\textsuperscript{185} For a review of approaches courts take to ensure liberality in the construction of insurance contracts, \textit{see} 13 \textit{Appleman & Appleman, supra} note 142, §§ 7401-05.
C. THE POSSIBILITY OF UNFAIR RESULTS

One might argue that the proposed rule would result in unfairness to a pilot who departs in beautiful VFR conditions, flies for five seconds in IFR conditions through the only cumulus cloud in the state, flies two hours thereafter in VFR conditions, and suffers an accident in VFR conditions. In such a situation, the inception rule may yield a more just result than the proposed rule because the proposed rule would result in no coverage despite the unrelated and relatively minor breach. Notwithstanding the fact that the likelihood of such an occurrence is remote, the real argument in this situation sounds in causation. Such a scenario should be treated in the same manner courts have handled other policy violations, such as flight without a valid medical certificate or aircraft airworthiness certificate, which are unrelated to the loss. The result depends on how the particular jurisdiction applies the causal connection requirement as referred to in Part V(C)(2) of this article.

A corollary argument is that the proposed rule will give insurers another means by which to escape coverage. This argument is illusory because the rule does not create an exception to coverage; it is simply a tool to aid the court in determining whether the pilot has complied with a stated policy condition.

Another anticipated argument is that the existence of coverage under the proposed rule may depend on the fortuity of the place of the accident. For example, one might argue that if the ceiling is 800 feet and the visibility is two miles, the pilot who crashes in controlled airspace is not covered while the pilot who crashes in uncontrolled airspace is covered. The answer in such a case, unlike the answer to the hypothetical situation raised in part V(B)(2) of this Article, does not depend exclusively on the type of airspace involved. Rather, the answer depends on whether the pilot encountered IFR conditions. One must not forget that it is entirely possible to encounter IFR conditions even where ground-based surface weather observations indicate VFR conditions.
VIII. CONCLUSION

The above analysis has established that the inception-rule has been neither universally accepted nor uniformly applied, has created coverage where it otherwise should not have existed, and has the potential to destroy coverage where it should exist. Though some courts have gone to great lengths to find ambiguous the policy language requiring the pilot to be properly rated for the flight, well-established aviation practices counsel against such a conclusion. Moreover, the rule's failure to account for a pilot's preflight and inflight knowledge of the weather has no sound legal justification, and the difficulty of establishing the inception weather undermines the rule's dream of speculation-free decisions. Consequently, the rule encourages arbitrary results which can be unfair to both the insured and the insurer. The rule, therefore, should be abolished. The test proposed in this article, though not without faults, is designed to avoid the inception rule's shortcomings and to provide the courts with a more fair and just test for determining whether the pilot is properly rated for the flight.
## APPENDIX A

### SUMMARY TABLE OF IFR/VFR CASES IN TEXT

<table>
<thead>
<tr>
<th>Case</th>
<th>Court</th>
<th>Policy Language</th>
<th>Ambiguous</th>
<th>Follows Inception Rule</th>
<th>Considers Pilot Knowledge</th>
</tr>
</thead>
<tbody>
<tr>
<td>King Craft</td>
<td>5th Circuit</td>
<td>while properly rated for the flight</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Glover</td>
<td>Texas</td>
<td>while properly rated for the flight</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Jim Hawk</td>
<td>Iowa</td>
<td>with ratings and certificates appropriate for the flight</td>
<td>No</td>
<td>No</td>
<td>Undecided</td>
</tr>
<tr>
<td>N'west Flyers</td>
<td>8th Circuit</td>
<td>with ratings as required by the FAA for the flight involved</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Marr's Short Stop</td>
<td>Texas</td>
<td>with ratings as required by the FAA for the flight involved</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes. Conditions a Takeoff Only</td>
</tr>
<tr>
<td>Andersen*</td>
<td>Arizona</td>
<td>properly certificated, rated and qualified under the current applicable FARs for the operation involved</td>
<td>Undecided</td>
<td>Yes</td>
<td>Yes. Conditions and Forecast at Takeoff Only</td>
</tr>
<tr>
<td>Ideal Mutual</td>
<td>5th Circuit</td>
<td>with ratings as required by the FAA for the flight involved</td>
<td>Undecided</td>
<td>Yes</td>
<td>Yes. Conditions at Takeoff Only</td>
</tr>
<tr>
<td>Transp. Indmty.</td>
<td>Wash.</td>
<td>properly rated for the flight involved</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Zuwer</td>
<td>Wash.</td>
<td>properly certificated, qualified and rated under the current applicable FARs for the operation involved (exclusion), with appropriate ratings as required by the FAA for the flight involved (pilot warranty)</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Mark</td>
<td>D. Colo.</td>
<td>while properly rated for the flight</td>
<td>No</td>
<td>No</td>
<td>Undecided</td>
</tr>
</tbody>
</table>

* Vacated on other grounds.