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AVIATION AND LIFE INSURANCE

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In no field of legal learning has there been any clearer demonstration that law meets changed conditions as changes develop than may be found in consideration of aviation and life insurance. Particularly is this conclusion obvious by reason of the fact that aviation is a comparatively recent development in itself and extensive use of air travel by the general public runs back for little more than a single decade. Consequently, the evolution of the law has covered only the last few years and its entire growth is quickly visualized.

It is not the purpose of this paper to alarm the reader or to suggest even the possibility that his insurance may be invalidated by an occasional trip in the air. A study of the conditions or restrictions applying to anyone's insurance might be desirable but few will find that they are under any restriction as to participation in aviation activities except possibly as to accidental death benefits or where there is some exceptional interest in aviation. The questions involved are of interest, however, particularly as demonstrating the rapidity with which the insurers have recognized the development of aviation and have sought to meet such conditions.

There has been created a fairly well established body of law on life insurance; policy forms have become largely

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standardized; certain principles have become quite thoroughly settled and consequently, a new field open to insurance, with new and exceptionally serious risks, necessitates only a new viewpoint of old problems rather than the establishment of an entirely new body of law. The science of aviation has changed so rapidly that the application of settled legal principles to the questions growing out of aviation has similarly been subject to rapid and very complete change.

It has been said that one of the few rather simple things about life insurance litigation is the fact that claims on policies are subject to the single test of whether the insured is alive or dead (omitting, of course, consideration of questions of identification, simultaneous death, disappearance, pre-existing diseases and few other possibilities). This test particularly applies to aviation wherein a serious accident in most instances means only death to all concerned. A very recent judicial expression of the danger involved is found in the decision of the United States District Court of Wyoming in a case where an otherwise unexplained airplane accident occurred and an attempt was made to predicate liability upon negligence by applying the theory of assumption of risk:

"It may be that in the not too distant future in the evolution and development of the wonderful and enchanting science of aviation, a sufficient fund of information and knowledge may be afforded to make a safe basis in compensating for injuries sustained, * * * but it seems to me quite clear that that time has not yet arrived. Man has made rapid strides within a very small cycle in his endeavor to become master of the air, of which the bird until recently has been exclusively king in his own right, but with the exceedingly large number of unexplained and inexplicable catastrophies it is evident that he has not yet become such master. It will not do to discourage the pioneer by making him assume undue hazards in a monetary way. In the meantime it is quite evident that those who choose air-ways for transportation must in many instances be held to have themselves assumed the risk."[1]

For the purpose of this paper a consideration of aviation and life insurance necessarily must recognize various types or groups of flyers, as for example, the professional or amateur pilot, the aviation official or business executive making

[1] Cohn v. United Air Lines Transport Corp. (1937), 17 F. Supp. 865.

constant use of air service with complete control though not doing the actual piloting, and, as the most interesting from the standpoint of the general public, that group of those who, from time to time, use aviation as a means of transportation in the regular normal course of life. Naturally, of much more restricted interest is the attitude of life insurance to the professional pilot or the aeronautic enthusiast, ambitious to become a pilot as compared with the last group, to which this paper is largely directed. It should again be noted, however, that those actually affected by aviation are very limited in number.

What development has occurred in aviation? From the time when the Wright Brothers first successfully operated a heavier than air flying machine, the advancement made in the science of flying has been rapid and constant, so that now air transportation service is offered and accepted by the public as no more of a novelty than rail or ocean travel, and with quite as much accuracy of schedule. The growth from month to month and year to year has been consistently active. An increase of practically ten million miles flown has taken place in 1936 over the year 1935, with an increase also of approximately 300,000 passengers, so that for the year 1936, passenger miles flown totaled almost a half billion as compared with something over 350,000,000 passenger miles flown for the year before. To give any very extensive resume of figures would be wearying and probably to no effect, but in all truth it may be said that the place of aviation is now thoroughly established in the life of our people.

Life insurance necessarily proceeds upon carefully worked out tables of mortality. Experience has determined with a very complete accuracy, of each thousand insured how many will die each year. To the insurer, it makes little difference *who* dies from each group, but it makes a great deal of difference that not more will die from each group than those who, as a result of the experience of years, may naturally be expected to die. The tables from which such conclusions have been prepared are based upon normal expectancy, and for that reason, when faced with a condition involving abnormal

and unusual mortality, the insurer seeks protection by making exceptions which, for the purpose of the inquiry before us, may be considered as taking out from the effect of the tables of experience certain groups or classes.

As long as aviation was still a novelty in its early days, even though much more unsafe than at present, aeronautic participation by those insured was so limited numerically that it could be overlooked as having any controlling effect upon life insurance. As aviation became more and more extended, then it was incumbent upon the insurer to examine the additional serious risk involved as a result thereof, particularly, when at that time any participation in aviation involved a chance of death much greater than that ordinarily assumed. Therefore, it became the attempt of insurers either to refuse to insure those displaying an excessive interest in aviation, or, in some degree to limit or except from coverage in one way or another liability to those whose deaths might be caused, directly or indirectly, by aviation; if not as to the entire risk, at least so far as any double indemnity was involved. That exception by which the risk was minimized had hardly become of some general use until an exception to the exception developed whereby there was taken out from under the interdiction of the exception by which the insured sought to avoid liability, those who, in the normal course of their business and personal lives, used aerial transportation. We now have, therefore, the situation of an exception superimposed upon an exception and hence at the present time there is a very limited restriction if any upon the use of air travel in the ordinary policy of insurance.

The history of aviation shows that it secured its present great popularity largely as a result of the World War. Immediately after the war those who had had either experience or some limited instruction in aviation promptly sought to capitalize that experience or instruction either for their own entertainment or as a means of employment. In quick successive steps the flying man became an entertainer at county fairs offering the experience of a flight in the air to all comers where the inadequacy of equipment and frequently the in-

adequacy of the flyer brought about a high percentage of aviation deaths.

Next came the development of transport service, so that at the present time a comparatively safe means of travel is offered through the recognized transport companies by which the various parts of the country are linked together and although accidents, often with fatal results and frequently with the wiping out of all concerned, still occur, between the time when aviation had only well started five or six years ago and the year 1936, passenger miles flown have increased from 13,000,000 to over 70,000,000 per fatal accident.

It is significant from a legal viewpoint that the development of aviation occurred simultaneously with the period of the World War for there were certain similarities in the questions involved, both in war and aviation exclusions. Insurance policies had sometimes excluded liability as to those engaged in military or naval service in time of war. Litigation after the war concerning deaths of persons in the military or naval service, brought forth some rather clear expressions on the extent and limitation of the military and naval service policy restriction.

In one instance a direct application of the reasoning involved in military cases was carried into consideration of similar language in a case involving aviation. In 1919, the Supreme Court of Arkansas passed upon a policy provision that death while in the service of the army or navy in time of war was not a risk covered and held that the benfieciary of the insured who died from pneumonia while in a southern military camp in 1917, could recover only the premiums paid.[2]

Thereafter, the same court in another case passed on substantially the same situation, where claim was made by the personal representative of the insured who died from influenza in Texas while a member of the aviation corps of the

2 Miller v. Illinois Bankers Life Assn. (1919), 138 Ark. 422, 212 S. W. 310. In this case it was argued that provisions such as those involved in the contract of insurance should be held void as against public policy as inducing the holder to evade or resist involuntary enlistment under the draft laws, but such contention was rejected by the court.

army. The policy provision in that case excepted death "while engaged in military or naval service in time of war" and that provision presented the only question before the court. The Arkansas Supreme Court held that the exemption involved in the earlier case excluding service in the army or navy in time of war meant death during the period of service or the period of time during which the insured was in service in the army but in the subsequent case, the phrase "engaged in military or naval service in time of war" denoted action or an actual discharge of duties so that "death while engaged in military service in time of war" meant death while doing, performing, or taking part in some military service in time of war; in other words, it must be death caused by performing some duty in the military service in contradistinction to death while in the service due to causes unconnected with such service. The court further said "the word 'engaged' as used in the policy means an active or physical performance of some act or duty in connection with military service" and, as the evidenced showed that the insured died from influenza, a disease prevalent throughout the country affecting both soldiers and civilians, his death was in no sense caused by performing any *military* service or in consequence of being engaged in military service. It was, therefore, held that the exception in the policy form was inoperative and the plaintiff prevailed.[3]

It is submitted that the Supreme Court of Arkansas adopted a somewhat restricted view of the generally accepted interpretation of the familiar phrase "military or naval service," which, as used in time of war, involved not only those actively engaged in combat, but all those subject to military discipline and control.

Subsequently, the Arkansas Court followed the earlier war restriction decisions in other life insurance cases, each time emphasizing the effect of the word "engaged,"[4] and these

[3] Benham v. American Central Life Ins. Co. (1919), 140 Ark. 612, 217 S. W. 462.

[4] Nutt v. Security Life Ins. Co. (1920), 142 Ark. 29, 218 S. W. 675; Benefit Assoc. Railway Employees v. Hayden (1927), 175 Ark. 565, 299 S. W. 995.

decisions of the Arkansas Court have been followed in other states, including Indiana[5] where the Supreme Court in passing upon the meaning of the word "engaged" in an aviation clause held that a passenger was not engaged in aeronautics, the word "engaged" meaning to carry on, to conduct, to employ oneself rather than to relate to a single act; to say that one is engaged in some activity is to say that the act is continuous and, therefore, the court held that *engaged* in aviation denotes and suggests permanency or continuity, or frequency of action and does not aptly describe a single isolated act of riding in an airplane as a passenger.[6]

The trend of the cases is that any exception from liability appearing in a contract of insurance in which the language used involves the idea of being *engaged* in aeronautics, necessarily includes an activity beyond that of mere passivity. It means a certain degree of direction, of control, and in the absence of that element, there would be found no exception from liability where no such control was exercised by the person riding in the plane, and the exception was built around some form of the word "engage."[7]

It is, of course, evident that a pilot would clearly be engaging in aviation but it may be accepted that a passenger is not so engaged, unless when the phrase includes "as a passenger or otherwise."

The other most common phrase found in policy forms uses the word *participating* rather than *engaging* in aviation, aeronautics and the like. Again with reference only to passengers rather than to pilots, it may be said that an exception in the policy contract relieving the company from liability as to those participating in aviation as passengers is effective and where a passenger comes to his death, no liability exists

[5] Masonic Accident Ins. Co. v. Jackson (1929), 200 Ind. 472, 164 N. E. 628.

[6] These are but a few of many cases dealing with the word "engaged" but may be accepted as leading cases upon that question.

[7] The opinion of the Indiana Appellate Court in Masonic Accident Ins. v. Jackson (1925), 147 N. E. 156 may be disregarded as clearly erroneous and superseded by the opinion of the Supreme Court under the same title reported in 200 Ind. 472.

on the part of the insurer where an exception involving such terminology is found.

The United States Supreme Court has not as yet dealt with any cases involving aviation and life insurance where an exception from liability is included in the policy by the expression "engaging in aeronautics" or "participating in aviation" or variations of either phrase. A few years ago, however, the United States Supreme Court did take jurisdiction of a case where the point involved was whether recovery was permissible upon a fraternal benefit certificate in which an exclusion applied to any member participating in the moving of explosives.[8] As an officer of an explosive manufacturing company, the insured assisted in the delivery of explosives and by reason of the specially constructed truck upon which he was riding being hit by a train, the insured was blown to pieces. Certiorari to the Circuit Court of Appeals for the Tenth Circuit was granted to resolve a possible conflict with other Federal decisions dealing with aviation, in both of which the exception under examination being participation as a passenger or otherwise in aviation or aeronautics.[9] The court, speaking through Mr. Justice Cardozo, said that participation in the carriage of explosives imports something more than the mere presence of the insured in the vehicle of carriage, and then added, "One who becomes a passenger in an airplane may thereby participate in aeronautics[10], but it does not follow that he participates in the carriage of the mails, and this though the plane to his knowledge is in part devoted to that use." However, it was pointed out that the insured's relation was not as remote or passive as the relation of a passenger. He was facilitating the delivery of explosives, and the return journey to his office had the same motive and occasion that induced the journey out. As stated by the court, "At the moment of the casualty the insurance was suspended by an

[8] Travelers Protective Assoc. Ins. Co. of America v. Prinsen (1934), 291 U. S. 576, 54 Supreme Court 502, 78 Law Ed. 999.

[9] Pitman v. Lamar Life Ins. Co. (1927), C. C. A., 17 F. (2nd) 370; Head v. N. Y. Life Ins. Co. (1930), C. C. A., 43 F. (2nd) 517.

[10] Head v. N. Y. Life, supra; Pitman v. Lamar Life Ins. Co., supra; Bew v. Travelers Ins. Co. (1921), 95 N. J. Law 533, 112 A. 859, 14 A. L. R. 983.

aggravation of the hazard, and suspended it remained till the forbidden hazard was removed." The decision is not authority for any conclusion that the effect of the "participating" cases are thereby weakened in view of the facts and the extent of "participation" by the insured.

Recently, the United States Supreme Court has refused to take jurisdiction in a widely publicized case where the Circuit Court of Appeals of the Eighth Circuit held that where a passenger was killed in an airplane crash the death was not the result of participation in aeronautics.[11] In that case, the policy provided that double indemnity should not be payable if death resulted from a participation in aeronautics. The District Court held in favor of the company upon the ground that one who rides in an airplane as a passenger participates in aeronautics within the meaning of the terms of the policy, and that the death of the insured resulted from participation in aeronautics. The Circuit Court of the Eighth Circuit reversed the lower court, saying: "We conclude that the words 'participation in aeronautics', as used in these policies, do not, properly construed, include a passenger on a transport airplane * * *." It should be noted, however, that the policy provision did not state "participating as a passenger or otherwise" and the court, therefore, held that the phrase used was ambiguous, with the usual result.

It is to be recalled that the Supreme Court in the Prinsen case as already quoted said one who becomes a passenger in an airplane may thereby participate in aeronautics, citing with approval decisions of the Fifth and Tenth Circuits. In one case, the insured was killed by being struck by the propeller after alighting from the grounded plane and starting to walk to his car, but the Fifth Circuit held that the company was not liable because the death of the insured was the result of participation in an aeronautic expedition or activity, which did "not begin or end with the actual flight;" his presence at the place where he was killed was immediately connected with and incidental to the trip, and, hence, "occurred while

11 Gregory v. Mutual Life Ins. Co. of N. Y. (1935), C. C. A. Eighth, 78 F. (2d) 522. Certiorari denied: 56 Supreme Court 157, 80 Law Ed. 126.

he was participating in an aeronautic activity."[12] The Fifth Circuit has likewise declared that a passenger killed in a crash was participating in aeronautics.[13] The Sixth Circuit in another case involving an airplane crash where the insured by reason of complete control of the flight was more than a mere passenger held that death resulted from participation in aeronautic operations[14], although the court pointed out that it was unnecessary to decide the question of the proper application of the phrase to a mere passenger. Subsequently, the Sixth Circuit had directly presented the question of a mere passenger under a policy provision "engaging, as a passenger or otherwise, in submarine or aeronautic operations"[15], and the court held that the company was not liable, citing many cases as to the difference in meaning between engage and participate, and holding that the phrase "as a passenger or otherwise" made the restriction all inclusive, even to the extent of overcoming the otherwise limiting effect of the use of the word "engaging."

By the decision of the Eighth Circuit in the Gregory case, it was held that because the insured was a mere passenger in the plane there was no participation in aeronautics. Numerous state cases had already decided that a passenger participated in aeronautics by partaking of the pleasure and benefits of the art or practice of sailing or floating in the air[16], or, again, and to the same effect, a passenger participates within the intent and meaning of a provision when flying in the air.[17] It was argued that certiorari should be granted in order to resolve this apparent conflict, and it is to be regretted that by the refusal of the United States Supreme Court to accept jurisdiction, some conflict in the decisions still remains.

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[12] Pitman v. Lamar Life Ins. Co., supra.

[13] Head v. N. Y. Life Ins. Co. (1930), 43 F. (2d) 517, 519-521.

[14] First National Bank v. Phoenix Mut. Life Ins. Co. (1933), C. C. A. Sixth, 62 F. (2d) 681.

[15] Mayer v. N. Y. Life Ins. Co. (1934), 74 F. (2d) 118.

[16] Bew v. Travelers Ins. Co. (1921), 95 N. J. Law 533.

[17] Travelers Ins. Co. v. Peake (1921), 82 Fla. 128, 89 So. 418; Meredith v. Businessmen's Assoc. (1923), 213 Mo. App. 688, 252 S. W. 976.

The latest expression of any court on the use of the words "engaging" or "participating" appears in a decision of the United States District Court for the Northern District of Illinois, handed down June 3, 1937, entitled *Christen v. New York Life Ins. Co.*[17a]

The insured held seven policies, upon which the face amount had been paid in each case and only the double indemnity was in controversy. Upon five of the policies it was provided that the double indemnity was not payable if the insured's death resulted from "engaging as passenger or otherwise in aeronautic operations," while in the other two policies double indemnity benefits were not payable if insured's death resulted from "participation as a passenger or otherwise in aviation or aeronautics."

While a passenger for hire on a commercial plane, the insured who had no connection with aviation whatever was killed as a result of a crash. The court pointed out that identical language had been made the subject of judicial scrutiny, and discussed three cases, each against the New York Life, which have been mentioned in this paper, the Goldsmith case, the Mayer case and the Gits case.

In the first two cases a policy provision excluded liability when death resulted from engaging as a passenger or otherwise, and recovery for double indemnity was denied. In the Gits case it was held that a passenger for hire was not "engaged in submarine or aeronautic operations." The court, although constrained to follow the Gits case, pointed out that the policies involved contained the additional qualifying phrase "as a passenger or otherwise" which, as pointed out in the Mayer case, covered everyone whether employee, pilot, mechanic or executive, and whether a fare-paying passenger or not whose death resulted from his presence in the plane at the time of the accident.

It was likewise held that such exclusion was not precluded by the incontestable clause, and that by reason of the exception in each policy from liability for death resulting from

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17a 19 F. Supp. 440.

engaging or participating as a passenger or otherwise in aviation, it was held that the insurer was not liable for the double indemnity.

The law seems rather confused but it appears that a clause excluding coverage of one participating as a passenger or otherwise would be adequate to protect an insurer against liability.

The courts have frequently fallen back on the doctrine of inherent ambiguity for sustaining findings against insurance companies, although this theory has been less used in aviation cases than in many other questions concerning insurance law. The words of Sanborn, C. J. are apt: "That the intent of the parties might have been better expressed is of no importance. It is ambiguity, and not awkwardness of language which opens the door for construction. If the meaning of language is clear, there is no room for construction."[18]

The Gregory case to which reference has already been made held that "participation in aeronautics" was ambiguous, and numerous decisions of both state and Federal courts, prior thereto have held similar provisions, in some cases ambiguous and in others clear and unequivocal. As the exception clauses have become somewhat standardized, it would appear that it may be anticipated that courts will not rely solely upon a claim of ambiguity to support a finding against an insurer where exclusion clauses are being considered.

Where it was claimed that the provisions of the policy were ambiguous, a New York court held that the policy was not ambiguous in the use of the word "expedition" as carrying "a notion of exploratory or warlike enterprises" without giving any consideration to any other words in the exemption clause. The conclusion of the court was that such a phrase could not exclude recovery for death of a passenger who did not conclude that a customary and usual trip in regular course of transportation would be considered an "aeronautical expedition."[19]

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[18] Goldsmith v. N. Y. Life (1934), 69 F. (2d) 273.

[19] Gibbs v. Equitable Life Assur. Soc. of the U. S. (1930), 246 N. Y. Sup. 560.

One of the most recent aviation cases again considers the question of an aeronautical *expedition* where the insured took a pleasure trip over an airport. The court pointed out that the mythical average man would not think of the ordinary airplane trip as excluded by the formidable words submarine or aeronautic expeditions. "On the contrary, the words carry an implication of a military expedition or an exploration into remote regions or over new routes. If it were intended when the policy was drafted and offered for sale to exclude from coverage every loss resulting from an airplane trip or flight, it is believed that counsel drafting the clause could have found language less apt to mislead the buying public than such a redoubtable phrase as this. A judgment for the defendant, the insurer, in the lower court was, therefore, reversed upon the ground that no one in common speech would ever refer to an ordinary short trip in a plane as an expedition in view of the extensive change in the attitude towards aviation, and with the citation of most of the familiar cases, the court held that the phrase was ambiguous.[20]

Certainly, the use of the word "expedition" is no longer to be considered as adequate to relieve an insurer from liability, whether considered either as ambiguous or perfectly plain, particularly, in view of the widespread acceptance of air travel in modern life.

The exclusion clauses heretofore considered have for the most part applied only to double indemnity by features of policies as to the entire policy. One phrase of the entire matter of the legal status of aviation, difficult to cover briefly, is found in the application of the theory of coverage as limited by contestability. The law has become pretty well settled that the incontestable clause in policies of life insurance means what it says, and that after the period covered by the clause has expired then the company cannot contest. As sometimes expressed, the cause of death has ceased to be an issue of fact.

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20 Day v. Equitable Life Assur. Soc. of the U. S. (1936), C. C. A. Tenth, 83 F. (2d) 147.

One of the most interesting and striking developments in the law of insurance has been the holding that as applied to aviation, there can be an exclusion of *coverage* where an aviation exclusion rider is attached to the policy even after the contestable period. This theory was developed by Mr. Justice Cardozo while sitting as Chief Judge of the New York Court of Appeals in the now famous Conway case.[21]

The conclusion of the court was that only within the limits of the *coverage* expressly agreed to by the parties to the contract would a liability on the policy of insurance exist. Thereafter, the same theory was approved by the Circuit Court of Appeals of the Tenth Circuit[22], and the Supreme Court of the State of Washington.[23] Subsequently, however, the Supreme Court of Louisiana determined that by reason of the omission from the incontestable clause of an exception as to aviation a general exclusion form coverage by a rider would be invalid thereby denying the coverage theory established by the New York decision.[24]

The word "operations" as used in connection with aviation has been declared ambiguous and tending to indicate a continuous and occupational relation as used in conjunction with aeronautics.[25] *It would plainly appear, therefore,* that where the insurer has used the word "operations" in an exception, it is not sufficient to warrant the conclusion that the insurer is relieved from liability by reason of an aviation experience, although the courts have taken the view that the objection lies more in the fact that it is ambiguous than otherwise and

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21 Metropolitan Life Ins. Co. v. Conway, Superintendent of Insurance (1930), 252 N. Y. 449, 169 N. E. 642.

22 Head v. New York Life Ins. Co. (1930), C. C. A. Tenth, 43 F. (2d) 517.

23 Pacific Mutual Life Ins. Co. v. Fishback (1933), 171 Wash. 244, 17 Pac. (2d) 841.

24 Bernier v. Pac. Mut. Life Ins. Co. (1932), 173 La. 1078, 139 S. 629.

25 Gits v. New York Life Ins. Co. (1929), C. C. A. Seventh, 32 F. (2d) 7; Charett v. Prudential Ins. Co. (1930), 202 Wis. 470, 232 N. W. 848; Missouri State Ins. Co. v. Martin (1934), 188 Ark. 907, 69 S. W. (2d) 1081; First National Bank of Chattanooga v. Phoenix Mut. Life Ins. Co. (1933), C. C. A. Sixth, 62 F. (2d) 681. In the latter case the evidence showed an actual direction on the part of the insured against the advice and judgment of the pilot.

with the addition of the phrase "engaged as a passenger or otherwise in aeronautic operations," no ambiguity would exist.[26]

When fare paying passengers are excepted from an aviation exclusion rider, their insurance is not affected by the aviation hazard, and claims are fully recognized despite a participation in aviation. However, where there is evidence of no possibility of a fare being paid or where it would have been contrary to law to have been a fare paying passenger, courts have recognized that no liability exists under the typical exception.[27]

The decisions have, for the most part, recognized a liability where accidents have happened in connection with flying, although not as the result of an actual crash of a plane, as for example, where, after completing a flight, insured was struck by a propeller[28], though another court, where the exception provided against liability for death in consequence of participating in aeronautics, held that death caused by the propeller after a flight could not be said to be *in direct consequences* of the flight, and therefore, not within the bounds of the aeronautical exceptions.[29] Spinning a propeller preparatory to taking off,[30] and death while boarding a plane[31] have both been considered as within the exception as was likewise a death where a seaplane was compelled to come to rest on the sea and one of the occupants was drowned by the waves,[32] and in each case recovery was denied.

It may likewise be of interest to note that the phrase "aviation operation" has been considered as sufficiently broad

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26 Gits v. New York Life Ins. Co. (1929), C. C. A. Seventh, 32 F. (2d) 7.

27 Metropolitan Life Ins. Co. v. Halcomb (1935), C. C. A. Ninth, 79 F. (2d) 788; Padgett v. Metropolitan Life Ins. Co. (1934), 206 N. C. 365, 173 S. E. 903.

28 Pitman v. Lamar Life Ins. Co., Supra.

29 Tierney v. Occidental Life of California (1928), 89 Cal. App. 799, 265 Pac. 400.

30 Blonski v. Bankers Life Ins. Co. (1932), 209 Wis. 5, 243 N. W. 410.

31 Murphy v. Union Indemnity Co. (1931), 172 La. 383, 134 So. 256.

32 Wendorff v. Missouri State Life Ins. Co. (1927), 318 Mo. App. 363, 1 S. W. (2d) 99.

to include one operating a glider where the insured was killed by a crash.[33]

Aviation riders used in cases of exceptional risk and generally accepted as covering the situation by which an exception from liability is established are approved by a majority of the state insurance departments. A form rather widely used is:

"Death as a result of service, travel or flight in any species of aircraft, except as a fare paying passenger on a licensed aircraft piloted by a licensed passenger pilot on a scheduled passenger air service regularly offered between specified airports, is a risk not assumed by this policy, but if the insured shall die as a result, directly or indirectly, of such service, travel or flight, the company will pay the beneficiary the reserve on this policy less any indebtedness thereon."

The terminology thus used is an outgrowth of the various decisions, and it is believed that there is given to the insured under such form of rider the largest possible protection for individual policyholders as well as an adequate protection to the insurer against the unusual risk involved in air service.

Usually a development of law will represent the slow change of centuries of consideration. Aviation, however, has grown so rapidly, and almost from day today has shown such advancement that a similar speed of change and development has occurred in the law, so that in a decade and a half there is now established a very thoroughly worked out recognition of aviation and its relationship to life insurance.

The position of life insurance in connection with the development of aviation has consistently been a recognition of the advancements made in that interesting field. With a purpose of offering protection to as broad a group as possible serving as the first test of the attitude of insurance on any phase of life, as aviation has increased in importance in the normal activities of the American public, so has the viewpoint of insurance extended and developed. The burden upon the underwriter and legal counsel has been to recognize coverage as rapidly as justified by experience without losing sight of

[33] Irwin v. Prudential Ins. Co. of America (1933), 5 F. Supp. 382.

the obligation to avoid unnecessary risks involved in unknown fields. Insurance theoretically covers the absolutely normal life. It is for that reason that the law has recognized any attempt to protect in some degree against death by reason of war or suicide as an abnormal and unpredictable conclusion of life, which, but for the exigencies of war or the act of suicide, would have been more extended. At times of strain, the span of life is shortened in many instances. The burden of business in the past decade has been such that many men have worn themselves out and have come to an untimely death all too early as the result of the physical and mental effort required in times of economic adversity. All of that makes no change in the attitude of insurance for that is the responsibility normally assumed, but where the insured voluntarily places himself in a position of unusual risk as in a participation in aeronautic activities, the insurer is thoroughly justified in seeking a protection by policy limitation against the unusual strain put upon the accepted basis of actual or anticipated mortality. Consequently, as participation in aviation became more popular, the first attempt of the insurers was to except from liability those policyholders who involved themselves in that extraordinary risk. With the courts constantly seeking to keep such exception within the most restricted position, no very definite knowledge existed at any time by which either the insured or insurer could be positive as to the liability for death caused by some form of aeronautics, nor could we as practicing lawyers advise our clients as to their rights or liabilities.

As aviation increased in popular use and in safety for the casual flyer, insurance relaxed in its efforts at protection against unusual risks as those risks were minimized until it may now be said with a high degree of accuracy that for the ordinary individual who, from time to time, sees fit to use established aviation as a means of transportation, his insurance situation is not materially changed from that which existed prior to the development of science of aeronautics. It is not to be denied that the risk is materially greater than that involved in railway, steamship, or even motor transpor-

tation, but the insurer has accepted that additional chance as inherent in the development of business and a risk to be taken if the service of insurance to the public is not to be unduly restricted. It is submitted, therefore, that from the standpoint of law as interpreted by the courts and as applied to the business of life insurance, there has been a splendid demonstration of a willingness on the part of life insurance to recognize and accept changing conditions of life, and to meet those conditions fairly as they occur. It is to the great credit of life insurance that it has proceeded so rapidly in meeting conditions as they have developed in the rapidly changing field of aviation.