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Recent Decisions

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Recent Decisions

**FEDERAL COURTS—CLASS ACTION—A District Court's Ruling**

Caceres and other travel agents brought an antitrust class action in a New York federal district court against several major international air carriers and their association, the International Air Transport Association. The petition alleged a "concerted boycott" and a "refusal to deal" with the travel agents because of the rejection of their applications for authorization to sell passenger and cargo tickets for member airlines. The district court, finding nothing in the record to indicate that any claims were of such a low order of magnitude that it would be unfeasible or uneconomic for the claimants individually to seek redress, disallowed the class action. The individual actions were left pending since jurisdiction was present. The plaintiffs appealed the district court order that disallowed their class action status to the Court of Appeals for the Second Circuit. Held, appeal dismissed: A district court order that disallows a class action is not an appealable "final decision" unless the facts bring the case within one of the statutory or judicial exceptions to the final judgment rule. *Caceres v. International Air Transport Association*, 422 F. 2d 141 (2d Cir. 1970).

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1 Caceres v. International Air Transp. Ass'n, 46 F.R.D. 89, 90 (S.D.N.Y. 1969). Caceres, for himself and others similarly situated, alleged antitrust violations against the defendants with the knowledge that IATA and the airlines had an immunity in relation to illegal restraints of trade given them by the grace of Congress under 40 U.S.C. § 1384 (1964), provided that the procedures of the Civil Aeronautics Board were used in duly notifying the applicants of the reasons for their disapproval. The main question for future litigation in the Caceres case was whether IATA would be deemed "immune" from antitrust remedies-violations or whether, in fact, the IATA had "waived" immunity by alleged faulty (under CAB standards) notices of disapproval.

2 Id. at 95. See Fed. R. Civ. P. 23(b)(3).

3 One of the important reasons that the district judge felt dictated a non-class characterization was the variances in notices given by the IATA to the individual agents. It was proved that notices varied as to (1) reasons given for disapproval; (2) amount and quality of information furnished by IATA as to the reasons for rejection; (3) the means by which the applicants could improve their positions; and (4) the ultimate results of their applications. Therefore, the notice was important to each individual member, and the notices would play an important part in the questions of antitrust immunity. Thus, the district judge found the important individual questions would be prohibitive of efficiency under a class type action; accordingly, he held that the action was maintainable only individually because the questions affecting the individual members predominated over common questions of fact and law and because there were other more efficient methods of conducting the action than the class device. 46 F.R.D. at 95, 96.
The final judgment principle,\(^4\) applied in cases since 1789 to disallow appeal from non-final, interlocutory orders,\(^6\) has been defined by the Supreme Court as “... that which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment”\(^6\) but does “... not necessarily mean the last order possible to be made in a case.” The main purpose of the rule is to discourage piecemeal review of cases.\(^6\) However, both Congress and the courts have been

\(^4\) In the federal appellate courts the jurisdictional requirements for an appeal from a district court order or decision must be fulfilled just the same as the initial jurisdictional requirements must be met in the lower courts. The main question for consideration of the jurisdiction of an appeal may be termed as whether the appeal should be processed at the present time or at some later, more appropriate time. The jurisdictional question for appeals may be raised at the court of appeal level by the parties, \textit{sua sponte} by the court and even on subsequent review by the Supreme Court. See Alart Associates, Inc. v. Aptaker, 402 F.2d 779 (2d Cir. 1968) (This is another of the surprisingly frequent occasions when neither party to an appeal briefed the appealability of the order complained of until the issue was raised at oral argument.) See also Diamond Shamrock Oil & Gas Corp. v. Comm'r, 422 F.2d 532 (8th Cir. 1970) where the court applied the general rule that “it is a duty of a court of appeal to satisfy itself as to its jurisdiction, whether or not the jurisdictional issue is raised by the parties”; 21 Turtle Creek Square, Ltd. v. New York State Teachers' Retirement Sys., 404 F.2d 31, 32 (5th Cir. 1968) (“It is essential for this court to stay within the limits of its statutory jurisdiction and to refrain from deciding cases and questions which it has no authority to decide.”). Cf. Swift & Co. Packers v. Compania Del Caribe, S.A., 339 U.S. 684 (1949); Mitchell v. Maurer, 293 U.S. 237, 244 (1934).

\(^6\) See 28 U.S.C. § 1291 (1964): “The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.”

\(^6\) Catlin v. United States, 324 U.S. 229, 233 (1945).


"Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed.

Other reasons interrelated with and ancillary to the statutory and common law policy against piecemeal review that are often cited in support of a rule of finality include (1) inconveniences and cost of piecemeal review, Gillespie v. United States Steel Corp., 359 U.S. 148, 153 (1964); (2) denial of justice by delays, \textit{Id.}; (3) an appellant's ultimate right of review upon appeal from a final judgment all stages of the proceedings that may be reviewed and corrected, American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 280 (2d Cir. 1967); City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 299 (2d Cir. 1969). See also Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949); 21 Turtle Creek Square, Ltd. v. New York
sensitive towards a too rigid application of the rule that would cause irreparable harm to the parties or deny effective review. A rule that would require all judgments appealed from to be absolutely final in the sense that the whole adjudication must be completed would be far too rigid; conversely, a rule that would unqualifiedly allow every order handed down from pre-trial to judgment to be appealed at will would be ludicrous. Thus, in an effort to create a workable rule that would allow interlocutory review in some instances, finality has been given a pragmatic rather than a technical application, even though the Supreme Court has stated that "it is impossible to devise a formula to resolve all marginal cases."

Appeals may therefore be taken from non-final orders under the provisions of section 1292 if the district court (1) has granted, re-

State Teachers' Retirement Sys., 404 F.2d 31, 32 (1968); (4) the elimination of unnecessary interlocutory appeals, since the complaining party may win the case or settle it, City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 299 (2d Cir. 1969); American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 280 (2d Cir. 1967); (5) the absence of irreparable harm from many of the various types of interlocutory orders, id.; (6) the potential for harassment of litigants by nuisance appeals, American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 280 (2d Cir. 1967); (7) the burden on the reviewing court's docket from appeals of interlocutory, non-final orders which amount to mere housekeeping matters in the district courts, id.; (8) the chance of reversal of all but the most unusual of orders, id.; (9) keeping appellate courts from intervening or interfering with anything tentative, incomplete, open and inconclusive with the desired result of leaving review, intervention and correction for a time when judgment is final and conclusive; Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949); (10) a true final judgment renders some interlocutory orders unimportant and inconsequential once they merge on the final judgment in an appeal, 6 J. MOORE, FEDERAL PRACTICE § 54.11 (3d ed. 1968); and (11) indiscriminate appeals invite an improper, uncertain interference with a trial judge's discretion before he has a chance to go to trial to adjudicate the merits, Peter Pan Fabrics, Inc. v. Dixon Textile Corp. 280 F.2d 800, 805-6 (2d Cir. 1960) (dissenting opinion).

See, e.g., Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949); 21 Turtle Creek Square, Ltd. v. New York State Teachers' Retirement Sys., 404 F.2d 31, 32 (5th Cir. 1968).

28 U.S.C. § 1292 (1964) provides:

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such
fused or modified an injunction; (2) has appointed receivers or refused to wind up a receivership; (3) has determined rights and liabilities of the parties in admiralty cases; (4) has given judgment for patent infringement, final except for accounting; and (5) in making an order not otherwise appealable, has found that the order involves a controlling question of law to which there is substantial ground for difference of opinion and that an immediate appeal from the order would materially advance the ultimate termination of the litigation.

In cases involving multiple claims or multiple parties, Federal Rule 54(b) supplies a certification procedure by which the district judge may grant "... final judgment as to one or more but fewer than all the claims or parties." However, the usefulness of Rule 54(b) is limited. Confined to expediting multiple party, multiple claim litigation, even if a district judge grants a certificate under Rule 54(b), it is not binding jurisdictionally on the court of appeals. A district court cannot confer jurisdiction on a court of appeals where it does not exist.

The judiciary has developed two further exceptions. One is the appealability of a district court order that is a partial adjudication of the merits of a case; the other is the appealability of a collateral order. In *Forgay v. Conrad* the Supreme Court held that a partial adjudication of the cause of action may be appealed when it appears that a party may suffer irreparable injury if appellate review of that order is delayed until a final adjudication of the entire case by the district court. In *Forgay* suit was filed by a trustee in bankruptcy to set aside as fraudulent certain conveyances of land and other property and to obtain an accounting of rents and profits. The district court declared the conveyances void and entered a decree calling for immediate delivery of the wrongfully conveyed property to the plaintiff. However, at the same time the suit was retained to conduct an accounting. Although recognizing the decree was not technically final, the court nevertheless held that the appeal was properly taken. As a test Mr. Justice Taney stated:

order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however, that* application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof so order.

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13 FED. R. CIV. P. 54(b).
14 96 U.S. (6 How.) 201 (1848).
[if] these appellants must wait until the accounts are reported by the master and confirmed by the court, they will be subjected to irreparable injury. For the lands and [property] which they claim will be taken out of their possession and sold, and the proceeds distributed among the creditors of the bankrupt, before they can have an opportunity of being heard in this court in defense [sic] of their rights.15

The Supreme Court also established in *Cohen v. Beneficial Industrial Loan Corp.*16 that an order is “collateral” and thus appealable if, rather than relating to the merits, it is more in the nature of “judicial housekeeping.” The Second Circuit has extended this doctrine, however, to apply not only to situations in which there may be irreparable injury if no appeal is allowed until technical finality, but also to situations where if no appeal is allowed, an “effective termination” of the action will result.

In *Eisen v. Carlisle,*17 appeal was allowed even though the particular order had been previously determined to be one that was interlocutory, non-final and therefore unappealable under section 1291.18 The appeal in *Eisen* concerned the district court’s determination that a class action could not be maintained under Rule 23(c)(1). The court held non-appealability of the order would have sounded a “death knell”19 to the plaintiff’s ability to maintain his cause of action, even though appeals from class action denials have normally been dismissed as lacking appellate jurisdiction due to the non-finality of the order.20 Nevertheless, in a later decision the Second Circuit did not allow a district court’s order denying class action status to plaintiffs in an antitrust suit. In *City of New York v. International Pipe and Ceramics Corp.*21 the Court determined that the district order, if left unreviewed, would not be a “death knell” of the action since the “City and twenty-seven plaintiff-intervenors with adequate resources to continue the action

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15 *Id.* at 203.
16 337 U.S. 541 (1949). See also Swift & Co. Packers v. Compania Del Caribe, S.A., 339 U.S. 684 (1949). In Baxter v. United Forest Products Co., 406 F.2d 1120 (8th Cir.) *cert. denied*, 394 U.S. 1018 (1969) the Eighth Circuit determined that a seemingly interlocutory order sequestering the defendant’s monies without compliance with state laws was appealable even though not technically final. The court followed the *Cohen* collateral order doctrine and held the order appealable since the practical effect of un-appealability would permit a circumvention of the Iowa law of attachment.
21 410 F.2d 295 (2d Cir. 1969).
and with substantial amounts at stake will undoubtedly carry on." Accordingly, review was denied.

The Court maintained the same position in Caceres. The Second Circuit observed the sound congressional policy behind section 1291, and, while recognizing that exceptions to the final judgment rule should be permitted when refusal to review a district court order could result in irreparable injury to the appellant or a "death knell" to the entire action before litigation on the merits, it found the facts in Caceres similar to those in International Pipe and distinguished Eisen on the same basis:

... [T]he gloss upon sec. 1291 for alleged classes under Rule 23(b)(3) should not be expanded beyond the type of situation in Eisen. . . . In Eisen, the average claim of each member of the class was quite small. Here it is not; Judge Mansfield [trial judge] pointed out that the average claim alleged is $150,000 per member. In addition, the claim by the representative plaintiff in Eisen was only $70. While the damage claims of the seven plaintiffs here are not yet specific, enough appears in the record to justify Judge Mansfield's conclusion that no claim was of 'such a low order of magnitude that it would be unfeasible or uneco-
nomic for the claimant to seek redress.'

The distinction made between Eisen and Caceres was related to the difference in the size of the claims of the parties to the class actions. In Eisen the claims of the parties were of such a low magnitude that the court recognized that it would be economically unfeasible to pursue the claims on an individual basis. The plaintiff had filed suit both for himself and on behalf of all odd-lot purchasers and sellers on the New York Stock Exchange against two major odd-lot dealers alleging conspiracies in violation of the Sherman Antitrust Act. Even though the district court shaped its order dismissing the class action allegations thus permitting the plaintiffs to litigate their claims on individual bases, the court of appeals correctly analyzed Eisen's particular claim and its status in the spectrum of appealability. The Second Circuit in

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22 Id. at 299. The dissent felt the appeal was ripe since the Eisen rule could have been applied to the case. Judge Hays observed that: "Certain members of the proposed class have claims that are not large enough to warrant their undertaking the expense of separate law suits. For these members the order determining that the action is not maintainable as a class action has terminated the litigation." Id. at 301.
23 422 F.2d 141, 144 (2d Cir. 1970).
26 Judge Kaufman used the following language:
In the present case [there is] a single conclusion that the order dismissing this class action is appealable. The alternatives are to appeal now or to end the lawsuit for all practical purposes. Judge Tyler's order, if unreviewed, will put an end to the action . . . . We can safely assume that no lawyer of competence is going to undertake this complex and costly case to re-
cover $70. . . .
370 F.2d at 120 (citations omitted).
Eisen, therefore, allowed appeal of the denial of class action status since to disallow immediate appeal would mean that the district court order would never be reviewed by a higher court since the practical effect of that order would be to terminate litigation. In Caceres, however, the appeal of the order disallowing the class action was dismissed because the claims of the parties were high enough to justify suit on an individual basis. While the second circuit may be criticized for discrimination against parties with large claims insofar as their appeals may be disallowed, Eisen should nevertheless be followed since it provides a very realistic and responsible approach to the problem whether it is economically feasible to carry out litigation on an individual basis.

At first glance Caceres and International Pipe appear to contradict the exception to the final judgment rule enunciated in Eisen. However, the court in Caceres and in International Pipe balanced the policy of the final judgment rule against the likelihood that the individual parties in those cases would not be denied the opportunity to prosecute their claims on an individual basis if no appeal were allowed to the denial of their class action status. In both cases there were findings of fact that almost every claim was of a high magnitude. The result is both proper and realistic.

Caceres and International Pipe still recognize the Eisen interpretation of the collateral order doctrine as a viable exception to the final judgment rule, but Caceres and International Pipe also demonstrate the reluctance of the Second Circuit to extend the exception beyond the circumstances of Eisen. The court not only has granted flexible and fair exceptions to the finality principle, but also will follow the rule of finality where the circumstances do not show good cause for exception as illustrated in International Pipe and Caceres. If a party wishes to appeal an interlocutory class action denial, he must show that his claim is so small that it would not merit the expense involved in litigation on an individual basis.

Steven I. Ginsberg


The plaintiff's decedent drowned in a lake after the private airplane in which he was a passenger made a forced landing approximately two-
hundred yards from shore. Although uninjured in the landing, the insured drowned when he subsequently became entangled in a trot line as he attempted to swim to safety. The decedent's wife filed a petition in an Oklahoma state court to recover accidental death benefits under a group life insurance policy that contained the following exclusion clause:

This accidental death or dismemberment benefit shall not be payable if the death or dismemberment shall result directly or indirectly from . . . [t]ravel or flight in any species of aircraft, except as a passenger on a licensed aircraft piloted by a licensed passenger pilot or a scheduled air service regularly established between specified airports . . . .

Alleging the exclusion, the insurance company contended that the insured's death was not covered under the policy's accidental death provision. This contention was rejected by the lower court, and upon a jury verdict judgment was entered for the plaintiff-beneficiary. From this decision the insurance company appealed to the Oklahoma supreme court. Held, affirmed: When an insured passenger drowns in a lake while swimming ashore after a private airplane makes a forced landing without injuring the occupants, death is not the "direct or indirect" result of being a passenger; hence, an aviation exclusion clause is not applicable. Security Mutual Life Insurance Co. v. Hollingsworth, 459 P.2d 592 (Okla. 1969).

I. Aviation Exclusion Clauses

A. General Background

Recognizing the risk involved in aviation, insurance companies commonly incorporate aviation exclusion clauses into their life and accident policies. The purpose of these provisions is to except or limit the insurer's liability when death or injury has in some way been connected with aviation. However, identity of purpose is all these clauses have in common. Aviation exclusion clauses have not been standardized, even though standardization is common place among similar clauses that have

2 The great risks with which aviation was associated in its early years of development have decreased tremendously. On the basis of death rate per passenger mile, today, travel by air is safer than either travel by automobile or train and it has been suggested that there is no solid actuarial basis for the aviation exclusion clause. See Mooney, Functional Analysis of Exceptions in Accident Insurance, 1964 ILL. L. F. 495, 527 (citing 1 A. Appleman, Insurance Law and Practice § 601 (1965)); Comment, Exclusion of Aviation Risks From Life Insurance Contracts, 63 Yale L. Rev. 692, 693 (1954).
4 Technically, there are distinctions between an exception clause and an exclusion clause. See Mooney, supra note 2 at 499-500. But this distinction is irrelevant to the content of this article.
been in use over a long period of time. In fact, there are today more
than fifty distinct variations of the aviation exclusion clause.

In order to properly construe and apply an exclusion clause to a par-
ticular fact situation, a court must determine what the parties to the
insurance contract intended to exclude from coverage. To resolve this
issue the courts have applied the following principles of construction in
contract law: (a) the intent of the parties is to be gathered from the
terms of the policy, construed in light of the reasonable expectation and
purpose of the ordinary business man when making an ordinary business
contract; (b) if conditions, limitations and exceptions of, or exemptions
from, the liability of an insurer are not expressed plainly and without
ambiguity, they will be construed strictly against the insurer and liberally
in favor of the insured, in order that the purpose of insurance shall not
be defeated; (c) if the contract is clear and unambiguous, the words are
to be taken in their plain, ordinary and popular sense.

The courts have found these rules easy to state but often difficult to
apply. Even though the parties may have intended to exclude the risks
of aviation from the policy's coverage a court must still determine
whether the actual cause of death is a risk of flying and thus intended
to be excluded from coverage. Resolution of these issues sometimes
turns upon the causal relation between the excluded risk and the death

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"The function of the courts is not to make contracts but to enforce them and give

Paul Fire & Marine Ins. Co., 224 N.Y. 47, 120 N.E. 86, 87 ( Ct. App. 1918)).
8 "The function of the courts is not to make contracts but to enforce them and give

Paul Fire & Marine Ins. Co., 224 N.Y. 47, 120 N.E. 86, 87 ( Ct. App. 1918)).
10 Bergholm v. Peoria Life Ins. Co., 284 U.S. 489 (1932); Willingham v. Life &
Cas. Ins. Co., 216 F.2d 226, 228 (5th Cir. 1954); Wendorf v. Missouri State Life Ins.
Co., 318 Mo. 865, 1 S.W.2d 99, 101 (1927); Smith v. Metropolitan Life Ins. Co., 29
N. J. Super. 478, 102 A.2d 797, 799 (1954). "It is true that where the terms of a policy
are of doubtful meaning that construction most favorable to the insured will be
adopted ... This canon of construction is both reasonable and just, since the words
of the policy are chosen by the insurance company; but it furnishes no warrant for
avoiding hard consequences by importing into a contract an ambiguity which would
otherwise not exist, or under the guise of construction, by forcing from plain words
unusual and unnatural meanings." Bergholm, supra at 492.

11 "In proving policy exclusions, it is almost universally accepted that if the insurer
relies on an exclusionary clause of the policy, the burden of proof is on it to establish
facts that would avoid coverage. In other words, if the plaintiff proves a prima facie
case that the defendant insurer has the burden of proving any affirmative defenses." Davis,
"... to inform you that our aviation policy does not afford coverage." 36 J. Air L. &
Corp., 136 F. Supp. 717 (E.D. Wis. 1955), aff'd, 241 F.2d 101 (7th Cir. 1957); Wenden-
dorf v. Missouri State Life Ins. Co., 318 Mo. 865, 1 S.W.2d 99 (1927).
or injury. As stated in *Goforth v. Franklin Life Insurance Co.*: "The aviation activity must in some way be regarded as a proximate cause of the harm sustained in order to bring the harm within an aviation exception." In this sense, however, "proximate cause" is often said to refer to risks the parties contemplated and intended to include or exclude from coverage. Proximate cause in tort cases has been defined as "legal cause," but in the area of insurance law it is more closely akin to causation in fact and has been described as simply a mixture of "common sense, physics and 'policy' in the context of ascertaining the 'intent of the parties' to the insurance contract." In this context, Judge Cardozo, speaking for the New York Court of Appeals in *Bird v. St. Paul Fire & Marine Insurance Co.*, said:

General definitions of proximate cause give little aid. Our goal is the reasonable expectation and purpose of the ordinary business man when making an ordinary business contract. *It is his intention, expressed or fairly to be inferred that counts . . . .* The same cause producing the same effect may be proximate or remote as the contract of the parties seems to place it in light or shadow. That cause is to be held predominant which the parties would think of as predominant. A common-sense appraisement of everyday forms of speech and modes of thought must tell us when to stop. It is an act of "judgment as upon a matter of fact. . . ."

The distinction at least one authority has made between the normal exclusion clause and the "expanded exclusion clause" serves to illustrate the importance of the judiciary's cognizance of the different wording of exclusion clauses. The only difference between the two clauses

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18 224 N.Y. 47, 120 N.E. 86, 87 (Ct. App. 1918) (emphasis added). Many of the courts, while realizing the causation factor exists, have viewed the issue strictly as a question of law (i.e., did the parties intend to include or exclude coverage). See *Bull v. Sun Life Assur. Co.,* 141 F.2d 456 (7th Cir. 1944); *Green v. Mutual Ben. Life Ins. Co.,* 144 F.2d 55 (1st Cir. 1944); *Neel v. Mutual Life Ins. Co.,* 131 F.2d 159 (2d Cir. 1942); *Goforth v. Franklin Life Ins. Co.,* 202 Kan. 413, 449 P.2d 477 (1969). At least one court has even made the flat statement that it is both unnecessary and undesirable to borrow from the law of torts the nuances and subtleties which attend such a phrase as proximate cause. *Order of United Commercial Travelers of America v. King,* 161 F.2d 108, 109 (4th Cir. 1947), *aff'd,* 333 U.S. 153 (1948).
19 E. Mooney, *supra* note 2, at 517.
20 The exact language of the aviation clause involved is of great importance. This is recognized by the cases themselves. Thus, it was stated in *Bayersdorfer v. Massachusetts Protective Assoc.,* 20 F. Supp. 489, 490 (S.D. Ohio 1937), *aff'd,* 105 F.2d 595 (6th Cir. 1940).
is that the “expanded clause” is broadened by the addition of causation adjectives which purport to exclude from coverage losses caused “wholly or in part,” “directly or indirectly” as a result of the insured’s connection with aviation. The difference may appear slight, but it is extremely important because use of the “expanded exclusion clause” allows the insurer to withhold coverage in instances in which the excluded activity only secondarily contributes to the death or injury of the insured.$^{20}$

B. Applicability

Aviation exclusion clauses have generally been applied to deny recovery when an insured pilot has made a forced landing without injury but subsequently dies from drowning, exposure or similar causes.$^{21}$ The cases that have allowed recovery, holding the exclusion clause inapplicable, have generally involved restrictive exclusion clauses or clauses susceptible to a narrow construction by the courts. Three cases, arising in the Seventh Circuit, are illustrative. In *McDaniel v. Standard Accident Insurance Co.* the policy stated that no benefits are payable “for death, disability or other loss resulting directly or indirectly from injury sustained by the Insured while in or on any aircraft or other device for air travel.” The insured had drowned while trying to swim to shore after the private plane in which he had been traveling was forced to land in a lake. The Seventh Circuit held that the exclusion clause did not bar recovery because the insured’s death was not the result of injury sustained while “in or on” the airplane.$^{22}$

The same result was reached in *Eschweiler v. General Fire & Life* 1939: “The decision on the point here in controversy must be carefully scrutinized and considered, since there are many forms of the so-called aeroplane exclusion rider or provision and all cases deciding such questions are not necessarily applicable in this instance.” Also, “. . . it should be noted . . . that there are many types of aviation clauses and . . . conclusions reached under one clause are not necessarily decisive of like facts under another.” Annot., 17 A.L.R. 2d 1041, 1068 (1951).

$^{20}$ E. Mooney, *supra* note 2, at 517.

$^{21}$ Id. at 520. Accord, *Bull v. Sun Life Assur. Co.*, 141 F.2d 456, 459 (7th Cir. 1944) (dissenting opinion).


$^{23}$ 221 F.2d 171 (7th Cir. 1955).

$^{24}$ Id. at 171-72 (emphasis added).

$^{25}$ Id. at 172.
Assurance Corp. The aviation exclusion clause, similar to the one involved in McDaniel, excluded from coverage "any injury, fatal, or nonfatal, sustained by the insured while in or on any vehicle or mechanical device for aerial navigation." The insured made a forced landing upon the ice covered surface of a lake. Although uninjured in the landing, the insured subsequently died as a result of a heart attack caused by the physical effort he expended trying to drag himself to safety through a snowstorm. In holding that the exclusion clause did not bar recovery, the Seventh Circuit again stated that "the injuries which caused Mr. Eschweiler's death were not sustained while in or on the airplane."

Bull v. Sun Life Assurance Co. of Canada is similar. In Bull the insured, a navy pilot, was killed by strafing from a Japanese airplane after his seaplane had been downed in the South Pacific by enemy gunfire. Rather than the "in or on" distinction, the court used this language:

Where the service, travel, and flight in the airplane had definitely ended, and the only connection the insured had with the plane at the time he met his death at the hands of a strafing [enemy] was that he had arrived by plane at the place where the [enemy] shot him, his death was too remote to be considered the result, direct or indirect, of service, travel, or flight in an aircraft.

The three cases discussed are the exception rather than the rule. The decisions in McDaniel and Eschweiler are based entirely upon restrictively worded clauses that are only applicable when the insured is injured while "in or on" an airplane. Bull has been cited as a questionable decision and has been distinguished as applicable only in the rare situation where the insured's death has been caused by the deliberate act of a third person. On the other hand, there has been a long line of decisions dating from 1927 which have given effect, perhaps reluctant-

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27 Id. at 718 (emphasis added).
26 Id. at 720 (emphasis added).
29 141 F.2d 456 (7th Cir. 1944).
32 The decision in McDaniel was distinguished in a case having an almost identical fact situation on the basis of discrepancies in the wording of the exclusion clauses. In McDaniel the clause excepted "death . . . resulting directly or indirectly from injury sustained by the insured in or on any aircraft;" in this case the risk not assumed is "death resulting from travel or flight in, or decent from or with, any kind of aircraft . . . ." Elliot v. Massachusetts Mut. Life Ins. Co., 388 F.2d 362, 367 (5th Cir. 1968). The two clauses are materially different as to the place of injury.
33 See Green v. Mutual Ben. Life Ins. Co., 144 F.2d 55, 58 (1st Cir. 1944).
34 Pitman v. Lamar Life Ins. Co., 17 F.2d 370 (5th Cir. 1927).
ly," to the probable intent of the parties and have denied recovery. Generally, the courts have indicated that the intention of the parties to an unambiguous aviation exclusion clause has been to exclude from coverage the normal and reasonably foreseeable risks of aviation.39 The breadth of these activities and their accompanying risks are, in the final analysis, dependent upon the wording of the particular clause in question.40 Nevertheless, some generalizations can be made. For example, the Fifth Circuit's opinion in Pitman v. Lamar Life Insurance Co.41 pointed out that the "aeronautic activities of one who takes such a trip do not begin or end with the actual flight, but include his presence or movements in or near to the machine incidental to beginning or concluding the trip." In Wendorff v. Missouri State Life Insurance Co.,42 the Missouri supreme court went even further: "if a flight is interrupted by mechanical trouble necessitating an involuntary, or forced, landing, the interval during which the craft is supported by the watery element instead of the air is as much a part of the flying trip as any other."

Furthermore, notwithstanding the decisions in McDaniel and Eschweiler, death from drowning or exposure following a forced landing has been interpreted as a "reasonably foreseeable" risk of aviation for which most aviation exclusion clauses bar recovery.43 In Neel v. Mutual Life Insurance Co. of New York,44 the beneficiaries of the insured sought recovery under the double indemnity clause of the insurance contract which provided: "Double Indemnity shall not be payable if the death resulted . . . from participation in aeronautics." The essential facts of the case are as follows: the insured, flying solo, took off from a New Jersey airport and two weeks later his body was found floating in the Atlantic Ocean. For purposes of argument, the Second Circuit ac-

39 "Perhaps reluctantly" because of the desire of the courts to give effect to the purpose of life insurance.
42 17 F.2d 370 (5th Cir. 1927).
43 Id. at 371.
44 318 Mo. 865, 1 S.W.2d 99 (1927).
45 Id. 1 S.W.2d at 102. The court in Rauch v. Underwriters at Lloyd's of London, 320 F.2d 525, 531 (9th Cir. 1963) went even further, stating that the "aeronautics activities . . . included his (i.e., the deceased insured's) voluntary and involuntary presence and movements in the lake water near the plane following its crash."
47 131 F.2d 159 (2d Cir. 1942).
48 Id.
cepted the plaintiffs' theory that the insured got out of the plane when it landed and drowned while trying to swim to shore. Nevertheless, the court held as a matter of law that the insurer was not liable for the double indemnity. Judge Augustus Hand, speaking for the court, said:

The policy provides that Double Indemnity shall not be payable if death resulted "from participation in aeronautics" and it seems quite contrary to the natural meaning of the proviso to say that Stubbs did not meet his death from "participation in aeronautics" merely because he may not have been killed by impact upon the water. If he landed in the open sea, even though without immediate injury, drowning was an almost inevitable consequence. To say that his death did not result "from participation in aeronautics" would exclude from the proviso of the policy the most ordinary risks involved and limit the effect of the clause in an unexpected and unreasonable way.45

In a similar case, Rossman v. Metropolitan Life Insurance Co.,46 the insured and a passenger made a safe emergency landing in the Atlantic Ocean approximately fifty yards from shore. Neither person was injured in the landing and both were able to come to the surface some distance away from the plane. The companion was able to reach the safety of the shore, but the insured drowned. The right of the insured's beneficiary to recover upon the policy depended upon the applicability of the following exclusion clause:

Death as a result, directly or indirectly, of travel or flight in any species of aircraft, except as a fare paying passenger on a licensed aircraft piloted by a licensed pilot on a scheduled passenger air service regularly offered between specified airports, is a risk not assumed under this policy . . . .47

In holding that the death of the insured was a result of "travel or flight," thus excluding liability for such death, the district court emphasized that "to cut the chain of causation at the point of landing the aircraft would be unreasonably to limit the purview of the phrase 'indirect result,' in a world where the variety of fatalities from flight is only too well known."48

II. THE DECISION IN HOLLINGSWORTH—
UPON WHAT DOES IT STAND?

In Hollingsworth, the Oklahoma supreme court held the following exclusion clause inapplicable and allowed the insured's beneficiary to recover under the policy's accidental death provision:

45 Id. at 160 (emphasis added).
47 Id. at 594 (emphasis added).
48 Id. at 595.
This accidental death or dismemberment benefit shall not be payable if the death or dismemberment of the Insured shall result directly or indirectly from . . . [t]ravel or flight in any species of aircraft piloted by a licensed passenger pilot on a scheduled air service regularly established between specified airports . . . .

If precedent is to serve as a yardstick of continuing vitality, either the exclusion clause must be sufficiently restrictive to allow the decision to be based upon the reasoning of McDaniel and Eschweiler; or the insured's death must have been the result of the deliberate act of a third person thus enabling the court to apply the reasoning of Bull. In either case, it is necessary to turn to the facts.

The plaintiff's petition alleged that the insured was uninjured in the emergency landing and drowned when he became entangled in a trot line as he attempted to swim to shore. The plaintiff alleged that entanglement was an "independent, intervening, and proximate cause" of accidental drowning which made double indemnity benefits due and payable under the terms of the policy. In response, the defendant-insurer contended that the death of the insured was the result, whether direct or indirect, of travel in a private plane piloted by other than a licensed passenger pilot on a scheduled air service, and as such, recovery should be barred by reason of the exclusion clause. The court determined that "the essential facts are not in serious dispute . . ."; however, conflicting evidence was presented concerning the entanglement of the insured in a trot line. The evidence showed that four men were in the plane when it went down in the lake, but that only two of the men drowned. Admittedly, the insured was one of the drowned men, but there was a question of whether it was the insured who had become entangled in the trot line. In reference to this question the court stated:

No necessity arises for extended discussion of this phase of argument. The policy insured against death by drowning. It is admitted drowning was the cause of death. For this reason whether insured drowned as a result of becoming entangled in a trot line, as alleged, is purely a matter of semantics.

By summarily concluding this point to be unimportant, the court dismissed any possibility of deciding this case upon the basis of the reasoning advanced in Bull. However, an argument can be made that

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Id.
Id.
Id.
Id.

It should be noted that the evidence showed that the crash victims had been drinking. Also, there was some indication that the plane crashed into the lake, as opposed to the plaintiff's allegation that the plane made a forced landing. Id. at 595.

Id. at 599-600.
the death of the insured was the result of the act of a third person, not intended by the parties to be excluded from coverage. This line of reasoning was not pursued. The lower court's decision was affirmed on the basis of the reasoning advanced in *McDaniel, Eschweiler* and *Tierney v. Occidental Life Insurance Co.* In *Tierney* the insured was fatally struck by the plane's propeller as he stepped to the ground following a safe landing. The issue before that court was based upon the alleged applicability of the policy's aviation exclusion clause, excluding from coverage "any injury, fatal or non-fatal, sustained by the insured while participating or in consequence of having participated in aeronautics." The court found it necessary to determine two questions: first, was the insured killed "while participating" in aeronautics; and second, was the insured's death "in consequence of having participated in aeronautics"? Both of these questions were answered negatively; it was concluded that under the circumstances the exclusion did not bar recovery. As to the first question, the California supreme court concluded that an insured was not to be considered to have been killed "while participating" in aeronautics if the fatal injury was sustained after the flight had been completed. In this regard, the court stated that "when the machine clears the earth and returns successfully, and is resting securely upon the ground, the 'aeronautics'—the flight—is completed, and the aeronautics is at an end."

In answer to the second question it was stated that "the question answers itself: The flight was not the proximate cause, but there was the intervening act of the deceased in his poor judgment in so conducting himself after climbing out of the machine as to be struck by the propeller." The death of the insured was a sequence of the flight, but it was not *in consequence* of it.

The reasoning of *Tierney* as to the second question was adopted in *Hollingsworth*, but no mention was made of the reasoning in support of the negative answer given to the first question. This may have been simply an oversight, but, nevertheless, it was a significant deletion. Had the *full* reasoning of *Tierney* been applied, it is likely that the Oklahoma supreme court would have rendered a different decision. According to the reasoning of *Tierney*, the aviation activities in question, *i.e.* the flight, had not ended. The plane had made a forced landing in the lake; it had not returned *successfully*, and it was not resting *securely* upon the ground. Since the flight had not been "completed," there was no

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89 Cal. App. 779, 265 P. 400 (1928).
88 Id.
7 265 P. at 401 (emphasis added).
87 265 P. at 401.
need for the insurer to show that participation in the flight had a causative relation to insured’s death. Therefore, it appears that the death of the insured should have been interpreted as having occurred “while participating” in aviation or, in reference to the exclusion clause in question, “as a direct result of flight.”

Hollingsworth also relied heavily upon the reasoning advanced in McDaniel and Eschweiler. Although the facts of the three cases are analogous, the exclusion clauses are significantly different. In McDaniel and Eschweiler, the policy only excluded coverage for injuries sustained while “in or on” the aircraft, but in Hollingsworth, the accidental death benefits were not payable if death or dismemberment resulted “directly or indirectly” from flight. Thus, the breadth of the exclusion clause in Hollingsworth is much greater than those in McDaniel or Eschweiler. Consequently, the decisions in those cases should not be controlling. Nevertheless, the court in Hollingsworth relied upon those decisions in concluding that the insurer failed to show that the flight had a causative relation to the insured’s death. This conclusion appears questionable when viewed in light of the numerous decisions which have considered death from drowning, after the plane had come to rest in the water, as an “almost inevitable consequence of travel by aircraft.”

The insurer’s final contention was reversible error in the lower court’s instruction to the jury on the issue of causation. The trial court instructed the jury that “the question to be determined was whether there was an independent, intervening cause of death separate and distinct from the plane landing in the lake, or that death resulted from another cause rather than travel in the plane being the direct or indirect cause.” The insurer argued that this instruction was only applicable to the issue of proximate cause in negligence actions, and that it placed an improper burden upon the insurer to prove that the flight and subsequent crash was the “proximate cause” of death. In reply to this argument, the court stated that “assuming the instruction was technically incorrect from use of ‘independent and intervening cause of death,’ the further statement

60 Id. at 599. The court went on to state that “all participants were in a position of at least potential safety.” Id. at 599. A similar proposal was refuted in Order of Commercial Travelers of America v. King, 161 F.2d 108, 109 (4th Cir. 1947), aff’d, 333 U.S. 153 (1948) stating: “To pursue this somewhat ingenious argument is to invert the real question of the case. It is true that rescue, routine or fortuitous, may remove a man from peril. But it does not follow that the failure of rescue brings the peril that causes death.”


63 Id.

64 Id.
that traveling in the plane 'was not the direct or indirect cause of death' completely clarified the preceding statement and expressly defined the only ground upon which liability could attach.\textsuperscript{65} Even though completely clarified,\textsuperscript{66} the instruction failed to indicate the distinction between "proximate cause" in insurance law and "proximate cause" in torts. Furthermore, it would appear from the instruction that the issue of causation is controlling, but the better view has relegated causation to a position of secondary importance behind the intent of the parties.\textsuperscript{67}

\section*{III. Conclusion}

The insurance company was in no uncertain terms a victim. It was victimized by faulty reasoning and by the confusion surrounding the application of "proximate cause" standards to contract issues, \textit{i.e.}, insurance law.\textsuperscript{68} Although it may be impossible to completely eliminate these problems, they can be alleviated significantly. The following suggestions may be helpful in achieving this result:

(1) The issue is one of law (the proper construction of an insurance contract) and it should be so treated.

(2) Since one of the major difficulties in this area is due to the multiple variations of aviation exclusion clauses, an effort should be made to achieve uniformity in their construction.

(3) The confusion associated with "proximate cause" could be greatly reduced if the courts would apply the following test: Is it reasonable to conclude that at the time of contracting the parties intended to exclude from coverage the resulting occurrence?

\textit{Philip J. Pfeiffer}

\begin{footnotesize}
\footnote{\textsuperscript{65} Id.}
\footnote{\textsuperscript{66} The court may have considered the instruction to have been completely clarified, but the author feels the lack of clarity remains.}

\textsuperscript{68} One might conclude that this decision should be upheld as simply an extreme application of the general principle that if conditions, limitations and exceptions of, or exemptions from, the liability of an insurer are not expressed plainly and without ambiguity, they will be construed strictly against the insurer and liberally in favor of the insured, in order that the purpose of insurance shall not be defeated.}
\end{footnotesize}