



“THERE I WAS AT 10,000 FEET...”

WHEN HAPPY LANDINGS DEPEND ON THE RIGHT AVIATION INSURANCE

BY J. MITCHELL COBEAGA, ESQ. AND LEAH M. BLAKESLEY, ESQ.

Most pilots feel that they are great storytellers and that everyone is waiting with bated breath to hear their tales of derring-do. These aviation anecdotes normally start off with something akin to: “There I was at 10,000 feet when suddenly...”

- A.** a few of the engine instruments began fluctuating in a manner I’d never seen before;
- B.** the engine felt like it was running rough;
- C.** on top of everything else, I was not sure where I was (aside from lost);
- D.** the engine quit on me; or
- E.** all of the above.

Flying has been described as hours of sheer boredom followed by moments of heart stopping fear and anxiety. This article is designed to help the novice pilot best procure insurance in order to protect against the catastrophes that provide those moments of excitement,

and to avoid the pitfalls of exclusions in aviation policies. This article should provide some direction for those looking into flying themselves and those with clients requesting aviation insurance advice.

It will become immediately obvious that flying and aviation in general are sui generis. Aviation is a highly regulated field, containing many twists and turns that the average practitioner may not ever encounter. It is for this reason that we highly recommend always seeking appropriate expertise when dealing with aviation related matters, from obtaining insurance coverage to defending an enforcement action against a license by the FAA.

Licence Requirements

All pilots are required to have a pilot certificate, a photo ID and a medical certificate in their possession when operating a civil, N-numbered aircraft in the United States. These requirements do not apply to certain categories of flight; craft including balloons, gliders and sport aircraft (the small 1200 lb. open air machines) are exempt. While there is no requirement for any ratings on a nice sunny day, no person may operate an aircraft under instrument flight rules without an instrument rating on that person's pilot certificate. Title 14, Code of Federal Regulations (CFR), Part 61A.

The requirements for medical certificates are set forth in Title 14, CFR 61.23. Basically, a private pilot under the age of 40 must hold a first-class medical certificate, which is good for five years, while a pilot over 40 needs a renewal every two years. Title 14, CFR 61.53 prohibits an individual from acting as pilot in command if he knows of, or has any reason to know of, any medical condition that would make him ineligible for flight. This is a very sticky requirement; an individual flying while aware of having a medical condition which would prevent the pilot from holding a license can lead to loss of coverage. Such medical conditions can include taking certain prescription medications that *wouldn't* be a total bar to obtaining a medical certificate.

It is very important to comply with all requirements of CFR Part 61, to ensure that there are no grounds available for the cancellation of insurance following an accident. The key is being very familiar with your policy and the restrictions and limitations set forth therein.

Insurance

When you want to insure your automobile, you call your agent and tell him/her what limits you want. That's it. Not so with aviation insurance. This article cannot begin to cover all of the variations in insurance available to the private pilot. Suffice to say that anyone purchasing insurance, whether for an owned aircraft, a rental or a jointly-owned aircraft, will have to consult with an aviation broker. There are many top-notch aviation brokers in the market; one simply has to go through one of them to find insurance that fits a pilot's particular needs.

Further, unlike with your auto policy, one really needs to read their policy and know what exclusions are included before taking to the air. Beyond the intentional act exclusion, there is very little in the standard auto policy that would allow an insurer to deny coverage after an accident. Such is not the case with an aviation policy; there

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are many exclusions that can void coverage if they come into play.

Pilots also have to make sure that they have enough insurance. A typical owner's or renter's insurance policy might provide one million dollars in coverage for damage to the airplane, medical payments, injury to passengers, injuries to persons on the ground or damages to objects on the ground. One million dollars sounds like a fairly healthy amount. However, this coverage is generally limited to \$100,000 per seat, per passenger. This is simply not enough to cover injuries sustained by a passenger in an accident if that passenger looks to the pilot for redress. To put it plainly, you must address this issue with your broker and make sure you have enough coverage to satisfy any contingencies you might face when carrying passengers

Damage to the aircraft, usually called hull loss, also differs from

collision with a deductible on an auto policy. Generally the hull loss figure is stated value and will depend on the age of the aircraft, its condition, the pilot's level of experience and similar factors. This is something to be negotiated when obtaining coverage. It is a stated value policy and there is no depreciation when the aircraft is damaged.

Insurance Coverage Issues

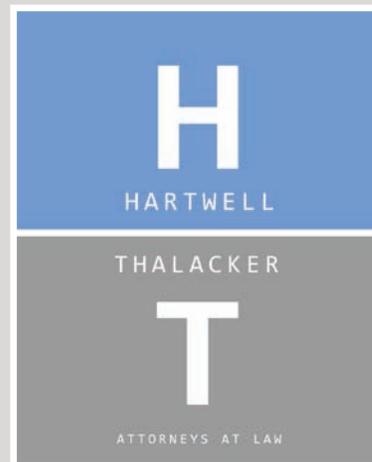
There are very few exclusions that come into play in a typical automobile liability policy. About the only one that comes up with any frequency is the intentional act exclusion: one can't deliberately run over a neighbor after an argument and then expect the insurance company to provide a defense and indemnity when the neighbor sues. On the other hand, there are numerous

exclusions in many available aviation policies that can come into play following an incident or accident. It is for this reason alone that an aviator should pick a good broker, consult with the broker about the coverage available and the exclusions in the policy, and then read the policy.

The following cases feature just a few of the exclusions that might come into play in a given accident. One basis frequently raised by insurance carriers in aviation cases is the pilot's failure to maintain a medical certificate, or flying in a condition that would void that certificate. In such cases, if the policy carries an appropriate exclusion, and the pilot does not have a current medical certificate, coverage can be voided. The same would be true if there was a current medical certificate but the pilot was flying with a condition he or she knew would disqualify him or her from flying.¹

Another area where violation of a policy provision can lead to no coverage is failure to comply with pilot warranties. Certain policies contain requirements for minimum experience

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and/or training of pilots operating an aircraft. If these minimums are not met, the carrier has a basis for denying coverage.²

Finally, one extremely important issue is that of causation. The jurisdictions are split as to whether or not coverage can be denied unless the policy violation is in some way a causative factor in the accident. It appears that in Nevada any violation of a policy provision may lead to a loss of coverage, regardless of whether or not it is a causative factor in the accident. This issue is exemplified by the holding in the *Old Republic Insurance Co. v. Kevin Jensen, M.D.*, 276 F. Supp. 2d 1097 (D. Nev. 2003). Dr. Kevin Jensen was flying in the Carson City area when he crashed short of the runway. He and his wife were severely injured, the aircraft was destroyed and the aircraft crashed into a residence, causing substantial damage to the residence and severe and life altering injuries to its occupants. Jensen speculated that he had either switched to an empty fuel tank or that there had been a problem with the fuel system. Subsequent investigation revealed

that the annual airworthiness inspection had not been performed on the aircraft. Old Republic took the position that the aircraft was not airworthy at the time of the accident flight, and therefore relied on an exclusionary clause in its policy to deny coverage. But the Jensens argued that there was no link between the annual

inspection and the accident in question. In other words, they claimed that this accident would have occurred whether or not the inspection had been performed on schedule. Judge Larry Hicks examined cases from many jurisdictions on this causality issue and noted that the majority

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of courts "...have found that public policy favors a rule that encourages annual inspections." He then went on to hold:

The exclusionary clause involved in this case relates to aircraft and public safety. Enforcement of such a provision serves to encourage compliance with the Federal Aviation Regulations, which serve an important safety function. The court finds that there is a strong public policy consideration that warrants the court enforcing the contract and finding that the *Bayers* does not apply. (276 F.Supp. at 1104.)

Hence, a pilot had better know his policy and all of its exclusions. Whether it's flying without a proper medical certificate, not being in compliance with a pilot warranty, missing an annual inspection or something else entirely, a flyer may well end up with no coverage if the policy contains an appropriate exclusion. Public policy favors everyone flying safely, and those who fly are best advised to make sure that they comply with all of these requirements.

In closing, I'd like to offer one final tip my old flying instructor gave his students many years ago: always land wheels-side down!!! **NL**

1. See *US Specialty Insurance Co. v. Skymaster of Virginia, Inc.*, 123 F. Supp.2d 995 (E.D. Va, 2000).
2. See *Trishan Air Inc. v. Federal Insurance Co.*, 635 F.3d 422 (9th Cir. 2011).

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LEAH M. BLAKESLEY is a native of Las Vegas. She graduated from William S. Boyd School of Law in 2012. After clerking for one year for a Nevada District Court judge, she went into private practice with her husband. Blakesley is primarily involved in civil litigation and domestic practice.

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