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INSURANCE - CONSTRUCTION OF EXCEPTION CLAUSE "PARTICIPATING IN AVIATION"

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INSURANCE — CONSTRUCTION OF EXCEPTION CLAUSE "PARTICIPATING IN AVIATION" — The insured was killed while riding as a fare-paying passenger on a commercial transport airplane. Plaintiff, decedent's wife, brought suit on his accident insurance policy and recovered. *Held,* on appeal, that the insured was not "participating in aviation or aeronautics" within the terms of an accident policy excluding indemnity for death resulting from "participation in aviation or aeronautics." *Massachusetts Protective Assn. v. Bayersdorfer,* (C. C. A. 6th, 1939) 105 F. (2d) 595.

Life insurance companies often attempt to limit or exclude from their policies liability for death or injuries resulting from aviation.[1] For the attainment of this result various clauses are inserted in policies, the cases indicating that the clauses "engaged in aviation" and "participating in aviation" are most common.[2] The phrase "engaged in aviation" is universally construed to include only those persons who are taking an active part in the operation of an airplane, and does not include passengers.[3] However, the courts have experienced more difficulty with the "participating in aviation" clause. Early cases held that this clause included passengers, with the result that recovery on a policy containing such a clause for the death of a person killed in an airplane was denied.[4] The theory behind this early view was that, since aviation was in its experimental stages, every person who entered an airplane, whether as pilot or passenger, was participating in the art of flying, with the result that the "participating in aviation" clause was held to be a broad exception inclusive of passengers.[5] With the expansion of the aviation industry and the increase in air travel, a change in the

[1] 5 AIR L. REV. 213 (1934).

[2] Until recent years it has always been recognized that a distinction exists between the legal effects of the two phrases. Glass, "Aeronautic Risk Exclusion in Life Insurance Policies," 7 J. AIR L. 305 (1936). In holding that a passenger, an invited guest, was not within the "engaged in aviation" clause, the court in Flanders v. Benefit Assn. of Ry. Employees, 226 Mo. App. 143 at 147, 42 S. W. (2d) 973 (1931), said, "The word 'engaged' means more than a single act or transaction. It involves some continuity of action. 'Engaged in aviation' means that one must take part in aviation operations other than merely being in an airplane as a passenger. It means that one must take part in the operation of the airplane in some way other than merely participating in flying."

In some policies the word "aeronautics" is used in place of, or in conjunction with the word "aviation." The additional word "operations" is generally considered to limit the scope of the clause to exclude passengers. Missouri State Life Ins. Co. v. Martin, 188 Ark. 907, 69 S. W. (2d) 1081 (1934).

[3] Price v. Prudential Ins. Co. of America, 98 Fla. 1044, 124 So. 817 (1930); Benefit Assn. of Ry. Employees v. Hayden, 175 Ark. 565, 299 S. W. 995 (1927); Masonic Acc. Ins. Co. v. Jackson, 200 Ind. 472, 164 N. E. 628 (1929); Gits v. New York Life Ins. Co., (C. C. A. 7th, 1929) 32 F. (2d) 7; Flanders v. Benefit Assn. of Ry. Employees, 226 Mo. App. 143, 42 S. W. (2d) 973 (1931); 83 A. L. R. 333 at 385 (1933).

[4] Bew v. Travelers' Ins. Co., 95 N. J. L. 533, 112 A. 859, 14 A. L. R. 983 at 986 (1921); Travelers' Ins. Co. v. Peake, 82 Fla. 128, 89 So. 418 (1921).

[5] Meredith v. Business Men's Acc. Assn., 213 Mo. App. 688, 252 S. W. 976 (1923); VANCE, INSURANCE, 2d ed., 901 (1930).

courts' interpretation of the "participating in aviation" clause came naturally. The courts soon emphasized the *occupational* connotation of the words "aviation" and "aeronautics," [6] hence there developed a tendency to hold that a passenger was not "participating in aviation" within this exception.[7] In view of this development it seems safe to conclude that the legal effect of the "participating in aviation" clause and the "engaged in aviation" clause is now the same.[8] Modern decisions uniformly hold that passengers are not within these exception clauses, except in unusual fact situations where, for example, the passenger is exercising some degree of control over the operation of the airplane.[9] An exception which contains the additional words "as a passenger or otherwise" is held to include a passenger.[10] Inasmuch as these exception clauses are couched in very general terms, the modern construction of the clauses, giving added protection to the insured, would seem to be an application of the well-settled principle that in case of ambiguity insurance policies are construed most strongly in favor of the insured.[11]

[6] Gregory v. Mutual Life Ins. Co. of N. Y., (C.C.A. 8th, 1935) 78 F. (2d) 522.

[7] Glass, "Aeronautic Risk Exclusion in Life Insurance Policies," 7 J. AIR L. 305 (1936); Mutual Benefit Health & Acc. Assn. v. Moyer, (C.C.A. 9th, 1938) 94 F. (2d) 906; Marks v. Mutual Life Ins. Co. of N. Y., (C. C. A. 9th, 1938) 96 F. (2d) 267. In Mutual Benefit Health & Acc. Assn. v. Bowman, (C. C. A. 8th, 1938) 99 F. (2d) 856, the court suggested that the word "participating" is patently ambiguous, since it connotes either active or passive sharetaking, and held that a passenger not actively taking part in the operation of the plane was not "participating in aeronautics."

[8] In holding that an invited guest was not within the "participating" clause, the court pointed out that "participate in aviation" is synonymous with "engage in aviation." Martin v. Mutual Life Ins. Co. of N. Y., 189 Ark. 291, 71 S. W. (2d) 694 (1934). *Contra*: Sneddon v. Massachusetts Protective Assn., 39 N. M. 74, 39 P. (2d) 1023 (1935).

[9] In First Nat. Bank of Chattanooga v. Phoenix Mut. Life Ins. Co., (C. C. A. 6th, 1933) 62 F. (2d) 681, the court held that a passenger-owner of an airplane who determined whether weather conditions warranted flight, and flew with a hired pilot was within the "participating in aviation" clause. This decision is justifiable on the ground that this passenger did impose his judgment on the operation of the airplane, and should not be treated in the same manner as the ordinary inactive passenger on a commercial transport plane where its operation is in the hands of experts, and the risk to the insurance companies is therefore correspondingly minimized.

[10] Mayer v. New York Life Ins. Co., (C. C. A. 6th, 1934) 74 F. (2d) 118. However, in Goldsmith v. New York Life Ins. Co., (C. C. A. 8th, 1934) 69 F. (2d) 273, Stone, J., in dissent, said that such a clause was ambiguous and did not include the insured passenger.

[11] Possibly the insurance companies should state their risk exclusion clauses in more precise terms, with the result that the extent of the insured's protection would be more definitely marked.