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## Public Policy and Aviation Liability Insurance

On July 12, 1969, a small private aircraft owned by Francis and Bernice Thelen and piloted by Everett Pavitt took off from Compton Airport near Los Angeles, California. Also on board were three passengers, Ann, Robert and Edward Schroeder. Almost immediately after take-off the plane plunged into the ground killing Ann and Robert and seriously injuring Edward. A home owned by Maurice and Della Carter was also damaged. A wrongful death action was instituted against the Thelens and Pavitt by the parents of the Schroeder victims and the Carters brought an action to recover for the damage to their home.

A liability insurance policy on the plane involved in the crash had been issued by National Insurance Underwriters (hereinafter "National"). During the course of the subsequent litigation, National filed a declaratory relief action to determine the extent of its liability, if any. The California Supreme Court, concluding that National had no liability under the policy, decided: (1) the policy expressly excluded coverage for permissive users; (2) an exclusion of this type did not violate public policy; and (3) exclusion of coverage for non-paying guest passengers was not unconstitutional.<sup>1</sup>

The issue which drew most of the court's attention was whether the policy issued by National excluded coverage for permissive use.<sup>2</sup> One clause of the policy expressly provided such coverage<sup>3</sup> but the court found that a subsequent exclusionary clause was controlling and therefore ruled that permis-

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1. Nat'l Ins. Underwriters v. Carter, 17 Cal. 3d 380, 551 P.2d 362, 131 Cal. Rptr. 42 (1976). This case may also be found at 14 Av. Cas. 17,267. The Court of Appeal decision may be found at 116 Cal. Rptr. 88 and 13 Av. Cas. 17,311.

2. This was the only issue on which the court split, ruling 5-2 that the policy had successfully excluded such coverage.

3. The unqualified work 'insured' wherever used in Part I of this policy *includes not only the Named Insured but also any person while using or riding in the aircraft* and any person or organization legally responsible for its use, *provided the actual use is with the permission of the named insured.* (emphasis original)

Nat'l Ins. Underwriters v. Carter, 17 Cal. 3d 380, 390, 551 P.2d 362, 369, 131 Cal. Rptr. 42, 49 (1976) (concurring and dissenting opinion, J. Tobriner).

sive users were not covered.<sup>4</sup> In reaching its conclusion, the court determined that the exclusionary clause in question was both clear and unambiguous and that the National policy was therefore distinguishable from that involved in *Gray v. Zurich Insurance Co.*<sup>5</sup> It further determined that "an insurance company has the right to limit the coverage of a policy issued by it and when it has done so, the plain language of the limitation must be respected."<sup>6</sup> The majority additionally ascertained that this interpretation corresponded with the "reasonable expectations of the insured" as to coverage.<sup>7</sup>

The dissenting justices did not agree that the policy's exclusionary clause was clear and unambiguous. Pointing out that the relevant language was found in three widely separated locations within the policy and that fine print had been used, the dissent concluded that these provisions should not operate to bar coverage.<sup>8</sup> These justices also felt that the majority's interpretation of the policy frustrated the reasonable expectations of the insured because that construction completely ignored the insuring clause which expressly covered such use.<sup>9</sup>

The defendants also contended that the Uniform Aircraft Financial Responsibility Act<sup>10</sup> was unconstitutional because it mandated insurance coverage for paying passengers but allowed for the exclusion of non-paying passengers. The argu-

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4. The exact language of the excluding clause is set out at 17 Cal. 3d 380, 393-94 n. 2, 551 P.2d 362, 371 n.2, 131 Cal. Rptr. 42, 51 n.2 (concurring and dissenting opinion, J. Tobriner).

5. 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966). *Gray* held invalid an exclusion deemed to be hidden and ambiguous.

6. *Nat'l Ins. Underwriters v. Carter*, 17 Cal. 3d 380, 386, 551 P.2d 362, 366, 131 Cal. Rptr. 42, 46 (1976) quoting from *Continental Cas. Co. v. Phoenix Constr. Co.*, 46 Cal. 2d 423, 432, 296 P.2d 801, 806 (1956).

7. *Id.* at 396, n.6, 551 P.2d at 373, n.6, 131 Cal. Rptr. at 53, n.6.

The majority state that it is self evident that the Thelens could not have reasonably expected National to afford coverage without regard to the identity and qualifications of those persons entrusted with flying the aircraft. The Thelens knew that National had agreed to provide coverage when the insured aircraft was piloted by Mrs. Thelen even though she had only 20 flying hours and lacked any experience with the make and model of aircraft in question. The Thelens thus could reasonably expect that National would not withdraw coverage because the plane was piloted by Pavitt, a permissive user with more experience and better qualifications than either Mr. or Mrs. Thelen.

Additionally, "insureds . . . tend to equate aviation insurance with their automobile policy . . ." E. JERICHO, *INSURANCE COVERAGE VIOLATIONS* 246, found in *SMALL AIRCRAFT ACCIDENT LITIGATION; PHASE II* (1975). The experience of the Thelens with their automobile policy, which by law had to include coverage for permissive use, would also lead them to expect coverage.

8. 17 Cal. 3d 380, 389, 551 P.2d 362, 368, 131 Cal. Rptr. 42, 48 (Tobriner, J., concurring and dissenting).

9. *Id.* at 396, n.5 & 6, 551 P.2d 362, 373 n.5 & 6, 131 Cal. Rptr. 42, 53 n.5 & 6.

10. CAL. PUB. UTIL. CODE §§ 24230-24410 (West Supp. 1976).

ment that this distinction violated the defendants' equal protection rights was unanimously rejected by the court. The justices determined that the Act did not require coverage for any passenger, whether paying or non-paying;<sup>11</sup> thus, since coverage for both classes of passengers could be excluded, no equal protection violation existed.<sup>12</sup>

Finally, the court also unanimously held that the Uniform Aircraft Financial Responsibility Act did not evince a public policy to forbid the exclusion of coverage for permissive users in aviation liability policies. The balance of this Note will re-examine that determination and discuss the question of whether the court should have declared such a public policy on its own absent any legislative declaration thereof.<sup>13</sup>

The plausibility of the court's making such a determination in this case is raised because of its prior holding in *Wildman v. Government Employees' Insurance Co.*<sup>14</sup> In *Wildman*, the Court determined that the Automobile Financial Responsibility Act<sup>15</sup> declared a public policy which prohibited insurers from excluding coverage for permissive users of automobiles.<sup>16</sup> The

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11. Defendants maintain, however, that this provision, and the exclusion therein contained, are impermissibly discriminatory since other provisions of the Act require coverage for paying passengers. To the contrary, we find nothing in the Act mandating such coverage.

17 Cal. 3d 380, 388, 551 P.2d 362, 368, 131 Cal. Rptr. 42, 48.

12. The seed for this argument comes from CAL. PUB. UTIL. CODE § 24350(b) which requires coverage for injuries caused to those who are not passengers. The Court concluded that these separate classifications had rational bases because passengers were aware of the risk they were undertaking while innocent parties on the ground were not aware of nor could they control any risk.

13. [T]hree different situations may arise before a court: (1) The legislature has declared the public policy of the government positively and unmistakably; (2) the legislature, though not declaring public policy in unequivocal terms, has enacted statutory provisions from which a public policy may reasonably be inferred; or (3) the legislature has not made known any preference, either by positive declarations or negative implications (inaction or silence).

Hopkins, *Public Policy and the Formation of a Rule of Law*, 37 BROOKLYN L. REV. 323, 325 (1970-71). The instant case falls in either the second or third category depending on one's point of view. *Wildman v. Gov't Employees' Ins. Co.*, 48 Cal. 2d 31, 307 P.2d 359 (1957) would seem to fall in the first category.

14. 48 Cal. 2d 31, 307 P.2d 359 (1957).

15. CAL. VEHICLE CODE §§ 16000 *et seq.* (West 1966).

16. We are of the opinion that for an insurer to issue a policy of insurance which does not cover an accident which occurs when a person, other than the insured, is driving with the permission and consent of the insured is a violation of the public policy of this state as set forth in Sections 402 and 415 of the Vehicle Code. [sections 402 and 415 are now sections 16450 and 17150 respectively].

obvious analogies between travel by automobile and travel by air make it reasonable to expect that similar public policies would govern each.<sup>17</sup> In rejecting this contention, the Court held that the particular language used in former Vehicle Code Sections 402 and 415,<sup>18</sup> which mandated such a policy, had no counterpart in the Uniform Aircraft Financial Responsibility Act.

At the time of *Wildman*, California Vehicle Code Section 402 read as follows:

Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages.

California Vehicle Code Section 415 stated:

Requisites of Motor Vehicle Liability Policy.

(a)(2) Such Policy shall insure the person named therein and any other person using or responsible for the use of said motor vehicle or motor vehicles with the express or implied permission of said assured.

Admittedly, the Uniform Aircraft Financial Responsibility Act has no express counterpart to former Vehicle Code Sections 402 and 415. However, Section 402 is paralleled in the State Aeronautics Act:<sup>19</sup>

Liability of the owner or pilot of an aircraft carrying passengers for injury or death to the passengers is determined by the rules of law applicable to torts on the land or waters of this state, arising out of similar relationships. Every owner of an aircraft is liable and responsible for death or injury to person or property resulting from a negli-

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*Wildman v. Gov't Employees' Ins. Co.*, 48 Cal. 2d 31, 39, 307 P.2d 359, 364 (1957). The *Wildman* doctrine has received mixed acceptance by other courts. The following cases have either expressly or implicitly accepted the doctrine: *Jenkins v. Mayflower Ins. Exch.* 93 Ariz. 287, 380 P.2d 145 (1963); *Sandoval v. Chenoweth*, 102 Ariz. 241, 428 P.2d 98 (1967); *Lynch-Davidson Motors v. Griffin*, 171 So. 2d 911 (Fla. App. 1965); *Protective Fire and Cas. Co. v. Cornelius*, 176 Neb. 75, 125 N.W.2d 179 (1963); *Commercial Union Ins. Co. v. Universal Underwriters Inc.* 223 Tenn. 80, 442 S.W.2d 614 (1969); *Hughes v. State Farm Mut. Auto. Ins. Co.*, 236 N.W.2d 870 (N.D. 1975). Other cases have rejected the doctrine: *Hart v. Nat'l Indem. Co.*, 422 P. 2d 1015 (Alaska 1967); *Pennsylvania T.&F.M. Cas. Ins. Co. v. Travelers Ins. Co.*, 233 Md. 205, 196 A.2d 76 (1963); *Auto. Underwriters Inc. v. Hardware Mut. Cas. Co.*, 120 Ill. App. 2d 159, 256 N.E.2d 46 (1970); *State Farm Mut. Auto. Ins. Co. v. Ward*, 340 S.W.2d 635 (Mo. 1960); *Western Cas. and Sur. Co. v. General Cas. Co. of Wisconsin*, 200 N.W.2d 892 (1972); *Greene v. Great American Ins. Co.* 516 S.W.2d 739 (Tex. Civ. App.). For a more complete annotation see 8 A.L.R.3d 388.

17. This seems especially true in light of the parallel treatment given aircraft and automobiles in the Court of Appeal ruling on the constitutionality of the aviation guest statute. See e.g. *Ayer v. Boyle*, 37 Cal. App. 3d 822, 112 Cal. Rptr. 636 (1974).

18. CAL. VEHICLE CODE §§ 405 and 415, now §§ 16450 and 17150. (West Supp. 1976).

19. CAL. PUB. UTIL. CODE §§ 21001 *et seq.* (West Supp. 1976).

gent or wrongful act or omission in the operation of the aircraft, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner.<sup>20</sup>

However, there is no statute which specifies that an aviation liability policy "shall insure the person named therein and any other person using or responsible for the use of the aircraft with the express or implied permission of said assured" as Section 415 does for automobile policies. In the absence of such language and, in light of the traditional reluctance of courts to determine public policy absent express legislative declaration thereof, the Court's holding in the instant case is understandable.<sup>21</sup>

Even absent language similar to that found in the Automobile Financial Responsibility Law, the Court had the option of declaring that the exclusion of coverage for permissive users of aircraft violated public policy if it had determined that such an exclusion was "contrary to the policy of express law, although not expressly prohibited."<sup>22</sup>

The broad policy behind the enactment of the Uniform Aircraft Financial Responsibility Act was to "establish minimum standards for aircraft financial responsibility"<sup>23</sup> and to lessen "the toll of aircraft accidents upon third party victims who . . . may suffer personal injury or property loss and who have neither foreknowledge of flights of small aircraft, nor opportunity to assess the risks and insure against them."<sup>24</sup> "Such a law is remedial in nature and in the public interest is to be liberally construed to the end of fostering its objectives."<sup>25</sup> The question thus becomes whether a liberal construction of the Act would impliedly evidence a policy prohibiting the exclusion of cover-

20. CAL. PUB. UTIL. CODE § 21404. The amount of this liability is limited, however, by CAL. PUB. UTIL. CODE § 21404.1. *See also*, Nachsin v. Bretonne, 17 Cal. App. 3d 637, 95 Cal. Rptr. 227 (1971).

21. *See*, 1 WITKIN SUMMARY OF CALIFORNIA LAW § 373 (8th ed. 1973) and cases cited therein. *See also*, 12 CAL. JUR. 2d, Contracts § 79 (1963), and 14 CAL. JUR. 3d, Contracts § 122 (1974). *See also*, Hopkins, *Public Policy and the Formation of a Rule of Law*, 37 BROOKLYN L. REV. 323 (1970-71).

22. CAL. CIV. CODE § 1667 (West 1964); Vick v. Patterson, 158 Cal. App. 2d 414, 417, 322 P.2d 548, 550 (1958).

23. CAL. PUB. UTIL. CODE § 24410 (West Supp. 1976).

24. Nat'l Ins. Underwriters v. Carter, 17 Cal. 3d 380, 388, 551 P.2d 362, 368, 131 Cal. Rptr. 192, 198 (1976).

25. AAS v. Avemco Ins. Co., 55 Cal. App. 312, 322, 127 Cal. Rptr. 192, 198 (1976). This case may also be found at 13 Av. Cas. 18,421.

age for permissive users of aircraft.<sup>26</sup>

Section 24351 of the Act delineates those coverages which are *not* required in an aircraft liability policy or bond.<sup>27</sup> Significantly, protection for permissive users is missing from that list of coverages which may be excluded. The logical implication of this provision is that coverage *is* required for all purposes not exempted and, therefore, coverage for permissive use must be included in all aviation liability policies in this state. Certainly, this provides at least an arguable legislative expression of policy requiring coverage for permissive use. When this expression is viewed in light of the policy considerations behind the Act, it would seem that the Court both could and should have interpreted the law to protect the innocent victims of aviation accidents.<sup>28</sup>

The primary impediment to the Court's deciding to so act is found in California Insurance Code Section 11584.<sup>29</sup> That statute reads in pertinent part:

This section does not prohibit the use of specific exclusions or conditions in any such aviation policy which relates to any of the following:

(4) Establishing limitations on the use of the aircraft.

The inference, if not the clear statement of this section, is that insurers may exclude coverage for permissive users because flight by them relates to "use of the aircraft".<sup>30</sup> This construction of the statute is clouded by two factors. First, the statute only states that *it* does not prohibit exclusions limiting the use

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26. CAL. CIV. CODE § 1667 (West 1973). *Vick v. Patterson*, 158 Cal. App. 2d 414, 417, 322 P.2d 548, 550 (1958).

27. CAL. PUB. UTIL. CODE § 24351 (West Supp. 1976) states:

The policy or bond need not cover:

- (a) Any liability on account of bodily injury to or death of any employee of the owner or operator while the employee is engaged in the duties of the persons employment.
- (b) Any obligation for which the owner or operator or the insurer of the owner or operator may be held liable under any workman's compensation law.
- (c) A guest, or any other person, riding in or upon any aircraft without giving compensation.

28. It is an elusive argument to maintain that the courts have no right to declare public policy because the legislature has failed to do so. The default of one branch of the government is hardly a reason to suggest that another branch should likewise refrain from acting. Moreover, the legislature remains in command. If the view of public policy expressed by the court is not acceptable, the legislature may speedily revise the expression by appropriate statutory provision.

Hopkins, *Public Policy and the Formation of a Rule of Law*, 37 BROOKLYN L. REV. 331 (1970-71).

29. CAL. INS. CODE § 11584 (West 1972).

30. *Nat'l Ins. Underwriters v. Carter*, 116 Cal. Rptr. 88 (District Court of Appeal, 1975).

of the aircraft. It says nothing about limitations on exclusions which may exist in other statutes. Second, the statute refers to *use* of the aircraft, not to the *user* thereof. It is arguable that this language refers to limitations in insurance policies which may, for example, exclude coverage for use at night or use to and from certain or otherwise dangerous airports without referring to who the user is. Under this construction the statute may say nothing at all about excluding coverage for certain individuals.<sup>31</sup> Because of the varied interpretations to which it might be subject, the statute can hardly be deemed to be a clear expression by the legislature that aviation insurance policies may allowably exclude coverage for permissive users.

Assuming, as the court did, that no expression of public policy may be gleaned from the Uniform Aircraft Financial Responsibility Act or from other related statutes, it is still necessary to examine the possibility that the court might have announced such a policy on its own.

It is primarily the prerogative of the legislature to declare what contracts and acts are unlawful and against public policy. But courts, following the spirit and genius of the law, written and unwritten, may declare void as against public policy contracts which, though not in terms specifically forbidden by legislation, are clearly injurious to the interests of society.<sup>32</sup>

Courts can and do declare public policy.<sup>33</sup> "Anything which has a tendency to injure the public welfare is in principle, against public policy."<sup>34</sup> Under this definition it seems reasonably clear that an insurance contract which excludes permissive users from its coverage has a tendency to injure the public welfare. Those injured by the uninsured will often be cared for at the expense of society at large. Minors orphaned when an uninsured permissive user is responsible for the death of their parents might become charges of the state. The conclusion is inescapable that situations such as these fall within the broad ambit of that which public policy should seek to prevent.

The Supreme Court has declined to take advantage of a

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31. This statute has never been clearly interpreted.

32. 12 CAL. JUR. 2d, *Contracts* § 79 (1963). See also, 14 CAL. JUR. 3d, *Contracts* § 122 (1974) and 1 WITKIN, SUMMARY OF CALIFORNIA LAW § 373 (8th ed. 1973). The leading California case is *Maryland Cas. Co. v. Fidelity & Cas. Co.*, 71 Cal. App. 492, 236 P. 210 (1925).

33. *Grimes v. Allen*, 93 Cal. App. 2d 653, 656, 209 P.2d 651, 653 (1949).

34. 1 WITKIN, SUMMARY OF CALIFORNIA LAW § 373 (8th ed. 1973).

unique opportunity to protect the interests of society.<sup>35</sup> Had it done so, the insurance companies could not complain that the court exceeded its authority or that its decision was unprecedented. *Wildman v. Government Employees' Insurance Co.* had put them on notice twenty years earlier. "[W]here the precise question as to whether or not a particular agreement is against public policy has not been determined, analogous cases involving the same general principle may be looked to by the courts in arriving at a satisfactory conclusion."<sup>36</sup> Insurers would have been forewarned by the passage of the Uniform Aircraft Financial Responsibility Act in which a legislative concern for those injured by aircraft accidents was demonstrated.<sup>37</sup>

As long as insurance companies draft adhesion contracts which evidence the "practice of building into policies one condition or exception upon another in the shape of a linguistic tower of Babel"<sup>38</sup> there will be a need for the courts to declare that such practices cannot violate the interests of society at large. In this decision the court has declined to afford judicial protection to policy holders who, as laymen, might not comprehend complicated insurance contracts. It has further declined to protect innocent third party victims "who have neither foreknowledge of flights of small aircraft, nor opportunity to assess the risks and to insure against them."<sup>39</sup> It seems clear that the Legislature must now act to protect California's citizens.

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35. *Maryland Cas. Co. v. Fidelity & Cas. Co.*, 71 Cal. App. 492, 236 P. 210 (1925). See, 17 AM. JUR. 2d, *Contracts* § 177 (1964) which states:

What the public policy is must be determined from a consideration of the federal and state constitutions, the laws, the decisions of the courts, and the course of administration, not by the varying opinions of laymen, lawyers, or judges, as to the demands of the interests of the public. From these principles the conclusion has been derived that in determining the public policy of a state, courts are limited to a consideration of the statutes, the constitution, the judicial decisions, and the practice of government officers. *But if this statement means that there must be a precedent to warrant every judicial declaration that a contract is against public policy, it unquestionably embodies too rigid a rule.* (emphasis added)

36. 17 AM. JUR. 2d, *Contracts* § 177 (1964).

37. *Nat'l Ins. Underwriters v. Carter*, 17 Cal. 3d 380, 388, 551 P.2d 362, 368, 131 Cal. Rptr. 42, 48 (1976).

38. *Ins. Co. of North America v. Electric Purification Co.*, 67 Cal. 2d 679, 691, 433 P.2d 174, 182, 63 Cal. Rptr. 382, 390 (1967).

39. *Nat'l Ins. Underwriters v. Carter*, 17 Cal. 3d 380, 388, 551 P.2d 362, 368, 131 Cal. Rptr. 42, 48 (1976).