WARRANTIES AND REPRESENTATIONS IN AVIATION INSURANCE: A CONTRIBUTE-TO-THE-LOSS SOLUTION TO THE CONFUSION CREATED BY THE COMMON LAW AND THE STATUTORY RESPONSE

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The majority of jurisdictions do not require proof of a causal nexus between the breach of an aviation insurance policy provision and the actual loss sustained for the insurer to deny coverage on the basis of the breach.[1] However, a growing minority of courts do require such proof of a causal connection.[2] As a result of this split, an insured who allows his medical certificate or airworthiness certificate to lapse or who fails to comply with any other requirement contained within the policy may find that his policy is invalid in one jurisdiction while it would only be suspended in another jurisdiction.[3] In yet another jurisdiction, the policy may remain in full force as long as the breach did not contribute to the loss sustained.[4] In part, this disparity is due to disagreement about the terms used to describe the various insurance clauses involved.

Aviation insurance law is fraught with confusion due to conflicting determinations of whether certain policy provisions are warranties, representations, or coverage provisions. Even when an insurance policy employs one of these labels, courts have given them differing effects. Not only is there disagreement about the definitions of warranty, representation and coverage provision, but once a court has decided upon a definition for one of these labels, that label may be applied to the same clause which another court has labeled with one of the other terms.[5] Furthermore, two different courts, both of which apply the same label to a particular policy provision, often treat such a clause very differently.[6]

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1. *See infra* notes 64-67, 77-123 and accompanying text.
2. *See infra* notes 68-69, 124-161 and accompanying text.
3. *Compare* Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co., 189 Neb. 610, 204 N.W.2d 162 (1973) *with* Kilburn v. Union Marine & General Ins. Co., 326 Mich. 115, 40 N.W.2d 90 (1949).
4. *See* Bayers v. Omni Aviation Managers, Inc., 510 F. Supp. 1204 (D. Mont. 1981); Avemco Ins. Co. v. Chung, 388 F. Supp. 142 (D. Haw. 1975).
5. *See infra* notes 39-45 and accompanying text.
6. *Compare Bayers*, 510 F. Supp. 1204 *with Omaha Sky Divers*, 189 Neb. 610, 204 N.W.2d 162.

Statutory attempts to alleviate this confusion have only added to the problem.[7] The majority of states have enacted so-called contribute-to-the-risk statutes.[8] These statutes allow an insurer to avoid coverage whenever an insured breaches a provision of the agreement which affects the risk assumed by the insurer. A minority of states have enacted contribute-to-the-loss statutes.[9] Under this statutory scheme, the insurer may not avoid coverage for a breach of a policy provision unless the breach actually caused, or in some way contributed to, the actual loss involved. These statutes only further the confusion they were enacted to clarify.[10] Moreover, courts in jurisdictions with either type of statute do not always follow, or in some cases even acknowledge, the statutory requirements.[11]

This Note describes the history of the common law development of warranties, representations, and the other related terms involved in aviation insurance law and will review the legislative response to this development. This Note also shows how the different definitions, statutes and interpretations have created uncertainty among the courts, legislatures, insurer and insured in aviation insurance law. It discusses how the focus on definitional analysis and the statutory response has been highly ineffective and has added to the confusion. Finally, it suggests that because disparate treatment of aviation insurance policy provisions originated in the common law, the necessary changes should be effected through the common law as well. This Note advances the argument that the courts should apply contribute-to-the-loss analysis to all policy provisions to achieve uniformity among jurisdictions and to avoid forfeiture of coverage for breaches which in no way contribute to the loss sustained.

THE COMMON LAW DISTINCTION BETWEEN WARRANTIES AND REPRESENTATIONS.

The roots of American insurance law are grounded in English common law.[12] During the eighteenth century it became common practice for underwriters, those who insured risks for a price or premium, to conduct business at Lloyd's Coffee House in London.[13] Anyone requiring insurance coverage would go there to offer proposals of insurance to the underwriters, who would in turn insure the risk for an amount they, the underwriters, prescribed.[14] Since the insured often knew more about the risk than did the

7. *See infra* notes 62-72 and accompanying text.
8. *See infra* notes 64-67 and accompanying text.
9. *See infra* notes 68-69 and accompanying text.
10. *See infra* notes 62-72 and accompanying text.
11. *See generally Bayers*, 510 F. Supp. 1204; American States Ins. Co. v. Byerly Aviation, Inc., 456 F. Supp. 967 (S.D. Ill. 1978); United States Fire Ins. Co. v. West Monroe Charter Service, 504 So. 2d 93 (La. App. 1987); *Omaha Sky Divers*, 189 Neb. 610, 204 N.W.2d 162; Security Mut. Casualty Co. v. O'Brien, 99 N.M. 638, 662 P.2d 639 (1983); Puckett v. United States Fire Ins. Co., 678 S.W.2d 936 (Tex. 1984); Schepps Grocer Supply, Inc. v. Ranger Ins. Co., 545 S.W.2d 13 (Tex. Civ. App. 1976).
12. *See generally* E.W. PATTERSON, THE ESSENTIALS OF INSURANCE LAW 272 (1957); R. KEETON, BASIC TEXT ON INSURANCE LAW § 6.5(b), at 373 (1971).
13. Vance, *The History of the Development of the Warranty in Insurance Law*, 20 YALE L.J. 523, 525 (1911).
14. *Id.* at 526.

underwriter, a custom developed which established several implied conditions of the contract, such as seaworthiness, deviation, and illegality.[15] These conditions were frequently called warranties.[16]

The term "warranty" was used extensively in early English maritime insurance.[17] It simply denoted a condition of the contract which required strict compliance.[18] Then, in 1778, Lord Mansfield, Chief Justice of the Court of King's Bench, made a distinction between a warranty and what he called a representation.[19] A warranty was something which was written into the contract.[20] If a warranty was not strictly performed, the entire contract was void.[21] A representation, on the other hand, was outside the contract.[22] The breach of a representation would only avoid the policy if it was material to the risk assumed by the underwriters.[23] This distinction was perpetuated in 1786, when Lord Mansfield held that "[a] warranty in a policy of insurance is a condition or a contingency, and unless that be performed, there is no contract. It is perfectly immaterial for what purpose a warranty is introduced; but being inserted, the contract does not exist unless it be literally complied with."[24] Therefore, a technical breach[25] of a condition contained in the policy, or even a breach which eased the underwriter's potential risk,[26] worked a forfeiture upon the insurance contract.

In the United States, the practice of insurance grew and developed over time under these distinctions.[27] As the practice grew, so did the sophistication of the underwriters.[28] The insured no longer had greater knowledge of the risks involved. The insurer had taken the place of the insured as the author of the insurance contract. The policies became more technical in nature.[29] The drafters of insurance contracts exploited the warranty/representation distinction to its fullest extent by including in the in-

15. *Id.* at 526.
16. *Id.* at 525.
17. *Id.* at 526.
18. Vance, *supra* note 13, at 526. If a vessel was not seaworthy, the contract was void. This result applied only to those conditions considered material to the risk assumed by the insurer.
19. Pawson v. Watson, 2 Cowp. 785, 98 Eng. Rep. 1361 (1778).
20. The warranty was no longer implied, but was explicitly provided for by the terms of the agreement. Prior to *Pawson*, it had only been implied. Lord Mansfield's decision in *Pawson* required, for example, that the insured expressly "warrant" in writing that the vessel was seaworthy.
21. *Pawson*, 2 Cowp. at 788, 98 Eng. Rep. at 1362.
22. A representation was a statement, oral or written, not contained within the four corners of the document. The statement could be made prior to, contemporaneously with, or subsequent to the execution of the written agreement. It could have been made to induce the insurer to enter into the contract, or to subsequently modify it. Healy, *The Hull Policy: Warranties, Representations, Disclosures and Conditions*, 41 TUL. L. REV. 245, 250 (1967).
23. *Pawson*, 2 Cowp. at 789, 98 Eng. Rep. at 1363.
24. De Hahn v. Hartley, 1 T.R. 343, 345-46, 99 Eng. Rep. 1130, 1131 (1786).
25. A technical breach would be one that related to neither the risk assumed nor the actual cause of the loss. Vance, *supra* note 13, at 525; R. KEETON, *supra* note 12, § 6.5(b) at 375-78. For example, where the risk assumed and the cause of the loss are weather-oriented, a technical breach would be a statement which warranted that the cargo would be apples, when in fact the cargo was oranges.
26. A breach of a warranty which decreased the risk assumed might occur when the insured warranted that the ship would sail on June 30 in order to complete the voyage before winter set in, but in fact, the ship left port on June 28.
27. E.W. PATTERSON, *supra* note 12, at 272-75.
28. *See generally id.* at 275.
29. *Id.*

surance policy warranties which protected the insurer from any and every possible hazard.[30] This resulted in an increased probability that the policy would be declared void for breach of a warranty that the insured might not have even known was contained in the agreement.

Legislatures, judges, and commentators reacted to the ensuing harsh legal consequences in varied ways.[31] Before considering these reactions and their applications to modern aviation insurance law it is helpful to explore the modern terminology used to define the clauses of insurance policies.

Warranties

A warranty is a statement in the policy which prescribes the existence of something material to the risk assumed.[32] It differs from a coverage provision, which is sometimes called an exception.[33] One commentator distinguished warranties from other clauses in an insurance contract on the basis of actual cause versus potential cause.[34] A warranty excludes the potential cause of an insured event, while an exception (coverage provision) excludes only specified actual causes of an insured event.[35] A potential cause is something which increases the risk, while an actual cause is more specific: it is the event which results in a loss.

Warranties may only suspend coverage for the duration of the breach if they are couched in terms of "while".[36] An example of such a warranty is a provision contained in the insurance policy which states that coverage will not be in effect while a student pilot operates an aircraft without prior Federal Aviation Administration ("FAA") approval.[37] Warranty can also be defined as a promise by the insured to do or not to do something, that something does or does not exist, or that something will or will not happen.[38] This definition does not require that the warranty affect the risk assumed.

Most courts have attempted to distinguish between a representation and a warranty.[39] However, they have often used several other terms to describe

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30. *Id.*

31. *See infra* notes 34-161 and accompanying text.

32. E.W. Patterson, *The Apportionment of Business Risks Through Legal Devices*, 24 COLUM. L. REV. 335, 340-41 (1924).

33. *Id.*

34. *Id.*

35. R. KEETON, *supra* note 12, § 6.5(b), citing E.W. PATTERSON, *supra* note 12, at 273. The term coverage provision has been given conflicting definitions. *See infra* notes 55-56 and accompanying text.

36. An example of a common "while" clause is discussed in Macalco, Inc. v. Gulf Ins. Co., 550 S.W.2d 883, 886 (Mo. Ct. App. 1977). The policy in *Macalco* stated,

> "This policy does not apply: . . .
> 6. Under coverages [provided by the policy] while the aircraft is in flight and . . . (d) operated by a Student Pilot unless such flight or attempted flight is with the specific advance approval of and under the supervision and control of an FAA Certificated Commercial Instructor Pilot."

Id.

37. The policy is not indefinitely void. If the student obtains FAA approval and then gets in an accident, the policy will afford coverage despite the earlier flaw.

38. Healy, *supra* note 22, at 252. An example would be that the assured warrants that he will not take out other insurance on the insured vessel, except as specifically permitted by the terms of the policy.

39. *See infra* notes 73-163 and accompanying text.

what is essentially a warranty.[40] This has caused considerable confusion. Some courts have equated a warranty with a condition precedent,[41] and have found that even a distinction as illusory as finding a condition to be a condition subsequent[42] would not operate to effect a forfeiture of the insurance coverage. Another court found that a condition having the same effect as a warranty is a provision which requires that certain prerequisites be met before the insurer is obligated to pay under the policy.[43] Other courts have found that a warranty is meant to be a part of the contract,[44] and materiality or intent will not affect its legal operation.[45] Many state legislatures have responded with regulatory statutes,[46] most of which require courts to treat warranties as representations.[47]

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40. *See infra* notes 92-121, 136-161 and accompanying text.

41. *See* Edmonds v. United States, 492 F. Supp. 970, 974 (D.C. Mass. 1980); *Chung*, 388 F. Supp. at 149-50.

42. *See* BLACK'S LAW DICTIONARY 266 (5th ed. 1979), which defines condition precedent as "[a condition] that is to be performed before the agreement becomes effective, and which calls for the happening of some event or the performance of some act after the terms of the contract have been arrested on, before the contract shall be binding on the parties, e.g. under [a] disability insurance contract, the insured is required to submit proof of disability before the insurer is required to pay."

Id.

A condition subsequent is a "condition referring to a future event, upon the happening of which the obligation becomes no longer binding upon the other party." *Id.*

The distinction is illusory because it exists only in form, and not in substance. For example, the statement, "I will wash your car tomorrow if it is sunny," is a condition precedent, because the obligation to wash the car does not arise unless the sun shines. On the other hand, the statement, "I will wash your car tomorrow, unless it rains," is a condition subsequent because the pre-existing duty to wash the car will terminate if it rains.

43. Ideal Mut. Ins. Co. v. Lucas, 593 F. Supp. 466 (N.D. Ga. 1983). The provision required that the pilot have certain minimum qualifications. These prerequisites included a predetermined number of hours in flight and certain pilot ratings. *Id.* at 469.

44. *Macalco*, 550 S.W.2d at 894, citing Ettman v. Federal Life Ins. Co., 137 F.2d 121, 125 (8th Cir. 1943); American Fire & Indem. Co. v. Lancaster, 286 F. Supp. 1011, 1014-15 (E.D. Mo. 1968), *aff'd*, 415 F.2d 1145 (8th Cir. 1969); Grand Lodge, United Bros. of Friendship v. Massachussetts Bonding & Ins. Co., 324 Mo. 938, 948, 25 S.W.2d 783, 787 (1930), citing F. BACON, LIFE & ACCIDENT INSURANCE, Vol. 1 (4th ed.) §§ 255-56, pp. 464-66.

45. *Macalco*, 550 S.W.2d at 894, citing *Ettman*, 137 F.2d at 125-26; Miller v. Plains Ins. Co., 409 S.W.2d 770, 774 (Mo. Ct. App. 1966); Dixon v. Business Men's Assurance Co. of Am., 365 Mo. 580, 588, 285 S.W.2d 619, 625 (1955).

One frequently cited court has lumped condition subsequent, condition precedent and promissory warranty into the general category of warranty and found these to be different from clauses termed exclusions. South Carolina Ins. Co. v. Collins, 269 S.C. 282, 237 S.E.2d 358 (1977).

46. Because some courts include terms within the definition of warranty that other courts have excluded from the definition, problems have arisen concerning not only the definition of warranty, but the disparate treatment given different terms in different jurisdictions. Due to this confusion, and a percieved need to avoid the harsh consequences of forfeiture for breach of a warranty, many state legislatures have responded with regulatory statutes. For a discussion of the statutes, see *infra* notes 62-72. One type of statute is called contribute-to-the-risk. The states which have adopted this approach are Alabama, Alaska, Arizona, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Illinois, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Virginia, Washington, West Virginia and Wyoming. For citations, see *infra* note 65. Under this scheme, the breach of a warranty will not cause a forfeiture unless it contributes to the risk assumed by the insurer.

Fewer states have enacted contribute-to-the-loss statutes, which differ from contribute-to-the-risk statutes in that even a breach which materially affects the risk assumed does not result in forfeiture if the breach does not contribute to the actual loss. These states are Iowa, Kansas, Missouri and Nebraska. See *infra* note 68 for citations.

47. See *infra* notes 62-65 and accompanying text for a discussion of these statutes.

Representations

Lord Mansfield distinguished representations from warranties in several ways. First, he found that while a warranty is contained within the policy, a representation is a statement, written or oral, which is outside the contract.[48] He then stated that although a breach of a warranty, material or immaterial, would void the contract of insurance, a material breach of a representation, if fraudulent, would make the policy merely voidable.[49] If it was not material, it could not be fraudulent.[50] Finally, he found that a representation, even if material, would be satisfied if it was equitably and substantially complied with and was not subject to the strict compliance required by warranties.[51] Another commentator has supplemented this definition by explaining that statements which induce the insurer to accept the risk are representations.[52] Many jurisdictions hold that, in the absence of contrary statutory regulation, material misrepresentations may now avoid the policy whether they were fraudulently made or made through mistake.[53] However, a minority of jurisdictions will not allow avoidance for an honest mistake.[54]

Coverage Provisions

A coverage provision is a provision so important to the contract itself that the breach of that provision will provide a complete defense for the insurer.[55] Traditionally, a coverage provision relates to the thing insured and often describes it.[56] For example, where a laundry is insured against fire, a coverage provision would be that the structure be made of stone or some other non-flammable material. If the building were actually constructed of wood, the insurance company would have a complete defense.

The outcome of a case very often hinges upon which of these terms a court focuses on when determining the treatment of the particular policy provision in question.[57] The consequences range in severity from complete forfeiture for breach of a coverage provision;[58] to possible forfeiture if the breach of a warranty, sometimes treated as a representation by statutory

48. *Pawson*, 2 Cowp. at 788, 98 Eng. Rep. at 1362.

49. At this point in the development of the common law, no distinction was made between material to the risk and material to the loss. The courts seemed to be concerned only with whether the breach was material to the risk assumed.

50. *Pawson*, 2 Cowp. at 788, 98 Eng. Rep. at 1362.

51. *De Hahn*, 1 T. R. at 346, 99 Eng. Rep. at 113.

52. Healy, *supra* note 22, at 250.

53. *See* R. KEETON, *supra* note 12, § 5.7(a), at 323, *relying on* Metropolitan Life Ins. Co. v. Becraft, 213 Ind. 378, 12 N.E.2d 952, 115 A.L.R. 93 (1938); Bankers Life Ins. Co. v. Miller, 100 Md. 1, 59 A. 116 (1904). *See also* 12A APPLEMAN, INSURANCE LAW AND PRACTICE, §§ 7293, 7294 (1943).

54. *See, e.g., Grand Lodge*, 324 Mo. 938, 25 S.W. 2d 783 (will not allow avoidance for representations or warranties not found to be fraudulent).

55. *See generally* R. KEETON, *supra* note 12, § 5.2(b), at 274.

56. *Id.*

57. *Compare Omaha Sky Divers*, 189 Neb. 610, 204 N.W.2d 162 (named pilot clause labeled a coverage provision giving insurer a complete defense) *with Byerly Aviation*, 456 F. Supp. 967 (named pilot clause labeled a condition precedent [or warranty] requiring a causal connection between breach and loss to avoid coverage; no causal connection was found).

58. *See Omaha Sky Divers*, 189 Neb. 610, 204 N.W.2d 162.

authority, contributes to the risk assumed;[59] to possible forfeiture for a breach which contributes to the actual loss;[60] to non-forfeiture for a misrepresentation which was either not material or not fraudulently made.[61] The resulting inequity has prompted many state legislatures to enact regulatory statutes.

STATUTORY MODIFICATION OF THE LEGAL EFFECT OF WARRANTIES AND REPRESENTATIONS

While courts have struggled with the problem of discerning between warranties and representations and the treatment to be accorded each, the legislative response has varied among states as well. Almost every state legislature has found it necessary to regulate the effect that terms such as warranty and representation have in insurance contracts.[62] The result has been an attempt to relegate restrictive policy provisions to the position they occupied before Lord Mansfield visited such harsh consequences on their breach.[63] The most common type of statute provides that statements in a policy will be deemed representations and not warranties.[64] Most of these statutes (called contribute-to-the-risk statutes), enacted by a majority of the states,[65] further provide that a representation will not avoid insurance coverage unless the representation was made fraudulently, was material to the acceptance of the risk or the hazard assumed by the insurer, or the insurer

59. *See Schepps Grocer*, 545 S.W.2d 13.

60. *See* Global Aviation Ins. Managers v. Lees, 368 N.W.2d 209 (Iowa Ct. App. 1985).

61. *See, e.g.*, Kerr v. State Farm Fire & Casualty Co., 552 F. Supp. 992 (D.S.C. 1982).

62. *See infra* notes 65, 66, 68 and 70.

63. *See supra* notes 17-26 and accompanying text.

64. ALA. CODE § 27-14-7 (1971), for example, states in part,

(a) All statements and descriptions in any application for an insurance policy or annuity contract, or in negotiations therefor, by, or in behalf of, the insured or annuitant shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts and incorrect statements shall not prevent a recovery under the policy or contract unless either:

(1) Fraudulent,

(2) Material either to the acceptance of the risk or to the hazard assumed by the insurer; or

(3) The insurer in good faith would either not have issued the policy or contract, or would not have issued a policy or contract at the premium rate as applied for, or would not have issued a policy or contract in as large an amount or would not have provided coverage with respect to the hazard resulting in the loss if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

65. ALA. CODE § 27-14-7 (1975); ALASKA STAT. § 21.42.110 (1966); ARIZ. REV. STAT. ANN. § 20-1109 (1956); ARK. STAT. ANN. § 23-79-107 (1959); CAL. INS. CODE §§ 353-361 and §§ 442-449 (West 1987); DEL. CODE ANN. tit.18, § 2711 (1974); FLA. STAT. ANN. § 627.409 (West 1982); GA. CODE ANN. § 56-2409 (1980); HAW. REV. STAT. § 431-419 (1985); IDAHO CODE § 41-1811 (1977); ILL. REV. STAT. ch. 73 § 766 (1965); KY. REV. STAT. ANN. § 304.14.110 (Michie/Bobbs-Merrill 1981); LA. REV. STAT. ANN. § 22:619 (West 1988); ME. REV. STAT. ANN. tit. 24-A § 2411 (1974); MD. INS. CODE ANN. § 48A 374 (1957)(only applied to life, health, or annuity contracts); MASS. GEN. L. ch. 175 § 186 (1908); MINN. STAT. ANN. § 60A.08 (West 1986); MONT. CODE ANN. § 33-15-403 (1959); NEV. REV. STAT. § 687B.110 (1986); N.M. STAT. ANN. § 59A-18-11 (1978); N.C. GEN. STAT. § 58-30 (1981); N.D. CENT. CODE § 26.1-30-10 to 26.1-30-21 (1970); OHIO REV. CODE ANN. § 3923.14 (Page 1971); OKLA. STAT. tit. 36 § 3609 (1976); OR. REV. STAT. § 743.042 (1985); S.D. CODIFIED LAWS ANN. § 58-11-44 (1978); TENN. CODE ANN. § 56-7-103 (1980); VT. STAT. ANN. tit.8 § 3736 (1984)(applicable only to life and annuity insurance contracts); VA. CODE ANN. § 38.2-309 (1950); WASH. REV. CODE § 48.18.090 (1984); W. VA. CODE § 33-6-7 (1988); WYO. STAT. § 26-15-109 (1983).

can show that it would not have issued the policy at the premium charged had it known of the misrepresentation.

The best conceived contribute-to-the-risk statute,[66] adopted by the state of New York, does not turn warranties into representations, but instead separately defines each term. It therefore provides for the breach of a warranty without the strained construction most other statutes require. The distinction within the statute should enable the courts to apply it with more uniformity and predictability. Unfortunately, this has not been the case. For example, as one commentator has pointed out, "though all provisions concerning *actual cause* of loss are coverage provisions, not all provisions concerning *potential cause* of loss are warranties," but instead some are coverage provisions.[67]

The second type of statute (called contribute-to-the-loss) allows coverage unless the breach of a warranty or a misrepresentation contributes to the loss, even if the breach enhances the risk in some way.[68] Although a very small minority of states have taken this approach, one of the major advantages of this kind of statute is that coverage will not be denied merely for a technical breach. Thus the statute prevents the type of forfeiture that most courts abhor.[69]

The third type of statute is a hybrid of the first two. It will not deny coverage if the breach of a warranty or a misrepresentation contributes to either the risk or to the loss.[70] This seems to allow the insurer to choose which standard to apply. It would be in the insurer's best interest to opt for the contribute-to-the-risk analysis because then the entire policy could be avoided for a breach which did not affect the loss. That is, in fact, how this type of statute has been applied in other areas of insurance law.[71] In aviation insurance, however, courts have basically ignored these statutes, adopt-

66. N.Y. INS. LAW § 3105, § 3106 (McKinney 1985). This statute was developed by E.W. Patterson. The first statute is entitled, "Representations by the insured." The second is entitled, "Warranty defined; effect of breach." They provide:

§ 3105. Representations by the insured.

(a) A representation is a statement as to past or present fact, made to the insurer by, or by the authority of, the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof.

§ 3106. Warranty defined; effect of breach.

(a) In this section "warranty means any provision of an insurance contract which has the effect of requiring, as a condition precedent of the taking effect of the insurer's liability thereunder, the existence of a fact which tends to diminish, or the non-existence of a fact which tends to increase, the risk of the occurrence of any loss, damage, or injury within the coverage of the contract.

67. *See* R. KEETON, *supra* note 12, § 6.5(b), at 375 (emphasis in original).

68. IOWA CODE ANN. § 515.101 (1988); KAN. STAT. ANN. § 40-2205 (1965); MO. REV. STAT. § 376.580 (1968): NEB. REV. STAT. § 44-358 (1984).

69. *See generally Bayers*, 510 F. Supp. 1204 (applying a contribute-to-the-loss analysis); O'Connor v. Proprietors Ins. Co., 696 P.2d 282 (Colo. 1985) (applying contribute-to-the-risk analysis). *See also* Grooms v. Rice, 163 Colo. 234, 429 P.2d 298 (1967); Moorman Mfg. Co. v. Rivera, 155 Colo. 413, 395 P.2d 4 (1964).

70. TEX. INS. CODE ANN. § 21.16 (1981); UTAH CODE ANN. § 31A-21-105 (1953); WIS. STAT. ANN. § 631.11 (West 1980). Utah and Wisconsin still distinguish between warranties and representations. Although the Texas statute does not change warranties into representations, it does not distinguish between them either.

71. *See, e.g.*, Pritchett v. Equitable Life & Casualty Ins. Co., 18 Utah 2d 279, 421 P.2d 943 (1966).

ing instead whatever analysis they prefer.[72]

COMMON LAW APPLICATION OF CONTRIBUTE-TO-THE-RISK AND CONTRIBUTE-TO-THE-LOSS ANALYSIS IN AVIATION INSURANCE LAW

In aviation insurance law, courts have largely ignored the statutes discussed above and instead have preferred to rely on the express terms of the insurance policy.[73] Some courts in jurisdictions with contribute-to-the-risk statutes have applied a contribute-to-the-loss analysis to the breach of various provisions in aviation insurance contracts.[74] Similarly, courts in states with contribute-to-the-loss statutes have applied a contribute-to-the-risk analysis to aviation insurance cases.[75] Interestingly, courts in jurisdictions with hybrid statutes also have avoided mentioning the statute when dealing in aviation insurance and instead have often applied a contribute-to-the-loss analysis.[76] The following discussion reviews the various attempts by courts to use their own approach despite the existence of statutory authority in their jurisdictions.

Contribute-To-The-Risk Analysis and the Lack of a Causal Relationship Requirement

The majority of courts favor a contribute-to-the-risk analysis for the breach of warranties or the effect of misrepresentations in aviation insurance policies. Courts favoring this position have allowed the insurer to avoid coverage when the insured has breached even a technical requirement of the policy.[77] The reasons advanced to support such findings range from the label given to the pertinent provision,[78] to the premiums charged by the in-

72. One can only speculate about the absence of statutory analysis. It seems that the reason for this absence lies somewhere between ignorance of the existence of statutory authority and a belief that the particular policy provision in question is beyond the scope of the statute. This latter view is found in *Omaha Sky Divers*, 189 Neb. at 612, 204 N.W.2d at 164.

73. *See infra* notes 77-161 and accompanying text.

74. *See infra* notes 145-156 and accompanying text. *See also Bayers*, 510 F. Supp. 1204; Griffith v. Continental Casualty Co., 506 F. Supp. 1332 (N.D.Tex. 1981) (applying Texas law); *Byerly Aviation*, 456 F. Supp. 967; *Chung*, 388 F. Supp. 142; Florida Power & Light Co. v. Foremost Ins. Co., 433 So.2d 536 (Fla. Dist. Ct. App. 1983); Pickett v. Woods, 404 So.2d 1152 (Fla. Dist. Ct. App. 1981); Central Nat'l Life Ins. Co. v. Peterson, 23 Ariz. App. 4, 529 P.2d 1213 (1975).

75. *See infra* notes 82-91 and accompanying text. *See also, e.g.*, Western Food Prod. v. United States Fire Ins. Co., 10 Kan. App.2d 375, 699 P.2d 579 (1985); *Omaha Sky Divers*, 189 Neb. 610, 204 N.W.2d 162.

76. *See infra* notes 157-161 and accompanying text.

77. *See generally Edmonds*, 492 F. Supp. 970 (the insured failed to have a biennial flight review as required by the policy, but the loss was caused by dangerous runway conditions); *United States Fire*, 504 So.2d 93 (the pilot did not have a valid medical certificate as required by the terms of the policy, but the loss was caused by inclement weather); Aetna Casualty & Sur. Co. v. Urner, 246 Md. 660, 287 A.2d 764 (1972) (the terms of the policy provided that coverage would be afforded only while the aircraft was piloted by a person with a valid pilot's certificate; the person piloting the plane had only a student's license, but the loss was caused when the plane encountered bad weather); *Kilburn*, 326 Mich. 115, 40 N.W.2d 90 (a student pilot, carrying a passenger in violation of the policy terms, hit high-tension wires and damaged the plane); *Baker*, 10 N.C. App. 605, 179 S.E.2d 892 (the pilot did not have a valid medical certificate, as required by the policy, at the time of the loss which apparently occurred due to the pilot's negligence or mechanical failure upon landing).

78. *Omaha Sky Divers*, 189 Neb. at 613, 204 N.W.2d at 164 (the provision was labeled a coverage provision).

surer,[79] to rules of construction.[80] The cases from these jurisdictions have dealt with policy provisions which require valid pilot certificates, valid medical certificates, valid airworthiness certificates and restrictions on the use of the aircraft.[81]

Contribute-to-the-Risk Analysis

One of the few cases to acknowledge the existence of statutory authority in the contribute-to-the-risk category is *Omaha Sky Divers Parachute Club, Inc. v. Ranger Insurance Company.* [82] In this case a small airplane was damaged when a brake failed on landing.[83] The pilot of the aircraft held a valid pilot's certificate, but his medical certificate, also required by FAA regulations,[84] had expired five months before the accident. The pilot's health in no way contributed to the loss sustained.[85] The insurance policy covering the plane contained a written declaration that any pilot must have both a valid pilot certificate and a valid medical certificate.[86] The policy further provided that no coverage would be afforded to any pilot not meeting the above described declaration.[87]

The plaintiff cited the Nebraska contribute-to-the-loss statute[88] in support of its argument that the insurer could not avoid its obligations under the policy since the lack of a valid medical certificate did not cause the loss. The Nebraska Supreme Court found that the declaration was in fact a coverage provision rather than a warranty or a representation. Therefore, the statute did not apply since this coverage provision was held to be something different from a warranty or a representation.[89] As noted earlier,[90] breach of a coverage provision provides a complete defense to the insurer. Thus the lack of a valid medical certificate made the policy void.[91]

Application of Contract Principles to Avoid a Causal Relationship Requirement

Other courts faced with exclusionary clauses have reached the same result as the Nebraska court without considering whether certain statutes were

79. DiSanto v. Enstrom Helicopter Corp., 489 F. Supp. 1352, 1353 (E.D. Pa. 1980) (" . . . the exclusion of coverage when the aircraft was operated by pilots without the requisite experience was reflected in a lower premium.").

80. *See DiSanto*, 489 F. Supp. 1359 (unambiguous policies are to be strictly performed); *Western Food*, 10 Kan. App. 2d 375, 699 P.2d 579 (where contracts are clear and unambiguous, there is no need for judicial interpretation); *O'Brien*, 99 N.M. 638, 662 P.2d 639 (courts cannot ignore the plain language of the policy).

81. *See, e.g., O'Connor*, 696 P.2d 282; Insurance Co. Etc. v. West Plains Air, 637 S.W.2d 444 (Mo. Ct. App. 1982); *Omaha Sky Divers*, 189 Neb. 610, 204 N.W.2d 162; Baker v. Ins. Co. of N.A., 10 N.C. App. 605, 179 S.E.2d 892 (1971).

82. 189 Neb. 610, 204 N.W.2d 162 (1973).

83. *Omaha Sky Divers*, 189 Neb. at 612, 204 N.W.2d at 163.

84. Aeronautics and Space, 14 C.F.R. § 61.103(c) (1987).

85. *Omaha Sky Divers*, 189 Neb. at 612, 204 N.W.2d at 163.

86. *Id.*

87. *Id.* at 613, 204 N.W.2d at 164.

88. NEB. REV. STAT. § 44-358 (1984). *See also supra* notes 68-69 and accompanying text.

89. *Omaha Sky Divers*, 189 Neb. at 613, 204 N.W.2d at 164.

90. *See supra* notes 55-56 and accompanying text.

91. *Omaha Sky Divers*, 189 Neb. at 610, 204 N.W.2d at 162.

possibly applicable and/or without relying on definitions. These courts sought guidance from the terms of the policy itself or from public policy considerations.

In *Schepps Grocer Supply, Inc. v. Ranger Insurance Company,*[92] the Texas Court of Civil Appeals examined an exclusionary clause which would not afford coverage unless the pilot had a multi-engine rating. The pilot had not yet received a multi-engine rating at the time he took out the coverage or by the time the accident occurred.[93] Although the evidence established that he had the requisite skills to pass the test to obtain that rating, the policy excluded coverage "while"[94] the pilot was not so rated. The insurer presumably required a multi-engine rating only as evidence that the insured had the skills commensurate with such a rating. It was those skills which defined the risk assumed, not the rating which only served a testamentary purpose.

The court found that the policy was unambiguous and that therefore the exclusionary clause should be given full effect.[95] Even though the breach was merely technical, the insured was not entitled to payment under the policy. The court stated that the denial of coverage would satisfy the intention of the parties and the purpose of the agreement.[96] The court added that if the parties intended otherwise, they should have said so explicitly.[97] Although the plaintiff made contribute-to-the-risk and contribute-to-the-loss arguments, the court ignored them in favor of a solution which looked only to the terms employed by the policy, disregarding the fact that the contract was forfeited for a purely technical breach.[98]

This analysis has been frequently cited by other courts which have also not required a causal connection between a breach and the risk assumed by the insurer.[99]

Schepps Grocer illustrates how the courts have ignored statutory application. The Texas statute[100] contains both contribute-to-the-risk and contribute-to-the-loss language. Had the statute been followed, the insured probably would have collected under the policy because the risk assumed by the insurer was not increased by the lack of a multi-engine rating when the pilot had the skills commensurate with such a rating.[101]

Another case, *O'Connor v. Proprietors Insurance Company,*[102] dealt with an exclusionary clause which purported to avoid coverage because the insured did not have the annual inspection necessary to maintain a valid

92. 545 S.W.2d 13 (Tex. Ct. App. 1976).
93. *Id.* at 14.
94. *Id.* For a discussion of the meaning of "while," see *supra* note 36 and accompanying text.
95. *Schepps Grocer,* 545 S.W.2d at 15.
96. *Id.* at 15-16.
97. *Id.*
98. *Id.*
99. *See, e.g., DiSanto,* 489 F. Supp. 1352.
100. TEX. INS. CODE ANN. § 21.16 (1981). This statute provides that: a provision which would void the contract for misrepresentation will have no effect "unless it be shown upon the trial thereof that the matter or thing misrepresented was material to the risk or actually contributed to the contingency or event on which said policy became due and payable . . . ." *Id.*
101. *Schepps Grocer* was later disapproved on public policy grounds by another court in the same jurisdiction, *Puckett,* 678 S.W.2d 936. *See also Western Food,* 10 Kan. App. 2d 375, 699 P.2d 579.
102. 696 P.2d 282 (Colo. 1985).

airworthiness certificate. The cause of the loss to the plane was unknown.[103] The plaintiff argued that the burden of proof was on the insurer to establish a causal connection between the failure of the exclusionary clause and the loss.[104] The Supreme Court of Colorado recognized the tenet accepted by most jurisdictions that forfeitures based on technical violations of a contract are not favored;[105] but they found outweighing public policy reasons to avoid coverage.[106] The court acknowledged that the annual inspection requirement was a safety regulation established by the FAA.[107] No consideration was given to whether the failure was material to the risk or loss. The dissent pointed out that such a great number of FAA safety regulations of a highly technical nature occur that coverage could almost always be excluded unless the insurer were made to establish a causal nexus.[108]

In *Security Mutual Casualty Co. v. O'Brien*,[109] the New Mexico Supreme Court found that a policy provision, which provided that no coverage would be afforded absent a valid airworthiness certificate, was an exclusion which suspended coverage while the certificate was not in order. The court distinguished between this exclusion and a condition subsequent.[110] The court stated that a contribute-to-the-loss analysis would apply to a condition subsequent. Since this was determined to be a policy exclusion, the court held that the exclusion in the policy made it void from its inception, precluding the need to look further for a causal connection.[111] This outcome differs greatly from jurisdictions where courts have held that the conditions subsequent and policy exclusions are the same as warranties.[112] These courts would conceivably treat them as warranties.

The *O'Brien* court did not have to make the strained and questionable distinction between a condition subsequent and policy exclusion. It could have reached the same result of denying coverage by simply having found the clause to be a warranty and giving it the prescribed statutory application, which under the New Mexico statute calls for a contribute-to-the-risk type of analysis.[113] The court could then have found that for public policy reasons a valid airworthiness certificate was an important formal safety requirement which significantly affected the risk assumed by the insurer because the insurer relied on it as proof that the aircraft was in fact airworthy.[114]

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103. *Id.* at 284.

104. *Id.* at 284. The court rejected this argument and placed the burden on the insured to show the lack of a causal relationship. *Id.* at 286.

105. *See also Grooms*, 163 Colo. at 239, 429 P.2d at 300; *Moorman Manufacturing*, 155 Colo. at 416-17, 395 P.2d at 6.

106. *O'Connor*, 696 P.2d at 286.

107. *Id.* at 285.

108. *O'Connor*, 696 P.2d at 288 (Neighbors, J., dissenting).

109. 99 N.M. 638, 662 P.2d 639 (1983).

110. *Id.* at 639-40, 662 P.2d at 640.

111. *Id.* at 640, 662 P.2d at 640-41.

112. *See supra* notes 32-47 and accompanying text.

113. N.M. STAT. ANN. § 59A-18-11 (1978).

114. For other cases requiring no causal connection in jurisdictions with a contribute-to-the-risk statute, see *DiSanto*, 489 F. Supp. 1352; Middlesex Mut. Ins. Co. v. Bright, 106 Cal. App. 3d 282, 165 Cal. Rptr. 45 (1980); Grigsby v. Houston Fire & Casualty Ins. Co., 113 Ga. App. 572, 148 S.E.2d 925 (1966); *Urner*, 246 Md. 660, 287 A.2d 764; *Baker*, 10 N.C. App. 605, 179 S.E.2d 892; Ochs v. Avemco Ins. Co., 54 Or. App. 768, 636 P.2d 421 (1981); Insurance Co. of N. Am. v. Lynpal, Inc., 14 Av. Cas. (CCH) ¶ 18,067 (Tenn. App. 1977).

In *Edmonds v. United States,* [115] a federal district court in Massachusetts held that coverage could be avoided despite the absence of a cause related to a particular policy provision if the breached clause was a condition precedent. To determine whether a clause was a condition precedent, the court looked to the wording of the provision and to whether the exclusion related essentially to the insurer's assumption of the risk.[116] "Condition precedent" is one of the terms considered by some jurisdictions to actually be a warranty.[117] Other courts have held that specific exclusions simply are not covered by the statutes because they are neither representations nor warranties.[118]

One court held that when an exclusionary provision was worded in terms of "caused by or resulting from", no causal connection was needed in order for the insurer to avoid coverage.[119] Another interesting manner in which courts have dismissed the causal nexus requirement has been to find that causal analysis is inappropriate to a contract dispute. According to these courts, the rights of the insured flow from the insurance policy as a contract and not from a claim arising in tort where a causal requirement would be more fitting.[120] This approach recognizes the right that parties to a contract have to limit the scope and nature of their dealings with each other. It does not, however, do justice to the restrictions of that right judicially imposed on parties to an insurance contract.[121] These restrictions include construing the language of the policy against the insurer[122] and imposing the duty of good faith upon the insurer.[123]

Contribute to the Loss Analysis and the Causal Relationship Requirement

A growing minority of courts have held that before a forfeiture occurs, there must be a causal link between the breach of a policy provision and the actual loss sustained.[124] Many good reasons for this holding have been ad-

115. 492 F. Supp. 970 (D.C. Mass. 1980).

116. *Id.* at 974.

117. *See supra* notes 39-45 and accompanying text.

118. *See, e.g., United States Fire,* 504 So.2d 93.

119. Schantini v. Hartford Accident & Indem. Co., 605 P.2d 920 (Colo. App. 1979).

120. *See* Roberts v. Underwriters at Lloyd's London, 195 F. Supp. 168 (D. Idaho 1961); Bruce v. Lumberman's Mut. Casualty Co., 222 F.2d 642 (4th Cir. 1955); *Kilburn,* 326 Mich. 115, 40 N.W.2d 90.

121. R. HENDERSON, materials for basic Insurance Law text, to be published by the Michie Co., Chapter 1 § A(2).

See generally Roach v. Churchman, 431 F.2d 849 (8th Cir. 1970); Royal Indem. Co. v. John Cawrse Lumber Co., 245 F. Supp. 707 (D. Ore. 1965); Sparks v. Republic Nat'l. Life Ins. Co., 132 Ariz. 529, 647 P.2d 1127 (1982); Mission Ins. Co. v. Nethers, 119 Ariz. 405, 581 P.2d 250 (1978); Ranger Ins. Co. v. Phillips, 25 Ariz. App. 426, 544 P.2d 250 (1976); Lindus v. Northern Ins. Co. of N.Y., 103 Ariz. 160, 438 P.2d 311 (1968); Ins. Co. of N. Am. v. Maurer, 505 S.W.2d 931 (Tex. Civ. App. 1974); Thompson v. Ezzell, 379 P.2d 983 (Wash. 1963).

122. *See generally Chung,* 388 F. Supp. at 147; *Puckett,* 678 S.W.2d at 938.

123. Rawlings v. Apodaca, 151 Ariz. 149, 726 P.2d 565 (1986).

124. *See, e.g., Bayers,* 510 F. Supp. 1204; *Griffith,* 506 F. Supp. 1332; *Byerly Aviation,* 456 F. Supp. 967; *Chung,* 388 F. Supp. 142; California State Life Ins. Co. v. Fuqua, 40 Ariz. 148, 10 P.2d 958 (1932); Jordan v. Logia Suprema, 23 Ariz. 584, 206 P. 162 (1922); Central Nat'l Life Ins. Co. v. Peterson, 23 Ariz. App. 4, 529 P.2d 1213 (1975); *Puckett,* 678 S.W.2d 936; *Florida Power & Light,* 433 So. 2d 536; *Pickett,* 404 So. 2d 1152; South Carolina Ins. Guar. Ass'n. v. Broach, 353 S.E.2d 450 (S.C. 1987).

vanced, such as avoidance of forfeitures due to a technical breach,[125] promoting the purpose of the contract,[126] and protection of innocent third parties who have suffered injury.[127] Courts following the minority position seem more likely to look at statutory authority.[128] Several of these courts have also dabbled in the distinctions between a warranty, a representation, and a condition.[129]

The origin of this minority view is rooted in older cases dealing with the effect of illegal acts on life insurance policies. It was determined as early as 1932 that an illegal act, prohibited by the policy, would not be sufficient cause for the insurer to avoid coverage unless the illegal act was the proximate or immediate cause of death.[130] A remote or indirect cause was not enough.[131]

One court has relied on a contribute-to-the-risk statute in order to apply contribute-to-the-loss analysis.[132] The Arizona Court of Appeals allowed coverage for an insured who misrepresented a back condition and a heart condition in an application for health and accident insurance.[133] The court acknowledged that the applicable statute[134] only required the breach to be material to the risk assumed in order to avoid coverage. However, the court added the additional hurdle that the particular risk or hazard must be the one which actually caused the loss.[135] Similar reasoning and requirements have been applied in aviation cases.

Case law in Iowa, for example, requires a causal connection between the breach of a policy provision and the loss sustained.[136] The authority for this rule lies in the contribute-to-the-loss statute adopted by the Iowa legislature.[137] This statute has been found to apply to all insurance provisions, including warranties and conditions, or exclusions.[138] The Iowa Appeals Court held that statutory authority and, possibly more importantly, public policy considerations, would not allow forfeiture of the policy when the insured failed to have valid airworthiness and medical certificates in violation

125. *Puckett*, 678 S.W.2d at 938.

126. *Broach*, 353 S.E.2d at 451.

127. St. Paul Fire & Marine Ins. Co. v. Asbury, 149 Ariz. 565, 567, 720 P.2d 540, 542 (Ct. App. 1986).

128. *See, e.g.*, *Central Nat'l Life*, 23 Ariz. App. 4, 529 P.2d 1213; *Florida Power & Light*, 433 So.2d 536; *Global Aviation*, 368 N.W.2d 209. *See also infra* notes 132-156 and accompanying text.

129. *See generally Byerly Aviation*, 456 F. Supp. 967; *Chung*, 388 F. Supp. 142; *Collins*, 269 S.C. 282, 237 S.E.2d 358; *Puckett*, 678 S.W.2d 936.

130. *Fuqua*, 40 Ariz. at 156, 10 P.2d at 961, relying on dicta in *Logia Suprema*, 23 Ariz. at 589, 206 P. at 163-64.

131. *Id.*

132. *Central Nat'l Life*, 23 Ariz. App. 4, 529 P.2d 1213. *See also Pickett*, 404 So.2d 1152.

133. *Central Nat'l Life*, 23 Ariz. App. at 6, 529 P.2d at 1215.

134. ARIZ. REV. STAT. ANN. § 20-1109 (1956).

135. *Central Nat'l Life*, 23 Ariz. App. at 7, 529 P.2d at 1216.

136. *Global Aviation*, 368 N.W.2d 209.

137. IOWA CODE ANN. § 515.101 (1988). It states

> [a]ny 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 a provision or the violation thereof did not contribute to the loss.

Id.

138. *Global Aviation*, 368 N.W.2d at 211.

of policy exclusions when these violations were not the cause of the loss.[139]

A significant number of courts follow the minority view despite the existence of contribute-to-the-risk statutes in their jurisdictions.[140] These courts recognize the statutes in many insurance cases, but do not recognize them in aviation insurance cases. In *Avemco Insurance Company v. Chung,* [141] for example, the pilot of a small private plane violated the terms of his insurance policy by allowing his medical certificate to expire. The federal district court in Hawaii found the pertinent provision[142] to be a condition subsequent and, therefore, was subject to a causal nexus requirement, following the "modern trend"[143] of authority which applies contribute-to-the-loss analysis. The court justified its decision on public policy considerations requiring that the insured not be deprived of the very protection purchased and on the "reasonable expectations doctrine."[144]

In *American States Insurance Co. v. Byerly Aviation, Inc.,*[145] Illinois law was applied to a clause which provided that coverage would only be afforded while specified pilots operated the aircraft. This clause was held by the federal district court to be a condition precedent. The determination that the clause was a condition precedent led the court to hold that a causal connection was required before forfeiture of coverage would be allowed.[146] The court viewed this holding as support of the well-established principle that insurance policies will be construed against the insurer.[147] It further felt that the purpose of the exclusion was to protect the insurers from liability for loss caused by pilot error due to negligence of an unskilled pilot.[148] The purpose of the exclusion was not abrogated by the holding because pilot error or negligence did not cause the loss. Furthermore, to hold otherwise would visit a windfall on the insurance company by allowing them to avoid coverage for an event which they espoused to cover and for which they accepted payment of premiums.[149] Although the court mentioned contribute-to-the-risk considerations, it did not apply such an analysis and ignored the fact that Illinois has a contribute-to-the-risk statute.[150]

A federal district court in Montana, in *Bayers v. Omni Aviation Manag-*

139. *Id.* at 212.

140. *See infra* notes 141-156 and accompanying text.

141. 388 F. Supp. 142 (D. Haw. 1975).

142. The "exclusions" portion of the policy stated that the policy does not apply, "(f) Under Coverages A, B and C to any aircraft, while in flight, (1) not bearing a valid 'Standard' Airworthiness Category Certificate . . . or (2) operated by a Student Pilot carrying passengers." *Chung,* 388 F. Supp. at 145.

143. *Chung,* 388 F. Supp. at 151.

144. The reasonable expectations doctrine allows courts to rewrite insurance contracts in favor of the insured. It operates in spite of unambiguous language and provides coverage for what a reasonable insured would expect to be covered by the policy, even if that coverage is specifically denied by the terms of the policy. It arises most frequently in response to boilerplate provisions. *See generally* Darner Motor Sales v. Universal Underwriters Ins. Co., 140 Ariz. 383, 682 P.2d 388 (1984).

145. 456 F. Supp. 967 (S.D. Ill. 1978).

146. *Id.*

147. *Id.* at 970.

148. *Id.*

149. *Id.*

150. ILL. REV. STAT. ch. 73, § 766 (1965).

ers, Inc.,[151] also ignored a contribute-to-the-risk statute when it disallowed forfeiture for failure of the insured to maintain a valid medical certificate, because that breach in no way contributed to the loss. The court labeled the clause an exclusion.[152] Interestingly, the clause in question was a "while" clause.[153] This wording has frequently been cited to find that coverage has been suspended and that any causal connection is therefore immaterial.[154] The court felt that requiring a causal nexus here promoted public policy considerations of fairness and did not negate the purpose of the clause.[155] Had the court applied the statute, coverage probably would have been forfeited.[156]

In a jurisdiction with a statute which is couched in terms of both contribute-to-the-risk and contribute-to-the-loss language, a court could do almost anything, making the outcome impossible to predict. One court used public policy considerations to apply contribute-to-the-loss analysis. In *Puckett v. U.S. Fire Insurance Co.*,[157] the Texas Supreme Court found that even though the contract itself was not ambiguous and therefore did not require a causal connection, public policy did. The court did not rely on the Texas statute.[158] *Puckett* does, however, point out the inconsistencies inherent in the dual approach. A court in the same jurisdiction decided *Schepps Grocer*.[159] Although the *Puckett* court disapproved *Schepps Grocer*,[160] it didn't overrule it.

It can be argued that contribute-to-the-loss analysis is simply a narrow reading of contribute-to-the-risk analysis. If an occurrence contributes to the loss, it also contributes to the risk. However, the converse does not necessarily follow. An occurrence which contributes to the risk need not contribute to the loss sustained. Apparently, under the hybrid statutes, two courts in the same jurisdiction can come to completely different conclusions and both will be good law. That seems to increase the danger of forum shopping.

The Texas court also made the interesting statement that a misrepresentation would render the policy void from its inception, whereas here coverage could only be suspended.[161] Note that this construction would not allow most breach of warranty situations, such as a medical certificate which expired during the term of the policy, to be treated as a representation, as

151. 510 F. Supp. 1204 (D. Mont. 1981).

152. *Id.* at 1205.

153. *See supra* notes 36-37 and accompanying text.

154. *See generally* Hollywood Flying Service, Inc. v. Compass Ins. Co., 597 F.2d 507 (5th Cir. 1979); *Roberts*, 195 F. Supp. at 171; *Macalco*, 550 S.W.2d at 892.

155. *Bayers*, 510 F. Supp. at 1207.

156. Obviously a medical certificate is a confirmation that the pilot is in good health. It is undisputed that good health is material to the risk assumed. Keep in mind that although a clause requiring a valid medical certificate pertains to the risk assumed, the breach of the clause could be merely technical if the breaching pilot is in fact in good health.

157. 678 S.W.2d 936 (Tex. 1984).

158. TEX. INS. CODE ANN. § 21.16 (1981).

159. For a discussion of *Schepps Grocer*, *see supra* notes 92-101 and accompanying text.

160. *Puckett*, 678 S.W.2d at 938.

161. *Id.* at 939. The court appears to be giving a misrepresentation the strict compliance required of a warranty or possibly even a coverage provision.

required by most state statutes, because that breach could not have related back to the inception of the policy.

A PROPOSAL TO ENSURE UNIFORMITY AND PREDICTABILITY FOR THE INSURER, INSURED, AND THE COURTS IN AVIATION INSURANCE CASES

The present confusion confronting the insured and the insurer in aviation insurance results from Lord Mansfield's bold change of the effect of the breach of warranties and representations.[162] The harsh consequence of forfeiture visited upon the insured who breached a warranty provision has led to a struggle between the insured and the insurer to define policy provisions in the manner most advantageous to the particular party or situation.[163] As this Note shows, the result has been chaotic. The label for the same provision may be different from jurisdiction to jurisdiction, and the label given a provision often determines the outcome of the case.

The legislative response[164] has been very ineffective. To bypass statutes, courts have simply defined a provision as a warranty, representation, coverage provision, condition precedent, condition subsequent or an exclusion, using whichever term is absent from an otherwise applicable statute.[165] Some courts simply ignore the statutes, while others fail to even mention their existence.[166] Therefore, legislative attempts to give aviation insurance clauses a predictable outcome have failed.

Since courts have rearranged common meanings of policy provisions either to avoid harsh forfeitures, or to consider the intent of the parties to the contract, the courts should clean up the mess which began in the common law. A contribute-to-the-risk analysis pays tribute to long standing principles of contract law by allowing the parties to an insurance contract to include and exclude items of coverage as they see fit. It also conforms to the plain terms of the agreement. It is unfortunate, however, that the majority of states have adopted the contribute-to-the-risk approach since this analysis fails to recognize the restrictions that courts have found necessary to impose on these contract principles in the area of insurance law. Moreover, contribute-to-the-risk analysis allows the negative result of forfeiture of coverage for a merely technical breach of a policy provision.

This Note urges courts to adopt a contribute-to-the-loss analysis when determining the availability of insurance coverage under an aviation insurance policy. This will avoid unjust forfeiture of coverage for purely technical breaches of policy provisions and for breaches which in no way caused the loss sustained. A contribute-to-the-loss approach overcomes the problems inherent in contribute-to-the-risk analysis and promotes the purpose of the agreement, which is to afford coverage for aircraft and passengers. The insured will not unexpectedly find that he or she paid premiums

162. *See supra* notes 17-26 and accompanying text.
163. *See supra* notes 77-161 and accompanying text.
164. *See supra* notes 62-72 and accompanying text.
165. *See supra* notes 73-161 and accompanying text.
166. *See supra* notes 73-161 and accompanying text.

for an invalid insurance policy. The insurer will not be unduly burdened since it will not be forced to pay on policies which were breached in such a way as to cause the loss.

The adoption of the contribute-to-the-loss approach through the common law would further eliminate the necessity of strict definitional analysis. It will not matter if the provision is a warranty, representation, coverage provision, condition subsequent, condition precedent or exclusion. The law will only concern itself with whether a breach of a provision contributed to the loss.

It would seem that this approach would allow an insured to breach something as basic as a coverage provision and still have coverage. Recall an example given earlier,[167] where a laundry constructed of wood is insured under a fire insurance policy requiring that the laundry be made of a nonflammable material. It would be difficult under a contribute-to-the-loss analysis, if not conceptually impossible, to find that this breach did not contribute to a loss by fire. The breach may not have caused the fire, but it would certainly have contributed to the loss.

CONCLUSION

The confusion surrounding what is a warranty, a representation, a condition precedent, a condition subsequent, an exclusion or a coverage provision has haunted courts since the time of Lord Mansfield. Not only do the various authorities disagree with each other about the definitions to be used, they also disagree about the treatment to be afforded each definition. The problem has manifested itself especially in the area of aviation insurance law. An insurance policy in Nebraska, for example, affords very different coverage than the same policy in Illinois would provide, depending upon the definition the courts apply to the same or similar clauses. In fact, this type of disparity has occurred within the same jurisdiction.[168]

Legislative response has been widespread but ineffective. Most state statutes mandate a contribute-to-the-risk analysis which does not require a causal connection between the breach of a policy provision and the actual loss sustained. This type of analysis creates problems since it will allow forfeiture of insurance coverage for a breach which has absolutely no bearing on the loss sustained. These statutes do not even require that the possibility of forfeiture be explicitly provided for in the contract. Arguably, this could result in the insured paying premiums for an extended period of time for a policy which is void for breach of a clause that the insured does not fully understand.

A contribute-to-the-loss analysis, on the other hand, requires that the act which constitutes a breach of a provision be the direct or proximate cause of the loss. Not only does this approach protect against forfeitures for technical breaches, it also encourages insurers to spell out in clear and unambiguous terms any condition which would avoid the policy. This approach further promotes the reasonable expectations of the insureds and is in

167. *See supra* notes 55-56 and accompanying text.
168. *Compare Schepps Grocer*, 545 S.W.2d at 13; *with Puckett*, 678 S.W.2d at 936.

agreement with standard rules of construction for insurance contracts.[169]

A contribute-to-the-loss analysis should be adopted by courts through the common law. As this Note shows, courts have for the most part ignored the statutes which already exist. Moreover, it was the common law, through Lord Mansfield, which put the law into this disorderly state. The contribute-to-the-loss approach will ensure uniformity and predictability in this unsettled area of aviation insurance law by providing the insurer, the insured, and the legal community with a standard which is fair and easy to apply in a consistent manner from jurisdiction to jurisdiction.

169. *See supra* note 144.