1977

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. : Respondent's Brief

Utah Supreme Court

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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.	)	

RESPONDENT'S BRIEF

Appeal from the Judgment of the

Third Judicial District Court, Salt Lake County

Honorable Stewart M. Hanson, Sr.

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TABLE OF CONTENTS

	Page
NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	3
POINT I: PAYMENT OF OPERATING AND MAINTENANCE EXPENSES DOES NOT CONSTITUTE REMUNERATION WITHIN THE MEANING OF DEFENDANT'S POLICY	3
POINT II: CONSTRUCTION OF THE TERM "REMUNERATION" SHOULD BE IN FAVOR OF COVERAGE	13
POINT III: EAGLE STAR'S POLICY IS SPECIFIC INSURANCE AND AFFORDS PRIMARY COVERAGE FOR THE CLAIMS MADE AGAINST THE ESTATE OF LYNN RICHARDS SILVER	16
SUMMARY	18

Cases Cited

Anchor Coal Co. v. Public Service Commission, 15 S.E.2d 406	5
Aschenbrenner v. U.S.F.& G., 292 U.S. 80 (1934)	15
Blue Bird Cab Co. v. Maryland Dept. of Employment Sec., 248 A.2d 331, 334	6
Bovard v. Ford, 83 Mo.App. 498, 501	6
Buestad v. Ranger Insurance Co., 551 P.2d 1033 (Wash.App. 1976)	7
Cammack v. Avemco Insurance Co., 505 P.2d 348 (Oregon 1973)	8,9,12
Gibson v. Equitable Life Assurance Society of the United States, 84 Utah 452, 36 P.2d 105, (1934)	14
Hassing v. Mutual Life Insurance Company of New York, 108 Utah 198, 159 P.2d 117 (1945)	15

Cases Cited (cont.)

	Page
Houston Fire and Casualty Insurance Company v. Iven, 338 F.2d 452 (5th Cir. 1964)	11
Jahrman v. Valley Air Park, Inc., 333 So.2d 712 (La.App. 1976)	7
Kaus v. Unemployment Compensation Commission, 299 N.W. 415 (Iowa 1941)	4
Melton v. Ranger Insurance Co., 515 S.W.2d 371, (Texas 1974)	6,7
Moutzoukos v. Mutual Benefit Health and Accident Association, 69 Utah 309, 254 Pac. 1005, (1927)	14
Muchant v. Unemployment Compensation Bd. of Review, 103 A.2d 438, 440	6
National Farmer's Union Property and Casualty Company v. Farmer's Insurance Group, 14 Utah 2d 89, 377 P.2d 786 (1963)	16
New York Life v. Benyon, 158 F.2d 260 (10th Cir. — Utah, 1946)	15
Pacific Indemnity Company v. Accell Delivery Service, Inc., 485 F.2d 1169 (5th Cir. 1973)	11
Pearl Assurance Company v. School District No. 1, 212 F.2d 778 (10th Cir. — Colo., 1954)	15
Prudential Federal v. St. Paul, 20 Utah 2d 95, 433 P.2d 602 (1967)	17
Richards v. Standard Accident Insurance Company, 58 Utah 622, 200 Pac. 1017	14
Russell v. Paulson, 18 Utah 2d 157, 417 P.2d 658 (1966)	17
Thompson v. Ezzell, 379 P.2d 983 (Wash. 1963)	10,11
Warner Co. v. Unemployment Compensation Bd. of Review, 153 A.2d 906, 911	6

Text Cited

17 AM JUR 2d, Contracts, Section 276	13
43 AM JUR 2d, Insurance, Section 271	13

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RESPONDENT'S BRIEF

NATURE OF CASE

This is a declaratory judgment action to determine whether the deceased pilot, Lynn Richards Silver, was an omnibus insured under the Aircraft Hull & Liability Policy of Eagle Star Insurance Company. If Eagle Star Insurance Company's policy does not provide primary coverage, there is no dispute but that American Casualty's Umbrella Excess Third Party Liability Policy would provide coverage to Lynn Richards Silver, less a $10,000 retained limit (deductible).

DISPOSITION IN LOWER COURT

Upon stipulated facts, both parties filed motions for

summary judgment and the trial court entered judgment in favor of respondents American Casualty Company and The Estate of Lynn Richards Silver.

RELIEF SOUGHT ON APPEAL

Respondents seek affirmance of the judgment entered by the trial court.

STATEMENT OF FACTS

The facts relevant to the issues of this case are not in dispute and respondents accept appellant's statement thereof with the following additions and corrections:

a) American Casualty's umbrella policy provides that it will indemnify the insured for loss in excess of the total applicable limits of the underlying insurance stated in the schedule, in excess of the insured's retained limit. The schedule of underlying insurance specifically lists coverage for "aircraft liability" through the underlying insurer, Eagle Star Insurance Company, in the sum of $1,000,000.00.

b) Eagle Star's aircraft policy was written on the specific aircraft which crashed and gave rise to the claims which have been filed against the Estate of the deceased pilot, Lynn Richards Silver.

c) When the aircraft was first acquired, there was some discussion of having C. W. Silver Company pay "remuneration to the Silco Corporation for its use, in addition to its mainter

ance and operation expenses. (Deposition of Roy R. Silver, p. 31-32). However, such a plan was never put into effect (Deposition of Roy R. Silver, p. 36, 42-43, & 50) and there is no record of any remuneration having been paid to Silco Corporation for use of the aircraft on the fatal trip (Deposition of Roy R. Silver, p. 43).

d) It is not admitted that the aircraft in question was never used for the business travel of Silco Corporation. Mr. Larry R. Silver seemed to remember that the aircraft was used at least on one occasion by Silco Corporation to take some people to Bear Lake to look at some property that Silco Corporation was interested in buying (Deposition of Larry R. Silver, p. 34).

ARGUMENT

The only real issue in this case is -- What constitutes "remuneration"? If Silco Corporation, the owner of the aircraft received remuneration for the flight in question, then the deceased pilot was not insured under the appellant's policy; if it did not, then he was insured under appellant's policy.

POINT I

PAYMENT OF OPERATING AND MAINTENANCE EXPENSES DOES NOT CONSTITUTE REMUNERATION WITHIN THE MEANING OF DEFENDANT'S POLICY

It should be noted that this is not an action by Silco Corporation against C. W. Silver Company to determine whether or not the former would have been entitled to remuneration from the

latter for the use of its aircraft, but it is an action by an excess insurance carrier and its insured, which has a personal liability exposure in the amount of its retained limit of $10,000.00, against the primary insurance carrier to determine the validity of the latter's denial of coverage to the insured on the basis that the aircraft in question was being operated at the time of the accident under an agreement providing for "remuneration" for the use of the aircraft.

Also, it should be noted that "remuneration" is not defined by defendant's policy and, therefore, the term should be construed consistent with its general meaning and as defined by legal authorities dealing with the term in similar actions.

Webster't New Twentieth Century Dictionary, Unabridged, Second Edition, defines remuneration as:

> "1. a remunerating; the act of paying an equivalent for services, loss, or sacrifices.
>
> 2. the equivalent given for services, loss, or sufferings; that which remunerates; reward; pay; recompense; compensation."

and Black's Law Dictionary, Fourth Edition, defines remuneration as "Reward; recompense; salary."

The following authorities have considered the question of whether remuneration means reimbursement for expenses, or only compensation over and above expenses.

In Kaus v. Unemployment Compensation Commission, 299 N.W. 415 (Iowa 1941), it was held that the amounts collected by taxicab drivers over and above the cost of gasoline and a $3.00

per 12 hour period charge made by the cab company for use of the taxicabs was "remuneration" to the drivers. In this regard the court stated:

> Remuneration of an employee may consist of the difference between the price which he pays his employer for goods and the price at which he sells them, a percentage of the sale price of goods sold by the employee to customers and collected by him from them, and various other methods of collecting compensation from customers rather than directly from the employer. (Auth. cited.) The earnings of the drivers over and above the $3 and cost of the gasoline constitute the remuneration or wages for their services and it is not necessary that they be paid directly by appellee.

In overruling a Public Service Commission order denying a petition to challenge the rates of a railway company, the Supreme Court of Appeals of West Virginia in Anchor Coal Co. v. Public Service Commission, 15 S.E.2d 406, gave the following guideline to the Commission:

> Remuneration should include a fair profit on the performance of any service, and compensation for any service should also include such profit, although, strictly speaking, it may have a narrower meaning.

Also, although not specifically differentiating between expenses and profits, the following authorities indicate profit for services rendered is an essential element of the term.

> "Wages" is defined as a compensation given to a hired person for his or her services; that for which one labors; stipulated payment for services performed. The word is synonymous with "hire," "reward," "stipend," "salary," "compensation,"

"remuneration". Bovard v. Ford, 83 Mo.App. 498, 501. (Emphasis added).

"Remuneration" is generally defined as a payment for services performed. Warner Co. v. Unemployment Compensation Bd. of Review, 153 A.2d 906, 911.

Where services expended by laid-off employee on his family's farm during period of layoff, might result in future profits to him, such prospective profits were "remuneration". Muchant v. Unemployment Compensation Bd. of Review, 103 A.2d 438, 440.

Money received by drivers of cabs owned by cab company was "remuneration" within wages definition of unemployment insurance law even though drivers were paid by customers and not by cab company. Blue Bird Cab Co. v. Maryland Dept. of Employment Sec., 248 A.2d 331, 334.

In the instant case, Silco Corporation received no remuneration from C. W. Silver Company since the latter merely paid the expenses of maintaining and operating the aircraft. Silco Corporation received no profit from C. W. Silver Company's use of the aircraft; and, specifically, received no payment from C. W. Silver Company for its use of the aircraft in connection with the fatal flight.

Appellant relies on the case of Melton v. Ranger

Insurance Co., 515 S.W.2d 371, (Texas 1974) as supportive of its position. In that case, the insurance policy in question specifically excluded from a definition of insured, "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." In that case the insured had executed an express rental agreement for profit from Melton. The court at page 372 stated:

> The facts in this case are undisputed. . . . On May 2, 1969, Donald S. Melton entered into an aircraft rental agreement with the St. Louis Flying Service, Inc., whereby Melton for a fee payable to lessor, rented a Piper Cherokee aircraft from St. Louis Flying Service, Inc. Later that day this aircraft ran out of gas and crashed, fatally injuring the pilot, Melton and 6 passengers.

The court later stated at page 372 and 373:

> It was undisputed that at the time the plane involved crashed it was being operated by the pilot Melton, under an aircraft rental agreement that provided a remuneration to the named insured, St. Louis Flying Service, Inc. (Emphasis added).

That case is clearly distinguishable by its undisputed facts, to wit: That an express rental agreement for remuneration was made. So also are the cases of Jahrman v. Valley Air Park, Inc., 333 So.2d 712 (La.App. 1976) and Buestad v. Ranger Insurance Co., 551 P.2d 1033 (Wash.App. 1976) cited by appellant. In these cases rental agreements for profit were clearly in effect.

Respondent agrees that the "purpose of use" provisions of a policy should not be used to expand the omnibus insured clause; but it is hoped, and assumed, that the drafters of insurance policies in general, and Eagle Star's policy in

particular, would intend the two provisions to be consistent with each other. In that light, it is interesting to note that appellant's policy, under DEFINITIONS, paragraph VII, defines "Purpose of Use" as follows:

> (A) Pleasure and Business. 'The term Pleasure and Business' wherever used in this Policy is defined as personal, pleasure, family and business uses excluding any operation for which a charge is made. (Emphasis added).

Just as the courts have held that "remuneration" requires a profit or profit motive, so have they held the term "charge" requires a profit or profit motive. The Oregon Supreme Court in Cammack v. Avemco Insurance Company, 505 P.2d 348 (Oregon 1973), held that the payment of flight expenses for an airplane was not "any operation for which a charge is made" within a policy which excluded the same from coverage. In Cammack, the plaintiff's policy provided coverage for the use of the plane for business and pleasure but excluded "any operation for which a charge is made," just as in the case at bar. The plaintiff permitted his uncle and cousin to fly the plane for $10.00 per flying hour. The court stated that the plaintiff "regarded the $10.00 per hour as helping defray the immediate costs of flying the airplane." The direct operating cost of using this plane was $7.25 per hour, including gasoline. In addition no "tie-down" fee was charged the owner of the plane but this was taken care of by the uncle who owned the airstrip. It was the uncle's friend, Rutledge, who was flying the plane when it crashed. And just as in the case at bar where Eagle

Star Insurance Company is attempting to avoid coverage by straining construction of their word "remuneration", the defendant insurance company in Cammack, unsuccessfully attempted to avoid coverage by straining interpretation of the word "charge".

The court found that the $10.00 per hour paid for the plane's use as well as the free storage of the plane was merely a "payment of expenses in a noncommercial context, and we agree with the trial court that Rutledge's use was not any operation for which a charge is made."

In the present case, C. W. Silver Company paid only for the maintenance and operational expenses of the aircraft which was owned by its sister corporation, Silco Corporation. And although an hourly rental rate had been discussed, it is clear from the depositions that such a plan was never put into effect. No profit above expenses was ever realized by Silco Corporation for allowing C. W. Silver Company to use the plane. Therefore, the Cammack case is directly on point. A payment of expenses was not "an operation for which a charge is made". And, similarly, a payment of expenses only is not "remuneration".

The Oregon court further stated at page 350:

> This exclusionary clause appears similar to the exclusionary clause in automibile coverage which provides that the insurance does not apply 'while the owned automobile is rented or leased to others'.
>
> In Christianson v. State Farm Auto Insurance 52 Hawaii 80, 91, 470 P.2d 521, 527 (1970) the court interpreted this clause, "On balance we think that the language of the policy excludes coverage only where a rental is commercial in nature. Visualizing a spectrum between simple permissive use (which

> clearly is covered under the policy), and commercial rental for a profit (which clearly is excluded), we view the present facts as being more in the nature of permissive use."

In that case, the decision was that the payment of $10.00 a week by a friend for the use of the car for three weeks while the insured was gone did not constitute a "renting". Other decisions to the same effect are cited at 7 Appleman Insurance Law and Practice, 453 Section 4436 (1962). Similarly, the instant case is one of permissive use and not a "commercial rental for profit".

Also, in Thompson v. Ezzell, 379 P.2d 983 (Wash. 1963), the Washington court dealt with an exclusionary clause reading:

> Excluding any operation or flight for which a charge is made (share expense flights shall not be considered as being made for a charge), dual or solo instruction (except instruction to the named assured) and rental to others.

Ezzell was the insured. He and his wife and four Thompsons went on a trip for which it was estimated that about $400.00 as rental would have to be paid to the flight club which owned the airplane. This included the cost of fuel. It was agreed Thompson would contribute $375.00 to expenses which would include plane rental. The court affirmed a summary judgment against the insurer, holding the contribution by Thompson was a sharing of the expense, not the payment of a charge. The court stated:

> It is obvious that both a charge and share the expense result in the flow of some monetary consideration to the recipient; yet one is insured under the policy of insurance while the other is excluded. . . . While undertaking to interpret

> the provisions of the policy, it is incumbent upon us to observe the maxims of construction hereinbefore referred to; e.g. the construction most favorable to the insured must be applied. . . . Thus the distinction seems to be that in a flight made for a charge the charge provides the impetus, or motivation for the flight; e.g. profit; while a share expense flight indicates a community interest in the flight, that is a common desire to make a particular flight.

In applying Thompson to the case at bar, C. W. Silver Company's payment of expenses was not a charge which "motivated the flight". Furthermore, Silco Corporation received no profit. As such no "charge" or "remuneration" was realized so as to exclude Lynn Silver from coverage under Eagle Star's Hull and Aircraft Liability Policy.

Additionally, in Houston Fire and Casualty Insurance Company v. Ivens, 338 F.2d 452 (5th Cir. 1964), an exclusionary clause for "an operation for which a charge is made" was also involved. One Ulsch agreed to pay $10.00 an hour toward the cost of gasoline used on a six hour flight. Charter rates for the use of such a plane would be $38.00 per hour when chartered with a pilot. The court found that the $60.00 paid by Ulsch toward the cost of the gasoline was not a charge within the meaning of the policy, and therefore held the insurance company could not deny coverage under their policy.

The only aviation case appellant cites which found a "charge" to have been made within the meaning of the exclusionary clause of their insurance policy was in the case of Pacific Indemnity Company v. Accell Delivery Service, Inc., 485 F.2d 1169 (5th Cir. 1973), and in that case, the assessment for the

use of the airplane was $10.00 "over and above" the cost of fue and storage. Thus, it was clearly a rental for profit and the court so found.

Appellant's contention that the word "any" in some way enlarges or changes the meaning of the word "remuneration" is not well taken. As noted in the Cammack case, coverage was excluded for "any operation for which a charge is made," but the court did not find that the "operation" of the aircraft in question for $10.00 per hour was an "operation" for which a charge was made, even though the direct operating cost of the aircraft was $7.25 per hour. The word "any" does not impart any special meaning to the words "operation", "charge" or "remuneration". It merely includes them, when they are otherwise found to be present. The question still remains -- What is remuneration? And the authorities as noted herein have consistently held that it means receiving compensation over and above expenses to the extent that a profit motive is involved.

Whether or not the payment of expenses in the instant case would satisfy the Guest Statute is immaterial. That statute was designed to meet a different, specific social problem and has no relevance to the facts of this case. In the instant case, the payment of expenses was not made by the passengers to the pilot, they were paid by the Corporation which employed both the pilot and the other male passenger.

POINT II.

CONSTRUCTION OF THE TERM "REMUNERATION" SHOULD BE IN FAVOR OF COVERAGE

Respondents submit that the authorities cited under Point I above quite clearly indicate that the term "remuneration" means compensation which results in a net gain or profit to the one receiving it, as contrasted to merely the paying of expenses, but if there is any ambiguity in the term as used in the policy language in question, such ambiguity should be resolved in favor of a construction which provides for the coverage anticipated by the insured when the insurance was purchased.

The rule applicable to contracts generally, a fortiori, insurance contracts is that doubtful language will be construed most strongly against the party who selected it. As stated in 17 AM JUR 2d, Contracts, Section 276:

> It is fundamental that doubtful language in a contract should be interpreted most strongly against the party who has selected that language, especially where he seeks to use such language to defeat the contract or its operation, unless the use of such language in the contract is prescribed by law. Also, in the case of doubt or ambiguity a contract will be construed most strongly against the party who drew it or prepared it, or whose attorney drew or prepared it. Another form in which substantially the same rule is stated is that where doubt exists as to the construction of an instrument prepared by one party thereto or his attorney, upon the faith of which the other party has incurred an obligation, that construction will be adopted which will be favorable to the latter. This rule finds its most frequent application in the case of insurance policies."

and, as stated in 43 AM JUR 2d, Insurance, Section 271:

> The rule of applying the popular meaning to

> insurance policy which are ambiguous, equivocal, or uncertain as to the extent that the intention of the parties is not clear and cannot be ascertained clearly by the application of the ordinary rules of construction are to be construed strictly and most strongly against the insurer, and liberally in favor of the insured, so as to effect the dominant purpose of indemnity or payment to the insured. (Authority cited)

This rule has long been recognized in Utah. In Richards v. Standard Accident Insurance Company, 58 Utah 622, 200 Pac. 101 (1921) the Utah Supreme Court in holding that sunstroke, altho scientifically a disease, is popularly understood as an accide and death resulting therefrom would come within the term of bodily injury by accidental means stated:

> The rule of applying the popular meaning to words found in insurance policies is doubly strengthened when the additional rules is invoked that insurance policies should be construed liberally in favor of the insured and their beneficiaries so as to promote and not defeat the purpose of insurance.

This rule was specifically followed in Moutzoukos v. Mutual Benefit Health and Accident Association, 69 Utah 309, 254 Pac. 1005, (1927) and in Gibson v. Equitable Life Assurance Society of the United States, 84 Utah 452, 36 P.2d 105, (1934). Although these cases are "old" cases, it is submitted that the courts generally have continued this liberal interpretation to the present time.

In the instant case, if the deceased, Lynn Richards Silver, the general manager of Both Silco Corporation and C. W. Silver Company, had not thought that his use of the aircraft by C. W. Silver Company was covered under Eagle Star's aircraft policy, such insurance would not have been listed in the schedu

of underlying insurance in American Casualty's policy.

Another principal of insurance law is that exclusionary clauses are strictly construed in favor of coverage. See Aschenbrenner v. U.S.F.&G.,292 U.S. 80 (1934); New York Life v. Benyon, 158 F.2d 260 (10th Cir.—Utah 1946) and Pearl Assurance Company v. School District No. 1, 212 F.2d 778 (10th Cir.—Colo., 1954).

Also, it is recognized that the insurer has the burden of proving that an exclusionary clause of a policy is applicable. Hassing v. Mutual Life Insurance Company of New York, 108 Utah 198, 159 P.2d 117 (1945).

Although, the language in question, "operating the aircraft under the terms of any agreement which provides any remuneration for use of said aircraft" does not appear in the Exclusions portion of the policy, it is in effect an exclusion to "persons insured" under the Insuring Agreements portion of the policy, and since it excludes persons who would otherwise be additional insureds (since they are using the aircraft with the permission of the Named Insured), the language in question is of an exclusionary nature and the same rule should apply, i.e., that Eagle Star has the burden of proving not only the meaning of the clause if it is questionable, but that it is applicable under the facts of the case.

All of the foregoing rules of construction are applicable in this action since one of the plaintiffs is the administrator of the estate of the deceased pilot, Lynn Richards

Silver, who is an "insured" under defendant's aircraft policy, if the aircraft was not being operated for remuneration at the time of the accident. Said estate is a real party in interest to this declaratory judgment action since if it is determined that there is no coverage under defendant's aircraft policy, th estate will be personally liable for the first Ten Thousand Dollars ($10,000.00) of claims arising out of the accident in question, that amount being the retained limit of American Casualty's umbrella policy.

POINT III

EAGLE STAR'S POLICY IS SPECIFIC INSURANCE AND AFFORDS PRIMARY COVERAGE FOR THE CLAIMS MADE AGAINST THE ESTATE OF LYNN RICHARDS SILVER.

Utah follows the general rule that a policy written t cover a specific vehicle is primary as to any other liability insurance which may also afford coverage of the incident involv ing the vehicle. In National Farmer's Union Property and Casua Company v. Farmer's Insurance Group, 14 Utah 2d 89, 377 P.2d 786 (1963), the defendant company insured the automobile involv in an accident and the plaintiff company insured the non-owner driver who had been using the automobile. The defendant compan refused to defend a negligence suit filed against the non-owner driver. The plaintiff company successfully defended the suit and then brought action for defense costs against defendant company. This Court stated:

> With regard to whether or not plaintiff is entitled to recover from defendant, by way of subrogation, the attorney's fees and court costs, the better reasoned cases would seem to support

> plaintiff's position. Both policies obligated plaintiff and defendant to defend the action brought by Wolfe. However, the defendant, being the primary insurance carrier, was the insurer ultimately liable to pay a judgment against Morgan, had one been obtained, and therefore was obligated to defend him in the first instance.

Also in Russell v. Paulson, 18 Utah 2d 157, 417 P.2d 658 (1966) it was held that if two insurance policies cover a loss and one has a pro rata clause as to other collectible insurance and the other policy has an excess clause with respect to other collectible insurance, that the pro rata policy is considered primary coverage and the excess policy is considered an excess coverage only. It would seem, a fortiori, that where appellant's policy contains neither a pro rata or an excess coverage clause with respect to other insurance and respondent's policy is an excess coverage policy with respect to other insurance that is listed in its schedule of underlying insurance, appellant's policy should be deemed primary and respondent's policy should be deemed excess coverage only, as it is written.

This Court has also considered the situation where one insurance policy provides specific coverage and another insurance policy provides blanket coverage which would also cover the same loss as the specific policy. In Prudential Federal v. St. Paul, 20 Utah 2d 95, 433 P.2d 602 (1967) this Court stated:

> The rule having wide acceptability provides that where a blanket policy contains a provision limiting its liability to excess over specific insurance, the blanket policy must respond, only if the specific fails to satisfy the loss.

This is exactly the situation in the case at bar.

American Casualty's blanket umbrella policy admittedly covers the loss in question, but what said policy contains is excess to the underlying insurance listed for each specific risk. Eagle Star's policy specifically covers the aircraft in question.

SUMMARY

The sole question in this declaratory judgment action is whether or not the aircraft in question was being operated under the terms of any agreement which provides any "remuneratio for use of said aircraft at the time of the accident in questio If it was not being so operated, then Eagle Star's aircraft policy provides primary coverage and American Casualty's policy provides only excess coverage in excess of Eagle Star's One Million Dollar limit and the insured's Ten Thousand Dollars retained limit.

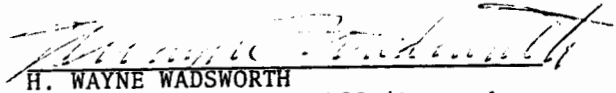
The record is clear that C. W. Silver Company never paid compensation to Silco Corporation for use of the aircraft, other than paying the maintenance and operational expenses incurred in using the aircraft. Under the authorities cited her in, such payment of maintenance and operational expenses does no constitute "remuneration" for use of the aircraft so as to remov the deceased pilot, Lynn Richards Silver, from the definition of persons insured under appellant's aircraft policy at the time of the accident in question.

If under the undisputed facts of this case, there is any question as to whether or not such facts constitute "operating the aircraft under the terms of any agreement which provides any remuneration for use of said aircraft" and the court is not clearly convinced that they do, then construction of the exclusionary clause quoted should be resolved in favor of the respondents, since one of the respondents, the Estate of Lynn Richards Silver is an otherwise "insured" under the terms of appellant's aircraft policy and has a personal interest in said action due to the fact that if there is no coverage under appellant's aircraft policy, then said Estate is personally liable for the first Ten Thousand Dollars of claims made against it under the retained limit of respondent's umbrella clause.

WHEREFORE, respondents pray that this Court affirm the judgment of the trial court and award respondents their costs incurred.

Respectfully submitted this 14th day of March, 1977.

HANSON, WADSWORTH & RUSSON



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served two (2) copies of Respondent's Brief upon Glenn C. Hanni, Attorney for Appellant, 604 Boston Building, Salt Lake City, Utah 84111 this 14th day of March, 1977.

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