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A Causation 'Requirement' In Aircraft Liability Policy Exclusions?

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Commentary

Out Of Thin Air: A Causation 'Requirement' In Aircraft Liability Policy Exclusions?

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The Court should join the mainstream, not grant aviation contracts their own interpretive jet stream.

— Hon. Don R. Willett, Justice, Supreme Court of Texas, January 11, 2008 (in dissent)

The highest state court in Texas recently missed its chance to address an aberration in the law of insurance coverage. Instead, by rejecting the petition for appeal in AIG Aviation, Inc. v. Holt Helicopters, Inc.,[1] the court ensured that its decision in Puckett v. U.S. Fire Ins. Co.,[2] will continue to be cited by holders of aircraft liability policies seeking coverage in instances where they fail to abide by unambiguous policy requirements and safety regulations. The decision in Holt Helicopters and the apparent continued vitality of Puckett mean that, in Texas, a policyholder may be able to obtain insurance for damage arising from an aircraft accident where the requirements of the policy establishing the scope of the insured hazard are not met — in particular, where the pilot at the controls of an accident aircraft does not meet the policy's flight experience requirements or where the aircraft does not have a current valid airworthiness certificate as mandated by the FAA.

In order to avoid coverage pursuant to policy exclusions that apply in such circumstances, prevailing law in Texas and other jurisdictions that apply the Texas approach requires an insurer to prove the existence of a causal connection between the breach of the policy terms and the accident, even where the policy does not require such a link to exist. The justice dissenting from the Texas high court's refusal to take the Holt Helicopters appeal wrote that this approach "is starkly at odds" with Texas insurance decisions generally and with "most American jurisdictions' aviation-insurance decisions specifically."[3] Justice Willet was correct. This article examines Holt Helicopters and explains why its result is contrary to the trend in modern law (including a searching analysis the Supreme Court of Nevada recently conducted in reaching the opposite result),[4] public policy, and fundamental principles of insurance coverage.

1. The Texas Rule: Holt Helicopters And Puckett

The underlying claim in Holt Helicopters involved a helicopter that crashed while herding cattle, causing property damage.[5] The insurance policy issued to the helicopter's owner provided in its declarations that it would apply only while the aircraft was piloted by someone that met specific qualifications. In particular, the policy required the pilot to be either (i) one of three persons identified by name, or (ii) any appropriately rated pilot that had logged at least 1,000 flying hours.[6] In addition to the requirements in the declarations, the policy contained an exclusion stating that the policy did not apply:

> To any Insured while the aircraft is in flight . . . if piloted by other than the pilot or pilots designated in the Declarations.[7]

At the time of the accident the pilot of the helicopter was not one of the pilots named in the declarations and had logged less than the required flying hours.[8] The insurer, AIG Aviation Inc., denied coverage on this basis, and the policyholder filed a coverage action.[9] The parties filed cross motions for summary judgment on the issue of whether AIG could deny coverage without establishing a causal connection between the accident and the pilot's lack of flight experience.[10] The trial court granted summary judgment in favor of the policyholder, ruling as a matter of law that, in order to avoid coverage, the insurance company must prove such a causal link.[11] The jury at the subsequent trial concluded that AIG did not prove causation.[12] The jury also found that AIG engaged in deceptive claim-handling practices by "knowingly refusing to pay" the claim after its investigation suggested that no causal connection existed between the pilot's flight time and the accident.[13]

The Court of Appeals affirmed the trial court's ruling.[14] In doing so, it determined that the prior holding of the Texas Supreme Court in Puckett v. U.S. Fire Ins. Co. remained viable and applied to the facts at hand. Puckett involved an air crash in which the accident aircraft did not have a valid airworthiness certificate at the time of the accident.[15] The parties stipulated that the lapse of the airplane's airworthiness certificate — caused by failure to perform required maintenance — in "no way" caused the accident.[16] The insurer denied coverage on the basis of policy language that stated that "there is no coverage under the policy if the . . . airworthiness certificate is not in full force and effect."[17]

The Texas high court concluded that, even though the insurance contract did not require a causal connection between the breach of the policy and the accident, public policy required a finding of coverage unless such a causal link existed.[18] The court embraced the policyholder's argument that "allowing an insurance company to avoid liability when the breach of contract in no way contributes to the loss is unconscionable and ought not be permitted."[19] In doing so, the court relied on an "anti-technicality" statute that applied to fire insurance policies.[20] The court concluded that the statute, which required a causal connection between the policyholder's breach of a fire insurance policy and the loss as a prerequisite to avoiding coverage, "indicate[d] the public policy of the state."[21]

The Puckett court considered the failure of the policyholder to maintain the aircraft so as to keep its airworthiness certificate valid to be "nothing more than a technicality."[22] Therefore, the court reasoned, allowing an insurer to avoid liability by way of a breach that amounted to a "technicality" would be against public policy.[23] "If we held otherwise," the court wrote,

> [I]t would actually be to the insurer's advantage that the insured failed to renew the airworthiness certificate. In such event, the insurer would collect a premium but would have no exposure to risk because the policy would no longer be effective.[24]

In its written opinion, the Court of Appeals in Holt Helicopters found that the policy language at issue was substantively indistinguishable from that in Puckett, and, therefore, the Puckett analysis applied to the question of coverage for the helicopter crash.[25] The Holt Helicopters court rejected AIG's request that it "call for" the overruling of Puckett, and concluded that it must follow the binding precedent of the Texas high court.[26] The court did, however, drop a footnote acknowledging the existence of at least a question as to Puckett's continuing viability:

> While it is questionable if the Texas Supreme Court will continue to follow the rational [sic] in Puckett, we are bound by existing precedent as an intermediate appellate court.[27]

Following Puckett, the Court of Appeals decided that enforcing the AIG policy's pilot-experience requirement would be contrary to public policy if doing so would void coverage under the circumstances.[28] AIG argued that the minimum-pilot-hours requirement in its policy was a factor in establishing the premium, and, therefore, did not amount to a "mere technicality" like the airworthiness-certificate requirement in Puckett.[29] The Court of Appeals disagreed, finding that requiring an airworthiness certificate "is as much a basis of the bargain" as the pilot-hours require-

ment,[30] and that the public policy rationale of Puckett was "equally pertinent in this case."[31] The court explained that, with reference to the "anti-technicality" statute for fire insurance, "[i]t is the unrelated breach, whatever it might be, that is the technicality not the specific fire policy provision."[32] According to the court:

> Likewise in Puckett it is not the airworthiness certificate or the Open Pilot Warranty in this case that are the technicalities. Both are important safety features but both are "technicalities" when they are not the cause of the loss.[33]

The court concluded that, because the accident would have been covered but for the breach of the pilot warranty, Puckett's public policy rationale applied "in order to prevent the insurer, AIG, from obtaining a windfall by denying coverage for a risk it undertook to insure and for which Holt paid for."[34]

AIG filed a petition for review that the Supreme Court of Texas denied,[35] thereby ensuring that Holt Helicopters remains good law in Texas for the foreseeable future.[36]

2. Griffin And The Majority Approach

In a 2006 opinion involving insurance coverage for an air crash, the Nevada Supreme Court analyzed case law, considered public policy arguments, and reached a result opposite to the one in Holt Helicopters. In Griffin v. Old Republic Ins. Co.,[37] like in Puckett, the subject aircraft's airworthiness certificate was not valid at the time of an accident because the owner had not performed the required annual inspection.[38] The National Transportation Safety Board concluded that the aircraft would have crashed regardless of whether the airworthiness certificate was in effect and the annual inspection was current.[39] The insurance policy at issue excluded coverage if the aircraft's airworthiness certificate was not "in full force in effect" or if the aircraft had not been subjected to required airworthiness inspections.[40] The federal trial court granted summary judgment to the insurer, ruling that it did not need to prove a causal connection between the policy exclusion and the accident.[41] On appeal, the United States Court of Appeals for the Ninth Circuit certified to the Nevada Supreme Court the following question: "may an insurer deny coverage under an aviation insurance policy for failure to comply with an unambiguous requirement of the policy or is a causal connection between the insured's non-compliance and the accident required?"[42]

The Nevada Supreme Court ruled that the policy's airworthiness requirement was unambiguous and did not require a causal connection between an aircraft's lack of airworthiness and the accident for coverage to be precluded.[43] Accordingly, the court refused to impose a causation requirement where the parties did not contract for it:

> We will not rewrite contract obligations that are otherwise unambiguous. Nor will we attempt to increase the legal obligations of the parties where the parties intentionally limited such obligations. Consequently, we will not imply a causality requirement in [the policy's] airworthiness exclusion when no causal connection language is present."[44]

The court also concluded that public policy did not render the policy language unenforceable. It agreed with the opinion of the Arizona Supreme Court, which, when ruling that an insurer need not prove causation to avoid coverage under similar circumstances, concluded that "public policy favors a rule that encourages owners and operators of aircraft to obey and satisfy safety regulations."[45] It reasoned that "aircraft safety is enhanced when policy exclusions are upheld, regardless of causal connection."[46] Citing Puckett as an example of "the minority approach," the court stated that it would:

> [N]ow join the majority and hold that insurers may avoid liability under safety-related exclusions in aviation insurance policies, even when the insured's non-compliance with the exclusion is not causally related to the loss, so long as the exclusion is unambiguous, narrowly tailored, and essential to the risk undertaken by the insurer.[47]

The court relied on the mandatory nature of federal aviation regulations that require a valid airworthiness certificate as a prerequisite to operating an aircraft:

> [A]irworthiness certificates require owners and operators to ensure that their aircraft undergo regular maintenance and annual inspections by certified mechanics. Presumably, an insurer would charge a much higher premium, or refuse to insure an aircraft altogether, if the aircraft was not subjected to regular maintenance and annual inspections as required by federal aviation regulations.[48]

Thus, the scope of the risk assumed by the insurer in return for the premium charged was limited to an aircraft that was maintained and inspected in accordance with applicable safety regulations.[49] Accordingly, the court concluded that "an airworthiness certificate is essential to the risk undertaken by an insurer."[50]

The court rejected an argument that common law disfavors finding that a policyholder's "technical noncompliance" with a policy exclusion results in no coverage.[51] The court stated that "failing to obtain federally mandated aircraft safety inspections" was "far removed" from a true technical breach such as where a policyholder provides its insurer with oral notice of a loss instead of written notice as required by the policy.[52] Thus, the court concluded that, "[a]s the airworthiness exclusion at issue in this case is narrowly tailored and essential to the risk undertaken by the insurer, it applies to exclude coverage."[53]

The Griffin decision is consistent with the majority of courts, which do not require the issuer of an aircraft liability policy to prove causation where an exclusion does not contain a causation requirement. Contrary to assertions by some commentators and litigants,[54] no "modern trend" exists to the contrary. Even the Puckett court recognized that the no-causation approach is the majority rule and that "[w]hether this is the modern trend is debatable . . . ."[55] Indeed, "it would be inaccurate to suggest that there is a significant split of authority on this issue. There are few cases that have rejected the majority view and found that a causal connection between the accident and loss is required."[56] The modern trend is to not require an insurer to prove causation in order to rely on a policy exclusion to deny coverage of a loss arising from an aircraft accident.[57]

3. Discussion

The recent result in Holt Helicopters, which stands in contrast to the ruling of the Nevada Supreme Court, underscores how the issue of a causation "requirement" for exclusions in aircraft liability policies continues to challenge the courts.[58] The Texas courts struggled to define an appropriate analytical framework and opted to rely on "public policy" extracted from a statute unrelated to aviation insurance. In doing so they ignored or gave the back of their hand both to unambiguous policy language and the public policy of aviation safety regulations. They also ignored fundamental and well-established principles of insurance coverage.

a. 'Technicality'

Some may point to the existence of the Texas "anti-technicality" statute as a reasonable explanation for the divergent results in Holt Helicopters and Griffin. That distinction misses the mark. First, the analysis of the Holt Helicopters and Puckett courts was flawed. The statute upon which they relied governed fire insurance policies. Nowhere in the statute or its legislative history was evidence that the Legislature intended it to constitute a statement of broad public policy applicable to aviation insurance. The Texas courts could have side-stepped the statute if they desired. Second, the breaches at issue in Holt Helicopters and Puckett should not have been construed as "technicalities" because they were material to the insured risk. As the dissent in Holt Helicopters recognized, the policy's pilot-experience requirement was a "basis of the bargain" and the "antithesis of a mere technicality" because a pilot's qualifications and training are factors that determine the policy premium.[59]

Moreover, the Griffin court recognized that a distinction exists between a true technical breach, such as providing notice in a form contrary to the requirements of a policy condition, and a breach material to the risk insured, such as failing to obtain a federally mandated aircraft safety inspection.[60] Unlike policy conditions that relate to "non-coverage" events, such as notice, exclusions "directly affect the risk the insurer assumes and upon which premiums are established."[61] The effect of violating an exclusion means that the policy is not triggered and that coverage was never available in the first place.[62]

In a case involving an aircraft accident where the pilot did not meet an insurance policy's qualification

requirements, the Iowa Supreme Court demonstrated a logical approach to an "anti-technical" statute that the Holt Helicopters court could have found instructive. Unlike the Texas fire-insurance statute, the anti-technicality law in Schneider Leasing v. U.S. Aviation[63] applied to any type of insurance policy.[64] The policyholder argued that the policy's exclusion for unqualified pilots could be overcome by operation of the statute if the "technical" breach of the policy and the accident were not causally connected.[65] The court rejected this argument and ruled that the statute did not apply to the exclusion in the policy.[66] The court distinguished between the breach of a policy condition that results in a forfeiture and an exclusion that takes a risk outside the scope of coverage in the first place:

> The limitation on which [the insurer] relies does not void any existing coverage under its policy but simply places this particular loss outside the coverages afforded from the inception of the contract.[67]

"We are confident," the court wrote, "that the limitation on coverage that is being contested in this litigation is not of a type that triggers [the anti-technicality statute]."[68] So too should the Holt Helicopters court have ruled.

b. Expansion Of Risk

It is fundamental that an insurance contract defines the scope of the risk insured.[69] Where a policyholder engages in an activity such as flying its aircraft without a valid airworthiness certificate or with an inexperienced pilot at the controls, and if doing so triggers a policy exclusion, then the prohibited operation takes place outside the scope of the insured risk. Accordingly, the policy no longer applies. If the insurers in Holt Helicopters and Puckett had been willing to insure aircraft operated by inexperienced pilots or in contravention of mandatory safety regulations, they could have chosen to do so — in exchange for appropriate premium payments.[70] The Texas courts not only wrote into the contracts an unbargained-for causation requirement, they expanded the scope of the risk insured, ignoring the plain statement of that scope expressed in the policy language.

The policies in Holt Helicopters, Puckett, and Griffin unambiguously stated that the insurer elected to not provide coverage for an accident that took place *during* a flight under prohibited circumstances, not *because* the flight was made under those circumstances. This distinction is fatal to the reasoning of the Texas courts, and forms the basis of various holdings in jurisdictions that do not impose a causation requirement. For example, in Security Insurance Co. of Hartford v. Andersen,[71] the Arizona Supreme Court concluded that an insurer need not show a causal link between an accident and the pilot's failure to have a valid medical certificate as required by the insurance policy and FAA regulations. In so ruling, the court explained the "clear" rationale for a court "not imposing a causal connection when none is indicated in the policy" as follows:

> The clear meaning of [the exclusion] is not that the risk is excluded if damage to the aircraft is *caused* by failure of the pilot to be properly certificated, but that the risk is excluded if damage occurs *while* the aircraft is being flown by a pilot not properly certificated. Under such circumstances coverage under the policy simply did not exist . . . .[72]

Thus, the court concluded, the insurer "may lawfully exclude certain risks from the coverage of its policy, and where damage occurs during operation of the insured aircraft under circumstances as to which the policy excludes coverage, *there is no coverage*."[73]

Other courts agree that an aircraft liability policy "may validly condition liability coverage on compliance with a governmental regulation and, while noncompliance with such a regulation continues, the insurance is suspended as if it had never been in force."[74] The Oklahoma Supreme Court criticized the reasoning of courts that impose a causation requirement, explaining that, by "focusing on the cause of the loss, the minority rule ignores whether it is reasonable to assume that, *at the inception of the policy,* the insured understood and agreed that the commission of the act triggering the exclusion would increase the insurer's risk of loss."[75] Accordingly, the court reasoned that,

> [a]n exclusion that excludes from coverage, activity that increases the *risk* of loss is reasonable. We see no justification for depriving an insurer of the exclusion's

> benefit unless the insurer first satisfies requirements in addition to those called for by the policy.[76]

The court concluded that, because the risk of an accident while flying an airplane without the required airworthiness certificate "is clearly greater than the risk of an accident while flying an aircraft without one," the insurer would not be required to show a causal link between the accident and the lack of the airworthiness certificate required by the policy.[77]

Where, as in Holt Helicopters, the requirements of an exclusion are "essential to the risk undertaken by the insurer," and the terms of the exclusion are triggered, then the exclusion operates to prevent the existence of coverage from the outset.[78]

c. Public Policy

The Holt Helicopters court, in its reliance on "public policy" purportedly expressed by a fire-insurance statute, gave short shrift to countervailing considerations. First, as many courts have recognized, public policy "favors a rule that encourages owners and operators of aircraft to obey and satisfy safety regulations applicable to their operation of aircraft."[79] Aviation safety cannot reasonably characterized as a "technicality."[80] Aircraft safety "is enhanced when policy exclusions relating to safety are upheld, regardless of causal connection."[81] The South Dakota Supreme Court, in rejecting the argument that a policy's requirement that a pilot have a valid FAA medical certificate was a "technicality," explained as follows:

> The exclusion is no mere formulation to be invoked as an excuse to deny coverage. In fact, it encourages owners and operators of aircraft to obey and satisfy safety regulations applicable to their operation of aircraft.[82]

Similarly, the exclusion at issue in the Security Mutual case provided that no coverage would be available in the absence of a valid airworthiness certificate.[83] The Supreme Court of New Mexico explained that "[t]he policy behind such exclusions is clear and unambiguous . . . [they] encourage aircraft owners to obtain annual inspections of their aircraft in order to be certified . . . ."[84] Therefore, to find coverage where such an exclusion applied the court "would have to rewrite the regulations or the insurance policy."[85] The court concluded that, to require a causal connection between an accident an exclusion of coverage would

> [A]llow courts to ignore the plain language of policy exclusions whenever they feel an insurer should not be allowed to avoid liability for an accident unrelated to a policy exclusion. This rationale is contrary to substantial legal precedent and longstanding public policy.[86]

It is well established that courts will not rewrite unambiguous contracts to achieve a result more favorable to a party than it would have obtained under the contract for which it bargained.[87] "[A] court should not attempt to revise the policy to increase the risk or extend liability just to accomplish a so-called good purpose."[88] A court's discretion in construing an insurance policy is limited in that it "cannot rewrite the policy or create a better one than that which was purchased by the insured."[89] Indeed, the decision in Holt Helicopters seems contrary to established Texas law governing the enforcement of unambiguous insurance contracts. As recently as last fall, the Supreme Court of Texas observed that:

> For more than a century, this Court has held that in constructing insurance policies 'where the language is plain and unambiguous, courts must enforce the contract as made by the parties, and cannot change that which they have made under the guise of construction.' *Texas courts must stick to what those policies say, and cannot adopt a different rule when a 'crisis' arises.*[90]

An insurance company has the right to limit its liability through unambiguous contractual provisions that courts must enforce.[91]

4. Conclusion

The Texas high court's refusal to review the decision in Holt Helicopters was a mistake because the court missed its chance to overturn Puckett. The analysis in Holt Helicopters, like in Puckett, was flawed in a number of respects. Although the Texas court based its ruling on the rationale that public policy favors imposing a causation requirement, the major-

ity of courts have correctly concluded that public policy — aviation safety as expressed by controlling federal regulations — mandates the opposite result. Moreover, the Texas court's analysis represents a stark departure from basic principles of insurance contract interpretation because it rewrites unambiguous terms to expand the scope of the risk to which the parties contracted. As Justice Willett wrote in dissent of the Supreme Court's decision not to take the appeal:

> Because [the court] should strive for uniformity in giving effect to unequivocal contract terms, [the court] should not apply one enforcement rule to aviation contracts and a different enforcement rule to all other contracts.[92]

The result of Holt Helicopters is that Texas continues to defy the majority rule, exemplified by the Nevada Supreme Court's decision in Griffin, which is not to write causation requirements into unambiguous exclusions contained in aircraft liability policies.

Endnotes

1. 198 S.W.3d 276 (Tex. App. 2006).

2. 679 S.W.2d 936 (Tex. 1984).

3. *See* AIG Aviation, Inc. v. Holt Helicopters, Inc., No. 06-0484, at 3 (Tex. Jan. 11, 2008) (unpublished opinion) (Willet, J., dissenting).

4. *See* Griffin v. Old Republic Ins. Co., 133 P.3d 251 (Nev. 2006).

5. Holt Helicopters, 198 S.W.2d at 278.

6. *Id.* at 279.

7. *Id.*

8. *Id.*

9. *Id.* at 278.

10. *Id.* at 288.

11. *Id.*

12. *Id.*

13. *See id.* at 287-88. The trial court awarded the policyholder $524,643.70, which included $65,000 for property damage and the balance for attorney fees, interest, and penalties arising from unfair claim handling practices, plus unspecified contingent attorney fees in connection with the appeal. *Id.* at 279.

14. *Id.* at 288.

15. Puckett, 678 S.W.2d at 937. The parties stipulated that the annual inspection of the aircraft required by the Federal Aviation Regulations had not been performed. *Id.* As a result, by operation of the regulations, the accident aircraft's standard airworthiness certificate had lapsed, and, therefore, the aircraft was operated in contravention of the regulations. *See id.*

16. *Id.*

17. *See id.* at 937, 938.

18. *Id.* at 938.

19. *Id.*

20. *Id.*, *citing* Tex. Ins. Code. Ann. art. 6.14. The statute (subsequently repealed and replaced by a similar law, Tex. Ins. Code. Ann. § 862.054) stated as follows:

> No breach or violation by the insured of any warranty, condition or provision of any fire insurance policy . . . shall render void the policy or contract, or constitute a defense to a suit for loss thereon, unless such breach or violation contributed to bring about the destruction of property.

21. *Id.* The majority stated that it declined "to hold otherwise in this analogous situation."

22. *Id.*

23. *Id.*

24. *Id.* (citation omitted). The wording in this passage — "failed to renew the airworthiness certificate" — may provide insight into the court's understanding — or misunderstanding — of what an airworthiness certificate is. Unlike an automobile registration, a standard airworthiness certificate of the sort at issue was not subject to periodic renewal as an administrative formality. Rather, a standard airworthiness certificate is effective only where the aircraft is properly registered and maintained in accordance with applicable safety regulations. *See* 14 C.F.R. § 21.181(a)(1). An annual inspection, like the one that had not been performed on the accident aircraft, is not a mere formality in the FAA's view. Rather, it may be conducted only by a specially qualified mechanic, requires the performance of specific enumerated actions, and results in mandatory entries being made in aircraft logbooks. *See generally* 14 C.F.R. §§ 91.409 (annual inspection requirements), 43.15 (additional maintenance rules for inspections), and Appendix D to § 43 (itemizing scope and detail of inspection). The Puckett court actually suggested that the long list of items the regulations require to be inspected annually was evidence that breach of the regulations and policy requirements would be a technicality because "[i]t would be virtually impossible for an insured to know whether his certificate was valid." Puckett, 678 S.W.2d at 938. This statement appears to ignore the fact that an annual inspection is complete when the required inspection is performed and specific logbook entries are made by an appropriately qualified mechanic authorizing the return of the aircraft to service. *See* 14 C.F.R. §§ 43.5, 43.11, 43.15, 91.409.

25. *Id.* at 282.

26. *Id.* at 280. AIG argued that Puckett should not apply because (i) the majority of jurisdictions do not impose a causation requirement and (ii) the court has a duty to give full effect to unambiguous policy language. The Court of Appeals refused to consider these arguments because the Puckett court had determined that "the better rule" was to require causation and that, "even with unambiguous contracts," public policy might trump contract terms. *Id.* at 280. *See also id.* at 281 ("Given AIG's challenges to Puckett's viability fail to present any reasoning that the Puckett court did not consider, we decline to overrule Puckett.")

27. *Id.* n.3.

28. *Id.* at 283.

29. *Id.*

30. *Id.* ("The only reasonable purpose for requiring an airworthiness certificate, and specifically an annual inspection, is to limit the insurer's liability caused by an inappropriately maintained and unsafe aircraft.") Justice Duncan, writing in dissent, would have held that Puckett did not apply because the pilot-qualification requirements in the policy were the basis of the bargain between the parties, and thus "the antithesis of a mere 'technicality.'" *Id.* at 288. The dissent did not take issue with logic of the Puckett analysis.

31. *Id.* at 282.

32. *Id.*

33. *Id.* The Court of Appeals rejected AIG's argument that the recodified anti-technicality statute did not apply because, if the legislature had intended to expand its application beyond fire insurance policies, it would have done so at the time of recodification. *Id.* at 281 ("AIG's argument that the Legislature intended to exclude commercial aviation insurance policies when it recodified [the statute] is unsupported by legislative history" because legislature merely intended to recodify prior section without changing its substance).

34. *Id.* at 283 ("Therefore, pursuant to Puckett, denying coverage in this situation would be against public policy.") The court also disposed of AIG's argument that, even if a causal connection was required, AIG did not bear the burden of proving it. *Id.* at 284.

35. *See* AIG Aviation, Inc. v. Holt Helicopters, Inc., No. 06-0484 (Tex. 2008), review denied (Aug. 24, 2007), petition for rehearing denied (Jan. 11, 2008).

36. Without issuing a written opinion, the Texas high court denied a motion for rehearing of its denial of the petition for review of Holt Helicopters. Justice Willett, dissenting from this order, wrote that "Puckett granted an unbargained-for expansion of coverage in the face of a bargained-for exclusion." *See id.* at 2 (January 11, 2008 unpublished opinion)

(Willett, J., dissenting). The dissent concisely summarized Texas jurisprudence enforcing unambiguous insurance contracts as written, and stated that the court should either:

> (1) overrule Puckett, (2) distinguish it, or (3) explain forthrightly why we insist on applying a hazy, public policy-based interpretive standard to aviation insurance contracts (an area where public safety concerns should urge hard-and-fast enforcement of safety-related provisions).

Id. at 2-3 (citations omitted). Interestingly, Justice Willett on the same day also issued a lengthy dissent from a majority ruling that, in order to avoid coverage, an insurer must show prejudice arising from the policyholder's breach of a policy's notice requirement, even where the policy itself does not require prejudice. *See* PAJ, Inc. v. The Hanover Ins. Co., __ S.W.3d ___, 2008 WL 109071 (Tex. 2007) (unpublished). Perhaps reflecting an emerging ideological divide on the court, Justice Willett, joined by two other justices, wrote:

> Regardless of which side makes the superior public policy argument as to what an insurance policy *should* provide, I would decline to insert nonexistent language into the parties' agreement.

Id. at *9 (Willett, Hecht, Wainwright, and Johnson, JJ., dissenting) (emphasis in original).

37. 133 P.3d 251 (Nev. 2006).

38. *See* Old Republic Ins. Co. v. Jensen, 276 F. Supp.2d 1097, 1099 (D. Nev. 2003) ("It is undisputed that the annual airworthiness inspection was not performed before the accident . . . . Thus, for purposes of the federal regulations and the [insurance policy] the aircraft was not airworthy at the time of the crash.")

39. *Id.* at 1102.

40. *Id.* at 1101.

41. *Id.* at 1105-06.

42. Griffin, 133 P.2d at 253.

43. *Id.* at 254 ("[W]e will not rewrite contract provisions that are otherwise unambiguous.")

44. *Id.* (internal quotation and citation omitted).

45. *Id.* at 255, *quoting* Security Ins. Co. v. Andersen, 762 P.2d 246, 249 (Ariz. 1988). *See also id.* ("This court has also held that federal aviation regulations are a legitimate means of insuring safe flight and that federal aviation regulations 'are designed to promote safe conduct of air traffic.'"), *quoting* Lightenburger v. Gordon, 407 P.2d 728 (Nev. 1965).

46. *Id.*

47. *Id.* The court rejected the argument that a "modern trend" for requiring causation exists, observing that "a majority of jurisdictions that have considered causality have held that insurers may avoid liability under a policy exclusion, even when the insured's noncompliance with the exclusion does not cause the loss, so long as the exclusion is unambiguous." *Id.* at 254-55. *See also id.* at 255 n.17 (collecting cases).

48. *Id.* at 256.

49. *See id.* ("The failure to have an annual inspection and to have an airworthiness certificate is material to the hazard assumed by the insurer.")

50. *Id.*

51. *Id.* n.26.

52. *Id.*

53. *Id.* The Ninth Circuit subsequently affirmed the trial court's grant of summary judgment to the insurance company. *See* Old Republic Ins. Co. v. Griffin, 185 Fed. Appx. 588 (9th Cir. 2006).

54. *See, e.g.,* Derrick J. Hahn, General Aviation Aircraft Insurance: Provisions Denying Coverage For Breaches That Do Not Contribute To The Loss, 64 J. Air L. & Com. 675 (1999). Some courts and litigants have cited a passing reference in a 35-year old treatise (Appleman, 6A The Law of Insurance, § 4146 (1972)) for the proposition that a "modern trend" to require causation exists. *E.g.,* Avemco

Insurance Co. v. Chung, 388 F. Supp. 142, 151 (D. Haw. 1975). But, courts that recently considered the issue have concluded that no such trend exists. *See, e.g.,* Aviation Charters, Inc. v. Avemco, 763 A.2d 312, 316-17 (N.J. App. 2000) (majority of cases reject causation requirement) (collecting cases); Economic Aero Club, Inc. v. Avemco Ins. Co., 540 N.W.2d 644, 646 (S.D. 1995) (court, urged to adopt "modern view" requiring causation, determined that majority of courts do not require causation); Avemco Ins. Co. v. White, 841 P.2d 588, 590 (Okla. 1992) (contrary to Appleman, "our research reveals that [a causation requirement] is *not* the modern view) (emphasis in original). *See also* Old Republic Ins. Co. v. Jensen, 276 F. Supp.2d 1097, 1104 n.7 (D. Nev. 2003) ("In reality, [the 'modern trend' described by Appleman] has seldom been followed in the last thirty years.")

55. Puckett, 678 S.W.2d at 938. *See also* Allan D. Windt, Insurance Claims and Disputes 4th § 6:8 (2007 ed.) ("The vast majority of courts have held . . . that an insurance exclusion is effective whether or not there is any causal connection between the excluded risk and the loss.")

56. Old Republic Ins. Co. v. Jensen, 276 F. Supp.2d 1097, 1103-04 (D. Nev. 2003). *See also id.* at 1103 n.6 (collecting twenty-eight cases representing the majority view).

57. *See, e.g.,* Aviation Charters, Inc. v. Avemco, 763 A.2d 312 (N.J. App. 2000) (insurer not required to show causal link between unqualified pilot and accident to deny coverage), *aff'd* 784 A.2d 712 (N.J. 2001); Economic Aero Club, Inc. v. Avemco Ins. Co., 540 N.W.2d 644 (S.D. 1995) (lack of pilot medical certificate); Avemco Ins. Co. v. White, 841 P.2d 588 (Okla. 1992) (lack of required airworthiness certificate); U.S. Fire Ins. Co. v. West Monroe Charter Serv., 504 So. 2d 93 (La. App. 1987) (lack of pilot medical certificate); Security Mut. Cas. Co. v. O'Brien, 662 P.2d 639 (N.M. 1983) (lack of airworthiness certificate); Ochs v. Avemco Ins. Co., 636 P.2d 421 (Or. App. 1981) (same); DiSanto v. Enstrom Helicopter Corp., 489 F. Supp. 1352 (D. Pa. 1980) (pilot not qualified as policy required). *But see* South Carolina Ins. Guar. Assoc. v. Broach, 353 S.E.2d 450, 451 (S.C. 1987) (noting that South Carolina "expressly rejected" the modern trend); Pickett v. Woods, 404 So. 2d 1152 (Fla. App. 1981) (anti-technicality statute required insurer to establish causal link), *petition for review denied,* Foremost Ins. Co. v. Pickett, 412 So. 2d 465 (Fla. 1982). In fact, we are aware of no reported decision since Puckett other than Holt Helicopters in which a court ruled that an insurer must prove a causal nexus as a prerequisite for relying on a policy exclusion an air accident case.

58. The Holt Helicopters decision, and the divergence among Supreme Court justices about whether to take the appeal of it, demonstrates that the causation issue has not been put to rest, even though commentators with varying points of view have written about the issue in the past. *See, e.g.,* Derrick J. Hahn, General Aviation Aircraft Insurance: Provisions Denying Coverage For Breaches That Do Not Contribute To The Loss, 64 J. Air. L. & Com. 675 (1999); Timothy M. Bates, Comment, Aviation Insurance Exclusions—Should A Causal Connection Between The Loss And Exclusion Be Required To Deny Coverage, 52 J. Air. L. & Com. 451 (1986); Noralyn O. Harlow, Aviation Insurance: Causal Link Between Breach Of Policy Provisions And Accident As Requisite To Avoid Insurer's Liability, 48 A.L.R.4th 778 (1986).

59. Holt Helicopters, 198 S.W.3d at 288 (Duncan, J., dissenting).

60. *See* Griffin, 133 P.2d at 256 n.26. *See also* Puckett, 678 S.W.2d at 940 ("Aviation safety a technicality? The object of the policy provision requiring compliance with the federal regulations is safety.") (Pope, C.J., and McGee, J., dissenting).

61. Aviation Charters, Inc. v. Avemco Ins. Co., 763 A.2d 312, 315 (N.J. App. 2000) (pilot-qualifications exclusion relates to aircraft safety). *See also* Security Mutual Cas. Co. v. O'Brien, 662 P.2d 639, 640 (N.M. 1983) (finding distinction between policy condition and exclusion of coverage for aircraft lacking valid airworthiness certificate to be "determinative").

62. *See* Security Ins. Co. of Hartford v. Andersen, 763 P.2d 246, 250 (Ariz. 1988) (distinguishing technical violation of a policy condition from breach of an exclusion); Couch On Insurance 3d § 81:19 (2007 ed.) (result of breach of exclusion is "to declare

that there never was insurance with respect to the excluded risk").

63. 555 N.W.2d 838 (Iowa 1996).

64. *See id.* at 841. Iowa Code § 515.101 provided:

> Any condition or stipulation in an application, policy, or contract of insurance, making the policy void before the loss occurs, shall not prevent recovery thereon by the insured, if it shall be shown by the plaintiff that the failure to observe such provision or the violation thereof did not contribute to the loss.

65. *Id.* at 840.

66. *Id.* at 842.

67. *Id.* Having ruled that the statute did not apply to the policy exclusion, the court declined to reach the issue of whether an exception in the statute for coverage defenses referring to changes in the material risk caused by the policyholder applied. *Id.* The court remanded the case for factual determinations on the issues of waiver and estoppel to assert coverage defenses. *Id.* at 843 (absent success by the policyholder in proving waiver or estoppel, the insurer "is entitled to a judgment confirming that its policy does not cover the loss").

68. *Id. See also* U.S. Fire Ins. Co. v. West Monroe Charter Serv., 504 So. 2d 93, 100 (La. App. 1987) (insurance policy requirement that pilot hold valid medical certificate not a technicality of the sort that should require insurer to show causal link to accident pursuant to an anti-technicality statute).

69. Unambiguous insurance policy provisions that define the risk "state the limit of the insurer's responsibility. Once the parties arrive at their agreement, they are bound by its terms and an insured is entitled only to the coverage for which it contracted." Couch On Insurance 3d §101:1 (2007 ed.). *See, e.g.,* Ortiz v. State Farm Mut. Auto Ins. Co., 955 S.W.2d 353, 360 (Tex. App. 1997) ("The provisions of an insurance contract define the rights of the insured and the insurer."); Safeco Ins. Co. of America v. Husker Aviation, Inc., 317 N.W.2d 745, 748 (Neb. 1982) ("[I]t does not follow . . . that the terms of an insurance policy may be distorted from their natural meaning, or that the agreed liability of the insurer should be enlarged into one which only a new contract could have imposed, nor, indeed, that a court should indulge in scholastic subtleties to extend the rights of the insured.").

70. As the Nevada Supreme Court explained:

> Federal Aviation regulations specifically require aircraft owners and operators to obtain airworthiness certificates in order to operate their aircraft, and airworthiness certificates require owners and operators to ensure that their aircraft undergo regular maintenance and annual inspections by certified mechanics. Presumably, an insurer would charge a much higher premium, or refuse to insure an aircraft altogether, if the aircraft was not subjected to regular maintenance and annual inspections as required by federal aviation regulations.

Griffin, 133 P.3d at 256.

71. 763 P.2d 246, 248 (Ariz. 1988).

72. *Id.* at 249, *quoting* Baker v. Ins. Co. of North America, 179 S.E.2d 892, 894 (1971) (emphasis in original).

73. Security Insurance, 763 P.2d at 249 (internal quotation and citation omitted) (emphasis added).

74. Ochs v. Avemco Ins. Co., 636 P.2d 421 (Or. App. 1981) (insurer not required to show causal link between lack of valid airworthiness certificate and accident). *See also* Schneider Leasing, Inc. v. U.S. Aviation Underwriters, Inc., 555 N.W.2d 838, 842 (Iowa 1996) (pilot-qualifications requirement in insurance policy "does not void any existing coverage under its policy but simply places this particular loss outside the coverages afforded from the inception of the contract").

75. Avemco Ins. Co. v. White, 841 P.2d 588, 591 (Okla. 1992) (emphasis in original).

76. *Id.* (emphasis in original). Requiring a causal connection between the cause of an accident and

an unambiguous exclusion would "constitute an unbargained-for expansion of coverage, *gratis,* resulting in the insurance company's exposure to a risk substantially broader than that expressly insured against in the policy." Aviation Charters, Inc. v. Avemco Ins. Co., 784 A.2d 712, 714 (N.J. 2001) (no requirement to show causation between accident and breach of pilot-qualifications requirement), *quoting* Zuckerman v. Nat'l Union Fire Ins. Co., 495 A.2d 395 (N.J. 1985).

77. *Id.* ("We see no reason to rewrite the agreement.") "An exclusion is essential to the risk undertaken by the insurer if the clause excludes activities that are material to the acceptance of the risk, or are material to the hazard assumed by the insurer." Griffin, 133 P.3d at 255-56.

78. *See* Griffin, 133 P.3d at 256 (enforcing exclusion requiring valid airworthiness certificate as "narrowly tailored and essential to the risk undertaken").

79. Security Insurance, 763 P.2d at 250. *See also* Aviation Charters, Inc. v. Avemco Ins. Co., 763 A.2d 312, 315 (N.J. App. 2000) (enforcing pilot-qualifications exclusion would encourage aircraft safety, "certainly a countervailing policy consideration to the concerns of forfeiture" of coverage).

80. *See, e.g.,* Puckett, 678 S.W.2d at 940 (Pope, C.J., and McGee, J., dissenting).

81. Griffin, 133 P.3d at 255.

82. Economic Aero Club, Inc. v. Avemco Ins. Co., 540 N.W.2d 644, 646 (S.D. 1995). The court concluded that "any shift in the method for construing aviation insurance contracts would be better left to legislation." *Id.* Virginia has enacted such a state, which does not allow an aircraft insurance policy to "exclude or deny coverage because the aircraft is operated in violation of federal or civil regulations . . . ." Va. Code Ann. § 38.2-2227 (West 2007). Significantly, however, the statute states that it does not prohibit "specific exclusions or conditions" that relate to aircraft certification, pilot certification, and requirements for pilot experience. *Id.* Thus, the statute, by its plain terms, apparently would not apply to the policies at issue in Holt Helicopters and Griffin. *See* U.S. Specialty Ins. Co. v. Skymaster of Virginia, Inc., 26 Fed. Appx. 154, 158, 2001 WL 1602030 at *4 (4th Cir. 2001) (unpublished) (declining to decide whether statute applied to policy exclusion for pilots without valid medical certificates).

83. Security Mutual Cas. Co. v. O'Brien, 662 P.2d 639, 640 (N.M. 1983).

84. *Id.*

85. *Id.* ("This we will not do.") *See also* Aviation Charters, Inc. v. Avemco Ins. Co., 763 A.2d 312, 315 (N.J. App. 2001) (Enforcement of "clear and unambiguous" pilot-qualifications exclusion "would serve to encourage compliance with those qualifications, certainly a countervailing policy consideration to the concerns of forfeiture"); Avemco Ins. Co. v. White, 841 P.2d 588, 589 (Okla. 1992) (exclusion for aircraft without current airworthiness certificate "is not contrary" to public policy and insurer need not prove causal link between lack of certificate and accident).

86. *Id.* at 641 ("Insurance coverage must not be afforded aircraft owners who ignore or refuse to comply with established certification requirements commonly part of policy exclusions.") A telling parallel may be drawn between exclusions such as the one at issue in Holt Helicopters and the "named driver exclusion" common to automobile insurance policies. The "named driver exclusion" precludes coverage if a particular driver is behind the wheel of the insured vehicle at the time of the accident. Courts enforce the exclusion without requiring an insurer to prove a causal link between the accident and the identity of the person driving the car. *See, e.g.,* Safeway Managing General Agency for State & County Mut. Fire. Ins. Co., 952 S.W.2d 861, 866, 868 (Tex. App. 1997) (exclusion effective to preclude coverage where accident was not the fault of a driver who was specifically excluded in policy declarations because she did not have a driver's license). The Texas Court of Appeals has ruled that the exclusion is valid and furthers public policy by "focusing on the risk involved." Zamora v. Dairyland County Mut. Ins. Co., 930 S.W.2d 739, 740-41 (Tex. App. 1996). In Zamora, the court concluded that the "named driver exclusion" furthers public policy because, *inter alia,* "it deters insured drivers from entrusting their au-

tomobiles to unsafe excluded drivers, thus, keeping those unfit drivers off public roadways." *Id.* at 741. Similarly, the exclusion at issue in Holt Helicopters furthered public policy by ensuring that experienced pilots were at the controls of the aircraft. Thus, the reasoning employed by the Holt Helicopters courts is contrary to the logic of Texas appellate decisions construing the "named driver exclusion."

87. *See generally* Barry R. Ostrager & Thomas R. Newman, Handbook On Insurance Coverage Disputes, § 1.01[a] (11th ed. 2002); Couch On Insurance 3d, § 21:4 (2007 ed.); Allan D. Windt, Insurance Claims and Disputes 4th § 6:2 (2007 ed.).

88. Security Insurance, 763 P.2d 246, 248 (Ariz. 1988) (internal quotation omitted). As the California Supreme Court explained, "we do not rewrite any provision of any contract . . . for any purpose." Powerine Oil Co., Inc. v. Superior Court, 118 P.3d 589, 599 (Ca. 2005) (courts should not rewrite insurance policies to shift economic burden from insured to insurer or to advance public policy).

89. Couch On Insurance 3d, § 21:4 (2007 ed.). A literal interpretation of an insurance policy will not be avoided "simply to obtain a fairer result. Courts are not allowed to rewrite insurance contracts simply in order to make them more favorable to the insured." Allan D. Windt, Insurance Claims and Disputes 4th § 6:2 (2007 ed.). Significant economic consequences that may flow from a finding of no coverage are "not sufficient reason for a court to create new coverage and impose risks not assumed or paid for by the contracting parties. . . . Indeed . . . judicially created insurance coverage leaves ordinary insureds to bear the expense of increased premiums necessitated by the erroneous expansion of their insurers' potential liabilities." Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co., 959 P.2d 265, 286-87 (Ca. 1998) (refusing to hold that policy was triggered by an EPA notice of potential responsibility for environmental cleanup because "conflicting social and economic considerations" favoring coverage "have nothing whatsoever" with interpretation of unambiguous policy language) (internal quotations and citations omitted). *See also* Conair Corp. v. Old Dominion Freight Line, Inc., 22 F.3d 529, 534 (3d Cir. 1994) ("court should not make a different or a better contract than the parties themselves have seen fit to enter into"); Hoosier Energy Rural Elec. Co-op., Inc. v. Amoco Tax Leasing IV Corp., 34 F.3d 1310, 1317 (7th Cir. 1994) (court "is not at liberty, because of equitable considerations," to rewrite contract to improve the bargain for one of the parties to it); U.S. Fire Ins. Co. v. West Monroe Charter Serv., 504 So. 2d 100 (La. App. 1987) (no causal link required to exclude coverage where pilot of accident aircraft did not hold valid medical certificate because "[t]o impose such a requirement would only serve to alter the agreement between the parties to the contract").

90. Fiess v. State Farm Lloyds, 202 S.W.3d 744, 753 (Tex. 2006) (emphasis added), *quoting* E. Tex. Fire Ins. Co. v. Kempner, 27 S.W. 122 (Tex. 1894).

91. *See, e.g.,* Great Plains Ins. Co. v. Kalhorn, 280 N.W.2d 642, 645 (Neb. 1979) ("An insurance policy is a contract. . . . As such, the insurance company has the right to limit its liability. . . . If [limiting provisions] are clearly stated and unambiguous, the insurance company is entitled to have those terms enforced."); Security Mut. Cas. Co. v. O'Brien, 662 P.2d 639, 640 (N.M. 1983) ("We start with the proposition that our function is not to write insurance contracts. We are not underwriters. We must apply them as written by the parties . . . even though the result compelled by the plain words used may appear or be thought to be unreasonably, unduly harsh, or stringent. We cannot ignore them. We cannot substitute others for them."), *quoting* Electron Machine Corp. v. American Mercury Ins. Co., 297 F.2d 212 (5th Cir. 1961).

92. AIG Aviation, Inc. v. Holt Helicopters, Inc., No. 06-0484, at 3 (Tex. Jan. 11, 2008) (unpublished opinion) (Willet, J., dissenting). ■

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