1978

Donald A. Dyson et al v. Aviation Office of America, Inc. : Brief of Appellants

Utah Supreme Court

Raymond A. Hintze; Attorneys for Respondents;
R. Clark Arnold; Attorneys for Respondent;

IN THE SUPREME COURT

OF THE STATE OF UTAH

DONALD A. DYSON, STEPHEN F. KESLER, W.T, BISSELL, RONALD McCLAIN, DONALD L. OBORN, and ELMO WALKER,

Plaintiffs, (Donald A. Dyson, Appellant)

vs.

AVIATION OFFICE OF AMERICA, INCORPORATED, a Texas corporation, and RANGER INSURANCE COMPANY, a New York corporation and KENNETH R. SHANNON,

Defendants/Respondents.

Case No. 15661

AVIATION OFFICE OF AMERICA, INCORPORATED, a Texas corporation, and RANGER INSURANCE COMPANY, a New York corporation,

Third-Party Plaintiffs and Counterclaim Defendants/ Respondents,

vs.

DONALD A. DYSON, LeROY F. DYSON and L. F. DYSON & ASSOCIATES, INC., a Nevada corporation,

Third-Party Defendants and Counterclaimants/Appellants.

BRIEF OF APPELLANTS DONALD A. DYSON AND L. F. DYSON & ASSOCIATES, INC.

STEPHEN F. KESLER, W. T. BISSELL, RONALD McCLAIN, DONALD L. OBORN, and ELMO WALKER,

Plaintiffs/Respondents,

vs.

DONALD A. DYSON, LeROY F. DYSON and L. F. DYSON & ASSOCIATES, INC., a Nevada corporation,

Defendants/Appellants.

APPEAL FROM JUDGMENT OF THE

THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

HONORABLE BRYANT H. CROFT, JUDGE

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NATURE OF CASE

This is an action to recover a money judgment for the value f an aircraft damaged in an emergency landing near the Salt Lake ity Airport. The plaintiffs, Donald A. Dyson, Stephen F. Kesler, . T. Bissell, Ronald McClain, Donald L. Oborn, Elmo Walker and ary Ferguson (Owners) sued the defendant pilot, Kenneth R. Shannon Shannon) on the grounds of negligence and defendants Aviation ffice of America, Incorporated (AOA) the general insurance agency nd Ranger Insurance Company (Ranger), the hull liability carrier, n the grounds that AOA and Ranger failed to acknowledge insurance overage placed by the Dysons, their ostensible agent. AOA and anger then filed a Third-Party Complaint against Dysons alleging hat if AOA and Ranger were liable to the Owners, Dysons were iable to them for negligence and breach of duty as local agents r AOA and Ranger.

The Owners also filed an action directly against the Dysons leging that the Dysons agreed to secure coverage under the policy question while the aircraft was being piloted by Shannon, but iled to do so. The Dysons then filed a Counterclaim against AOA nd Ranger in the latter's third-party action alleging that if ysons were held liable to the Owners, AOA and Ranger were liable them for not endorsing Shannon as a covered pilot on the policy question as Dysons had requested.

DISPOSITION IN LOWER COURT

The trial court entered judgment in favor of AOA and Ranger Owners' Complaint but entered judgment in favor of Owners and

against Dysons on Owners' Cross-Claim and Third-Party Complaint against Dysons. The trial court further entered judgment in favor of AOA and Ranger and against Dysons on Dysons' Counterclaim against AOA and Ranger.

Prior to trial, the trial court on motion of the other parti but without hearing, struck Dysons' demand for jury trial as being untimely.

RELIEF SOUGHT ON APPEAL

Plaintiff Donald A. Dyson, as one of the Owners, seeks rever of the trial court's judgment in favor of AOA and Ranger on plaintiffs' Complaint; and Donald A. Dyson and L. F. Dyson & Associates, as third-party defendants and counterclaimants, seek reversal of the trial court's judgment against them in favor of AOA and Ranger on Dysons' Counterclaim and pray that the trial court be directed to enter judgment in favor of Dysons against AOA and Ranger in the sum of any judgment entered in favor of the plaintiffs against them.

Alternatively, Dysons seek remand of the case to the trial court for trial by jury pursuant to Dysons' demand therefor.

STATEMENT OF FACTS

On or about March 18, 1975, the five original Owners, plaintiffs herein, purchased a 1968 Cessna aircraft which was financed by Walker Bank & Trust Company (Ex. 36). On March 21, 1975, Donald A. Dyson, one of the original Owners who was also an insurance agent

bmitted an Application For Aircraft Insurance to AOA (Ex. 4). OA is an underwriting group which specializes in writing aviation nsurance for approximately 65 insurance companies that offer avia- ion coverages (R. 568). The application indicated that the insured as to be Donald A. Dyson and that Donald A. Dyson and Jim Breeze, FAA instructor, were to be the named pilots, with "Additional ilots to be added as they qualify" (Ex. 4). AOA placed the coverage ith Ranger and policy No. AC A1-198882 dated April 1, 1975 was ssued effective as of March 26, 1975 for a one-year period (Ex. 3) r a total premium of $748.00 (Ex. 5).

All of the original Owners except McClain were present at e time financing was arranged at Walker Bank and understood that yson would secure insurance on the aircraft in the amount of their vestment, $27,000.00 (R. 356, 362-363, 383).

At the time of the application in question, AOA operated rough a local general agency at Cody, Wyoming known as Aviation neral Agency (AGA) to make their market more attractive to insur- e agencies in this area (R. 573). Mrs. Cartwright, the underwriter o handled the policy in question at the Dyson agency submitted e application for coverage on the aircraft in question to AOA rough AGA and dealt with AGA for some time thereafter on matters lating to the policy (R. 479). Prior to the accident in question, e started dealing directly with AOA as she had done prior to the tablishment of AGA.

The Dyson agency had been writing aviation coverage through AOA with Ranger since approximately February 14, 1968 when an Agency Agreement was executed between AOA/Ranger and Dyson (Ex. 2). This agreement provides, inter alia, that:

> Nothing herein shall be construed as authorizing the Agent to commit or bind the Company to any liability without prior approval of Aviation Office of America, Inc.

The agency agreement was not modified in writing prior to the date of the loss in question (R. 385). Donald Dyson contended that by practice and usage, this limitation was modified about October 1971 (R. 507-511) when AOA/Ranger began to put into effect their memo requests, effective as of the date of the request.

The office procedure followed by AOA in handling a mailed-in application to add a pilot to an existing policy is that the application is received and opened in the mail room and then distributed to the underwriting department (R. 570); an underwriter will then review it and initial it for approval and route it to the policy writing department (R. 680) where the endorsement is typed in final form. Since the underwriter does not note a date when he initials the application as approved, the typist, in the absence of other instruction, will type the endorsement effective as of the date of the application requesting it. (R. 680).

Mr. Tom Dougherty, a Senior Vice-President at AOA, is in charge of the underwriting department (R. 568). Prior to trial, he reviewed AOA's filed regarding the Dyson agency (R. 638). He

cknowledged that it was the practice of the AOA underwriting epartment when writing an endorsement to add a pilot to an xisting policy to make the endorsement effective as of the date f the application requesting the endorsement, if no other date as requested in the application and if the application contained ll information necessary to rate the risk (R. 612). In every nstance this would result in back-dating the effective date of he endorsement because the endorsement would always be typed in OA's office at a date later than the application requesting it as typed in the agent's office (R. 612). Depending on the amount f activity going on with respect to a particular policy, such ack-dating may amount to as much as a couple of months (R. 615).

Although Mr. Dougherty was reluctant to admit that there re no exceptions to the aforementioned practice, after review of A files regarding transactions with the Dyson agency, he was able to cite any instances to the contrary (R. 611, 672-675).

In those instances where the initial application did not ontain all necessary information to rate the risk, the endorsement uld be back-dated from the issue date in AOA's office to the date en the additional information was sent to AOA from the agent's ffice (R. 670). The only instance which Mr. Dougherty could find a review of AOA files regarding the Dyson agency where AOA had not ccepted a risk as requested by Dyson was a situation where coverage d been requested for an insured in the business of repairing and uilding damaged aircraft who wanted coverage while transporting h aircraft in their damaged condition (R. 654).

The history of activity on the policy in question in adding pilots after the initial writing is substantially as follows:

Re: STEPHEN KESLER. Mrs. Mary Cartwright of the Dyson agency requested his addition by telephone call and follow-up memo of July 21, 1975 to Dave Brannon at AGA (Ex. 8). Mr. Brannon by telephone call and memo of July 21, 1975 to underwriter Tom Dougherty at AOA requested coverage effective July 22, 1975 (Ex. 7). On August 20, 1975, AOA sent a memo to Dysons requesting certain pilot experience information (Ex. 9). The requested information was sent to AOA, date uncertain, but prior to September 17, 1975 when AOA advised Dysons by memo (Ex. 10) that an endorsement adding Kesler was being typed that date. The endorsement was issued September 17, 1975, effective as of July 22, 1975 (Ex. 11).

Re: TIM BISSELL. Mrs. Cartwright requested his addition by memo to Mr. Brannon at AGA on August 26, 1975 (Ex. 6). On September 17, 1975, AOA sent a memo (Ex. 10) requesting advice as to Bissell's first name [although it was noted on Mrs. Cartwright's memo to AGA]. On September 24, 1975, Sara Broughton, assistant underwriter at AOA (R. 575), penned a reply note requesting pilot experience forms (see Exhibit 12) to Mrs. Cartwright's memo of August 26, 1975, which she had sent to AGA, who apparently forwarded the same to AOA. By memo of November 13, 1975 (Ex. 26), the pilot experience form for Bissell (Ex. 13) was sent to AOA by Mrs. Cartwright. AOA issued the endorsement adding Bissell on December 2, 1975, effective as of Novebmer 13, 1975 (Ex. 14).

Re: GARY FERGUSON. On December 4, 1975, Mrs. Cartwright ent a memo with pilot experience form attached (Ex. 15) directly o Mr. Dougherty at AOA. At that time, Mrs. Cartwright had been rnished a supply of Pilot Experience Forms (R. 439) [per her equest to AOA of November 5, 1975 (Ex. 20)]. Without further ommunication, AOA issued the endorsement (Ex. 16) adding Ferguson December 10, 1975, effective as of December 4, 1975.

Re: KENNETH SHANNON. On December 8, 1975, Mrs. Cartwright ent a memo with pilot experience form attached (Ex. 17) directly Tom Dougherty at AOA. The records of Dyson reflect no response this request prior to February 1, 1976 when the aircraft crashed ile being operated by Kenneth Shannon (R. 441). Mrs. Cartwright calls two telephone conversations with Mr. Dougherty at AOA garding other policies [Reynolds and Rich] prior to the accident en she mentioned that they were still waiting on Shannon's endorse- nt (R. 442). In both instances, she recalls Mr. Dougherty saying would check on it and get it out. No mention was made of Shannon being acceptable as a pilot (R. 442). Mr. Dougherty has no collection of the telephone calls (R. 598). His files do reflect lephone calls with respect to these individuals. Both Mrs. Cartwright Mr. Dougherty agree that there was a telephone call regarding e Rich policy on December 16, 1975 (R. 635), but Mr. Dougherty ntends that the telephone call regarding Reynolds occurred after e accident in question (R. 635). Mr. Dougherty's telephone notes these calls in the particular files do not reflect an inquiry

regarding the Shannon endorsement and he has no independent recollection whether or not the Shannon request was mentioned (R. 599).

Upon being advised of the accident, Mrs. Cartwright reported the same to AOA by telephone WATTS line (R. 422) and confirmed with a First Notice of Claim dated February 2, 1976 (Ex. 18).

On February 15, 1976, Mrs. Cartwright sent a follow-up memo (Ex. 19) regarding the memo of December 8, 1976 requesting the endorsement of Shannon and mentioned that Dyson had sold his interest in the aircraft to Shannon.

On March 1, 1976 Mr. Dougherty had a telephone conversation with Mr. Tom Lehman, an AOA claims examiner (R. 603). Mr. Dougherty made notes of the conversation (Ex. 31), which he interpreted in the record as follows:

> Has heard from agent. Been selling interest in aircraft, but did not add as insureds at time of loss. Insured had no insurable interest. To deny loss. Answer memo, did not add pilot because no reply to Sara B. 12/15 memo.

On that same date, March 1, 1976, Mr. Dougherty replied to Mrs. Cartwright's memo of February 15, 1976 as follows:

> 1. Please note that we quoted the amount of premium required to add pilot, but did not receive a response.
>
> 2. It is not customary to assign policies, and you would need approval of the company in advance.
>
> Because of open claim, have passed this information to claims, ref. #17046. (Ex. 30).

On March 3, 1976, Mr. Dougherty received a telephone call from Mary Cartwright responding to Mr. Dougherty's memo of March 1.

976. Mr. Dougherty's notes (Ex. 32) indicate that Mrs. Cartwright advised him that she had not received Sara Broughton's memo of December 15, 1975, that Mr. Dyson had not completed transfer of his interest in the plane to Shannon as yet and that she wanted to know the status of the endorsement and whether or not the claim was affected. The note then indicates he would check with Tom Lehman and the bottom portion of the note reads as follows:

> Tom Lehman digging in with attorney-------To be denied. Will have written insured in a week--do not commit. (R. 607).

The December 15, 1975 memo of Sara Broughton referred to above, which Mrs. Cartwright stated she had not received and which could not be found in Dysons' policy file, was appended to Mrs. Cartwright's memo of December 8, 1975 requesting the endorsement of Shannon. The message portion of Mrs. Cartwright's memo reads as follows:

> We enclose a pilot experience form completed by Kenneth Richard Shannon who is to be included as a pilot under the above captioned policy. We would appreciate your endorsement to this effect. Thanks.
>
> (Signed Mary)

The hand written memo of Sara Broughton as it appears on AOA's file copy reads as follows:

> This risk has reached a flying club exposure. To add this pilot it will be a fully earned premium of $100.00. Please advise if you want him added.
>
> (Signed Sara Broughton)

Sara Broughton, by deposition, testfied she is an underwriter at AOA (R. 732) and that she wrote the bottom portion of what is now Exhibit 34 and "mailed it back to the agent" (R. 739-740). Mail generated by the underwriting department is turned over to the mail room people. According to Mr. Dougherty, Sara Broughton would not be an individual who would actually put mail in a U.S. Mail receptacle (R. 609).

The case was originally set for trial on September 19, 1977, and on September 14 counsel for appellants served by delivery a demand for jury trial on the other parties and filed the same on September 15 (R. 201-202). On September 15 and 16, counsel for the other parties filed and served variously denominated documents, objecting to appellant's demand for jury trial. On September 16 the Court ruled on said objections, without hearing, and advised counsel that appellant demand for jury trial was denied.

ARGUMENT

Appellants Dyson recognize that on appeal any disputed facts upon which conflicting evidence was received must be construed in favor of the trial court's findings and judgment. However, appellants contend that the trial court erred in assessing the legal effect of the testimony of AOA's witnesses on cross-examination, and that pursuant to such undisputed testimony, appellants are entitled to judgment over against respondents AOA/Ranger in the manner of plaintiffs' judgment against Dysons.

POINT I

THE PRACTICE OF AN INSURANCE COMPANY IN BACK-DATING ENDORSEMENTS FOR COVERAGE TO THE DATE OF AN AGENT'S REQUEST AMOUNTS TO EXTENDING BINDING AUTHORITY TO THE AGENT.

As an abstract principle, respondents do not seriously ntend the proposition that if an insurance company adopts the ractice of back-dating endorsements for additional insurance coverage the dates that the soliciting agent requested the coverages, that d e company has in fact impliedly extended binding authority to the gent. Rather, respondents deny that they adopted such a practice.

The rational for the foregoing proposition is discussed in tail in Lewis v. Travelers Insurance Company, 239 A.2d 4 (New Jersey d 968). In that case, the agent admittedly gave an oral binder to nt e insured for fire coverage of certain premises on August 27. e company contended that it had rejected the application on ptember 4. The insured suffered a fire loss on September 5. e company's letter of rejection reached the agent on September 6. e company declined coverage and denied that the agent had binding thority. The insured sued both the agent and the company. gs

Although there was a substantial dispute as to whether or the company [Travelers] had ever expressly authorized the agent bind it in the area of inland marine coverages, the Supreme Court New Jersey specified in its opinion, "We accept the premise that avelers never in so many words authorized the agents to bind a

risk in that category." The Court then explained that the case turns upon the admitted fact that the company had accepted some 300 inland marine risks submitted by the agents over a period of years and in each case had back-dated the policy as of the date requested on the application for whatever coverage was sought as of that time.

Travelers took the position that back-dating is a uniform practice in the industry and does not bespeak authority in the agent to issue a binder, but means only that if Travelers should decide to accept the application, coverage will attach retroactively to the date requested in the application. With respect to such explanation, the Court stated:

> Under that view, the applicant would hold the interim risk if Travelers should reject the application after a loss, while Travelers, if it issued the policy, would obtain a full premium for the period during which it held the option to accept or reject the application even though at the time of acceptance Travelers knew there had been no loss and of course no risk. . . .
>
> . . . The unfairness of an undisclosed option in the company is evident. [Authority cited]. Equally obvious is the room for overreaching either by an agent eager to get the business or by a company which learns of a loss before acting on the application.

The Court then held with respect to the insured's claim against Travelers as follows:

> For these reasons the cases hold that a practice of back-dating the policy to the date requested in the application spells out authority in the agent to give a binder for interim coverage pending action upon the application [Authorities cited].

In that case, Travelers had not appealed from the trial court's judgment in favor of the insured against it, but only of the trial court's refusal to permit indemnification over against the agent. With respect to the company v. agent dispute, the court noted:

> The cases just cited deal with a controversy between the applicant and the carrier. As we noted earlier, Travelers did not appeal from the judgment the applicant obtained against it. The question is whether those cases are also meaningful when the carrier turns to the agent for indemnification. We think they are, for although it was unnecessary in those cases to decide whether the carrier was liable because the agent's authority was merely "apparent" rather than implied in fact and therefore actual, nonetheless, ultimate basis for those cases would equally support a finding of authority as between the agent and the principal. We say this because the theme was not that the fact of agency itself necessarily excluded apparent authority to bind the risk, but rather that it was the company's practice of back-dating which imported the existence of authority to bind. If such conduct on the part of the principal could reasonable lead the agent too to believe he has authority to bind the risk, then the principal should be equally chargeable with the implication of its conduct in a controversy with the agent.
>
> * * *
>
> In short, an agent is in fact authorized to do "what" it is reasonable for him to infer that the principal desires him to do in light of the principal's manifestations and the facts as he knows or should know them at the time he acts," Restatement (Second) of Agency (1958), §33, p. 115; and with exceptions not here relevant, "authority to do an act can be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causing the agent to believe that the principal desires him so to act on the principal's account," Restatement (Second) of Agency (1958), §26, p. 100. And if the authorization is ambiguous, the agent has authority to act in accordance with what he reasonably believes to be the wish of the principal even though it is contrary to the principal's actual intention. [emphasis added]

The Court then discussed the practical business purposes for the back-dating practice between company and agent as follows:

> Curran [Agent] testified that he was lead by the practice of back-dating to believe that he was authorized to bind the risk while Travelers considered the application. We see no reason to doubt the truthfulness of that testimony or the reasonableness of that belief. As we have already said, it would be unreasonable to expect an applicant for insurance to give any one company an option, indefinite as to time, to decide whether to sell coverage retroactively with the applicant holding an interim risk. The practice of back-dating the policy which would lead the applicant to believe the agent is authorized to bind the risk, if no more were shown, lead an agent to the same estimate of his authority. That conclusion is so strongly required that an insurer could escape it only through the plainest instructions to the agent to tell an applicant for immediate coverage in so many words (1) that the interim loss will fall upon the applicant if the application is rejected by the company; (2) the period of time within which the company will act on the application; (3) the objective standard upon which the company will weight the application, or the absence of such a standard; and (4) that a premium will be charged at the full rate for the period of retroactive coverage if the policy should issue. We doubt that a company which so instructed its agents would remain competitive. We do not suggest that such instructions would bar the applicant if the agent failed to abide by them. Rather the point is that a principal, who as in this case, wants to shift the interim insurance risk to the agent because he failed to inform the applicant would have to alert the agent to that consequence by such explicit instructions. (Emphasis added).

The Court then went on to hold with respect to the company v. agent dispute:

> We prefer to hold that a practice of back-dating policies to the date requested in the application implies, as between principal and agent, authority in the agent to bind a risk pending the principal's decision on the application.

Lastly, with respect to Travelers contention, as AOA's in the instant case, that the written agency agreement between the company and agent barred a grant of authority other than by writing, the Court stated:

> Finally Travelers contends that the written agency agreement of 1954 barred a grant of authority other than by a writing. It refers to the provision that authority to bind as to a marine line "may be extended specifically by an authorized representative of the Company in writing." The short answer is that, if the contract be read as Travelers would read it, nonetheless the parties did not thereby disable themselves from amending, supplementing or replacing a contract by a later agreement made orally or by conduct objectively manifesting a new understanding. [Authority cited]. (Emphasis added).

The foregoing case is in accord with the law of several other jurisdictions regarding the practice of back-dating as stated in Couch on Insurance 2d, Section 26:198 which reads as follows:

> There is authority that an agent, empowered to bind the company by contracts of insurance, has authority to bind it by a preliminary or temporary contract of insurance. Authority to enter into contracts of interim insurance may be implied from the custom of the insurer of dating policies as of the date of the application, for in such case the agent taking the application has implied or apparent authority to make a valid preliminary contract of insurance, effective from the making of the application until its acceptance or rejection, although the application provides that the company shall not be bound by any act done or statement made by any agent, not authorized by or contained in the application, and notwithstanding the application also recites that it is subject to the approval of the company; otherwise in the case of loss subsequent to the application and prior to its acceptance or rejection the insured would not be covered, whereas if loss had not occurred during such a period, he would, in case of acceptance of the risk, have had to pay a premium covering it. (Emphasis added).

However, Lewis v. Travelers Insurance Company, supra, is particularly significant in the instant dispute since it also deals with the question of indemnity between agent and company.

As the New Jersey Supreme Court pointed out in Lewis v. Travelers, supra, an insurance company could not remain competitive if it required its agents to give the type if instructions necessary to avoid the legal consequences of back-dating policies and endorsements. Mr. Dougherty, AOA's Senior Vice-President in charge of underwriting, acknowledged in his testimony that an insurance agent must be able to promptly meet the needs of his insurance clients and that if an insurance company did not allow its agents to supply that kind of service, the agents would be looking for other companies with which to write their insurance (R. 572-573). This is obviously the reason AOA/Ranger back-dates its endorsements as of the date of its agents' requests.

With respect to the question of whether or not the Dyson agency could have reasonably believed that AOA/Ranger wanted Dyson to represent to its insurance customers the capability of providing immediate coverage, Mr. Donald Dyson testified that since about October 1970 when AOA/Ranger commenced acting upon his memo requests in connection with the J. D. Air Service Account, that AOA/Ranger had always issued endorsements to an existing policy effective as of the date of request, if sufficient information was submitted to rate the risk (R. 507-518, 525-528). Similarly, Mrs. Mary Cartwright an underwriter in the Dyson agency, testified that to the best of

er memory, AOA/Ranger had always back-dated endorsements to the ate of her request if all necessary information to rate the risk as submitted with the application for the endorsement during the eriod she worked for the Dyson agency (R. 470). Mrs. Cartwright orked for the Dyson agency from March 1970 to April 1977 (R. 474-475).

Such course of conduct was certainly the case with respect o the policy in question. The addition of Stephen Kesler was first equested by Mrs. Cartwright in a telephone call to Mr. Brannon AGA who relayed the request by telephone call to Mr. Dougherty AOA, both of which were confirmed by memos. However, AOA requested ertain pilot information which was subsequently furnished a en the endorsement of Kesler was actually issued on September 17, 975, it was back-dated effective as of July 22, 1975 as initially equested (Ex. 11). With respect to the addition of Tim Bissell, e pilot experience form was forwarded, after request by AOA, by emo dated November 13, 1975 and the endorsement when typed on ecember 2, 1975, was back-dated effective November 13, 1975, the ate the information was forwarded by Dyson (Ex. 14). By the time the request to add Gary Ferguson, Mrs. Cartwright has secured a pply of the pilot experience forms and submitted one directly with e memo request to add Gary Ferguson on December 4, 1975. Without rther communication, AOA issued the endorsement adding Ferguson on ecember 10, 1975, back-dating it effective as of December 4, 1975 x. 16). With respect to Kenneth Shannon, the memo application th pilot experience form attached was sent by Mrs. Cartwright to

AOA on December 8, 1975 only two days before the Ferguson application was acted upon and back-dated by AOA. Considering that the Ferguson application would have been received back in the Dyson office shortly after December 10, 1975 showing an effective date as of the date of memo application of December 4, 1975, Mrs. Cartwright had every reason to believe that the Shannon application of December 8, 1975 would be acted upon in due course in the same manner.

Knowing of the contention of Dyson that AOA/Ranger had established a practice of back-dating requests for coverage effective as of the date of the request and of the contention that AOA had always accepted Dysons requests for coverage, AOA's Mr. Dougherty had reviewed his agency's files with respect to policies written through the Dyson agency and was able to offer in rebuttal to such contentions only the example of an application for insurance coverage which had been refused because the applicant who was in the business of repairing and selling damaged aircraft wanted to insure such aircraft while they were being flown in their damaged condition to his location for repairs (R. 654). Appellants contend that such example is clearly distinquishable from the situation at bar where the aircraft in question had already been accepted for coverage and the matter at issue was merely the adding of additional pilots to the policy as they qualified for coverage.

Also, the holding in Travelers that the expressed terms of the agency agreement between the company and agent could be modified by subsequent conduct is in accord with Utah law. As stated in PLC Landscape Construction v. Picadilly Fish-'n Chips, Inc., 28 Utah

350, 502 P.2d 562 (1972) this Court observed:

> . . .there is nothing so sacrosanct about having entered into one agreement that it will prevent the parties entering into any such change, modification, extension or addition to their agreement for doing business with each other that they may mutually agree. That is what appears to have happened here and such subsequent agreements are governed by the same rules as to proof and enforceability as the original agreement.

This is true, even if the original agreement provided by its terms that it could not be subsequently amended as stated in Davis v. Wyne and Day, Inc., 10 Utah 2d 53, 348 P.2d 337 (1960) and affirmed in Dillman v. Massey Ferguson, Inc., 13 Utah 2d 142, 369 P.2d 296 (1962):

> It is a well-established rule of law that parties to a written contract may modify, waive, or make new terms notwithstanding terms in the contract designed to hamper such freedom.

Appellants respectfully submit that all elements that controlled in Travelers are present in the instant case, except that in Travelers the course of conduct of back-dating policies alleged by the agent to confer binding authority upon him was proven by some 300 examples of back-dating, whereas in the instant case, the practice of back-dating endorsements was admitted by AOA's senior vice-president in charge of underwriting, as noted in the following point.

POINT II

AOA AND RANGER ARE CONCLUSIVELY BOUND BY THEIR ADMISSION OF BACK-DATING ENDORSEMENTS EFFECTIVE AS OF THE DATE OF THE AGENT'S REQUESTS FOR SUCH ENDORSEMENTS PRIOR TO THE LOSS IN QUESTION.

Since the commencement of this action, it has been Dyson's position that AOA/Ranger effectively granted the Dyson agency binding

authority with respect to modifying existing policies by a course of conduct of accepting Dyson's applications for endorsement and back-dating the endorsement effective as of the date of the Dyson memo requesting the modification. However, Dysons did not anticipate that AOA's witness, Tom Dougherty, Senior Vice-President in charge of underwriting, would actually admit on cross-examination that it was, without exception to the contrary [insofar as he was able to document], the practice of AOA to back-date endorsements to policies and all information necessary to rate the risk was submitted with the application. Some of Mr. Dougherty's testimony on this point was as follows:

> Q. Let me back up. What I am asking is, you know of no instance where the effective date of the endorsement making the change or adding, whatever was to be added, was not made effective as of the date of request by the agent if that request contained all of the information necessary by the underwriting department to rate the risk?
>
> A. I will agree. (R. 612).
>
> * * *
>
> Q. You heard Mr. Dyson's testimony on Tuesday, where he stated that to his knowledge that was the practice. That the effective date of the endorsement was always the date of the request when the request contained all of the information, did you not?
>
> A. I heard that.
>
> Q. And I suppose you went through your files insofar as you could over the evening recess to determine if he was wrong about that?
>
> A. Not as such, really to say - to agree, I would have to disagree until we went through. I don't want to agree to something like that on a carte blanche basis.

Q. I understand you can't say there is a possibility something is otherwise if you didn't look. I am saying, from whatever looking you did do and from whatever knowledge you presently have, you are not presently aware of any instances that it was different from what he said?

A. That is right, only what we have discussed.

The effect of such judicial admissions is as stated in 31A C.J.S., Evidence, Section 381:

> The cases abound with statements and holdings that a judicial admission is generally conclusive on the party by whom it was made or to whom it is attributable, if, as has been stated, such judicial admission is made in the case on trial, and if unequivocal, and unexplained or uncontradicted, unless the court, in the exercise of its discretion, expressly permits him to withdraw his admission and relieves him from its effect by reason of its having been made by inadvertance or under a mistake of fact.
>
> Such an admission made in the case on trial constitutes a waiver of proof generally dispensing with the production of evidence by the opposing party as to the fact admitted. However, it is held that such an admission is not conclusive on the court, and it has been said that judicial admissions may be disregarded in the interests of justice. (Emphasis added).

The Kansas Supreme Court has noted that a verdict cannot stand even if there is evidence to support it, if the party in whose favor it was rendered has made a judicial admission of facts which would not entitle him to the judgment. In Hallett v. Stone, 534 P.2d 232 (Kan.1975) that Court stated:

> This court has frequently recognized that admissions made by a party are the strongest kind of evidence. The proposition of law to be applied under these circumstances has been stated as follows: a verdict cannot be upset if there is any evidence in the record to support it, where such issue is clearly presented without complicating factors

> but such rule yields to the impact of admissions made by a party in his testimony while a witness in the case, and such admissions are binding and conclusive upon him if uncontradicted or unexplained, whether such admissions are elicited on direct examination or on cross-examination of the party. (Authority cited).

Similarly, the Oregon Supreme Court in Gaswint v. Case, 509 P.2d 19 (Ore.1973) in an action for wrongful discharge during the term of an employment contract, stated as follows:

> In this case, however, plaintiff admitted on cross-examination that only 50 percent of the estimated sum of $1,500, or $750, was expended in seeking other employment and this was binding upon him as a judicial admission. It follows that the trial court erred in its award to plaintiff of $1,115.37 as incidental damages to reimburse him for such expenses. It also follows that any such award to plaintiff may not properly exceed the sum of $750.

Likewise, this Court has held that a witness's testimony on direct examination is no stronger than as it is left on cross-examination. Alvarado v. Tucker, 2 Utah 2d 16, 268 P.2d 986 (1954).

The trial court erred in not applying the foregoing rule to the testimony of Mr. Dougherty since there was no reason to invoke the "interests of justice" exception. To the contrary, the interests of justice required that the rule be invoked to prevent the unjust enrichment that inures to an insruance company when it back-dates policies and endorsements to the date of the application therefor and charges and collects a premium from that date when no loss has occurred, but then would repudiate the practice when a loss has occurred. There is no question but that if an endorsement involved an additional premium, it would be charged from the effective back-dated date (R. 726).

It appears from the record that the trial court misconstrued the prerequisites to an implied agreement based on the conduct of the parties to require the affirmative consent of both parties to the implied agreement. During the testimony of Mr. Dougherty, the Court itself inquired as to the procedure which resulted in the back-dating practice in the following coloquy:

> THE COURT: What would the underwriter do physicallly to that application to indicate that the endorsement requested was approved:
>
> THE WITNESS: Generally they will just initial it as approved and get it--route it to the policy writing department.
>
> THE COURT: And do you indicate the date on which it is approved?
>
> THE WITNESS: No, I think that is probably why a lot of these endorsements have the date of the agent's memo. The policy writing department knows we have approved them and if it is not specific, you know, as to what the effective date is, they are picking up the date of the memo. That is the mechanics of it.
>
> THE COURT: Yet as I understand it, it isn't until you approve it that you figure the pilot is included in the policy; is that correct?
>
> THE WITNESS: Yes, sir. (R. 680).

And, in the Court Memorandum Decision, it makes the observation:

> Broughton's note to Dyson, the receipt of which was denied, does not support an implication that as of that date Ranger was bound on Shannon and so understood it. (R. 263).

The doctrine of implied agreement based on a course of conduct would be meaningless if the parties had to affirmatively acknowledge that the implied agreement was intended. Under such circumstances, you would then have an express agreement.

Also, the trial court ignored the legal effect of Mr. Dyson's admission that back-dating of endorsements to the date of request by the agent was binding upon AOA/Ranger and did not require further proof of such course of conduct by Dyson. In its Memorandum Decision, the Court stated:

> . . . I have considered the testimony with respect to these other policies and do not find the facts support counsel's contention that a course of dealing was established from which it can be found that coverage was binding upon submission of the pilot information and request for the change. (R. 261).

The Court goes on to state that there were sufficient variations in the other policies to preclude such a finding. Even accepting such a finding on the evidence as we are required to do on appeallant review, does not vitiate the uncontroverted admission of Mr. Dougherty that it was in fact the practice of AOA/Ranger to back-date endorsements effective as of the date of request by the agent if the request contained all of the information necessary to rate the risk and no other date was requested, or obviously indicated such as adding a new plane effective as of the date of purchase or renewing a policy effective as of the anniversary date of the policy. These were the types of situations found in some of the other policies which the trial court was referring to in its Memorandum Decision.

Appellants challenge repondents to support the trial court's finding by showing in the record one single occasion when AOA/Ranger did not back-date an endorsement to add a pilot to an existing policy effective as of the date of the agent's request when all information necessary to rate the risk was submitted with the request for the addition of the pilot.

The reason give by Mr. Dougherty for the back-dating of such endorsements was as follows:

> Q. In response to my question, if you don't assume the pilot is flying the airplane until he gets your written endorsement, what is the purpose of pre-dating the effective date of the endorsement?
>
> A. Well, really I could only repeat my last answer. We are looking for the best possible effective date for everyone involved. Quite often the person typing the endorsement wouldn't know exactly what date I approved it. (R. 660).

Apparently, however, this reason of "the best possible effective date for everyone involved" did not apply if a loss occurred between the request for the endorsement and the issuance of the same.

Even if the trial court was not satisifed with the weight and effect of appellant's evidence submitted in their case in chief, it cannot disregard the admissions of respondent's chief witness made in the course of his cross-examination. Especially when it is uncontraverted that the last action taken by AOA/Ranger on the policy in question prior to the loss conformed with Mr. Dougherty's admission, i.e., without telephone binder of any kind, Mrs. Cartwright sent a memo dated December 4, 1975 with pilot experience form attached requesting the addition of Gary Ferguson as a covered pilot on the policy in question and without further communication of any kind, AOA/Ranger issued such endorsement adding Ferguson as a pilot on the policy by an endorsement typed December 10, 1975, but back-dated effective as of December 4, 1975, the date of Mrs. Cartwright's memo requesting the endorsement.

However, ignoring Mr. Dougherty's admission and the acknowledged handling of the Ferguson endorsement, the trial court summarily found in its Memorandum Decision that:

> From the foregoing facts it is thus apparent that no written endorsement approving the addition of the name of Shannon as a pilot to Item 7 of the policy was ever issued. (R. 260).

The question is not whether an endorsement adding Shannon was in fact issued, but rather, whether such an endorsement should have been issued considering the admitted practice of AOA/Ranger and its prior conduct with respect to the policy in question and who held the interim risk of loss while the request for the endorsement was being processed by AOA/Ranger.

AOA and Ranger seek to avoid the interim risk of loss while the request for the addition of Shannon [an admittedly acceptable pilot] (R. 600) was being procecced in their offices on the ground that they had not received a response to Sara Broughton's memo of December 15. Such a position cannot be sustained for the reasons set forth in the following point.

POINT III

AOA VIOLATED ITS DUTY TO ACT UPON DYSONS' REQUEST TO ADD KENNETH SHANNON AS A PILOT.

As a general rule of law, an insurance agent has a duty to promptly and competently act upon a request for the placement of insurance coverage. As stated in 43 Am.Jur.2d, §174, p. 230:

> As a general rule, a broker or agent who, with a view to compensation for his services, undertakes to procure insurance for another, and

unjustifiably and through his fault or neglect, fails to do so, will be held liable for any damage resulting therefrom. The agent or broker is liable on the theory that he is the agent of the insured in negotiating for a policy and that he owes a duty to his principal to exercise reasonable skill, care, and diligence in effecting the insurance. He may be sued for breach of contract or negligent default in the performance of a duty imposed by contract, at the election of his client.

In Consolidated Sun Ray, Inc., et al. v. Lea, et al., 401 F.2d 650 (3rd Cir. 1968) the Court held that an insurance broker must follow the instructions of its customer or be liable for damages resulting from his failure to do so in the following language:

> If a broker or agent of the insured neglects to procure insurance, or does not follow instructions, or if the policy is void or materially defective, through the agent's fault, he is liable to his principal for any loss he may have sustained thereby. . . . It is generally considered that if the neglect or breach of duty of such broker results in loss to his principal, the broker is liable to the same extent as the insurer would have been liable had the insurance been properly effected, and must pay the resulting loss. (Emphasis added).

Similarly, in Brown v. Cooley, 247 P.2d 868 (N.M.1952) the Court stated:

> Under the facts and circumstances in this case it is the determination of this court that Paul S. Brown was the agent of the appellee that he failed to perform with reasonable diligence the instructions received from his principal; that the appellee suffered damages proximating resulting from that neglect, and; that the appellant is liable therefor. (Emphasis added).

In Talbot v. Country Life Insurance Company, 291 NE2d 830 (Ill.App.1973) the Court held that an allegation that five months elapsed between the application for fire insurance and an uninsured

fire loss stated a cause of action; and in Brand v. International Investors Insurance Company, 521 P.2d 423 (Okla.1974) a three week delay between an application for life insurance and the death of the applicant without a policy having been issued constituted a jury question as to the negligence of the agent.

In the case at bar, Mrs. Cartwright made an unqualified request that Kenneth Shannon be added as a covered pilot in the following language:

> We enclose a pilot experience form completed by Kenneth Richard Shannon who is to be included as a pilot under the above captioned policy. We would appreciate your endorsement to this effect. Thanks. (Ex. 17).

It should be noted that the language of the memo does not condition the request by providing that the premium must remain the same or be increased only so much. The contention of AOA that it had to wait for confirmation of a premium increase of $100.00 per year on a policy which already carried a premium of $1050.00 (Ex. 5 and R. 631) is absurd and contrary to the evidence.

The policy premium was increased $302.00 when the policy was changed to "limited commercial" and AOA admittedly did not know if that increase was approved by Dysons before the endorsement was issued, since it had dealt only with AGA (R. 716). Also, AOA knew that the addtional $100.00 premium would be charged to the Dyson agency account (R. 720) and, therefore, the agency would be ultimat responsible to pay the premium, whether or not the insured paid the additional premium to the Dyson agency.

For AOA to contend that it had to "have an understanding ...are going to pay [be paid] for what we do" (r. 716) before it ...elt secure enough to act upon the unqualified instruction to add ...hannon as a pilot which would increase the premium $100.00 per year, ...en it had been doing business with the Dyson agency since February ...968 (Ex. 2) stretches one's imagination and smacks of afterthought.

Appellants suggest that considering the duty of an insur...nce broker to timely and competently act upon unqualified instruction ...procure insurance as noted in the cases referred to above, that ...that broker [AOA] deems that it needs further confirmation to ...crease the policy premium by $100.00 per year, that the respon...bility for follow-up regarding that confirmation should rest with ...A. The record is undisputed that Sara Broughton did nothing to ...llow-up on the request for coverage of Shannon as a pilot after ...legedly sending a reply memo to confirm the additional $100.00 ...r year premium.

As hereinafter discussed, the record will not support the ...sumption that the Dyson agency received the Sara Broughton reply ...mo and, therefore, legally the burden could not be upon the Dyson ...ency to respond to it.

POINT IV

IN THE ABSENCE OF TESTIMONY THAT THE SARA BROUGHTON MEMO WAS DEPOSITED IN A UNITED STATES MAIL DEPOSITORY, THERE IS NO PRESUMPTION THAT IT WAS RECEIVED BY THE DYSON AGENCY.

Respondents AOA/Ranger introduced the testimony of Sara ...oughton [via deposition] and with respect to the question

of the mailing of her memo of December 15, 1975, she stated:

Q. What did you do after you had written the memo?

A. I mailed it back to the agent.

Q. The agent being Dyson?

A. And Associates.

Q. And Associates?

A. Yes sir. (R. 739-740).

Respondents never laid a factual foundation as to how the mailing was accomplished and, consequently, Miss Broughton's testimony is nothing more than a conclusionary statement that she "mailed it." Her supervisor, Mr. Dougherty, testified regarding the mailing situation as follows:

Q. And then I suppose mail that goes out from the underwriting department is then turned over to the mail room people and they mail it out?

A. Yes.

Q. Sara Broughton would not be an individual who would actually put the mail in a U.S. Mail receptacle, is she?

A. No. (R. 608-609).

In view of Mr. Dougherty's testimony, the trial court was obligated to accept the fact that Miss Broughton did not place the reply memo in question in a U.S. Mail depository and there was no evidence from anyone who might have done so. Therefore, the record is devoid of any evidence upon which it can be found that a memo was in fact mailed back to the Dyson agency through the United States mails.

In a somewhat similar case, Coffey v. Polimeni, 188 F.2d 535 (9th Cir.1951), an insurance agent apparently misplaced a client's

letter requesting insurance coverage and giving the necessary information to secure the same and wrote a letter to the customer advising the customer of the required information. A fire occurred before insurance coverage was effected and the jury trying the case found in favor of the customer and against the insurance agent. The Nineth Circuit affirmed the finding and noted with respect to mailing facts very similar to those in the instant case:

> . . .the record fails to indicate with any degree of clarity whether this letter of June 4 actually reached Polimeni. A copy of it was attached to Coffey's answer in the case and on the trial a carbon copy was introduced along with the remaining correspondence. . . . The burden of proof on this issue [mailing] was concededly on the defendant, [insurance agent] where the court placed it.

Regarding the agent's obligation to act upon the request for insurance, the court stated:

> Counsel argued that, assuming negligence, the correct rule is that no action will lie against an insurance agent for delay in acting on an application where no breach of legal duty to obtain insurance appears. They concede that this view is at variance with the general trend of authority and with the great bulk of the decisions dealing immediately with the subject. A few commentators and an occasional judge have criticized this line of decisions as unorthodox or unsupported by reason, but they appear to us to announce a salutory rule. The thought they stand for is that the agent or company owes the applicant for insurance what amounts to a legal obligation to act with reasonable promptness on his application, either by providing a desired coverage or by notifying the applicant of the rejection of the risk so that he may not be lulled into a feeling of security or put to prejudicial delay in seeking

> protection elsewhere. Implicit in the case is a recognition that these transactions are fundamentally unlike ordinary commercial or business dealings where a mere profit is the stake, so prone is the failure of insurance protection to result in irretrievable disaster to the individual. Those engaged in the insurance business understand perfectly the particular urgency of the need for prompt attention in these matters.

In a recent Eighth Circuit case, Leasing Associates, Inc. v. Slaughter & Son, Inc., et al., 450 F.2d 174 (8th Cir.1971), the majority and minority rules regarding mailing were discussed and according to that Court's interpretation of the rules, the evidence submitted in the instant case would not support a finding of "mailing" under either rule. In that case, the testimony regarding mailing was as follows:

> Q. You assumed, then, that it went out?
>
> A. Yes, I assumed that it went out . . . I cannot prove it ever got inside the mail box. All I can say is it went out of our office in the normal course of business.
>
> Q. You assumed that it did?
>
> A. That's right.
>
> Q. You don't know whether it ever got past your secretary's desk, do you?
>
> A. Yes, it came for my signature, I put it in my out box for the mail clerk to pick up and mail.

The Circuit Court conceded that the question of mailing would be determined by Arkansas law, but could find no Arkansas authority directly on the question and, therefore, discussed the majority and minority rules as follows:

> The most analogous Arkansas case is Dengler v. Dengler, 198 Ark. 103, 127 S.W.2d 340 (1938).

There the evidentiary problem was whether defendant's testimony that she personally mailed a particular letter was sufficiently precise to warrant a presumption that the letter was received. Of importance here is the fact that the tenor of the Arkansas Court's approach to the problem was cautiously to require clear proof of all the facets of a proper mailing, i.e., proper stamping, addressing and posting. Moreover, the Arkansas Court's view of this type of evidence is clearly matched by its zealous protection of the debtor under Ark. Stat. §85-9-504(3) in Barker & Norton, supra. We therefore are constrained to approach this question with the narrow view of Dengler, that "technicalities that make for justice may not be casually disregarded." 120 S.W.2d at 354.

As shown by Annotations 25 A.L.R. 9, 13, supplemented at 85 A.L.R. 541, 544 and 30 Am.Jur2d Evidence §1119, the weight of authority holds the evidence here presented to be insufficient due to the failure to call the mail clerk to verify either that he mailed this particular letter or at least that it was his custom to mail such letters. Thus if Arkansas were to adopt the "majority rule," reversal would here be required. . . . However, even if Arkansas law were in accord with the "minority," a jury finding that clerical personnal performed their duties in properly posting the mail would be permissible only if there were clear testimony by the executive as to the customary practice in his office and his actions in compliance therewith. The problem in this case, however, is that plaintiff's sole witness on this point, Dillinger, proffered no description of the office practice from which a jury could properly determine whether his actions were in accord with it. He gave no indication as to who customarily did the basic acts as addressing, sealing and stamping the envelopes and whether he could verify that he and his secretary had done such of those as was their customary duty before he signed the letter and placed it in the tray on his desk. His conclusionary statement that "it went out in the normal course of business in my office as all mail does each day" is simply not enough. "The essential elementary facts may be shown by course of business properly proved, but [illegible] must be directed to facts and not to mere conclusions.

> Central Trust Company v. City of Des Moines, 205 Iowa 742, 218 N.W. 580, 583 (1928). While plaintiff may "show the essential facts constituting transmission by mail by showing the course of business, it failed because there is no evidence in the record as to what this office routine may have been." Forrest v. Sovereign Camp, W.O.W. 220 Iowa 478, 261 N.W. 802, 804 (1935). "That may be rather technical but the appellee relies on a presumption which does not arise, unless the evidence itself discloses" the basic facts underlying it. Deniger v. Deniger, 120 S.W.2d at 343.
>
> Accordingly, whichever view Arkansas might be deemed to follow, we are constrained to hold that the evidence is not adequate to support the requisite jury finding that notification was placed in the United States mail.

Similarly, in the instant case, no evidence was offered under even the "minority" business routine rule as to who stamped, addressed posted or deposited mail of the type in question, and no evidence was offered that those who customarily perform such duties did in fact perform them during the time period in question.

The trial court seemed to acknowledge the lack of proof of mailing in this regard by alleviating counsel's request to voir dire by stating:

> I would say this, the acceptance of the exhibit, [AOA's file copy] I would not interprete it as saying as proof you received it. (R. 632).

Such being the case, AOA had a duty to process the instruction to add Shannon as a pilot without further confirmation, and not having done so is liable to Dysons for any liability they have incurred as a result of AOA's failure to so act.

POINT V

AOA AND RANGER WRONGFULLY DENIED COVERAGE FOR THE LOSS IN QUESTION.

On the day after the loss in question, Mrs. Cartwright of the Dyson agency filed a First Notice of Claim (Ex. 18); and on March 31, 1976, the insured, Donald A. Dyson, filed a Proof of Loss Affidavit (Ex. 37). Respondents have not contended that Mr. Dyson has not complied with the policy's applicable notice of loss requirements. However, Mr. Thomas W. Lehman, one of AOA's claims examiners (R. 603), advised the insured, Donald A. Dyson, by letter of March 30, 1976 (Ex. 38), one day before the Proof of Loss Affidavit was executed, that his claim was denied for the reason that:

> Mr. Shannon was not a named pilot under the terms of the policy nor did he qualify under the open pilot endorsement. Additionally, you warranted in the application for aircraft insurance that you were the sole owner of the aircraft. The records of the FAA and our further investigation indicates this information was incorrect.

At the time of the loss, AOA's underwriting department and files were in Dallas and the claims department was still in Beaumont (R. 603). Mr. Dougherty's first notice of the loss was a request from the claims department for a complete copy of the underwriting file (R. 603). He was never interviewed by the claims department (R. 603-604) and, therefore, the claims examiner, Mr. Tom Lehman, who denied the loss could not have known about the underwriting department's admitted practice of back-dating endorsements to the date of request, if the request contained all information necessary to rate the risk.

Mr. Lehman apparently went through the underwriting file and together with such other information as was available to him, determined the most plausible reasons for denying the loss--the fact that Mr. Shannon had not as yet been endorsed on the policy, giving no thought as to whether or not under AOA's admitted practices and prior conduct on the policy Shannon should have been endorsed on the policy or who held the interim risk while the request for endorsement was being processed. In that regard, it is interesting to note that even the claims department did not deem a lack of response to Sara Broughton's memo of December 15 requesting confirmation of an additional $100.00 per year premium charge as a good reason for denying the loss in its formal letter denying the claim (Ex. 38).

Also, it should be noted that there is no contention that Mr. Shannon did not have the experience qualifications to be covered as a named pilot. That determination already had been made as is obvious from the fact that Sara Broughton's alleged memo acknowledged that he could be added for another $100.00 per year premium charge.

The reasons given for the denial of coverage are (1) that Shannon had not been endorsed as a named pilot and (2) that Mr. Dyson had warranted in his application for the aircraft insurnace that he was the sole owner of the aircraft. As mentioned, Mr. Lehman did not even consider whether Shannon should have been so endorsed, or who held the interim risk.

The second reason advanced by Mr. Lehman for declining coverage is totally inaccurate. Mr. Lehman states:

> Additionally, you warranted in the application for aircraft insurance that you were the sole owner of the aircraft. (Ex. 38).

An examination of the Application for Aircraft Insurance (Ex. 4) will reveal no item number even requesting ownership information. It is true that the policy (Ex. 3) states in item 8 of the declaration that the named insured is the sole owner unless otherwise indicated. However, the declaration sheet of the policy is prepared at the offices of AOA and is signed by Thomas Dougherty on behalf of AOA, not by Mr. Dyson. The most that can be said against Mr. Dyson is that if upon receiving the policy he happened to note and to read that particular line item of the policy (of which there is no evidence) that he failed to call to the attention of AOA that there were other owners of the aircraft. On the other hand, it is obvious that AOA's underwriting department made such entry on the policy with no application information to support it. The general law regarding an inaccuracy in an application for insurance, even when it is the fault of the insured, is as indicated in Couch on Insurance 2d, §38:68, p. 382:

> It is well settled, whether the risk is that of life, accident, or fire, that where an application for insurance is made in writing, and the questions therein as to material facts are unanswered or incompletely answered, and the insurer, without further inquiry, issues the policy, it thereby waives all right to a disclosure, or to a more complete answer with respect to the fact to which the unanswered question or incompletely answered question relates, and the policy cannot thereafter, in

> the absence of clear proof of a fraudulent or intentional suppression of the fact, be avoided on the ground of concealment or of incomplete answers.

In support of this rule, the text cites approximately 80 cases from 35 jurisdictions. The text further states at §37:555, p. 164:

> Although knowledge of the insured's breach of the ownership clause is ordinarily essential to effect a waiver or an estoppel, the insurer cannot assert its lack of knowledge of the breach when it is the insurer's own fault that it was not informed. That is, where the insurer fails to inquire of the insured it is generally deemed charged with knowledge of the facts as to which it did not inquire, even though the ownership clause is a requirement of the standard policy. So it is declared that when an insurance company insures property without inquiring into the state of title to such property before issuing the policy, it waives the ownership clause, and the policy is valid, provided the insured has sufficient title or interest to sustain the contract of insurance. (Emphasis added).

In the instant case, since the application form used by AOA did not request ownership information, it must be held to have waived such information. Donald A. Dyson was a one-fifth (1/5) owner of the aircraft and had sufficient ownership interest in the aircraft to sustain a contract of insurance. Under such arrangement, he would hold in trust four-fifths (4/5) of any proceeds recovered under the insurance policy for the benefit of the other joint owners.

Further, Mr. Dougherty acknowledged that the existence of additional owners who were not yet flying the aircraft would not increase the underwriting risk or the policy premium (R. 657) The company, of course, would know when such owners became pilots because they would have to be endorsed as named pilots on the policy and the company could then adjust the premium if it deemed it appropriate.

It is clear that AOA/Ranger suffered no prejudice in not being aware that there were other owners of the aircraft at the time the policy was issued, and since the reason they did not know is because they did not ask for such information in their standard application form, the fact that the application did not reveal such information cannot justly be used as a reason for denying coverage of the loss in question.

POINT VI

THE TRIAL COURT ERRED IN DENYING APPELLANTS' RIGHT TO TRIAL BY JURY.

This case was originally set for trial on Monday, September 19, 1977. On Wednesday, September 14, appellants personally served counsel for the other parties with copies of a demand for jury trial and filed the original with the Clerk of Court on Thursday, September 15. On Thursday and Friday, the other parties by various pleadings moved to strike the demand. Judge Croft, to whom the case was assigned, without hearing, granted said motions and struck appellants' demand for jury trial on Friday, September 16 by a telephone call to appellants' counsel's office.

Admittedly, the demand for jury trial did not fully comply with Rule 5.2 of the Rules of Practice in the District Courts of the State of Utah which provides that a demand for jury trial shall be made ten (10) days prior to trial, but the demand was served and filed sufficiently in advance of the trial date to provide opposing counsel adequate time to prepare their requests for instructions and

to permit the Clerk's office to call a jury in its regular course of handling such matters. Counsel had three (3) weekdays prior to the date of trial in which to prepare requests and the Clerk's office had two (2) weekdays in which to call a jury. The Clerk's office rountinely does not call a jury for a Monday trial until late Friday afternoon when it has been determined that there will be a Judge available the following Monday to try the case.

This Court has long since held that opposing parties have no standing to contest a parties' application for a jury trial, although such application is not made in the precise manner and at the precise time prescribed by rule or statute. Davis v. Denver and Rio Grande Railroad Company, 45 Utah 1, 142 Pac. 705 (1914). The granting or denying of an application for jury trial not made strickly in accord with rules of Court is, concedely, a matter of discretion. Hunter v. Michaelis, 114 Utah 242, 198 P.2d 245 (1948); Webb v. Webb, 116 Utah 155, 209 P.2d 201 (1949).

However, appellants contend that the denial of a demand for jury trial which is made sufficiently in advance of trial so as to not prejudice the opposing parties or inconvenience the normal operation of the Clerk's office is an abuse of such discretion, since there was no real reason to deny such a very basic and substantial right of a party in the American system of jurisprudence.

CONCLUSION

The salient facts in this case are undisputed in the record, i.e., that AOA/Ranger had succumbed to the practice, intentional or unintentional, of back-dating requests for endorsements adding named pilots to existing policies effective as of the date of the

request therefor, if the request contained all information necessary to rate the risk; and AOA had so treated the request [Ferguson] most recent to the request in question [Shannon] on the Dyson policy. Such a practice is legally tantamount to extending binding authority to the writing agent, since to hold otherwise gives the insurance company the unfair advantage of requiring the insured to hold the risk of loss while the request for endorsement is being processed in the company's offices, but allowing it to charge the insured for the endorsement from the date of the request if the same is accepted, when no loss has occurred and, consequently, the company knows that there has been no risk incurred during the time between the agent's request for the endorsement and the date of its issuance.

The evidence of such conduct was the testimony of AOA's senior Vice-President in charge of underwriting on cross-examination and such evidence is conclusive on that issue and the trial court erred in finding that appellants had not proved such a course of conduct. Procedurally, it is not necessary to prove what is admitted.

There was a legal duty imposed upon AOA/Ranger to promptly and competently process the request for endorsement of Shannon as named pilot to the policy in question. That duty was not legally terminated by the mailing of a request to confirm the additional $30.00 per year premium to be charged for the endorsement when there was insufficient evidence proferred at trial to raise a presumption of mailing.

Therefore, AOA/Ranger wrongfully and unjustly denied coverage for the loss of the [illegible] when Shannon, a named

pilot under the terms of the policy," which begs the real issue of whether or not AOA's back-dating practice constituted implied binding authority on the part of the writing agency and required AOA/Ranger to hold the risk of loss during the time the request for endorsement was being processed. The further reason given for denial of coverage--that Dyson had "warranted in the application for aircraft insurance that you were the sole owner of the aircraft" and that such representation was untrue was without merit since the application signed by Dyson did not give any information regarding ownership. The application form was one supplied by AOA and since it did not request such information, AOA must be deemed to have waived it and cannot now be permitted to use the absence of such information as a justifiable basis for denial of the loss in question.

Since the Dyson agency properly submitted a request for the endorsement of Shannon as a named pilot, including his pilot experience form, to AOA, under AOA's admitted practice of back-dating such endorsements it should be held that AOA held the risk of loss while the request for the Shannon endorsement was being processed in AOA's office, and the Court erred in finding that Dyson was not entitled to recover the amount of the policy coverage from Ranger Insurance Company and in its finding that Dysons had not fulfilled their duties to the other plaintiff Owners. If AOA/Ranger had promptly processed the request for the Shannon endorsement, the Owners would not have suffered the loss in question. The loss sustained was due to AOA's

neglect, not that of Dysons'. However, even if it is held that the Dysons are technically liable to the plaintiff Owners since the Shannon endorsement was in fact not issued prior to the time of the loss in question, then the trial court erred in not granting Dysons judgment over against AOA/Ranger for the latter's failure to promptly process the request for the endorsement and in failing to find that AOA/Ranger held the risk of loss during the time such request was being processed.

Further the trial court erred and abused its discretion in denying Dysons' demand for trial by jury since the same was served and filed sufficiently in advance of the trial date to cause no prejudice to the opposing parties nor interference with the Clerk's routine in processing requests for jury trial.

WHEREFORE, appellants pray that this Honorable Court reverse the judgment of the trial court by directing that judgment be entered in favor of Donald A. Dyson against AOA/Ranger on plaintiffs' Complain that judgment be entered in favor of Donald A. Dyson and L. F. Dyson & Associates on their Counterclaim against AOA/Ranger in the amount of any judgment found in favor of the Owners against the Dysons.

Alternatively, appellants pray that the action be remanded to the Third Judicial District Court in and for Salt Lake County for trial by jury pursuant to appellants' demand therefor prior to the trial of this case.

Respectfully submitted this _____ day of July, 1978.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed, postage prepaid, two copies of the foregoing Appellants' Brief to each counsel for the parties as designated below on the _____ day of July, 1978.

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