

Claims Gone Bad

- Paul Leonard, Charles Taylor Aviation
- Keith Brown, Brown & Company USA
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Factual Background

Ricardo Rodriguez is a computer software designer. During the course of his work, he developed a computer program to computerize certain aircraft maintenance records and inspection schedules. He established a company known as **Military Software, Inc. (MSI)**, and successfully marketed his computer program to the U.S. Air Force for their use in maintaining maintenance records on various aircraft.

In order to protect MSI from liability in the event of accidents or other issues allegedly arising from defects or glitches in the computer program, Rodriguez purchased a CGL policy from an aviation insurance company.

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CGL Insurance Policy

Named Insured: Military Software, Inc.

Coverage: Comprehensive General Liability, including Products/Completed Operations, Personal and Advertising Injury, etc.

Policy Limit: \$1,000,000

Insuring Agreement, Coverage A, Bodily Injury and Property Damage Liability: "We will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies resulting from your **aviation operations**. However, we will have no duty to defend the insured against any suit seeking damages for **bodily injury** or **property damage** to which this insurance does not apply.

Insuring Agreement, Coverage B, Personal & Advertising Injury Liability:
 "We will pay those sums that the insured becomes legally obligated to pay as damages because of **personal and advertising injury** to which this insurance applies resulting from your **aviation operations**. However, we will have no duty to defend the insured against any suit seeking damages for **personal and advertising injury** to which this insurance does not apply. This insurance applies to **personal and advertising injury** caused by an offense arising out of your **aviation operations**."

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Litigation - California

Ricardo Rodriguez and Choose Your Fetish.com are sued by Playboy Magazine and other Plaintiffs in State Court in San Francisco.

Rodriguez tenders the defense of both Defendants to the Aviation CGL carrier.

CGL carrier declines to defend either Rodriguez or Choose Your Fetish.com.

Rodriguez declares bankruptcy on behalf of both Defendants.

Litigation - Texas

Rodriguez and Choose Your Fetish.com are sued in Federal Court in Dallas by Plaintiff Richard Karamatic.

Karamatic also petitions the bankruptcy trustee in California and purchases the rights of Rodriguez and CYF.com, including the right to sue the CGL carrier for bad faith for refusing to defend the underlying lawsuit. Karamatic proceeds to file a bad faith suit against the CGL carrier in California.

Rodriguez tenders the defense of both Defendants in the Texas litigation to the CGL carrier.

Defense of Lawsuits

CGL carrier retains counsel in California to defend the bad faith suit. Rodriguez asserts that coverage exists, and defense is owed, in the Texas case pursuant to the Policy, which states, in part:

Section II – Who is an Insured

3. Any organization you newly acquire or form, other than a partnership, joint venture, or limited liability company, and over which you maintain control over more than 50% of voting rights, will qualify as a Named Insured if there is no other similar insurance available to that organization. (Ed.- Subject to several conditions and exclusions, which are N/A)

CGL carrier issues Reservation of Rights letter and retains counsel to defend both Rodriguez and CYF.com in the Texas litigation, and retains separate counsel to file DJ action.

Result of Litigation

California Litigation
 CGL carrier successfully obtained Summary Judgment on the coverage issue, and therefore was not in bad faith for refusing to defend the underlying lawsuit.

Texas Litigation
 For economic reasons, the CGL carrier elected to settle the underlying lawsuit for a nominal amount, and the Declaratory Judgment action was then dismissed.

Coverage at Issue

The claim was tendered to Broad Cover and was declined on the grounds that coverage was excluded under Coverage A, Exclusion 2(g), which states:

This insurance does not apply to: Bodily injury or property damage arising out of the ownership, maintenance, use or entrustment to others of any aircraft, auto or watercraft owned or operated by or leased, rented, or loaned to any insured. "Use" includes operation and loading or unloading and with respect to aircraft, "operated by" also includes operation on behalf of any insured.

Section II – Who is an Insured.
 Each of the following is also an insured:
 Your employees, other than your executive officers, but only for acts within the scope of their employment by you. However, no employee is an insured for: Property damage to property owned or occupied by or leased or rented or loaned to that employee.

Air Cover's Argument

Air Cover argues that Mr. Baker "occupied" the aircraft and therefore is not an insured to which Exclusion A.2(g) applies. As a result, Air Cover argues that coverage would apply and Broad Cover is obligated to satisfy the default judgment.

Court's Ruling ?

The Court granted summary judgment to _____ ??

Court's Ruling

The court ruled in favor of Broad Cover and agreed that Exclusion A.2(g) did apply and therefore coverage was excluded. The court concluded that the claimed property damage arose out of the use or operation of an aircraft operated by, or on behalf of, any insured.

The court rejected Air Cover's argument and found that regardless of whether Mr. Baker qualified as an insured, he was operating the aircraft on behalf of Balance who did qualify as "any insured".

- *But wait There's more.*

Appeal

Air Cover appealed the court's ruling, claiming the trial court erred in its application of the Exclusion. Air Cover argued that the flight was operated by Amos Air, not Balance, and that the terms "operated by" and "operated on behalf of" are ambiguous and must be construed against Broad Cover.

Appellate Court's Ruling

The appellate court affirmed the summary judgment ruling of the trial court, agreeing that Exclusion A.2(g) excludes from coverage property damage arising out of the use of any aircraft operated by any insured.

The appellate court further held that having obtained a default judgment based on allegations that Balance *did operate* the aircraft, Air Cover cannot now claim that Balance *did not operate* the aircraft in order to avoid the application of the Exclusion.

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