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Jason B. Libby

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WAR RISK AVIATION EXCLUSIONS

JASON B. LIBBY

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I. INTRODUCTION

THIS COMMENT addresses a series of cases that grew out of military-related aviation accidents during World War II. After the United States entered the Second World War, it dramatically increased its use of the airplane as an instrument of war. The tactical use of the airplane resulted in an increased number of aviation-related deaths, either from United States planes being shot down or from crashing as a result of mechanical failure.

Survivors of deceased American pilots and crews sought recovery as beneficiaries under the deceased's life insurance policies. The insurance companies often denied recovery, alleging that the insurance policies did not cover the particular cause of death. The beneficiaries of the life insurance policies, in contrast to the insurance companies, argued that the life insurance policies provided coverage or that they were at least ambiguous and should be construed in favor of the insured.

This comment examines the litigation resulting from the conflict between the insurance companies and the survivors of American soldiers seeking recovery under various life insurance policies. Special attention is given to aviation exclusions where certain risks associated with aerial flight are risks not covered under the respective life insurance policy. Policy exclusions from war related risks and policies covering war-related risks are also examined in connection with the aviation accidents. The specific issue addressed is

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1 The Japanese aerial attack on Pearl Harbor on December 7, 1941, not only created popular support for the United States entry into the war but also demonstrated the destructive capabilities of military airplanes.
3 See infra part II.B.2.
4 See infra part III.B.2.
5 See infra part III.A.
what effect an aviation exclusion clause has on insurance coverage in the event of an aviation accident.

The current increase in world-wide violence, political unrest, and the United States involvement in armed conflicts abroad creates a contemporary need and interest in a closer inquiry into situations which could possibly give rise to a dispute over life insurance coverage in the aviation context.\(^6\) Military and civilian planes flying to the Middle East during the Gulf War caused insurance underwriters and insureds to reexamine their aviation insurance policies.\(^7\) More recently, the political struggle in Russia\(^8\) and the conflicts in Somalia\(^9\) and the former Yugoslavia\(^10\) will place aviation insurance policies under renewed scrutiny.

In the event of a crash resulting from a war risk, the basic questions are whether the survivors of the passengers and crew members can recover under their respective life insurance policies, and whether the owners of the aircraft are insured for the loss of the airplane.\(^11\) The existence and interpretation of war risk and aviation exclusion clauses in an insurance contract are central to answering these questions.


\(^7\) See Denise Gellene, *Pan Am Halts Flights to Tel Aviv and Riyadh*, Los Angeles Times, Jan. 4, 1991, at D1. During the Persian Gulf War, Pan American Airlines canceled flights to the region because its insurance rates increased ten to twenty times the normal rates; see Souter & McIntyre, *supra* note 6, at 1. The authors explain that the war created confusion about war risk exclusions. "Policy holders queried whether military actions ordered by Saddam Hussein would be excluded under the war risk exclusion clauses if they took place outside of Iraq or Kuwait." *Id.*

\(^8\) At the time this comment was written, Russian President Boris Yeltsin and the Russian Parliament were engaged in a struggle for control of the government. See Yeltsin and Foes in Parliament Sign Agreement, Wall St. J., Oct. 1, 1993, at A6.


\(^11\) This is a very basic hypothetical for purposes of introducing the topic. Issues concerning civilian plane crashes, military plane crashes, civilian passengers, military passengers, governmental immunity, matters of insurance policy construction, and other relevant considerations will be developed fully in the article.
An aviation exclusion clause limits or suspends the coverage of an insurance policy in certain situations, resulting in denial of beneficiary recovery. The excluded risks are usually those that the underwriter feels will materially increase the risk of loss. The exclusionary clause often excludes a war risk. Exclusionary language usually makes a statement similar to the following: "This Policy does not apply . . . [u]nder Coverage A [Liability], to liability assumed by any insured under any contract or agreement. . . ." Thus, insurance contracts simply do not cover certain excluded risks. Insurance companies use these exclusions to ensure that the aviation policy covers what is meant to be insured and limits the liability of the insurer for those events that are not meant to be included in the coverage.

This comment is organized into three parts. The first section gives an historical perspective of aviation and aviation insurance with a discussion of modern developments. It discusses the rise of aviation as a mode of transportation and the corresponding growth of aviation insurance. The second section explains war risk and aviation exclusions and their application in the context of case law interpretations. The current status of war risk aviation insurance exclusions and some of the controversies pertaining to them are analyzed. Cases involving life insurance policies as well as cases involving property insurance demonstrate the application and controversy of insurance exclusions. Matters concerning war risk insurance exclusions that are yet to be resolved will also be identified.

The final section includes analysis and public policy considerations. Answers to the confusion surrounding war risk

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13 Id.
17 Id.
and aviation exclusions and possible future developments are considered. The federal government’s response to the problem of war risk insurance via the Federal Aviation War Risk Insurance Program is included in this discussion.

II. HISTORICAL BACKGROUND

A. EARLY AVIATION AND AVIATION INSURANCE

On December 17, 1903, at Kitty Hawk, North Carolina, Orville Wright made the first controlled flight of a powered aircraft. The Wright brothers’ aerial achievements began the most significant era in transportation history. In a short period, the United States developed a large and complex airline industry that completely changed travel and transportation.

The United States Post Office sparked the beginning of the American airline industry. But these early flight attempts—around 1911-1912—faced problems of poor weather, undependable planes, and limited use of planes at night. These problems were solved through the assistance of military pilots, planes and technology. With this help, regularly scheduled airmail services began in the United States around 1918. By 1924, the post office achieved twenty-four hour air mail schedules, and the airplane secured its place in the new age of transportation.

The commercialization of the airline industry was largely the result of the Airmail Act of 1925 which encouraged the commercial operation of airmail transportation. In a mat-

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19 Id.
20 Id. at 1-2.
22 V. Foster Rollo, Aviation Law: An Introduction 53 (2d ed. 1982). The early airmail flights were regarded as little more than stunts. Id. (citing Kane & Vose, supra note 18, § 5).
23 Id.
24 Id. After the first year of airmail delivery, the United States Post Office reported over $20,000 in profits.
25 Id. Flying at night became common as the Department of Commerce assisted in the development of radios, aircraft, and better airport facilities. Id. at 53-54.
26 Taneja, supra note 21, at 1.
ter of a few years, the government had turned over the task of transporting the mail to the commercial sector.27

The United States soon realized that the commercial airlines needed better communication and safety regulation.28 Congress responded to safety concerns and industry needs by passing the Air Commerce Act of 1926. The Act authorized the Secretary of Commerce to establish the Aeronautics Branch, which became the Bureau of Air Commerce. The Bureau, which was charged with writing and enforcing safety regulations,29 began the age of governmental airline regulation.30

The Air Commerce Act of 1926, while showing a commitment to the growth of commercial aviation, firmly established the government's role in this industry. The safety regulations required by the Act demonstrated the increased governmental role.31 The early regulations called for the registration of airplanes, the licensing of pilots and planes, medical certification for pilots, and civil penalties for violations.32 The airline industry, therefore, matured and grew out of early governmental involvement.33 Growth in the insurance industry corresponded to increased air travel to meet the needs of the expanding insurance market.34

Surprisingly, insurers wrote the first aviation insurance policy only a few years after the 1903 flight by the Wright Brothers.35 The Lloyd's Insurance Company of London accepted its first aviation insurance policy before the end of 1910.36 The Lloyd's policy only covered legal liability be-

27 Id.
28 Rollo, supra note 22, at 54.
29 Id. at 54. The Aeronautics Branch was later called the Bureau of Air Commerce after a reorganization in 1934 and it ultimately evolved into the current Federal Aviation Administration. Id.
30 Id.
31 Kane & Vose, supra note 18, at 5-5.
32 Id.
33 Id.
34 Aleksander Tobolewski, Monetary Limitations of Liability in Air Law 110-11 (1986).
36 Raymond Flower & Michael W. Jones, Lloyd's of London: Air Illustrated History 138 (1974). In 1911, Lloyd's wrote their first standardized insurance policy...
cause the airplanes of that era had not developed to the point of being reliable and predictable.\textsuperscript{37}

After World War I, the rise of the United States air mail service was accompanied by the need for aviation insurance. The risks, however, remained too high for expansive growth in the industry.\textsuperscript{38}

As a result of the high risks, insurance companies only started to experiment with aviation insurance policies during 1917-1927.\textsuperscript{39} A number of United States insurance companies wrote aviation policies at the close of World War I.\textsuperscript{40} The Travelers Insurance Company entered the enterprise of aviation insurance and outlasted the competition.\textsuperscript{41} Besides Travelers, no other United States insurance company maintained aviation insurance coverage after these early attempts.\textsuperscript{42} Travelers provided life insurance, public liability, and accidental injury coverages for aviation-related activity.\textsuperscript{43} World War II sparked the modern age of aviation insurance and pushed the industry out of its formative beginning.\textsuperscript{44}

B. MODERN AVIATION AND AVIATION INSURANCE

The commercial aviation industry hit a boom after World War II.\textsuperscript{45} Aircraft manufacturers gained enormous experi-
ence in building airplanes for the war effort and military pilots and mechanics provided an abundance of technical knowledge after the war.\textsuperscript{46} Military surplus airplanes and an almost endless supply of inexpensive parts and cheap fuel, set the stage for the birth of the modern airline industry.\textsuperscript{47}

The new technology and experience enabled planes to be flown safely at night.\textsuperscript{48} New transport planes flew farther and faster and had a much higher payload capacity.\textsuperscript{49} Planes flew routes safely and routinely across the Pacific and Atlantic oceans.\textsuperscript{50} By 1955, the United States airline industry matured.\textsuperscript{51} The establishment of the airline industry brought with it an increased amount of governmental regulation and a corresponding growth of aviation insurance underwriters.

The growth of the airline industry and need for insurance met with a period of confusion after World War II.\textsuperscript{52} The aviation insurance market overexpanded and companies dropped out of the market.\textsuperscript{53} As insurance companies gained experience in this new field, relevant information became available and the companies adjusted premiums to adequately reflect risks.\textsuperscript{54} By 1948, the insurance industry had adequately adjusted to the market risks.\textsuperscript{55} The settling down of the insurance industry corresponded to the governmental regulation of the airline industry.

\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Rollo, Aviation Insurance, supra note 35, at 7. "Better instruments and radios; the use of radar; the establishment of new high-frequency, omni-directional, radio ranges—all helped make most bad-weather flying more practical." Id.
\textsuperscript{49} Taneja, supra note 21, at 7.
\textsuperscript{50} Rollo, Aviation Insurance, supra note 35, at 7.
\textsuperscript{51} Taneja, supra note 21, at 10.
\textsuperscript{52} Rollo, Aviation Insurance, supra note 35, at 8.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id. The Insurance Corporation of North America and American Mercury Insurance Company were among the independent aviation insurers forging the way in the growing industry. Id.
In 1938, Congress passed the Civil Aeronautics Act. This act either amended or repealed all significant prior legislation relating to aviation regulation. The Civil Aeronautics Act organized three agencies to oversee economic and safety regulation of the airline industry. This Act subjected the commercial airlines to standard governmental safety regulations.

The growth of the airline industry and air travel after World War II caused complex safety and logistical problems. A series of airplane collisions that occurred in mid-air prompted Congress to take action. Congress passed the Federal Aviation Act of 1958 to handle these problems. The new law made it easier for the Federal Aviation Agency to suspend licensing certificates and gave the agency clear authority to divide and allocate the airspace and travel schedules between civilian and military aircraft. The involvement of the Federal Aviation Agency grew, and its Federal Aviation Regulations (FAR) became more complex.

The insurance companies used these aviation regulations as benchmarks when writing aviation policies. That is, early insurance policies contained exclusions for FAR viola-
tions which meant that the policy did not cover many FAR regulations.66 The insured airline industry realized that few aviation accidents occurred without a violation of one of the Federal Aviation Regulations.67 Insurance companies claimed that virtually every aviation accident violated FAR regulations and refused to cover those risks.68 Courts and state legislatures reacted by rejecting claims that any violation of the FARs would be grounds to deny coverage.69

Today, quality aviation insurance policies do not have the sweeping FAR exclusions.70 The insurance industry adapted to meet the shape and needs of the airline industry in conjunction with the role of the courts. Today, the United States private insurance industry is the largest and most organized insurance market in the world.71 The modern airline industry effected the nature of this dynamic industry.

Aviation today can generally be divided into three categories: (1) military, (2) commercial, and (3) general.72 Military aviation includes tactical airplanes such as fighters, bombers, intelligence aircraft, helicopters, cargo planes, troop transport airplanes, and a variety of others.73 The commercial airline category includes everything from small aircraft to jumbo jets.74 Finally, general aviation is the broad

66 Id. The Federal Aviation Regulations have always been extremely complex. FARs give "detailed statutory prohibitions against every potential harmful activity on board from using portable electronics devices to 'operating an aircraft in a careless or reckless manner so as to endanger the life or property of another. . . .'" McGhee-Glisson, supra note 12, at 212 (citing 14 C.F.R. §§ 91.9, 91.10, 91.19 (1973)).
67 McGhee-Glisson, supra note 12, at 212.
68 Id.
69 Id.; see also Roach v. Churchman, 431 F.2d 849, 853 (8th Cir. 1970) (holding that denying coverage for any FAR causes "the insuring agreements [to] become illusory in effect since few accidents occur without the aircraft's owner or pilot violating one or more of the very detailed regulations promulgated by the Federal Aviation Administration").
70 Rollo, Aviation Insurance, supra note 35, at 71.
71 Id. at 15. The United States is home to almost 2,000 insurance companies that offer life and health insurance and close to 3,000 companies that offer property and liability insurance. The combined assets of these firms is over $733 billion. Id.
72 Id. at 27.
73 Id. As of 1986 there were over 19,000 airplanes being used by the United States government. Id.
74 Id. Close to 4,370 airplanes made up the commercial airline fleet in 1984.
category that includes everything else. Hence, there are a lot of airplanes in the air and a correspondingly high number of aviation accidents.

The modern insurance industry responded to the need to insure against these risks. Insurance companies sell three basic types of aviation insurance: (1) aircraft liability, (2) hull insurance, and (3) accident insurance. Aircraft liability insurance covers damages caused in connection with the use and operation of the aircraft. Hull insurance protects the aircraft owner’s interests with coverage for damage or loss to the plane and cargo. Accident insurance is the last category, and it is a sweeping coverage that provides insurance coverage resulting from tort claims that arise out of an aircraft accident.

These types of coverage come to life in the modern aviation insurance policy. Insurance companies divide the basic aviation insurance contract into five key parts: (1) declarations, (2) definitions, (3) insurance agreements, (4) exclusions, and (5) conditions. The declaration page basically describes the type of coverage, the amount of coverage, the person or company being insured, the time periods of coverage, and various warranty and purpose clauses.

The definitions section of the aviation insurance contract explains essential terms of the policy for purposes of clarifi-

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75 Rollo, Aviation Insurance, supra note 35, at 15. Some examples of aircraft in this category are private business aircraft, personal aircraft, rental and commuter operations, instructional and sport flying, and special purpose aircraft used for such things as police work and crop dusting. Id.
76 Speiser, supra note 44, § 22:2 at 5-6. "Annually, U.S. general aviation suffers approximately 4300 major accidents in which about one-quarter of the aircraft are destroyed and the remaining are damaged substantially. In recent years, these accidents produced about 1400 fatalities." Id.
77 Miller, supra note 40, at 48.
78 Id.
79 Rollo, Aviation Insurance, supra note 35, at 48.
80 Miller, supra note 40, at 48. Life and health insurance will also be included under this category as insurance claims and disputes for casualties relating to an aviation accident are to be expected. See Rollo, Aviation Insurance, supra note 35, at 48.
81 Speiser, supra note 44, § 23:1.
82 Id. § 23.2.
The insurance agreements section is important because it identifies the types of coverage that are available under the policy. "Passenger bodily injury" and "property damage" are examples of coverage. The conditions section explains those "event[s], not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due."

Before discussing aviation exclusions in detail, the differences between exclusions, conditions, warranties, and representations needs explaining. Conditions usually fall into two categories: (1) conditions precedent and (2) conditions subsequent. Conditions precedent, require the occurrence or performance of some event, after the terms of the contract have been agreed upon but before the contract takes effect, and before a duty is created. Conditions subsequent terminate the operation of a contract with the happening of some event or failure of some required act.

A representation is a statement by the insurer to the insured explaining what risks the insurance contract covers and those it does not. A representation is made before

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83 Id. § 23.3. Things such as "aircraft," "in flight," "taxying," "insured," and other terms the insurer feels necessary to contractually define are included in this section. Speiser notes that the use of a definitions section does not completely distinguish controversy over the meaning of words in the contract. Id.

84 Id.


87 The importance of these distinctions exists because the classification may effect whether an aviation accident is included or excluded from the insurance coverage. 43 AM. JUR. 2D Insurance § 1011 (1982).


89 Id.

90 Conditions are different from exclusions: These types of conditions are distinguishable from exclusions in two significant regards: (1) conditions are concerned with exceptions to coverage and exclusions limit the contractual duties and obligations of the insurer, and (2) the burden of proof with respect to conditions precedent is on the insured, and the burden with respect to exclusions is on the insurer.

91 SPEISER, supra note 44, § 26:4.
the parties enter into a contractual agreement and the representation is technically not part of the contract.92 A representation voids the contract if it materially relates to the dispute and was made wilfully and knowingly to defraud the insured.93

A warranty is a promise by the insured that appears in the contract and relates to the risks it insures against.94 A breach of warranty, whether it is material or insignificant, will void an insurance contract completely.95 Significantly, a breach of a warranty prevents recovery by the insured even if the breach is not material to the cause giving rise to the dispute.96 This is different from representations that only call for substantial compliance.97

The distinction between exclusions when compared to conditions, warranties, and representations often effects the outcome of a case. Commentators suggest, however, that modern courts may focus less on these technical differences.98 In any case, a familiarity with these terms provides a gateway to understand the implications of aviation insurance exclusions.

The exclusions section of an aviation contract allows the insurer to explicitly set forth those risks which are not part of the contract.99 Central to this understanding is the notion that there is no insurance for an excluded risk and that there never was.100 A familiarity with the basic types of coverage and elements of an aviation insurance policy assists when attempting to fully understand war risk and aviation insurance exclusion clauses.

92 Id.
94 Speiser, supra note 44, § 26:9.
95 Hagglund & Arthur, supra note 88, at 10.
96 Speiser, supra note 44, § 26:9. A state statute, however, may provide less severe results for breach of warranty. Id. § 26:10.
98 Id. at 12.
99 Ballard & Chero, supra note 15, at 118.
100 Id. at 119 (citing 63 A.L.R. 2d 1114, 1123 (1959)).
III. WAR RISK AND AVIATION INSURANCE EXCLUSIONS

A. DISCUSSION OF WAR RISK EXCLUSIONS

War risk exclusions have a long history in the United States. The United States insurance industry entered into the War and Civil War Risks Agreement in 1937.\textsuperscript{101} The industry entered the agreement because it suffered extreme financial losses during the Spanish Civil War.\textsuperscript{102} The agreement provided that "exclusive of the United States and Canada, no underwriter will insure against damages due to war, including civil war."\textsuperscript{103}

The insurers accepted standard war risk exclusionary language drafted by the Fire Offices Committee (FOR).\textsuperscript{104} This agreement is the grandfather of modern aviation war risk exclusions.\textsuperscript{105} Today, insurance companies consider aviation and war risk exclusion clauses particularly important because of the growth of the aviation and aviation risks.\textsuperscript{106}

Although the number of aviation insurance policies that insurers are writing is increasing, liability is being limited by using aviation exclusions.\textsuperscript{107} Exclusionary clauses often result in litigation when a policy holder is denied coverage.\textsuperscript{108} When a policy holder sustains a loss from an aviation acci-

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\textsuperscript{101} Shannon, \textit{supra} note 16, at 1.
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} Id. The standard war risk aviation exclusion clause is probably similar to the following:

\textbf{THIS POLICY DOES NOT APPLY:}

(10) To loss or damage or any liability of the Insured directly or indirectly occasioned by, happening through or in consequence of military, naval or usurped power whether in time of peace or war and whether lawful or unlawful, war, invasion, civil war, revolution, rebellion, insurrection or warlike operation, whether there be a declaration of war or not.

\textit{Speiser}, \textit{supra} note 44, § 23:5 (Exclusion of Lloyd's Aircraft Hull Policy (USA)).

\textsuperscript{106} Hagglund & Arthur, \textit{supra} note 88, at 5.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
dent, the question becomes: "What was excluded and what is the meaning of this exclusion?"\textsuperscript{109}

Courts recognize the legality of war risk exclusion clauses as well as the insurer's right to limit its liability.\textsuperscript{110} Neither public policy nor matters of questionable patriotism affect the validity of such exclusions.\textsuperscript{111} Thus, the dispute between the insured and insurer usually centers around the meaning of the exclusion.\textsuperscript{112} The outcome of disputes involving war risk aviation exclusions is often critical, especially if the dispute relates to the life insurance policy of a person in the armed services killed in the line of duty. The reason is that the Federal Tort Claims Act\textsuperscript{113} does not provide a remedy for military personnel injured or killed during the course of their employment.\textsuperscript{114}

Active duty soldiers precluded from recovering under the Federal Tort Claims Act are similarly precluded from recovering under the Military Personnel and Civilian Employees act of 1964.\textsuperscript{115} If the insured is not covered by his life insur-


\textsuperscript{110} Sidney I. Simon, \textit{The Dilemma of War and Military Exclusion Clauses in Insurance Contracts}, 19 AM. BUS. L. J. 31, 34 (1981); see also, 10 GEORGE J. COUCH, COUCH ON INSURANCE § 41:551 (2d ed. 1987). In Stanbery v. Aetna Life Ins. Co., the court held: [the] purpose of such a [war risk exclusion] clause is not insidious or difficult to understand. Military or naval service in time of war, whether in training or combat, is admittedly hazardous, and fraught with incalculable danger. It is difficult to determine the scope of risks assumed by members of the armed forces in view of the methods of warfare, keeping in mind the possible devastation of present and future developments.

\textsuperscript{111} Simon, \textit{supra} note 110, at 34.

\textsuperscript{112} \textit{Id.}

\textsuperscript{113} See WINDLE TURLEY, AVIATION LITIGATION § 2.29 (1986) [hereinafter Turley]. The author explains that suits arising out of negligence against the government will be subject to liability under the Federal Tort Claims Act.

\textsuperscript{114} Feres v. United States, 340 U.S. 135, 143 (1950) (placing importance on the federal nature of the relationship between the United States and the government); see Turley, \textit{supra} note 113, at 108 (explaining that Feres was expanded to preclude third-party actions against the United States in Stencel Aero Eng'r Corp. v. United States, 431 U.S. 666 (1977), thus creating what is commonly know as the Feres-Stencel Doctrine).

\textsuperscript{115} Turley, \textit{supra} note 113, § 2.29 (citing Towry v. United States, 459 F. Supp. 101 (E.D. La. 1978), aff'd per curiam, 620 F.2d 568 (5th Cir. 1980), cert. denied, 449 U.S.
ance policy, federal legislation severely limits his opportunities for compensation. Thus, the war risk and aviation exclusions become increasingly important.

Courts are often called on to interpret various terms in aviation insurance policies that contain war risk exclusions. The terms that courts repeatedly analyze are: (1) military or usurped power, (2) riot, (3) warlike operations, (4) insurrection, (5) civil commotion, and (6) war. One of the first problems a court may face is determining whether any of the above type terms, which were set forth in the contract, existed at the time of the alleged injury.

The courts adopted two doctrines to determine if the word war in the insurance policy applies to the violence giv-


Military or usurped power has been defined as that “power exerted by an invading foreign enemy, or by an internal armed force in rebellion, sufficient to supplant the laws of the land and displace the constituted authorities.” Aetna Ins. Co. v. Boon, 95 U.S. 117, 127 (1877).


Military or usurped power has been defined as that “power exerted by an invading foreign enemy, or by an internal armed force in rebellion, sufficient to supplant the laws of the land and displace the constituted authorities.” Aetna Ins. Co. v. Boon, 95 U.S. 117, 127 (1877).

One court defined riot as the gathering of “three or more persons” with the “common purpose” to do “an unlawful act [with the intention to use] force or violence,” Insurance Co. of N. Am. v. Rosenberg, 25 F.2d 635, 636 (2d Cir. 1928). Another court defined riot as requiring a “tumult” or “disturbance” at the time of the action. Hartford Fire Ins. Co. v. War Eagle Coal Co., 295 F. 663, 665 (4th Cir. 1924).

An insurrection has been defined as “[a] rebellion, or rising of citizens or subjects in resistance to their government,” BLACK'S LAW DICTIONARY 808 (6th ed. 1990); see Vinciguerra, supra note 117, at 927.

A civil commotion has been defined as a local domestic disturbance that is confined to the immediate area of its occurrence. Hartford Fire Ins. Co. v. War Eagle Coal Co., 295 F. 663, 665 (4th Cir. 1924).

Vinciguerra, supra note 117, at 925.

James M. Crain, Comment, War Exclusion Clauses and Undeclared Wars, 39 TENN. L. REV. 328, 331 (1972).
ing rise to the insured's claim. The first is the "technical meaning" doctrine which explains that war means war in the legal sense and must be declared. The second is the "common meaning" doctrine. The common meaning doctrine requires that words used in an insurance policy are construed in their plain, ordinary, common and popular sense. The only exception is when it is apparent from the face, scope, and purpose of the contract, that the words were to have some other special meaning.

Many life insurance policies today usually do not exclude death from war risks or war related activity. Most life insurance policies, however, limit the amount of recovery for an insured who dies in a war related activity. Therefore, whether the insured's death results from a war related activity is usually not at issue for recovering the face value of the insurance contract. The controversy arises under the double indemnity provisions of an insurance contract.

The policies with double indemnity provisions usually employ war risk exclusion clauses that prevent double recovery where the insured dies as a result of war. The issue in controversy, therefore, is often whether the insurer must pay the double recovery or just the face value of the policy. The answer to this question typically depends on the judicial construction and interpretation of the exclusion clause.

125 Id. at 332.
126 Id. at 332.
129 Id.
130 Id.
131 Id. at 34.
132 Id. at 34.
133 Id. A large number of life insurance policies provide for recovery of twice the amount of the face value of the policy if the insured dies accidentally. Id. at 33-34. This is known as double indemnity.
134 Simon, supra note 110, at 54.
135 Id.
136 Id.
General principles of contract law relating to construction influence and determine the outcome.\textsuperscript{137} The rule of adhesion in insurance law probably affects how a court interprets the operation of the policy.\textsuperscript{138} Generally, this rule means that courts construe ambiguities against the insurer and in favor of the insured.\textsuperscript{139} Judges, however, interpret clear terms in their ordinary sense unless they have a changed technical meaning.\textsuperscript{140}

Thus, because courts avoid rewriting contracts for the parties, they usually enforce the war risk exclusion if it is drafted correctly.\textsuperscript{141} In each case the court must not only decide whether the language is clear but also what the meaning and intent of the contracting parties was from the four corners of the insurance contract.\textsuperscript{142}

Aviation exclusion clauses are normally categorized as either result or status clauses.\textsuperscript{143} Result clauses exclude coverage for death that results from military related activity during war.\textsuperscript{144} Status clauses exclude recovery for death while the insured is in military service in a time of war solely because of the insured's status as a member of the military.\textsuperscript{145}

The difference between how the court classifies a war risk exclusion clause may be critical to the outcome of the case. Precise wording used in a result clause may exclude the aviation risk and absolve the insurer from liability.\textsuperscript{146} The insurer is absolved from liability when the insured is

\textsuperscript{137} Hagglund & Arthur, supra note 88, at 6.
\textsuperscript{138} Simon, supra note 110, at 34.
\textsuperscript{139} Speiser, supra note 44, § 25:7.
\textsuperscript{140} J.A. Bryant, Jr., Annotation, Who is "Fare-Paying Passenger" within Coverage Provision of Life or Accident Insurance Policy, 60 A.L.R. 3d 1273, 1276 (1974).
\textsuperscript{141} Simon, supra note 110, at 34.
\textsuperscript{142} Id. at 34-35.
\textsuperscript{143} Id. at 35.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Simon, supra note 110, at 35 (citing Long v. St. Joseph Life Ins. Co., 255 S.W. 106 (Mo. 1920)) (construing a clause excluding coverage for "death while engaged in military or naval service in time of war" to allow recovery of survivor of insured where insured died of pneumonia. The court held that the clause was a result clause and the insured's death did not result from his military service.).
employed in military service, or, more generally, when the insured dies as a result of war. The outcome is the same whether or not the insured actually served in the military as a combatant or otherwise. If a consumer, therefore, purchased a life insurance policy containing a result clause war risk exclusion and subsequently died as a civilian casualty of war, the insurance company could deny her recovery. The issue courts decide, therefore, is whether the exclusion is a result clause or a status clause.

The recovery outcome of status clauses usually depends on two issues: (1) the military status of the insured, and (2) the courts interpretation of whether the hostility is within the policy's meaning of war. If the policy uses a clause which excludes coverage simply because of the insured's status as a member of the armed services, his recovery may be denied even if his death is not related to a hostile or warlike action. Case decisions revolving around status clauses often turn on the question of whether a person served in the military at the time of the accident or whether the person died as a civilian.

The following case law analysis examines situations where there was conflicting authority as to the result of a war risk aviation exclusion clause. Since many of these cases arose out of the use of aviation in World War II, the Korean War, and Vietnam, the perspective of the following analysis is somewhat historical. The analysis used in the cases, however, will be useful in a current context because this is an area where no clear guidelines exist.

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147 Simon, supra note 110, at 35.
148 Id.
149 Id.
150 Id. at 38; see supra notes 118-133 and accompanying text for a discussion of the meaning of war.
151 Simon, supra, note 110, at 38. In Saladino v. Prudential Life Ins. Co., 68 N.Y.S.2d 35, 37-39 (N.Y. Sup. Ct. 1946), appeal dism'd, 70 N.Y.S.2d 577 (N.Y. App. Div. 1947) the court denied double indemnity recovery under a policy that excluded double recovery while insured was a "member of the military, naval or air forces of any country at war," where the insured was a member of the armed services and died in an automobile accident during World War II.
152 Simon, supra note 110, at 39.
153 See COUCH, supra note 14, § 41:555.
B. Case Law Problems in Interpreting Insurance Exclusions in the Context of War or Military Aviation-Related Activity

1. Background

Most of the controversy surrounding aviation exclusion clauses and war risk exclusions relates to life insurance policy coverage and the beneficiary’s attempt to recover under the policy.\textsuperscript{154} Categorizing aviation casualty cases is a tenuous endeavor. No two cases arise out of a similar fact scenario. Although the cases appear to be largely decided on their facts, a few generalizations can be made. First, a majority of the cases arise out of conflicting clauses within the insured’s insurance policy. Second, most of the other cases turn on an interpretation of a specific insurance policy clause. Finally, a separate class of cases exist for an aircraft owner’s claims arising out of losses to her aircraft or cargo. The cases in this section demonstrate the early struggle that courts had in interpreting insurance policies in the context of aviation casualties resulting from military or wartime activity.

2. Aviation Exclusions in the Absence of a War Risk Exclusion

The following cases are situations where an insured’s life insurance policy contained an aviation exclusion but did not contain a war risk exclusion. For purposes of categorization it is helpful to separate the cases based on the insured’s apparent cause of death. In some situations the insured died as a result of hostile enemy activity. In other situations the insured died as a result of accidents arising out of tactical maneuvers or training exercises. Finally, a few cases arose out of severe weather or mechanical malfunctions in the plane.

\textsuperscript{154} Id.
a. Crashes Resulting From Hostile Enemy Activity

*Paradies v. Travelers Insurance Co.*\(^{155}\) is typical of the controversy that developed when courts attempted to understand the operation of an aviation exclusion in the absence of a war risk exclusion. In *Paradies* the insured, Paradies, purchased a life insurance policy that excluded aviation related risks\(^{156}\) but did not exclude war risks. Paradies died while performing his duties on a military aircraft in a combat mission.

The New York city court held that the aviation exclusion was not a bar to recovery because, according to the court, the exclusion related to civilian flying, not military aviation.\(^{157}\) The court reasoned that if the insurer wished to exclude war risks it could have done so, and had Paradies died "in a foxhole, on a landing beach, or lost at sea" the insurance company would have undoubtedly paid.\(^{158}\) The source of the court's confidence is questionable because only two years after *Paradies* a New York appellate court held for the insurer in a similar case.\(^{159}\)

The facts and issues of *Boye v. United Services Life Insurance Co.*\(^{160}\) are similar to *Paradies*. The insured, Boye, purchased a life policy that specifically excluded aviation risks but did not have a war risk exclusion clause. Boye died while performing duties as a crew member on an plane flying a mission during World War II. His plane never returned. The court held that since Boye died on a military mission and probably from enemy fire, "it resulted from a risk of war that the policy did not exclude and not from a risk of aviation that the policy did exclude."\(^{161}\)

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\(^{155}\) 52 N.Y.S.2d 290 (N.Y. City Ct. 1944).

\(^{156}\) The policy stated, "[d]eath as a result, directly or indirectly, of service, travel or flight in any species of aircraft, except as a passenger on a licensed passenger aircraft . . . is a risk not assumed under this contract." *Id.* at 291.

\(^{157}\) *Id.* at 291.

\(^{158}\) *Id.* at 292.


\(^{161}\) *Id.* at 571. The court explained that if Boye's policy had excluded death due to riding in an automobile and he had been gunned down in the car it is obvious his death was not related to the auto exclusion. *Id.*
Paradies and Boye are important to understanding the early controversy surrounding the judicial interpretations of aviation insurance exclusions. The cases reveal that the courts appeared to favor the insured in situations where the death resulted from hostile enemy activity even where the death occurred in an apparently uninsured aviation related event. The courts, however, had a more difficult time wrestling with accidents that did not directly relate to hostile enemy fire.

b. Crashes Resulting From Tactical Maneuvers and Training

The District of Columbia Court of Appeals decided United Services Life Insurance Co. v. Bischoff\textsuperscript{162} in apparent opposition to its Boye\textsuperscript{163} decision. In Bischoff the insured crashed when the wing of his plane brushed against a train as he maneuvered away after an attempted attack.\textsuperscript{164} Bischoff's insurance policy contained an exclusion for aviation risks but had no war risk exclusion. The aviation exclusion limited recovery to premiums paid if death related to "operating or riding in any kind of aircraft . . . ."\textsuperscript{165} Interestingly, the court held, "[r]isks of war are not excepted from this general aviation exclusion clause. Since the exclusion is unqualified it applied equally to all risks, whether of war or of peace, that result from operating or riding in airplanes."\textsuperscript{166} Additionally, in Bischoff, the court found it immaterial that the policy specifically stated that it contained no restrictions for military service.\textsuperscript{167} The court found that this clause meant that the policy did not exclude all war risks, however,

\textsuperscript{162} 181 F.2d 627 (D.C. Cir. 1950).
\textsuperscript{163} Boye, 168 F.2d at 570.
\textsuperscript{164} Bischoff was flying close to the ground to attack a locomotive with machine gun fire. The wing of his plane came in contact with the train as he banked away and caused the plane to crash. Bischoff, 181 F.2d at 628.
\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} Id.
it did not mean that the insurance policy covered all war risks.\textsuperscript{168}

The court's decision in this case is hard to explain in light of its decision in Boye\textsuperscript{169} because the insurance coverage was essentially the same in both cases. The court even cited Boye but only said that the policies were similar in that both included aviation exclusion clauses.\textsuperscript{170} The court made no attempt to distinguish the cases, and issued its holding in a brief one-page opinion. A possible explanation for the differing holdings is that Bischoff's crash was an uninsured aviation risk and not a war risk because his death related to his control of the plane, not enemy fire. Bischoff and Boye demonstrate the lack of judicial guidance and predictability in determining how the courts will interpret aviation exclusion clauses.

\textit{Trahan v. Southland Life Insurance Co.}\textsuperscript{171} is a case arising out of the death of an insured during a training mission. In Trahan the insured served as a pilot in the air force. Trahan bought a life insurance policy and explicitly told the insurance agent that he did not want a life insurance policy that excluded aviation risks. When the agent delivered the policy, Trahan rejected it because it contained two aviation riders; one was a "War and Aviation Risk" rider while the company labeled the other rider a "Partial Exclusion of Aviation Risk."

The insurance agent subsequently returned a different policy along with a written statement that he had removed the "War and Aviation Risk" rider. The "Partial Exclusion of Aviation Risk" rider, however, had not been removed. Trahan relied on the written statement and the agent's assurance that the written statement "takes care of the flying coverage" and accepted the policy without reading it.

Trahan fell to his death from an airplane a few months later while engaged in a training flight over the Gulf of

\textsuperscript{168} Id.
\textsuperscript{169} Boye, 168 F.2d at 570.
\textsuperscript{170} Bischoff, 181 F.2d at 628.
\textsuperscript{171} 289 S.W.2d 753 (Tex. 1956).
Mexico. The insurer denied coverage because Trahan’s death was related to the flight. This was an excluded risk under the “Partial Exclusion of Aviation Risk” rider which had not been removed from the policy.172

The court held for the insured reasoning that the policy contained ambiguous terms.173 The court found the policy ambiguous because “[t]he fact that the company would place two practically identical riders on the same policy within itself raises a question as to its intention.”174 The court relied on the fact that the insurance company labeled one exclusion “War and Aviation Risk Exclusion Rider,” and titled the other “Partial Exclusion of Aviation Risk.”175

The court found that a reasonable explanation of the different labels meant that one exclusion applied to military aviation and the other exclusion related to civilian aviation.176 The rider which the insurance agent removed from the policy mentioned war, and the rider which remained in force did not. Finally, the court noted that the label of “Partial Exclusion” supported the holding that it only partially excluded aviation risks, and the part excluded was civilian aviation, not military aviation.177

The court’s analysis is interesting because the “Partial Exclusion of Aviation Risk” indicated that the policy excluded from coverage any death resulting from an insured’s involvement as a crew member on an aircraft.178 Trahan served as a member of the aviation crew when he died and

172 The rider excluded coverage for death relating directly or indirectly to aviation or flight “[i]f at any time, the Insured is a pilot, officer, or member of a crew of any aircraft. . . .” Id. at 756.

173 Id. at 755. The court addressed the issue of the insurance agent’s representations to Trahan by stating that under the Texas Insurance Code an insurance agent does not have the power to alter the terms of the policy. See Tex. Ins. Code Ann. art. 21.04 (Vernon 1981). Thus, the court decided the case on issues of contractual interpretation relevant to this comment.

174 Id. at 756.

175 Id. at 754.

176 Trahan, 298 S.W.2d at 756.

177 Id.

178 Id.
this raises the question of how the court determined the insurance policy was ambiguous.\textsuperscript{179}

The court acknowledged that had the policy been initially delivered with only the Partial Exclusion Aviation Risk Rider attached, the meaning would not be ambiguous.\textsuperscript{180} The court based its decision on the fact that the insurance agent first tendered the policy with two aviation riders and subsequently tendered it with one of them removed.\textsuperscript{181} The court seemed to be stretching to find an ambiguity, which is important because it indicates that this case could have been decided in favor of the defendant insurance company.

The court then dismissed former decisions\textsuperscript{182} and stated that it could not find any decision on all fours with the case at bar.\textsuperscript{183} The court continued by holding, that the absence of a war risk clause had no legal effect and did not serve to nullify the aviation exclusion rider.\textsuperscript{184} The court found analytical support only by arguing the negative. The court reasoned that even though the insurer could not use a war risk exclusion to deny coverage (because there was not one in the policy) it did not mean that it could not use the aviation exclusion rider to deny coverage for war or military aviation risks.\textsuperscript{185}

\textit{Wilmington Trust Co. v. Mutual Life Insurance Co.}\textsuperscript{186} also illustrates the unpredictability of cases involving a life insurance policy which excludes aviation risks but fails to mention war risks where the insured dies while on a test flight. In \textit{Wilmington Trust} the insured purchased a life insurance policy that excluded "[d]eath as a result of operating or riding in any kind of aircraft, whether as a passenger or otherwise, except [when] riding as a fare paying passen-

\textsuperscript{179} Id. at 755.
\textsuperscript{180} Id. at 757.
\textsuperscript{181} \textit{Trahan}, 289 S.W.2d at 757.
\textsuperscript{183} \textit{Trahan}, 289 S.W.2d at 757.
\textsuperscript{184} Id.
\textsuperscript{185} Id.
\textsuperscript{186} 177 F.2d 404 (3d Cir. 1949).
ger in a licensed passenger aircraft . . . ."187 The policy also included a provision which expressly stated that it contained no restrictions relating to occupation.188 Finally, the policy did not mention war risks or employment in the military.

The insured subsequently gained employment with the Army Air Corps Glider Program as a civilian assistant before the policy was issued. He affirmatively answered the insurer's questions regarding his occupation as a pilot. Shortly after the insurance company issued the policy, the insured bailed out of a glider while piloting it on a test flight and died when his parachute did not open. The insurer denied recovery under the policy, and the executor of the insured filed suit.

The court rejected the plaintiff's argument that the "no restrictions on occupation" clause meant that the aviation exclusion only applied to pleasure flights.189 The court found the policy unambiguous because it excluded coverage if the insured died as a result of operating or riding in any kind of aircraft except as a fare-paying passenger.190 The court felt the language of the insurance contract clearly excluded this risk.191

The court in Mutual Life Insurance Co. v. Daniels192 cited Wilmington Trust Co.193 in support of a similar decision for the insurer.194 In Daniels the insured, Daniels, purchased a life insurance policy that excluded aviation risks unless the insured was a fare-paying passenger. The policy did not contain an exclusion for war or military risks. Daniels died while piloting his military airplane, when it crashed as a result of engine failure.

187 Id. at 405.
188 Id.
189 Id. at 409.
190 Id.
191 Wilmington Trust Co., 177 F.2d at 409.
192 244 P.2d 1064 (Colo. 1952).
193 177 F.2d at 404.
194 Daniels, 244 P.2d at 1068.
The Supreme Court of Colorado held that the aviation exclusion applied to more than just civilian aviation. The court reasoned that no specific provision or exclusion limited the policy coverage to civilian aviation. Just because the policy failed to exclude military aviation explicitly did not mean that the policy covered military aviation. The court basically held that the policy contained ambiguities that the court construed against the drafter/insurance company.

The cases involving casualties resulting from tactical maneuvers, test flights, and training exemplify the courts' early difficulties in interpreting life insurance policies. The courts struggled with policies that contained aviation exclusions but failed to contain provisions for military-related activity. The courts faced the issue of determining whether the death resulted from an uninsured aviation risk or a risk associated with military service. The holdings reveal that it was difficult to formulate a rule of law applicable to the differing fact scenarios and insurance policies.

c. Crashes Resulting from Mechanical Malfunction or Severe Weather

A final line of cases, involving life insurance policies that contained aviation exclusions but no war risk exclusions, relates to casualties resulting from mechanical failure or severe weather. In *Green v. Mutual Benefit Life Insurance Co.*, Green, the insured, purchased a life insurance policy which contained an aviation exclusion that excluded coverage for "[d]eath occurring by reason of any aerial flight or journey . . ." unless the insured was a fare-paying passenger. Subsequent to purchasing the insurance policy, Green enlisted in the Navy and became a pilot. Thereafter, while on an assignment in the Pacific, he crash-landed his plane in the

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195 *Id.* at 1067.
196 *Id.* at 1067-68.
197 144 F.2d 55 (1st Cir. 1944).
198 *Id.* at 56.
ocean because of severe weather. Green died of drowning and exposure.

The First Circuit held that the policy excluded aviation risks.199 "The natural and obvious meaning of the aviation clause in the case at bar is that the insurer declines to assume those extra risks of death ordinarily associated with aerial flight."200 The court also rejected the argument that since the insurance policy failed to include a war risk exclusion, death resulting from a war related aviation accident should not be excluded.201

The court based its analysis on the argument that war risk exclusions and aviation exclusions are to some extent overlapping.202 In Green's case the court believed the aviation exclusion overlapped into war-related aviation risks and thus recovery was barred.203 Finally, the court rejected the argument that the aviation was not the proximate cause of Green's death. The court held that when death is related to the operation "of one of those popularly understood risks" the issue of proximate causation is not an issue for the court to decide.204

In *Durland v. New York Life Insurance Co.*205 the insured died in a military aviation accident when his plane crashed shortly after takeoff in the British West Indies. The insured's life insurance policy contained a clause which stated that the policy contained no conditions or exclusions regarding military service. A rubber stamped provision, however, followed this clause and stated that "[e]xcept as

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199 Id. at 57.
200 Id.
201 *Green*, 144 F.2d at 57. The court noted in dicta that if the insurance policy had included a war risk exclusion, it would have excluded, "not only the risks of death from participation in military aviation but also other multifarious risks attendant upon military service . . . in the air, or on the ground or under the sea." *Id.* See supra note 168 and accompanying text for a discussion of cases that disagree with the proposition that a war risk exclusion excludes coverage for military aviation.
202 Id.
203 Id.
204 *Id.* In this case the court believed that Green's drowning in the water was indisputably associated with the risk of aerial travel. *Id.*
provided by Aviation Rider Attached hereto." The aviation rider was an exclusionary clause for aviation risks.

The beneficiary of the policy argued that the clause stating that the policy contained no military occupation conditions indicated that the aviation rider only applied to civilian flying. The court rejected the beneficiary's argument and granted the insurer's summary judgment motion on the grounds that the policy was not ambiguous with respect to the aviation exclusion.

The court reasoned that the rubber stamped imprint which read "except as provided by the aviation rider" limited the "free from military service conditions" clause. According to the court, the interpretation required the result that while the policy, in general, covered military service risks, the policy did not provide coverage for aviation risks associated with military service.

Conaway v. Life Insurance Co. is probably one of the most plaintiff-oriented decisions in this line of cases. In Conaway the insured purchased a life insurance policy that specifically excluded aviation risks unless the insured paid for a ticket as a passenger. The policy also contained an exclusion for war risks but only for the double indemnity feature of the policy.

The insured joined the Naval Reserve and became a bomber pilot approximately a year and a half after purchasing the policy. Conaway, flying a mission while on duty in the Philippines, could not land his plane on his carrier be-

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206 Id. at 701.
207 "[A] rider is an attachment to an insurance policy that modifies the conditions of the policy by expanding or restricting its benefits or excluding certain conditions from coverage." BLACK'S LAW DICTIONARY 1323 (6th ed. 1990).
208 The clause excluded from coverage death as a direct or indirect result of riding in an aircraft, unless the insured was a "passenger." Durland, 61 N.Y.S.2d at 701.
209 Id. at 703.
210 Id.
211 Id.
212 76 N.E.2d 284 (Ohio 1947).
213 Insurance contracts define passengers who purchase tickets as "fare-paying passengers." Bryant, supra note 140, at 1278.
214 See supra text accompanying notes 133-40 for a discussion of double indemnity features of life insurance policies.
cause of a previous crash on the deck. Conaway died when his plane ran out of fuel and crashed into the sea while he was attempting to locate another U.S. carrier.

The insurer denied the beneficiary's recovery, claiming that the aviation exclusion barred recovery. The Supreme Court of Ohio disagreed and affirmed the appellate court's decision in favor of the plaintiff beneficiary.\(^{215}\) The court held that the policy contained an ambiguity in regard to the aviation exclusion.\(^{216}\)

The court explained that the double indemnity aspect of the contract specifically excluded war risks but the aviation exclusion located in the face value terms of the policy did not mention war or military risk at all.\(^{217}\) The court accepted the inference that the insurance contract may or may not have excluded military aviation from coverage and construed this ambiguity against the drafter.\(^{218}\) The court noted that if the insurer had intended to exclude war risks in the general policy terms, it could have done so.\(^{219}\)

Deaths resulting from an airplane's mechanical failure or severe weather would appear to be aviation risks. The courts in \textit{Green} and \textit{Durland} support this proposition. The court in \textit{Conaway}, however, did not find such reasoning persuasive. It is difficult to determine the rationale behind this discrepancy. The holdings, while they do not offer much guidance to the would-be litigant, illustrate the historical struggle courts have interpreting insurance exclusions.

3. "Fare-Paying Passenger"

In many of the cases discussed thus far, the aviation exclusions have provided exceptions for fare-paying passengers.\(^{220}\) The courts have addressed the question of whether or not a member of the military is a "fare-paying passen-

\(^{215}\) \textit{Conaway}, 76 N.E.2d at 286.
\(^{216}\) \textit{Id.}
\(^{217}\) \textit{Id.}
\(^{218}\) \textit{Id.}
\(^{219}\) \textit{Id.}
\(^{220}\) See discussion supra part II.B.
ger.” In *Quinones v. Life & Casualty Insurance Co.* the court addressed this question. Quinones, the insured, served as a military physician and was killed while flying as a passenger on a military transport plane that crashed into a mountain. The life insurance policy contained an exclusion that excluded coverage for death resulting from “operating, or riding in, any kind of aircraft, except as a fare-paying passenger in a licensed passenger aircraft, operated by a licensed pilot in a regular passenger route between definitely established airports . . . .”

The Supreme Court of Louisiana rejected the insurer’s argument that the aviation exclusion precluded coverage for Quinones because he did not satisfy the insurance policy’s fare-paying passenger requirement. The Louisiana Supreme Court agreed with the lower court’s reasoning, “[t]here is nothing in the aviation clause of this policy which limits the coverage to Civilian as distinguished from Military planes.”

The court then went on to hold that the airports satisfied the insurance policy requirement of being “definitely established.” The flight routes also met the “regular passenger route” policy requirement. Further, the court held that the airplane satisfied the “licensed passenger aircraft” requirement and that the pilot held a valid aviation license as required by the policy.

The court stated that it only had to decide whether Quinones satisfied the “fare-paying passenger” element of the contract. The court used judicial craftsmanship in its decision in a manner that was anything but formalistic.

The *Quinones* court reasoned that the insured definitely satisfied the passenger requirement, but in a narrow sense

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221 24 So. 2d 270 (La. 1945).
222 Id. at 271.
223 Id. at 272.
224 Id.
225 Id.
226 Id.
227 *Quinones*, 24 So. 2d at 272.
228 Id.
it could be said he did not pay his fare because he was riding on a pass.\textsuperscript{229} The court determined, however, that the aviation insurance exclusionary clause contained nothing which required that the insured pay his own fares.\textsuperscript{230} "A passenger whose fare is paid directly or indirectly by his employer is certainly 'a fare paying passenger.'"\textsuperscript{231} The court held that Quinones satisfied the "fare-paying passenger" requirement within the meaning of the insurance policy and that he should recover.\textsuperscript{232}

A federal district court decided the issue of whether a service member is a "fare-paying passenger" differently in \textit{Burns v. Mutual Benefit Life Insurance Co.}\textsuperscript{233} In \textit{Burns} the insured served as an army air corps flight officer who was traveling as a passenger on a military plane on an authorized flight when the plane exploded killing the insured and all of the other passengers. The defendant insurance company denied coverage on the ground that the insured did not meet the "fare-paying passenger" condition as required by the life insurance policy.\textsuperscript{234}

The court agreed with the insurance company and held that the insured did not qualify as a fare-paying passenger.\textsuperscript{235} The court stated that "[a] fare-paying passenger is one who pays the established legal rate of fare."\textsuperscript{236} The

\textsuperscript{229} Id. Since Quinones served in the military and flew on a military airplane the army did not receive payment from him. The court recognized, but rejected, the interpretation that Quinones paid no fare as required under the insurance contract. Id.

\textsuperscript{230} Quinones, 24 So. 2d at 272.

\textsuperscript{231} Id.

\textsuperscript{232} Id.


\textsuperscript{234} Id. at 849. The Policy read:

\begin{quote}
Death occurring by reason of any aerial flight or journey is not a risk assumed by the Company. . . . If the insured at the time of such flight shall be a fare-paying passenger in the course of transportation from one definite terminal to another by means of an aerial conveyance in charge of a licensed pilot, this provision shall not be effective.
\end{quote}

\textsuperscript{235} Id. at 853.

\textsuperscript{236} Id.
**Burns** court’s reasoning directly conflicted with *Quinones*\(^{237}\) in that the *Burns* court stated that “[t]he insured’s transportation may have been an expense to the army, but that fact did not make him a fare-paying passenger within the ordinary and generally accepted meaning of that term as used in the aviation clause of the policy.”\(^{238}\)

The *Burns* court even cited *Quinones* and called that court’s reasoning “far fetched” and stated that Burns obviously did not qualify as a fare-paying passenger because Burns never paid for a ticket.\(^{239}\) The court continued to reason that the ordinary meaning of “fare-paying passenger” encompassed civilian commercial flights and not military transport flights.\(^{240}\) The court stated that the ordinary meaning of a fare-paying passenger related to civilian passengers purchasing tickets and traveling for civilian purposes.\(^{241}\)

*Grimes v. New York Life Insurance Co.*\(^{242}\) also raised the issue of whether a passenger on a military aircraft satisfied a life insurance policy’s “fare-paying passenger” requirement. Grimes, the insured, worked as a civilian engineer with whom the government contracted to provide consulting services. Grimes died while traveling as a passenger on a military transport aircraft when it crashed into a hillside.

The defendant insurance company denied the beneficiary full recovery under the terms of the insurance policy because of an aviation exclusion. The exclusion restricted recovery to premiums paid if the insured died “as a result of operating or riding in any kind of aircraft, whether as a passenger or otherwise, other than as a fare-paying passenger of a commercial airline. . . .”\(^{243}\) The beneficiary brought suit in federal district court and the defendant insurance com-

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\(^{237}\) *Quinones*, 24 So. 2d at 272.

\(^{238}\) *Burns*, 79 F. Supp. at 853.

\(^{239}\) *Id.* at 853.

\(^{240}\) *Id.* at 853-54.

\(^{241}\) *Id.*


\(^{243}\) *Id.* at 990.
pany moved for summary judgment on the ground that the insured was not a "fare-paying passenger."

The court denied the defendant's motion for summary judgment and held that a genuine issue of material fact existed as to whether the insured qualified as a fare-paying passenger under the terms of the insurance contract. The court cited Quinones in support of its position that it is possible for a person to satisfy the terms of the condition by way of indirect payment of fare in the absence of a cash transaction.

The issue of whether a service member is a fare-paying passenger has not been decided conclusively. Quinones v. Life and Casualty Insurance Co., Burns v. Mutual Benefit Life Insurance Co., and Grimes v. New York Life Insurance Co. are the leading cases in the area, but they are in conflict. The holdings may be very fact-specific and depend on how strictly a court interprets insurance contracts. No clear reason, however, explains the courts' conflict. Like the other cases in this area, the differing results indicate the courts' early struggle with interpreting insurance exclusions in the aviation context.

4. War Risks Exclusions and Hull Insurance

War risk exclusions have been examined in light of aviation exclusions in the context of life insurance policies. Hull insurance is another area where judicial interpretation of war risk exclusions can be very significant. Aviation hull insurance is coverage that "furnish[es] broad property protection for the aircraft owner's interests with coverage for damage or loss to the plane or cargo. See supra text accompanying note 17.

244 Id. at 991.
245 Quinones, 24 So. 2d at 270.
246 Grimes, 84 F. Supp. at 911.
247 24 So. 2d 270 (La. 1945); see supra note 221 and accompanying text.
248 79 F. Supp. 847 (W.D. Mich. 1948); see supra note 233 and accompanying text.
249 84 F. Supp. 989 (E.D. Pa. 1949); see supra note 242 and accompanying text.

250 Hull insurance protects the aircraft owner's interests with coverage for damage or loss to the plane or cargo. See supra text accompanying note 17.

251 See supra note 79 and accompanying text.
This type of coverage is often limited by war risk exclusions and other limitations. Pan American World Airways, Inc. v. Aetna Casualty & Surety Co. is the landmark case in the area of aviation exclusions relating to hull insurance. Pan American had three types of coverage including, (1) all risk insurance, (2) private war risk insurance, and (3) a war risk insurance policy issued by the United States Secretary of Transportation. Two terrorists from the Popular Front for the Liberation of Palestine hijacked the Pan American airplane and destroyed it with explosives.

The Aetna insurance policy contained a war risk exclusion clause excluding losses from any military or usurped power, or resulting from war, civil war, insurrection, warlike operations, riots or civil commotions. The Court of Appeals for the Second Circuit affirmed the trial court decision that a war risk exclusion does not bar recovery for terrorist hostilities unless the policy explicitly excludes such activity.

It is significant that Pan American received insurance coverage under the War Risk Insurance Act because war risk insurance is not offered by American insurers. Thus, Pan American turned to the London market for its primary coverage and then had to seek insurance from the United States government for coverage above the London policy limits. The United States paid Pan American between $9,800,000 and $10,000,000 in insurance coverage.

A war risk exclusion had a different result in Airlift International, Inc. v. United States. In Airlift International the plaintiff owned a civilian aircraft that operated under a government contract to transport cargo during the Vietnam

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252 SPEISER, supra note 44, § 29:1, at 167.
253 Id.
254 505 F.2d 989 (2d Cir. 1974).
256 Pam Am. World Airways, Inc., 505 F.2d at 1022.
258 SPEISER, supra note 44, § 29:15, at 188.
259 Id.
War. The plane collided with another government aircraft and the plaintiff's plane crashed to its total destruction. The plaintiff had two insurance policies, one by a private insurer which contained a war risk exclusion; the other insurance coverage came from the United States government War Risk Insurance Act.\(^{261}\) The plaintiff sought recovery under the United States policy.

The government's policy explicitly provided coverage for the risks which private insurers excluded from the plaintiff's commercial aviation hull policy.\(^{262}\) The government policy coverage included, "[l]oss or damage due to or resulting from: . . . war . . . or warlike operations, whether there be a declaration of war or not . . . ."\(^{263}\) The court had to decide whether the commercial insurance policy excluded the war risk, thus triggering the governmental policy, or whether the commercial policy did not exclude the risk resulting in the private insurer's liability.

The court held that the commercial war risk exclusion did not exclude the accident that resulted in the loss of the plaintiff's aircraft.\(^{264}\) The court reasoned that neither an act of aggression nor an act of war caused the accident.\(^{265}\) The mid-air collision and subsequent loss resulted from a peril of the air, not a peril or risk of war.\(^{266}\) This interpretation meant that the government policy did not provide coverage for the accident because, according to the court, the commercial policy assumed the risk for such an accident.\(^{267}\)

As can be seen from the previous cases, the courts' analyses in the hull insurance cases are very similar to the life insurance policy cases. War risk and aviation exclusion often have an undetermined effect on the outcome of recovery. If a court determines the cause of the accident was

\(^{262}\) The governmental insurance policy served to provide civilian air carriers insurance for risks private insurers refused to insure. \textit{Id.}
\(^{263}\) \textit{Airlift Int'l, Inc.}, 335 F. Supp. at 446.
\(^{264}\) \textit{Id.} at 447.
\(^{265}\) \textit{Id.}
\(^{266}\) \textit{Id.}
\(^{267}\) \textit{Id.}
an excluded risk, the aircraft owner's losses are uninsured. The uncertainty appears to rest in the courts' difficulty in determining which fact scenarios fall under an excluded war risk. The implications of judicial interpretation and construction are, to a certain degree, interconnected in both life insurance and hull insurance cases. Thus, the considerations of public policy, possible solutions, and critical analysis are relevant to both types of cases.

IV. CRITICAL ANALYSIS

A. WAR RISK INSURANCE AND THE CIVIL RESERVE AIR FLEET PROGRAM

The problem of interpreting and dealing with war risk exclusions caused the United States government to enact the War Risk Insurance Act\(^\text{268}\) as a subchapter to the Federal Aviation Act of 1958.\(^\text{269}\) In the United States, war risk insurance is completely a governmental endeavor, since American insurance companies have avoided this market and have solidified their position with the use of war risk exclusions.\(^\text{270}\)

The War Risk Insurance Act is a program that provides insurance to air carriers "in situations where war risk insurance is unavailable and the President has determined the 'the continuation of American Aircraft . . . is necessary to carry out the foreign policy of the United States.'"\(^\text{271}\) Insurance can be issued for both premium insurance\(^\text{272}\) and non-


\(^{269}\) SPEISER, supra note 44, § 29:15, at 187.


\(^{272}\) Premium insurance is available when the Secretary of Transportation determines that commercial insurance becomes extremely high or unavailable. This type of insurance has been issued three time in our history: (1) for the Vietnam War, (2) for the period close to the TWA hijacking, and (3) during the Gulf War against Iraq. Id. at viii.
premium insurance.\textsuperscript{273} The War Risk Insurance program is limited, however, in that governmental insurance coverage is only available for flights where both points are outside of the United States or for flights between the United States and a foreign point.\textsuperscript{274}

The United States commercial air carrier industry witnessed the success of the War Risk Insurance Act during the Gulf War after Iraq invaded Kuwait.\textsuperscript{275} The Gulf War provided the largest civilian and military cooperative airlift in history.\textsuperscript{276} The commercial air fleet commissioned by the government gave the largest, most extensive, most impressive contribution of civilian aircraft to the military in support of military objectives that this country has ever seen.\textsuperscript{277} The War Risk Insurance program was critical to the successful operation as it guaranteed the aircraft owners protection from losses.\textsuperscript{278}

The importance of the War Risk Insurance Act is that it provided the necessary insurance coverage for war risks that United States insurers excluded from coverage.\textsuperscript{279} Without the government insurance program it is likely that the civilian and commercial airlines would have played a lesser role.\textsuperscript{280} This lesser role undoubtedly would have limited the United States mobility during the Gulf War.\textsuperscript{281} Significantly, the War Risk Insurance Act is a response to the confusion of war risk exclusions because the government insures those risks. The extra coverage decreases the likelihood of litigation because a party suffering a loss will receive compensation from either the government or a private insurer.

\textsuperscript{273} Non-premium insurance is available to aircraft called to participate in the Civil Reserve Air Fleet Program (CRAF) which provides civilian planes to supplement U.S. military air carrier capacity. Non-premium insurance can be issued to participating civilian carriers at the request of the Secretary of Defense. Id. at ix.
\textsuperscript{274} Id. at viii.
\textsuperscript{275} House Committee Report, supra note 271, at 1.
\textsuperscript{276} Id.
\textsuperscript{277} Id.
\textsuperscript{278} Id. at 4.
\textsuperscript{279} House Committee Report, supra note 271, at 4.
\textsuperscript{280} Id. at 6.
\textsuperscript{281} Id.
Although the operation of the Act is limited to situations determined to be in the interest of public policy, it has effected the interpretation of war risk exclusions. In *Airlift International, Inc. v. United States*\(^2\) the court faced a situation where the plaintiffs would recover no matter how the court ruled because the government policy covered war risks and the commercial policy covered all other risks.

Courts often prefer to decide cases in a manner that will not result in forfeiture.\(^3\) Some judges will, in extreme forfeiture cases, explicitly argue that a result is too harsh and will decide the case in a way that avoids forfeiture.\(^4\) These decisions are usually driven by the notion that the contracting party should receive some benefit of his bargain. However, courts are generally not this overt. Forfeiture is, therefore, sometimes avoided by using arguments of waiver, impossibility, or by construing the terms of the contract as satisfied.\(^5\) The importance of forfeiture is that it may have been an unstated driving force in the aviation cases examined thus far.

The significance of the War Risk Insurance Act's role is that courts did not concern themselves with issues of total loss or forfeiture in cases where an insured had both government and private insurance. Such concerns served no purpose as the injured party had at least one form of recovery, either under the War Risk Insurance program or through private insurance. Although cases not involving the War Risk Insurance Act rarely address issues of total loss and received little or no mention in judicial analyses,\(^6\) one has to wonder if the courts which ruled for the plaintiff/beneficiary were result driven in their construction of the


\(^4\) Professor Gregory Crespi, Lectures in Advanced Contracts, Southern Methodist University School of Law (Fall 1993).

\(^5\) Id.

\(^6\) Professor Crespi explains that judges prefer to decide cases on grounds other than forfeiture but believes issues of total loss often play a significant role in the outcome of contract cases. Id.
insurance policies. Although limited to relatively narrow situations, the interplay of the War Risk Insurance Act with commercial policies may influence a more strict construction and interpretation of aviation insurance policies and war risk exclusions.

B. AVIATION AND WAR RISK EXCLUSIONS IN LIFE INSURANCE POLICIES

Cases involving life insurance policies and controversies over war and military risks are more difficult to understand than the hull insurance cases. One of the problems is that no clear guidance is given by the courts for interpreting these types of exclusions.287 The only guidance the courts have explicitly set forth are broad concepts of insurance law and principles of the construction of contracts.288 The guiding principles are that ambiguities are construed against the insurer, that the terms of the contract are given their plain and ordinary meaning, that specific provisions are given greater weight than general terms, and that typed or hand written terms will prevail over boilerplate language.289

The source of the general principles is contract law because insurance law is founded in contract.290 Understandably, contracts have different provisions and terminology, and the lack of uniformity and precision is part of the problem.291 The great disparity between insurance policy language and terminology has caused a great deal of judicial confusion.292

A single type of aviation coverage may contain dozens of different policy variations and exclusions which are anything but identical.293 In fact “the language varies widely from policy to policy, and is often so ambiguous or complicated that the insured—and even the courts—cannot de-

288 Id.
289 Id.
290 McGhee-Glisson, supra note 12, at 211.
291 Id.
292 Id.
293 Miller, supra note 40, at 48.
termine exactly what is excluded. Another source of confusion is that judges approach cases differently in determining the meaning of an insurance contract and the expectations of the parties. The result of such confusion, as evidenced by the case law, is that the exclusion is not a negotiated part of the contract and only becomes an issue when the insured receives a letter denying coverage. Such letters usually result in litigation that is highly dependent upon judicial interpretation.

The judicial interpretation has been unpredictable because there are "no specific rules of construction which can be applied in this area, but rather the cases have turned largely upon the peculiar terms of phraseology of the policy provisions in question and the unique factual situations in each case." It would be a mistake, however, to assume that this area is completely unpredictable because the drafters of the policies can avoid complication through carefully worded policies. Courts have seemed to focus on the cause of the death or casualty.

Although the opinions of the examined cases did not expressly discuss causation, it seemed to play a role in several of the cases. This is true despite the rule recognized by a majority of courts that no causal connection needs to exist between the loss and the excluded risk for coverage to be denied. Recall in Boye v. United Services Life Insurance Co. and Paradies v. Travelers Insurance Co. that the pilots were

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294 McGhee-Glisson, supra note 12, at 211.
295 E. ALLAN FARNSWORTH, CONTRACTS § 7.7, at 238 (2d ed. 1990). Judges are not of a single mind in approaching this task of determining the expectations of the parties. They differ in their faith in the reliability of language and the inherent meaning of words. Judges also differ in their tolerance of the inevitable protraction of the judicial process that results from an abandonment of this faith.
296 Id.
297 Miller, supra note 40, at 48.
299 Simon, supra note 110, at 45.
300 Hagglund & Arthur, supra note 88, at 45.
301 168 F.2d 570 (D.C. Cir. 1948); see supra note 160 and accompanying text.
302 52 N.Y.S.2d 290 (N.Y. Civ. Ct. 1944); see supra note 155 and accompanying text.
killed when their aircraft was shot down. Their life policies contained aviation exclusions but no war risk exclusions.

The courts found that the insureds' deaths resulted from a risk of war and not from the risk of aviation. Thus, the courts found it significant that their death was caused by enemy fire and not an aviation risk. Since hostile enemy activity was not an excluded risk, the beneficiaries of the life insurance policies were allowed to recover. The courts used a causation analysis to determine that the accident arose out of a military risk, not from an excluded aviation risk. Had the accidents resulted from a mechanical malfunction the analysis would have been more difficult.

Using the causation analysis to understand the cases may also explain the result of Green v. Mutual Benefit Life Insurance Co., where the enemy did not shoot the insured down, but he died as a result of an aviation related mishap. Again recall that the insured had an aviation exclusion but no war risk exclusion. The court found that his crash landing was a risk of an aviation type and therefore excluded from coverage. Using a causation analysis in this type of situation is plausible.

The fact that a plane was shot down would seem to be evidence that such an incident was a war risk. Unless war risks are explicitly excluded from coverage, a fair interpretation of a policy with an aviation exclusion is that such a risk is not excluded. The reason is that there is no causal link between the death and the excluded coverage. In contrast, in a situation where the military pilot crashed as a result of malfunctioning instruments, and the policy included an aviation exclusion but no war risk exclusion, the causal analysis would mean that the death was not covered because of the causal connection between the death and the aviation exclusion.

Using a causation analysis to determine liability of the insurer seems like a reasonable approach to handling war risk

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503 144 F.2d 55 (1st Cir. 1944); see supra note 197 and accompanying text.
504 Id. at 57.
exclusions. Courts following this approach would probably not hold as the court did in Conaway v. Life Insurance Co., where the insured died when he crash landed his plane because he ran out of fuel. The insured's policy contained an aviation exclusion but no war risk exclusion. The court held that the insured was covered under his insurance policy.

A causal analysis might mean that Conaway would come out differently. The result would be different because Conaway's death had a causal connection to the aviation exclusion. Running out of fuel would seem to be an aviation risk and not a war risk. Although using a causation approach might appear to be a reasonable solution, the outcome of such cases may not change.

The possible explanation is that, when using a causal analysis, the arguments focus on the causal link. The Conaway court could have easily reached the same result using a causation approach merely by holding that running out of fuel is causally connected to a war risk. Thus, because the death was a result of war and war was not excluded from coverage, the insured is provided coverage. The nature of aviation exclusions is such that there is no easy solution and the courts' holdings are still unpredictable.

Another possible solution to deal with the unpredictable nature of aviation insurance policies and the judicial interpretation of exclusions is the standardization of insurance contracts. In fact, there has been some degree of standardization in the insurance industry in regard to war and military risk aviation exclusions. After the Pan America Airlines hijacking on September 6, 1970, all risk insurers

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305 76 N.E.2d 284 (Ohio 1947); see supra note 212 and accompanying text.
306 Id. at 285.
307 Id. at 286.
308 Miller, supra note 40, at 48.
309 See supra note 253 and accompanying text for a discussion of the Pan American Airlines hijacking.
in the United States adopted the Common North American Airline War Exclusion Clause (CWEC).\footnote{Vinciguerra, \textit{supra} note 117, at 932. This standardized clause excludes coverage for losses resulting from: (a) War, invasion, acts of foreign enemies, hostilities . . . civil war, rebellion, revolution or insurrection, military or usurped power . . . (b) Any hostile detonation of any weapon of war employing atomic or nuclear fission and/or fusion . . . (c) any unlawful seizure, diversion or exercise of control of the aircraft, or attempt, threat, by force or threat . . . (d) strikes, lockouts, labor disturbances, riots civil commotion. (e) vandalism, sabotage, malicious act or other act intended to cause loss or damage. \textit{Id.} at 932 n.61 (citing Comment, \textit{A Legal Response to Terrorist Hijacking and Insurance Liability}, 6 \textit{Law \\& Pol'y Int'l Bus.} 1167, 1195 n.191 (1974)).}

As can be seen from the CWEC, this standardized provision describes the coverage from the insurer's perspective. The apparent trend toward policies that expressly favor insurers is caused by the extreme vulnerability of insurers to the judicial determination that policy terms are ambiguous. Under the guise of ambiguity, judges with swift pens can construe insurance policy provisions against the insurer.\footnote{Miller, \textit{supra} note 40, at 48.} This type of standardization, however, is still subject to judicial construction and is unpredictable.\footnote{\textit{Id.}}

Litigation will likely follow despite the seemingly clear terms of the insurance contract.\footnote{Ballard \\& Chero, \textit{supra} note 15, at 136.} \"[T]he insured will argue (1) that he misunderstood what the coverage was, (2) that the scope of the coverage was misrepresented to him by the insurer or his agent, or (3) that the policy was not written as requested by the insured.\"\footnote{Miller, \textit{supra} note 40, at 49.} The outcome of such arguments is equally unpredictable when the result depends on a jury determination.\footnote{Interview with Larry Warren, Insurance Attorney at Ball \\& Weed, Inc., in San Antonio, Tex. (Oct. 22, 1993).} It is difficult to tell how a jury will decide when the common understanding of a life insurance policy is that the insurer pays if the insured dies an unexpected death.\footnote{\textit{Id.}}
Despite the unpredictability of jury decisions, standardization of aviation exclusions and policies will probably lead to more predictable and trustworthy judicial decisions.\textsuperscript{317} At the very least standardization would assist the insurance companies and claimants in resolving difficult issues concerning policy coverage and the intent of the parties.\textsuperscript{318} Standardization of insurance policies, however, is not free of problems.

One problem with standardization that is frequently cited is whether federal and state authorities would accept the standardized policy because of concerns with antitrust violations.\textsuperscript{319} Insurance companies also may object because of differing philosophies about how to underwrite aviation risks.\textsuperscript{320} Insurance companies have also voiced the opinion that they need to be free to tailor their policies to the needs of their customers as well as the needs of the state.\textsuperscript{321} Standardization may be one approach to dealing with the judicial unpredictability, but it is not a solution that has received unanimous support.

As long as aviation policies use vastly different language to cover and exclude similar risks, judicial rulings will continue to differ.\textsuperscript{322} Today, aviation insurance policies and exclusions are interpreted in isolation, and the courts do not have much precedent to assist in the analysis.\textsuperscript{323} It is likely that the insurers will adopt language that has been interpreted favorably by courts, and that the language resulting in verdicts against the insurers will be dropped.\textsuperscript{324} It is possible that such adoption has been one of the reasons why there have been relatively few recent cases involving war

\textsuperscript{317} Miller, supra note 40, at 50.
\textsuperscript{318} Id.
\textsuperscript{319} Id. The general concern is that standardized insurance policies would pose unlawful restraints on trade and commerce. See, e.g., Paul W. Engstrom, Alternative Wording to the Present General Aviation Insurance Policies, 43 J. AIR L. & COM. 357, 358 n.5 (1977).
\textsuperscript{320} Miller, supra note 40, at 50.
\textsuperscript{321} Id.
\textsuperscript{322} Hagglund & Arthur, supra note 88, at 56.
\textsuperscript{323} Id.
\textsuperscript{324} Id.
risk and aviation exclusion clauses. But until the insurers develop some sort of standardization, there may continue to be a number of decisions that may surprise claim departments and underwriters for their liberty of construction.footnote{325}

Commentators have argued that any standardization we are seeing today “describes coverage more from the insured’s perspective than that of the insurer. That, in itself, is significant progress as a matter of public policy in today’s era of consumerism.”footnote{326}

The writing of pro-consumer policies is questionable since other commentators have defined the role of the insurance companies in the aviation industry in a way that is less pro-consumer.footnote{327} The insureds’ position is that the insurance policy exclusions are plagued with confusion and ambiguity.

The insurance companies and insurance attorneys, however, have been quite vocal in presenting their position. The insurer’s use of exclusions has been explained as having an important role in aviation insurance policies.footnote{328} One commentator noted that, “[c]ontrary to the belief of many insureds and all plaintiffs’ counsel, exclusions are not the product of a collusive effort by underwriters and claim managers to attempt to delete, in fine print, all coverage provided by insurance agreements under every set of facts that could possibly result in a loss.”footnote{329}

The purposes of exclusions have been described as essential elements for ensuring that the premiums paid to the insurance company are commensurate with the risks against which the insurance company insures.footnote{330} “One basic principle behind all liability policies is often overlooked. These policies were not designed to compensate injured

footnote{325} Id.
footnote{326} Miller, supra note 40, at 48.
footnote{327} See generally Ballard & Chero, supra note 15, for a discussion of business attitudes and practices in the aviation insurance industry.
footnote{328} Id. at 117.
footnote{329} Id.
footnote{330} Id.
claimants. They were designed to indemnify the insured but only within the risks contemplated.\textsuperscript{351}

Since war and military risks are extremely unpredictable and hazardous, the insurance companies argue that the exclusions allow the insured to receive coverage at affordable rates.\textsuperscript{352} The argument continues that the exclusions allow insureds to only pay for coverage of the risks for which they seek insurance.\textsuperscript{353} Exclusions have also been defended on the grounds that they help guard against overcompensation by preventing multiple indemnification in cases where there would otherwise be overlapping coverage in the same policy or between different policies.\textsuperscript{354}

This argument could reach a logical extreme as insurance companies look to rewrite their aviation exclusion clauses and standardize their aviation insurance policies. Although such policies will arguably be cleaner, easier to understand, and will probably eliminate a lot of problems, the end result may be that no risk is covered.\textsuperscript{355} In fact, the last clause of such a policy may read:

\begin{quote}
Notwithstanding any of the above provisions, it is hereby agreed that due to the inadequacy of the premium charge, no claims will be paid for any loss occurring under the terms of this policy. However, in lieu thereof, upon notification of any such loss, the underwriter will extend to the insured his deepest sympathy.\textsuperscript{356}
\end{quote}

\section*{V. CONCLUSION}

The rise of the airplane as a mode of transportation has caused a certain degree of turmoil in the insurance industry as well as in the courts. It is apparent from the cases analyzed that "no two jurisdictions, when interpreting the same

\begin{itemize}
\item \textsuperscript{351} Ballard & Chero, supra note 15, at 136.
\item \textsuperscript{352} Id.
\item \textsuperscript{353} Id.
\item \textsuperscript{354} Id.
\item \textsuperscript{355} Tom H. Davis, \textit{Aviation Insurance Exclusions}, 37 J. AIR L. & COM. 337, 341 (1971).
\item \textsuperscript{356} Id.
\end{itemize}
or similar exclusion, will necessarily agree on its application."\textsuperscript{337} The only thing that can be stated with certainty is that each case stands on its own with its unique factual situation playing a vital role in the outcome.\textsuperscript{338}

Maybe this is not such a bad thing. "Perhaps each case should stand on its own."\textsuperscript{339} Maybe judges should be free to interpret each case in a manner that is somewhat unpredictable. The problem with such an approach, however, is twofold. First, uncertainty as to which accidents will be covered for the insurer translates into uncertainty for the insured as well.\textsuperscript{340} Second, uncertainty of the risks that will be covered means that the risk will be passed on to the insured in the form of higher premiums.\textsuperscript{341} As long as no clear explanation of the law exists, both the insurers and insureds alike will continue to argue and litigate the interpretation of aviation insurance exclusions in the context of military or war time service.

\textsuperscript{337} Ballard \& Chero, superscript{supra} note 15, at 136.
\textsuperscript{338} \textit{Id.}
\textsuperscript{339} \textit{Id.}
\textsuperscript{340} \textit{Id.}
\textsuperscript{341} \textit{Id.}