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American Casualty Company of Redding Pennsylvania And Larry Richards Silver, Administrator of The Estate of Lynn Richards Silver, Deceased v. Eagle Star Insurance Company, Ltd. : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF TH

AMERICAN CASUALTY COMPANY of REDDING PENNSYLVANIA and LARRY RICHARDS SILVER, Administrator of the Estate of LYNN RICHARDS SILVER, deceased,

Plaintiffs and Respondents,

vs.

EAGLE STAR INSURANCE COMP... LTD.,

Defendant and Ap...

Third ...

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IN THE SUPREME COURT OF THE STATE OF UTAH

AMERICAN CASUALTY COMPANY of REDDING PENNSYLVANIA and LARRY RICHARDS SILVER, Administrator of the Estate of LYNN RICHARDS SILVER, deceased,	)	
Plaintiffs and Respondents,	)	
vs.	)	Case No. 14800
EAGLE STAR INSURANCE COMPANY, LTD.,	)	
Defendant and Appellant.	)	

APPELLANT'S BRIEF

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County
Honorable Stewart M. Hanson, Sr.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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APPELLANT'S BRIEF

NATURE OF THE CASE

This is a declaratory judgment action to determine whether Lynn Richards Silver was an omnibus insured under the aircraft hull and liability policy of appellant Eagle Star Insurance Company, or whether Silver's primary coverage was under the umbrella excess third party liability policy of respondent American Casualty Company.

DISPOSITION IN THE LOWER COURT

Motions for summary judgment were filed by both sides. Plaintiffs and respondents were granted summary judgment in the Third Judicial District, Honorable Stewart M. Hanson, Sr. presiding.

RELIEF SOUGHT ON APPEAL

Defendant and appellant Eagle Star Insurance Company seeks reversal of the summary judgment and judgment in its favor as a matter of law, or in the alternative, remand of the action for trial.

STATEMENT OF FACTS

Lynn Richards Silver was piloting a Cessna 310 aircraft when it crashed on June 22, 1972, killing the pilot and his wife and the two other passengers. Various liability claims have been filed against the estate of Lynn Richards Silver, C. W. Silver Company and Silco Corporation, and this action was to determine which insurance company is obligated to defend the estate of Lynn Richards Silver and pay any claims for which the estate is legally liable.

The aircraft was owned by Silco Corporation, a Salt Lake City company in the business of leasing and renting real and personal property. Silco Corporation was the named insured in the Eagle Star hull and liability policy on the subject aircraft. This insurance contract excludes coverage to any person operating the aircraft under the terms of any agreement which provides any remuneration for the use of said aircraft, in the following language:

> "In consideration of the payment of the premium, in reliance upon the statements in the declarations made a part hereof and subject to the limits of liability, exclusions, conditions

and all other terms of this policy, agrees with named insured [Silco Corporation] to afford those of the following coverages as are specified in the declarations:

> ***
>
> Coverage E -- Single Limit Bodily Injury (including passengers) and Property Damage Liability.
>
> > To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury ... including death at any time resulting therefrom, sustained by any person including passengers as defined herein, ... caused by an occurrence and arising out of the ownership, maintenance, or use of the aircraft."

Also, under the "Insuring Agreements" of the policy, the persons insured are limited as follows:

> "III. Persons Insured.
>
> The unqualified word 'insured' wherever used in this policy ... includes not only the named insured but also any person while using or riding in the aircraft... The insurance with respect to any person or organization other than the named insured does not apply to:
>
> ***
>
> (d) to any person operating the aircraft under the terms of any agreement which provides any remuneration for the use of said aircraft."

Silco Corporation had an agreement with C. W. Silver Company whereby C. W. Silver's employees used the aircraft in return for full payment by C. W. Silver Company of all costs of maintenance, repair, storage, operation, inspection, and license. (Deposition of Larry R. Silver, pp.28-29; Deposition of Roy R. Silver, p.35).

Larry R. Silver, Chairman of the Board of Directors of the C. W. Silver Company and a Director of Silco Corporation, and Roy R. Silver, President and a Director of Silco Corporation and a Director and Shareholder of C. W. Silver Company, testified in their depositions that both corporation considered this agreement a fair business arrangement. Silco Corporation deemed the consideration it received to be a valuable benefit.

> "[The aircraft] is a valuable piece of equipment. It would cost us a lot to maintain that airplane when we weren't using it and they were doing all of that, which was a great expense." (Deposition of Larry R. Silver, p.47).

At the time Silco Corporation acquired the aircraft, there was an understanding between the two corporations that C. W. Silver Company would operate it and there would be "some kind of remuneration". (Deposition of Roy R. Silver, pp.31-32).

The two companies are owned and operated by some of the same individuals. Lynn Richards Silver was the Manager of both companies and an officer and director of both companies. (Deposition of Roy R. Silver, pp.24-25). Nevertheless, this agreement governing use and payment for the aircraft was a business arrangement. The aircraft was initially acquired by Silco Corporation not for the use of C. W. Silver Company but rather to discharge a debt owed by a third party. (Deposition of Roy R. Silver, p.34). Silco Corporation had rented or leased other equipment to

C. W. Silver Company from time to time under written lease contracts. Roy R. Silver, the President of Silco, the corporation which owned the aircraft, was surprised that there was no written lease agreement binding C. W. Silver Company to Silco for its use of the plane. (Deposition of Roy R. Silver, pp.41-42). At a Silco Corporation directors' meeting, the possible sale of the aircraft was discussed:

"Q. Did anyone mention the fact that C. W. Silver might not like the idea of selling the aircraft?

A. Tough. What has C. W. Silver Company got to say about it?" (Deposition of Larry R. Silver, pp.47-48).

At the time of the accident the aircraft was being operated by Lynn Richards Silver pursuant to the ongoing agreement between C. W. Silver Company and Silco Corporation for exclusive use of the aircraft in return for payment of all costs of maintaining and operating it. (Deposition of Larry R. Silver, pp.38-42). The aircraft was never used for the business travel of Silco Corporation and on the fatal trip it was not on Silco Corporation's business. (Deposition of Roy R. Silver, pp.41-43).

It is undisputed that at the time of the accident, respondent American Casualty Company had in force an umbrella excess liability policy which will provide primary coverage for the claims arising out of the accident in question if the policy of appellant Eagle Star is not applicable.

The liability coverage of each policy is one million dollars, and the American Casualty policy has a retained limit of ten thousand dollars.

ARGUMENT

POINT I.

LYNN RICHARDS SILVER WAS NOT AN OMNIBUS INSURED UNDER THE EAGLE STAR POLICY WHEN OPERATING THE AIRCRAFT BECAUSE SUCH OPERATION WAS UNDER THE CONTINUING AGREEMENT BETWEEN SILCO CORPORATION AND C. W. SILVER COMPANY FOR THE USE OF THE AIRCRAFT IN EXCHANGE FOR REPAYMENT OF ALL EXPENSES, WHICH AMOUNTED TO "ANY AGREEMENT WHICH PROVIDES ANY REMUNERATION FOR THE USE OF SAID AIRCRAFT" UNDER THE POLICY LIMITATION OF PERSONS INSURED.

It is a settled rule that terms of an insurance contract should be construed according to their clear meaning. Couch on Insurance 2d, § 15:38; Appleman, Insurance Law & Practice, § 7386. Where a term is clear and unambiguous, the courts are obliged to give it effect. Marriot v. Pacific National Life Assurance Co., 24 Utah 2d 182, 467 P.2d 981 (Utah,1970).

The ordinary meaning of the term "any agreement which provides any remuneration" includes the agreement for payment in this case.

Webster's New International Dictionary, Second Edition Unabridged, gives this favored definition of "any":

> "One indifferently out of a number; one indiscriminately of whatever kind."

This definition is consistent with the clear meaning of the word in this

context, to indicate that the Eagle Star Insurance does not extend to one operating the aircraft under [whatever kind] of agreement for [whatever kind] of remuneration.

The same authority defines "remuneration" as:

> "Recompense; pay. Synonyms: Payment, reimbursement, satisfaction."

Likewise, the prefix "re-" is defined as denoting "back, especially back to an original or former state or position." These definitions reflect the clear meaning of these terms which include the facts of the instant case, where C. W. Silver Company agreed to pay or reimburse Silco Corporation in return for exclusive use of the aircraft. The plain language of the insuring agreement should be enforced: "Any remuneration" means <u>any</u>, and the record is clear as to the important benefits conveyed to Silco Corporation through this agreement.

To strain the obvious meaning of "any agreement for any remuneration" in order to require, for example, a monetary profit, would subvert the plain language of the insurance contract. Where the officers and directors of Silco Corporation itself regarded the benefit received from the agreement to be substantial in terms of meeting the costs of maintaining and preserving the airplane as a valuable asset, a court should not substitute its judgment of what may or may not be a sufficiently profitable payment in order to

constitute "any remuneration". Silco Corporation, in its own financial best interest, agreed to accept remuneration for certain costs as considerati for allowing C. W. Silver Company to use the airplane. Reasonable minds should agree that this agreement obviously is included in the concept of "any agreement for any remuneration."

POINT II.

OTHER COURTS INTERPRETING THE SAME OR SIMILAR INSURING AGREEMENTS HAVE FOUND THEM CLEAR AND UNAMBIGUOUS AND HAVE RULED AGAINST COVERAGE OF A PILOT OPERATING THE AIRCRAFT UNDER AN AGREEMENT FOR REMUNERATION.

Melton v. Ranger Insurance Co., 515 S.W.2d 371 (Tex.Ct.of Civ.A 1974) involved a fact situation very similar to the instant case. Ranger Insurance Company had issued an aviation liability policy to the owner of the aircraft, as the named insured. The owner had rented the aircraft to Donald Melton, who was piloting it when it ran out of gas and crashed, fatally injuring Melton and six passengers. Thereafter, the estates of the passengers sued the pilot's estate for damages. Although requested to do so, the Ranger Insurance Company refused to defend the Melton estate in that case. The plaintiffs obtained a judgment against the Melton estate and then filed this suit against the defendant Ranger Insurance Company, seeking to collect under the terms of the liability policy, the amount of the judgment they had obtained in the previous action against the Melton estate.

In addition to naming the owner of the aircraft as the named insured, the policy in question provided under "Insuring Agreements" that:

> "The unqualified word 'Insured' wherever used in 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.
>
> The provisions of this paragraph do not apply:
>
> ***
> (c) to any person operating the aircraft under the terms of any rental agreement or training program which provides any remuneration to the named insured for the use of said aircraft." [Emphasis added]

Under the policy Declarations, the purposes of use of the aircraft were listed as "commercial", defined in part in the policy as permitting use for rental to pilots.

The plaintiffs argued that since the provisions of the Declarations of the policy made rental to pilots a permitted use of the aircraft, an ambiguity was thereby created as to whether or not a renter pilot was an omnibus insured under the terms of the policy and that the court should construe the policy to mean that the renter pilot, Melton, was an omnibus insured at the time he crashed.

The court found there was no ambiguity and affirmed summary judgment in favor of the Ranger Insurance Company and against the claimants. It observed that the policy clearly spells out who the insureds are, in

language that expressly excludes a person operating the aircraft under a rental agreement for remuneration. The effect of the "Purpose of Use" clause is to provide that the loss covered by the policy must arise out of certain named uses, one of which may be rental to pilots. This part of the policy merely makes it clear that the owner's coverage for its negligence as lessor not in possession of the plane is not forfeited by permitting a renter pilot to use the plane.

> "It is not the purpose or the effect of the Purposes of Use provisions of this policy to designate who is or who is not an insured under the policy.
>
> Nothing in the Purposes of Use provisions of the policy in any way modifies, even by implication, the definition of 'Insured' contained in the policy."

In reaching its decision, the court applied the following well known and accepted rules of contract construction:

> "(a) Courts may only construe a contract of insurance as it was made; they are not authorized to make a new contract for the parties."
>
> "(b) Courts are without authority to needlessly reject any words or terms used in contracts of insurance by parties or delete any clause therein as surplusage, unless that action is judicially mandatory."
>
> "(c) An implication cannot be allowed to override an express provision of a contract."
>
> Jahrman v. Valley Air Park, Inc., 333 So.2d 712 (La.Ct.of App.1976)

affirmed summary judgment dismissing the claim of coverage by a pilot

operating the aircraft under a rental agreement. The court held that the pilot was not an insured under the policy which provided that "insured" included any person while using the aircraft with permission of the named insured except any person, other than the named insured, while the aircraft was subject to any lease agreement. The court found the language of this insuring agreement to be clear and unambiguous. It further observed:

> "One of the permitted uses of an aircraft under the policy is rental to others. [The named insured] would be covered as to its liability but the person using the aircraft under a rental agreement would not be covered. The quoted provisions clearly state that they do not apply to any person, other than the named insured, while the aircraft is subject to any rental or lease." 333 So.2d at 714, [Emphasis in original].

In denying coverage to the pilot, the court followed the rule of 44 CJS "Insurance," § 290:

> "In the absence of ambiguity, ... it is the function of the court to construe and enforce the contract as written, even with respect to a restrictive provision... and regardless of whether it ... works a hardship ..." 333 So.2d 714.

The reasoning of this decision is sound. It is submitted that this same result is indicated in the instant case, and perhaps more particularly where the instant case is not a situation where a putative insured risks being left without coverage for a loss. Rather, it is undisputed that in

the event the Eagle Star policy does not apply because of the appropriate exclusion, nevertheless the policy of American Casualty Company will be in full force as to the pilot Lynn Richards Silver.

Buestad v. Ranger Insurance Co., 551 P.2d 1033 (Wash.Ct. of App. 1976) again reversed summary judgment in favor of coverage to a pilot operating the aircraft under an agreement for remuneration, and entered judgment as a matter of law that there was no coverage as to the pilot.

The pilot rented an airplane from the named insured to learn to fly. The "definition of insured" in the policy issued to the aircraft's owners extended to the named insured and permissive users, with an exception very similar to the policy language of the instant case:

> "The provisions of this paragraph do not apply:
>
> ...
>
> To any person operating the aircraft under the terms of any rental agreement or training program which provides any remuneration to the Named Insured for the use of said aircraft." 551 P.2d at 1034.

The pilot was specifically excluded from being an insured because he was a person operating the aircraft under a rental agreement providing remuneration to the named insured.

The Melton and the Buestad case both considered the claim of ambiguity between an Insuring Agreement limiting coverage to the named

insured where there is any rental agreement for remuneration, and a "Purpose of Use" description permitting rental of the aircraft to pilots, and in both cases the courts held there was no ambiguity and coverage should be denied. In a line of cases interpreting the same alleged ambiguity, the Michigan Court of Appeals reached the opposite conclusion and found an ambiguity which was resolved in favor of extending coverage to the renter pilot. Martin v. Ohio Casualty Ins. Co., 157 N.W.2d 827 (Mich. Ct. of App. 1968); Miller v. Ranger Ins. Co., 183 N.W.2d 621 (Mich.Ct. of App. 1970). These Michigan cases are not authority for finding ambiguity in the instant case since they were decided on different "Purpose of Use" policy language. In the instant case, the Purpose of Use allowed in the Eagle Star policy is "pleasure and business", defined as "personal, pleasure, family and business uses excluding any operation for which a charge is made,". There is no such possible ambiguity between the definition of "insured" and the "Purpose of Use", as that which confronted the Michigan courts. Consequently, the Michigan cases should be read as implicitly supporting the limitation of coverage to the named insured where the aircraft is operated under the terms of an agreement for remuneration for its use, because the court only denied such limitation on the basis of an ambiguity with the broader provisions of the Purpose of Use clause. In the instant case, where there is no such possible ambiguity, the limitation of coverage to the named insured should be given effect.

POINT III.

CASES TURNING ON WHETHER THE PURPOSE OF USE ALLOWED BY THE POLICY WAS VIOLATED BY AN OPERATION FOR WHICH A CHARGE WAS MADE ARE DECIDED ON COMPLETELY DIFFERENT ISSUES THAN THE INSTANT CASE. THEY ARE NOT AUTHORITY ON THE ISSUES IN THIS CASE.

Several well reasoned opinions discuss whether an aviation policy declaration limiting the Purpose of Use of the aircraft to "uses excluding any operation for which a charge is made," is violated by payments of various amounts under various fact situations. These cases generally conclude that the intent of this limitation is to prevent profit-making use of the aircraft for hire, in a commercial context in arms-length transactions which would not have taken place but for the receipt of funds in exchange for use of the aircraft. None of these cases discuss the policy language on which appellant relies in the instant case, which limits coverage to the named insured where "any person operate[s] the aircraft under the terms of any agreement which provides any remuneration for the use of said aircraft." (Emphasis added). This language is much broader than the exclusion for "operation for which a charge is made" as that term is discussed in the following cases, because the policy language on which appellant relies, expressly includes any agreement for any remuneration, regardless of whether the agreement is commercial or personal in nature, regardless of whether the remuneration was the motivating reason for making the flight, and regardless of the amount of remuneration with

respect to the operating costs or market rental value of the aircraft. Appellant submits that under the facts of the instant case, the exclusion for operation for which a charge is made could probably be met. Nevertheless, this is not the issue which is before the court, and cases turning on this issue should be distinguished.

Those of the following cases which were decided in favor of coverage all involved a single lump sum contribution for a specific flight, or an hourly contribution for time in flight. By contrast, the agreement for repayment between Silco Corporation and C. W. Silver Company involved neither a single incident of use nor a contribution for flight time. Rather, the business agreement was ongoing and all inclusive as to the costs of keeping, preserving, and operating the aircraft without regard to use on any given occasion, and in fact without regard to whether the plane was used or not.

As the Melton case stated, supra, it is not the purpose or the effect of the purposes of use provisions to designate who is or who is not an insured under the policy. It is understandable and proper that courts should scrutinize very carefully any attempts to deny coverage on the basis of an alleged violation of the Purposes of Use contemplated in the insurance contract. Such a denial of coverage to the named insured would indeed be

an extreme measure. By contrast, the Melton, Buestad, and Jahrman cases discussed supra, which refused to extend coverage to an alleged omnibus insured who does not meet the standards of the policy definitions of "Insured", are unanimous in holding that the named insured and the insurance company are free to contract between themselves as to the circumstances under which additional parties may or may not become insured under the policy. In the instant case, Eagle Star does not question the coverage of the named insured, Silco Corporation, nor the coverage of C. W. Silver Company as an "organization legally responsible" for the use of the aircraft. Eagle Star merely seeks to invoke an unambiguous provision of the Insuring Agreement which does not provide coverage to the pilot, Lynn Richards Silver.

The following cases should be distinguished on this basis:

In Thompson v. Ezzell, 379 P.2d 983 (Wash.1963), the exclusionary clause read:

> "Excluding any operation or flight for which a charge is made ('share expense' flight shall not be considered as being made for a charge)."

Ezzell rented the aircraft in question from a flying club of which he was a member, for the purpose of going on a trip with Thompson and their families. The estimated rental fee for the aircraft for the trip, including cost of fuel, was about $400.00. Thompson gave Ezzell $375.00 as a contribution toward

expenses, which would include plane rental and such other things as food and overnight accommodations. The court affirmed a summary judgment against the insurer which had sought to deny coverage to the named insured, holding the contribution by Thompson was a sharing of the expense, and not the payment of a charge. This case is important because the explicit exception of expense sharing arrangement from the exclusion for operation for which a charge is made, seems to have influenced subsequent courts interpreting the exclusion in policies where the expense sharing exception was not written. Significantly, the language upon which appellant relies in the instant case not only makes no exception for expense sharing, but to the contrary, carves a broad provision for "any remuneration."

Houston Fire & Casualty Ins. Co. v. Ivens, 338 F.2d 452 (5th Cir.,1964) involved an exclusion clause without the expense sharing exception. The insured pilot was going to fly the company's customer to pick up a part sold to the customer by the company. The pilot asked the company if it would pay $60.00 for the gas for the six hour flight and the company agreed. The charger rate for this plane was about $40.00 per hour. The company president stated in his deposition that he had not agreed to contribute to the cost of the original trip, but merely for this

flight addition to the itinerary necessary to pick up the part. He specifically observed that he had not agreed to "help pay the expenses of the flight"; on the contrary, he stated, "I talked to [the pilot] about expenses and he never asked me for a nickel for expenses other than he asked me to contribute to gasoline only". No payment was ever made by the company or its president to anyone for gasoline used on the trip.

The court held there was no charge. It stated:

> "It is the opinion of the court that when a charge is made for something, there is the distinct connotation that there is a quid pro quo. A charge may thus be considered as the price demanded for a thing or service. The agreement of [the company president] was merely the offer of a contribution made to help [the pilot] defray the cost of the gasoline.***
>
> The proposed contribution... of $10.00 an hour toward the cost of the gasoline was manifestly only a fractional part of the expenses of the flight, and fell far short of the applicable charter rates.
>
> The agreement ... to contribute $60.00 toward payment of the cost of the gasoline was a voluntary gesture ..., based upon his feeling that this was the fair thing for the company to do ... there was no obligation on the part of [the president] or on the part of the company to provide [the individual] with transportation."

The holding in this case is strongly persuasive that the contrary facts in the instant case should compel a contrary result. In the instant case, the arrangement for remuneration of expenses was ongoing and all-inclusive. The agreement was not a gratuity by C. W. Silver Company to Silco, but rather a quid pro quo arrangement, as understood by both companies. In the instant case, both sides benefited materially from the remuneration agreement.

Fidelity & Casualty Co. of N.Y. v. Marion L. Crist & Associates, Inc., 455 S.W.2d (Ark.1970), held that whether $15.00 per hour paid to the insured owner of the aircraft by a prospective purchaser constituted a charge for the purpose of the aircraft policy exclusion, rather than a reimbursement for expense, was a jury issue where the evidence showed that the operating cost of the plane was $14.11 per hour and that a fair rental value of the aircraft was $15.00 to $27.50 per hour. The jury was within its discretion in finding this payment was a reimbursement for expenses. As a reimbursement, the court found that the payments did not invoke the policy exclusion for use for which a charge is made, even though there was no policy language to the effect that a reimbursement for expenses was not a prohibited charge.

The court discussed the Ivens case at some length, and found it applicable in principle. Significantly, in this case the owner of the aircraft testified:

"Q. Did you reach any agreement with [the pilot] to rent or charter the plane for him?

A. No, I merely accepted his offer.

Q. Did you make any demand for a particular rental price for the plane?

A. No, he could have had it for nothing as far as we were concerned."

This testimony indicates the absence of a quid pro quo relationship such as the one in the instant case.

Cammack v. Avemco Ins. Co., 505 P.2d 348 (Ore.1973) found the carrier attempting unsuccessfully to invoke the policy exclusion for operation for which a charge is made, where the plaintiff who owned the aircraft, permitted his uncle and cousin, both pilots, to fly the plane and they agreed to pay $10.00 per flying hour, with plaintiff furnishing the gasoline. Plaintiff testified he agreed to the use of his plane for $10.00 per hour because of his relationship with his uncle, his permission to keep the plane at his uncle's air strip at no charge, friendship, and his desire that the plane be used since long idleness was bad for the plane. Plaintiff computed that it cost him $27.00 per flying hour.

Under these facts, the court construed the transaction to be a payment of expenses in a "non-commercial context" and affirmed the trial

court that the pilot's permissive use was not "an operation for which a charge is made."

In this case also, there was no policy language excepting an expense sharing arrangement from the exclusion for operation for which a charge is made.

Pacific Indemnity Co. v. Acel Delivery Service, Inc., 485 F.2d 1169 (5th Cir.,1973) again considered the circumstance of an insurer attempting to invoke the exclusion for operation for a charge. Here, the owner had assessed a $10.00 per hour fee over and above the cost of fuel and storage. Plaintiff contended that this was merely a sharing of expenses since it would barely cover the aircraft's maintenance and overhead expenses. Nevertheless, the court found that this was a charge within the policy exception excluding operations for which a charge was made. It held that the appropriate standard for determining whether a charge was made for use of the aircraft depends upon the motivating reasons for making the flight. The court held that this standard was consistent with the Ivens case, while the facts here compelled an opposite conclusion from Ivens. In this case, the owner of the aircraft testified that he expressly discussed with one of his colleagues the amount which was to be assessed to the pilot for his use of the aircraft, under circumstances which led the court to find a quid pro quo arrangement.

It is submitted that the facts of the instant case resemble Pacific Indemnity much more than Ivens, on the basis of the testimony as to the business relationship between Silco Corporation and C. W. Silver Company.

The Crist and the Cammack cases found that reimbursement for expenses was insufficient to constitute a charge for the operation of the aircraft, even though the policies in each case contained no exception whic would allow reimbursement for expenses. In both cases the court merely determined judicially that "operation for a charge" involved something more than reimbursement for expenses. Lest the court be tempted to reason alon similar lines in the instant case, it should be recalled that the language upon which appellant relies, appears in a completely separate part of the policy and would involve a radically different result, from the policy language considered in Crist and in Cammack. In fact, if a draftsman were to sit down to compose a contract provision designed to limit coverage to the named insured whenever the aircraft is operated under the terms of any agreement whatsoever, whether formal or informal, for any remuneration whatsoever, whether profit or reimbursement for expenses, and such a draftsman had before him the decisions of the Arkansas and Oregon courts in Crist and Cammack with their judicially imposed limitations on the meani of "operation for a charge", such a draftsman could scarcely produce a contract provision which would better communicate his intent, than the

one actually before the court in the instant case.

POINT IV.

BY THE UTAH STANDARD FOR DETERMINING WHETHER "COMPENSATION" IS PAID UNDER THE GUEST STATUTE, C. W. SILVER COMPANY MADE LEGALLY SUFFICIENT PAYMENTS TO SILCO CORPORATION TO THE EFFECT THAT LYNN RICHARDS SILVER IS NOT AN INSURED UNDER THE EAGLE STAR POLICY.

The only Utah cases which discuss the sufficiency of consideration and the circumstances of agreements concerning the payments of money and the receipt of carriage or use of an instrumentality of transportation, are the cases interpreting the Utah automobile guest statute, Utah Code Annotated 41-9-1, and the definition of "guest", 41-9-2. There is a companion aviation guest statute, Utah Code Annotated 2-1-33, which has not been the subject of judicial scrutiny on this particular point. The giving of compensation under the automobile guest statute has been explained by the Utah courts to require that compensation be given as the chief inducement for the carriage, regardless of whether close social or family relationships are also present. The central factor is that the parties deemed the consideration to be valuable, not whether there is an actual profit.

Jensen v. Mower, 4 Utah 2d 336, 294 P.2d 683 (1956):

"As indicated in the language quoted from Am.Jur., the cases turn not on whether money is received or paid as a result of carrying the rider, but upon the fact that the money or other

consideration was given to the driver, not as a gratuity or in appreciation but rather as an inducement for making the trip for the rider or furnishing carriage for the ride. If the driver extends the courtesy of a ride to a friend without more or takes on a hiker overtaken on the highway, the status of guest in either case is not replaced by that of passenger if gas is purchased, meals purchased or cash given to assist the driver in meeting the expenses of the trip. Such rider is not in the car because of any compensation or payment which induced the driver to give the ride. That the driver has already done."

Smith v. Franklin, 14 Utah 2d 16, 376 P.2d 541 (1962):

"It must be conceded that where it is shown that the rider is basically a social guest, neither the giving of just 'any compensation', which might be some inconsequential amount of money or other consideration of value, nor even the sharing of expenses, merely in social reciprocation for the ride, would change the relationship to that of passenger for hire. The phrase 'compensation therefor' as used in the statute means compensation for the ride. Therefore, it would have to be sufficient money (or other thing of value) that it reasonably could be supposed that the parties so regarded it. But whether there is profit in the transaction is obviously not the determining factor. When payment for the ride is the main inducement for it, the fact that there may also exist some social incentive which makes giving the ride enjoyable or desirable for the driver would not change its character to that of host and guest." (Emphasis added).

This requirement that both parties must consider the compensation "sufficient" under the circumstances, is clearly met under the facts of the instant case, where both the C. W. Silver Company and Silco Corporation received a material benefit from the remuneration agreement, namely, C. W. Silver Company could use the aircraft for its business purposes and

Silco Corporation received all expenses of the aircraft -- not just trip expenses but expenses that went on whether the plane flew or not, such as licensing, hangar, inspection, and safety maintenance, all of which were necessary to preserve this valuable asset. The undisputed facts show that both sides of the agreement regarded its conditions as a fair bargain and exchange. There was remuneration for the operation of the aircraft, and under the policy definition of "Insured", anyone operating the plane when any remuneration is involved, by definition is not an insured and is not entitled to coverage under the policy.

Under Utah law, the existence of close family or social interests between the bargaining parties is irrelevant to a finding that compensation was the chief inducement for carriage. Goff v. Goff, 535 P.2d 681 (Utah, 1975) found that plaintiff was a paying passenger where he gave his son $5.00 to buy gas, and rode along in the son's car along with the son and other relatives, on a trip for the father's business purposes.

Appellant Eagle Star submits that the policy language on which it relies in the instant case, embracing any agreement for any remuneration as discussed above, is much broader than the Utah guest statute. Nevertheless, if the court were to apply the guest statute standard of chief inducement for the carriage, to the facts of the instant case, Lynn Richards Silver would still be found to have been operating the aircraft under an

agreement for remuneration between C. W. Silver Company and Silco Corporation.

To the extent that the Utah guest cases suggest a useful concept, they should be considered by the court. However, as with the cases dealing with a "charge for use" of the aircraft discussed in Point III above, the Utah guest cases involved different policy inputs and contemplate different and harsher results than the policy language upon which defendant relies in the instant case. Likewise, the exact language employed is different: The reference to "any remuneration" in the Eagle Star policy should be read as a conscious attempt by the draftsman to avoid the narrower judicial interpretation placed on terms such as "charge" by the court in such cases as Crist and Cammack, and the word "compensation" under the guest statute, by the Utah Supreme Court.

POINT V.

IF THE COURT IS NOT DISPOSED TO RULE FOR APPELLANT AS A MATTER OF LAW, THE QUESTION OF WHETHER THE FACTS OF THIS CASE AMOUNT TO "ANY REMUNERATION" UNDER THE POLICY SHOULD BE DECIDED BY A TRIER OF FACT.

Appellant submits that the undisputed material facts show that the aircraft crashed while being operated under an agreement for remuneration. If the court chooses not to rule in favor of appellant on this point, it should remand the action for trial on the question of whether the terms of

the agreement were an "agreement for any remuneration."

CONCLUSIONS

1. The Insuring Agreement of the Eagle Star policy in question specifically limits coverage to exclude anyone operating the aircraft under the terms of any agreement which provides for any remuneration for the use of the aircraft. This limitation is consistent with the obvious purpose of the Insuring Agreement, to set forth who in fact are insured under the policy. Appellant Eagle Star does not question coverage as to the named insured, Silco Corporation, nor to C. W. Silver Company.

2. Employees of C. W. Silver Company operated the aircraft under an agreement for repayment to Silco Corporation in the amount of charges for all operation expenses and upkeep, and the aircraft was operated pursuant to this agreement at the time of the accident.

3. The ordinary meaning of "any agreement which provides any remuneration" includes the agreement in this case.

4. The words used in the policy limitation on persons insured, are clear and unambiguous. Other courts considering the same and similar language have enforced the same provisions.

5. In the event the liability of Lynn Richards Silver for this accident is properly held to be not covered under Eagle Star's policy, nevertheless the policy of respondent American Casualty Company will

remain in full force and effect and provide coverage to Lynn Richards Silver.

6. The undisputed facts show that the payments by C. W. Silver Company to Silco Corporation were the motivating reason and main inducement for allowing C. W. Silver Company to use the aircraft. Therefore, these facts meet the standard of exclusion for operation for which a charge is made, and the "compensation" standard of the Utah guest statute, although both of these standards require a harsher test than is properly indicated under the language of the policy in question.

The relationship between C. W. Silver Company and Silco Corporation in the agreement for use of the aircraft was a quid pro quo, where the two sides acted at arms-length and there was reciprocal exchange of consideration. Even though the two companies had interlocking directorates, nevertheless, Silco intended to do what was best for it and any result to the detriment of C. W. Silver Company would be "tough" in the words of Larry Silver. His testimony indicates that the use of the plane was in return for all maintenance, rent, and upkeep, a significant expense. The plane was a valuable piece of property, and its proper maintenance was important consideration to Silco's business interests. The plane was

obtained by Silco in the discharge of a debt, and it had intrinsic value which was maintained by C. W. Silver Company's expenditures. Silco Corporation recognized that the preservation of this asset in top condition so that it could be more easily sold at a future time, at C. W. Silver Company's "great expense", was a valuable consideration.

The judgment in favor of the plaintiff insurance company and pilot of the aircraft should be reversed and judgment entered on behalf of defendant that coverage did not exist under defendant's policy for the pilot Lynn Richard Silver at the time of the accident.

Dated this 11 day of January, 1977.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Appellant's Brief this _____ day of January, 1997, to H. Wayne Wadsworth, Hanson, Wadsworth & Russon, Attorneys for Plaintiffs and Respondents, 702 Kearns Building, Salt Lake City, Utah 84101.