1978

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

Utah Supreme Court

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.

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.

BRIEF OF RESPONDENTS A.O.A. AND RANGER INSURANCE COMPANY

Appeal From Judgment of the
Third Judicial District Court for Salt Lake County
Honorable Bryant H. Croft, Judge

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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

BRIEF OF RESPONDENTS A.O.A. AND RANGER INSURANCE COMPANY

NATURE OF THE CASE

This action was originally commenced by Dyson, Kesler, Bissell, McClain, Oborn, and Walker against Aviation Office of America (A.O.A.), Ranger Insurance Company, (Ranger) and Kenneth R. Shannon. Plaintiffs (owners of plane) claimed a breach of contract by the insurance company (Ranger) and its underwriting group (A.O.A.) alleging that the company failed to properly issue an insurance policy covering the loss to a Cessna airplane. (R., pp. 2-5). Plaintiffs' claim against Shannon

was for negligence in crashing the airplane. (R., pp. 6-7).

A third-party complaint was filed by A.O.A. and Ranger against Plaintiff, Dyson, an insurance agent, and his insurance agency alleging that Dyson and his agency indemnify the company for any money paid to the plaintiffs caused by Dyson's negligence, breach of duty, or intentional misrepresentation of facts. (R., pp. 18-21).

Dyson and his agency counterclaimed against Ranger and A.O.A. alleging that they had impliedly provided coverage to the plaintiffs and had also committed negligence in failing to advise Dyson that no coverage was provided. (R., pp. 72-76).

Finally, Plaintiffs, Kesler, Bissell, McClain, Oborn, and Walker filed a cross-claim and third-party complaint against Dyson and his agency alleging that Dyson had breached his contract to obtain insurance for the other plaintiffs. (R., pp. 54-57).

DISPOSITION IN LOWER COURT

The trial court, sitting without a jury, found in favor of A.O.A. and Ranger and against the plaintiffs, no cause of action, on the complaint. However, it did enter judgment in favor of the other plaintiffs against Dyson on their cross-claim and third-party complaint in the amount of $27,000. Finally, the trial court entered judgment, no cause of action, in favor of A.O.A. and Ranger against Dyson and his agency on the Dyson cross-claim against the insurance carrier. (R., pp. 284-

286).

RELIEF SOUGHT ON APPEAL

Respondents A.O.A. and Ranger Insurance Company seek affirmance of the lower court's decision as to all parties on all causes.

STATEMENT OF FACTS

Judge Croft, wrote an extensive memorandum opinion concerning this litigation. (R., pp. 249-269). This opinion is attached for this Court's convenience hereto as an Appendix. While these respondents do not disagree with the majority of the statement of facts as set forth in Appellants' brief, there have been many important facts and items of testimony omitted from Appellants' Statement. Rather than supplementing Appellants' Statement of Facts at this juncture, these Respondents shall rely upon abstracted portions of the Statement of Facts made by Judge Croft in his Memorandum Opinion with appropriate references to the record added in support thereof. In addition, further facts and testimony of the witnesses shall be discussed in detail in the various sub-parts of the argument portion of this brief.

The following is the pertinent portion of Judge Croft's Memorandum decision relating to the factual background: (R., pp. 253-260; App., pp. A-6 - A-17).

"In this memorandum I shall not undertake to summarize the

testimony of the respective witnesses as called, but rather will summarize what I consider to be the material and relevant facts as established by the evidence.

"AOA underwrites aviation insurance for Ranger and other insurance companies, and as such has agency contracts with some 5,000 agents throughout the country, only six of whom have written authority to bind AOA and its insurers on aviation policies without the prior approval of AOA. (Tr., p. 643). On February 14, 1968, Ranger through AOA executed an agency agreement with LeRoy and Donald Dyson, dba L.F. Dyson and Associates by which the Dysons were appointed "agent" of Ranger for aviation hazards only. (Tr., p. 374; Ex. 2D). The agreement, among other things, contained the following provision:

> "Nothing herein shall be construed as authorizing the agent to commit or bind the company to any liability without the prior approval of Aviation Office of America, Inc." (Ex. 2D).

"The agency agreement remained in force throughout the period relating to this case. On December 30, 1974, Ranger through AOA entered into an agency agreement with Aviation General Agency (hereinafter called AGA) of Cody, Wyoming, appointing AGA as an agent with authority to bind AOA and represented insurance companies on 'business and pleasure' risks, but with no authority to bind on 'limited commercial' risks, within the stated limits of coverage. Dyson was advised of the availa-

bility of AGA as an agency authorized to act for AOA. (Tr., pp. 336, 573-574).

"In March, 1975, Dyson, Kesler, Bissell, McClain, and Oborn orally agreed to purchase the Cessna plane in question as equal partners for $27,000. (Tr., p. 765). They borrowed the full amount of the purchase price from Walker Bank & Trust Company on March 18, 1975, and jointly signed a promissory note, on which they each became jointly and severally liable, for the face amount of $38,519.88 (Interest rate of 10.58%) payable in 84 successive monthly installments of $458.57 each commencing April 25, 1975. (Ex. 36P). The note was secured by a security agreement on the plane. At the time of the transaction Walker Bank stated that the plane must be fully insured. (Tr., pp. 361, 382, 766-767). Donald Dyson agreed with his other four partners that he would take care of obtaining the required insurance coverage on the plane, it being known by his said four partners that he was then in the insurance business as an insurance agent, and he then knew that they were relying upon him to do so. At the trial the Dysons acknowledged that Donald Dyson had a duty to obtain the required insurance coverage. (Tr., pp. 346-347, 355, 767). At this time only Donald Dyson was a licensed pilot and it was the intent of the other four partners to learn to fly the plane and to be licensed therefor. (Tr., pp. 383, 768-769).

"Donald Dyson then had prepared, and he signed, an 'applica-

tion' for aircraft insurance on an AOA form, requesting insurance on the Cessna plane with a liability coverage of $27,000 on the plane for all risks while in motion. (Tr., p. 384; Ex. 4DD). The application showed only Donald A. Dyson as the insured, marking it as an 'individual' ownership rather than a 'partnership' ownership. In Section 7 of the application it named Donald A. Dyson and Jim Breeze, an FAA Examiner, as pilots with 'additional pilots to be added as they qualify'. Walker Bank was shown as mortgagee. (Ex. 4DD).

"On March 22, 1975, Mary Jane Cartwright, an employee of Dyson, forwarded the written application to 'Aviation Office of America, P.O. Box 7, Cody, Wyoming,' which was the address of AGA. It stated that an application 'to be effective 3/21/75 covering a 1968 Cessna for Donald A. Dyson' was enclosed, requesting a policy at the earliest convenience, stating the purpose was 'pleasure' and suggesting language for the pilot clause. (Ex. 23DA).

"On March 26, 1975, AGA issued binder 1020 confirming it had bound with AOA insurance coverage on the plane for 30 days effective March 26, 1975. (Tr., p. 628; Ex. 24DA). Based upon said application, policy No. AC A1-198882 was issued by Ranger to Donald Dyson as the named insured, under date of April 1, 1975, and effective from March 26, 1975 to March 26, 1976. (Ex. 3DA). The total premium was stated as $748.00 with $400.00 thereof being charged for the $27,000 liability for all risks

while in motion. (Ex. 3DA; Ex. 5DD). The pilot clause provided that 'Only the following pilot or pilots holding valid and effective pilot and medical certificates with ratings as required by FAA for the flight involved will fly the craft'. (Ex. 3DA). Then followed the names Donald A. Dyson or Jim Breeze (together with private or commercial pilots with a minimum number of logged hours which phrase admittedly did not cover any of the parties here involved). (Ex. 3DA).

"The policy contained a provision in paragraph 19 thereof which provided as follows: '. . .nor shall the terms of this policy be waived or changed, except by improved (sic) endorsement issued to form a part of this policy, signed by the authorized company representative'. (Ex. 3DA).

"In April, 1975, the premium due on the policy was billed to L.F. Dyson and Associates by AGA. (Ex. 5DD).

"Mary Jane Cartwright handled the processing of insurance for the Dyson agency and Donald Dyson had nothing to do with contacting AOA or Ranger on the policy. (Tr., p. 384).

"The first steps to effecting a change in the policy occurred on July 21, 1975, when a request was made of AGA by Cartwright to add plaintiff Kesler as a pilot to be covered. (Tr., pp. 628, 671). Cartwright did not recall how her contact with AGA was made to initiate this change (Tr., pp. 428-429) but on that date AGA through David Brannon sent a handwritten communication to Tom Dougherty at AOA 'confirming our telcon of today'

and stating effective '7-22', AOA was to change use to include rental and also adding Stephen Kesler as a named pilot and stating liability premium was increased $21.00 and the Hull coverage by $203.00. (Ex. 7DD).

"Also on July 21, 1975, Cartwright typed a written note to Dave Brannon in Cody saying, 'Sorry--change signals again' and telling him to delete the earlier request to cover rental of the plane commercially. (Ex. 8DD). She then stated it was necessary to change the pilot clause to include Kesler, stating some facts about his experience, saying the $21.00 increase had been quoted to him and concluding by saying 'Please send us an endorsement adding him as a pilot'. (Ex. 8DD).

"By a memo dated August 20, 1975, from the AOA office in Beaumont, Texas, to L.F. Dyson and Associates a request was made to forward pilot information on Kesler as AOA needed to know specific information 'before we can add as approved pilot'. (Ex. 9DD).

"On August 26, 1975, Cartwright wrote Brannon at AGA in Cody requesting addition of Tim Bissell as a pilot and also stating therein that 'we had previously requested that you add Stephen Kesler, however we have not received any confirmation from you that these are being added. We would appreciate a note to that effect for our file.' (Ex. 6DD). This was received in the AGA office on August 28, 1975, and on a copy thereof, un-

der date of September 24, 1975, Sara Broughton of AOA in Texas wrote 'before we can approve above pilot please have the attached pilot form completed by Tim Bissell.' (Ex. 12DD).

"On September 9, 1975, Tom Dougherty made a written record of a telephone conversation he had with 'Dyson' requesting a change of use to limited commercial and to add two pilots, Bissell and Kesler. (Tr., pp. 588-589; Ex. 28DD).

"On September 17, 1975, the AOA office in Texas sent a communication to L.F. Dyson and Associates requesting advice as to Bissell's first name so he could be added as a named pilot and stating that an endorsement adding Kesler as pilot and changing use to limited commercial was then being typed. (Ex. 10DD). That endorsement was issued, dated September 17, 1975, showing Kesler as an added pilot and the purpose of use as 'limited commercial' with a total additional premium of $302.00 with the effective date of the endorsement being July 22, 1975, which was the date, as noted above, that it had been agreed by Dougherty (AOA) in his telephone communication with Brannon (AGA) on July 21, 1975, would be the effective date for adding coverage on Kesler as a pilot. (Ex. 11D).

"The requested pilot experience form, undated, was filled out, signed by Bissell, (Ex. 13DD) and submitted so that an endorsement was issued December 2, 1975, by AOA for Ranger amending Item 7 of the policy to add 'Tom Bissell'. (Ex. 14DD).

The effective date of this endorsement was November 13, 1975, which was the date the pilot information sheet was forwarded to AOA in Dallas by Cartwright on Bissell. (Tr., p. 583; Ex. 14DD). No additional premium was required on Bissell. (Tr., p. 630).

"As noted supra, McClain had sold his interest to Walker and Oborn had sold to Ferguson under a contract dated October 15, 1975, in which Ferguson agreed to pay Oborn's share of the amount due Walker Bank. (Tr., p. 395; Ex. 1PP).

"After the contract of sale to Ferguson on November 5, 1975, Mary Jane Cartwright sent a memorandum to AOA, but addressed it to P.O. Box 7 in Cody, Wyoming, stating they had another name to add to the policy - Gary Ferguson - and for thi they needed additional pilot information forms to be completed and requested a small supply for Dyson's use. (Ex. 20DA). Brannon at AGA replied to this by directing that they 'use Item #7 of the regular application.' (Ex. 22DA).

"On November 13, 1975, in Cartwright's memorandum to AOA in Dallas enclosing Bissell's pilot information sheet (mentioned supra), she also requested more pilot information forms 'as we have another commercial pilot to be added to this policy'. (Ex. 26DA).

"Thereafter, Mary Jane Cartwright forwarded on December 4, 1975, a memorandum to AOA in Dallas, Texas, enclosing a pilot's

statement on Ferguson, requested that Breeze be deleted, requested a confirming memo and stated that since Ferguson had so many hours, it was doubtful the rate would be affected. (Ex. 15DD). Under date of December 10, 1975, AOA issued an endorsement effective December 4, 1975, amending Item 7 to show Bissell, Dyson, Kesler and Ferguson as the pilots covered. (Ex. 16DD). No change in premium resulted. (Tr., p. 630).

"Also, about December 1, 1975, Dyson sold his interest in the plane to Kenneth Richard Shannon on a contract under which Shannon agreed to assume Dyson's obligation to Walker Bank. (Tr., pp. 396, 400). Dyson's partners in the plane voiced concern about Shannon's qualifications and ability, but he made some inquiry, advised them he was licensed by FAA and experienced and assured them they were protected in their investment by insurance coverage. (Tr., pp. 400, 750). However, Dyson did not advise either AOA or AGA of the sale of his ownership interest to Shannon nor did he request any change in the policy. (Tr., p. 392). He only told Mary Jane Cartwright to take the necessary steps to get Shannon's name added to the policy as a pilot. (Tr., p. 416). Dyson did not tell Cartwright to have his own name dropped as a pilot or as the insured nor did he tell her he had sold his interest in the plane to Shannon. (Tr., pp. 403, 416). Dyson either gave Shannon a key to the plane or left it with Cartwright for Shannon to pick up (Tr.,

pp. 402, 554) although Cartwright had no recollection that she received the key from Dyson or gave it to Shannon. (Tr., p. 761).

"Thereafter, on December 8, 1975, Cartwright forwarded an office memorandum to AOA in Dallas, Texas, enclosing a pilot experience form on Shannon stating he was to be included as a pilot under the policy and requesting an endorsement to this effect. (Ex. 17DD). This communication was received by AOA in Dallas, and on December 15, 1975, Sara Broughton, an employee of AOA whose underwriting duty it was to make changes in existing policies, wrote in reply thereto the following:

> "This risk has reached a flying club exposure. To add this pilot it will be a fully earned premium of $100. Please advise if you want him added." (Ex. 34DA).

"In a deposition taken in Dallas, Texas on September 13, 1977, Sara Broughton testified she mailed this response to the Dyson agency. (Tr., p. 740). Mary Jane Cartwright denied ever seeing this response or having received it in the mail. (Tr., p. 441). Dyson too denied ever having received or seeing it. Thus, no further written communication was sent in response thereto and no endorsement adding Shannon's name was ever issued by AOA. (Tr., pp. 632, 634). Cartwright testified that in talking to Tom Dougherty in connection with a file on one Don Rich on December 16, 1975, she asked him about the endorsement on Shannon, stating he said he would look into it. (Tr.,

p. 442). Dougherty did not personally recall this telephone conversation with Cartwright but did not deny having it as his file on Rich contained notes of a telephone call from Cartwright on December 16, 1975, but they contained no reference to Shannon. (Tr., pp. 598-599, 635). If Dougherty received this call and did in fact look into it, a reasonable inference is that he would have seen Broughton's reply of December 15, 1975, set out above and may reasonably have assumed Cartwright would be receiving it shortly. Cartwright also testified she recalled asking Dougherty about the Shannon endorsement in talking to him on a policy for one Dick Reynolds. (Tr., p. 441). However, Dougherty's file on Reynolds shows his policy was not effective until November 15, 1976, some 10-1/2 months after the plane crashed on February 1, 1976. (Tr., p. 635).

"The crash occurred on that date with Shannon at the controls and flying it. (Ex. 18DD). As noted, the plane was totally wrecked. A notation on a claim form dated February 2, 1976, indicated the accident occurred because while landing, the runway was missed, and the plane hit power lines and crashed. (Ex. 18DD). It appears Shannon's wife and two children were injured in the crash and hospitalized as a result thereof. (Ex. 18DD).

"On February 15, 1976, Cartwright wrote a letter to Dougherty at AOA enclosing a copy of the Dyson memo 'dated December 7, 1975' (actually dated December 8) wherein 'we requested that

you add Kenneth Shannon as a pilot to the above captioned policy in the name of Mr. Dyson.' (Ex. 19DD).

"She further stated: 'We have never received a confirming memo or endorsement to the policy. Actually Mr. Dyson sold his interest in the craft to Mr. Shannon. We would appreciate an endorsement at your earliest convenience', adding a postscript 'Perhaps this request hit your office when you were in the process of moving and thus the delay. We would appreciate the endorsement.' (Ex. 19DD).

"The move by AOA from Beaumont to Dallas had in fact been made in the summer of 1975. (Tr., p. 625).

"Dougherty replied on March 1, 1976, noting that 'we quoted the amount of premium required to add pilot but did not receive a response'. (Ex. 30). He also said it was not customery (sic) to assign policies and advance approval of the company would be needed. (Ex. 30). Dougherty's files also contained notations dated March 1, 1976 of a telephone call with Tom Lehman (manager) General Adjustment Bureau, Albuquerque, New Mexico) (sic) in which he recorded that they did not add the pilot because they had 'no reply to Sara B's 12/15 memo'. (Ex. 31).

"It was stipulated that the proof of loss or claim required under the policy had been duly filed. (Tr., p. 756; Ex. 37).

"By letter dated March 30, 1976, to Donald A. Dyson, Tom

Lehman advised that he regretted to advise him that there was no coverage under the policy for the claims arising out of the accident as Shannon was not a named pilot under the terms of the policy nor did he qualify under the open pilot endorsement. (Ex. 38). It further stated that Dyson had warranted under the application for aircraft insurance that he was the sole owner, but that the records of the FAA and their own further investigation indicated this information was incorrect. (Ex. 38)."

Based upon these findings a judgment was entered in favor of the plaintiff owners against Dyson personally and against the L.F. Dyson Agency in the amount of $27,000. The Court ruled against Plaintiffs' claim towards A.O.A. and Ranger, gave judgment in favor of A.O.A. and Ranger against Dyson, and ruled against Dyson and the agency as to all claims. (R., pp. 284-286). It is from this judgment that this appeal is taken.

ARGUMENT

POINT I

THE DYSON AGENCY WAS LIMITED BY THE CLEAR TERMS OF THE AGENCY AGREEMENT WITH RANGER INSURANCE COMPANY AND CANNOT CLAIM IT HAD EITHER EXPRESS OR IMPLIED BINDING AUTHORITY TO INSURE SHANNON.

A. It is Undisputed That Shannon was Never Expressly Covered Under the Airplane Policy.

The Ranger Insurance policy issued in March of 1975 did not include Kenneth R. Shannon as a named pilot. (Ex. 3DA).

Shannon did not qualify under the open-pilot provision in the policy since he did not have 100 hours in multi-engine aircraft nor 10 hours in the insured aircraft. (Ex. 3DA; 17DD). The trial court found that it was "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., p. 260; App., p. A-17). The last endorsement to the policy dated December 4, 1975 named Tom Bissell, Donald A. Dyson, Stephen Kesler, or Gary Ferguson as pilots (Ex. 16DD). Shannon was never listed as a pilot in any subsequent endorsements.

It is undisputed that the Dyson Agency never requested an oral binder to cover Shannon. (Tr., p. 475). The only means of requesting coverage was done through the memo dated December 8, 1975 enclosing a pilot experience form for Shannon and requesting his endorsement as a pilot. (Ex. 17DD). While Dyson claimed he never received a reply to his December 8 request, the files of the insurance company show that a reply was made on December 15, 1975 by Sara Broughton, an underwriter for A.O.A. stating the following:

> This risk has reached a flying club exposure. To add this pilot it will be a fully-earned premium of $100. Please advise if you want him added. (Ex. 34DA).

Thus, the last known communication from the company requested Dyson to give his approval as to the new status of the policy and to the additional premium. There was clearly no express

acceptance of Shannon as a risk and this fact would not have changed even if Dyson admitted receiving the reply message.

For these reasons, if Dyson is to recover in this lawsuit he must show coverage by implication rather than by express agreement. The trial court correctly held that such a showing was not made.

B. The Dyson Agency Did Not Have Express Nor Implied Authority to Bind the Company to Insure Shannon.

The agency agreement entered into between Ranger Insurance Company and the L.F. Dyson and Associates Agency dated February 14, 1968 specifically stated the following:

> Nothing herein shall be construed as authorizing the agent to commit or bind the company to any liability without the prior approval of Aviation Office of America, Inc. (Ex. 2DD).

The language contained in the agency agreement is clear and unambiguous. The terms clearly state that Dyson has no authority to bind any risk without the express approval of A.O.A.

Dyson admitted that he was not aware of any written or oral agreement from Ranger Insurance Company altering this express limitation in the agency contract. (Tr., pp. 385-386).

Similarly, Mrs. Cartwright of the Dyson Agency stated that she always assumed it was necessary for A.O.A. or A.G.A. to approve a risk and that she never assumed that she could do this herself. (Tr., p. 44). She also believed that A.O.A. could always reject an application if it did not wish to assume the risk. (Tr., p. 486). In addition, Mrs. Cartwright admitted

that as a regular procedure in almost all instances when there was going to be a material change in a risk on a policy she would call A.O.A. and obtain an oral binder and then follow up that conversation with a memorandum. (Tr., p. 497).

Thus, Dyson and his chief employee at the time of the coverage in question both admitted that they never considered themselves to have the power to bind the company but always sought specific approval as provided in the agency agreement.

Dyson attempts to circumvent the failure to have either an express endorsement of Shannon by the company or an express authorization to bind the company by claiming that the company impliedly gave Dyson binding authority because of its alleged practice of backdating policies.

Dyson, in his brief makes the following statement:

> As an abstract principle, respondents do not seriously contend the proposition that if an insurance company adopts the practice of backdating endorsements for additional insurance coverage to the dates that the soliciting agents requested the coverages, that the company has in fact impliedly extended binding authority to the agent. Rather, respondents deny that they adopted such a practice. (Appellants' brief, p. 11).

This statement purporting to present Respondents' position in this case is grossly erroneous. It is difficult to imagine how Appellants could make such a statement in light of Respondents' consistent position throughout the trial court proceedings. Respondents have always contended that course of conduct

cannot alter an unambiguous express agreement. (Tr., pp. 375-377, 458-459, 683-684).

Respondents argued throughout the trial that (1) course of conduct and custom cannot vary an unambiguous agency contract, and (2) there was no evidence showing a course of conduct existed between Dyson and Ranger Insurance Company which would have in any way affected the policy in this case. This second argument will be discussed in detail in Point II of this brief infra.

The law is overwhelmingly consistent that custom, usage, or course of conduct cannot be used to vary the terms of an express agreement unless the terms of the agreement are unambiguous and subject to interpretation.

A brief review of the authorities will illustrate this point. The rule as to the liability of an insurance agent to his company for issuance of a policy beyond his express authority is as follows:

> Where the instructions are clear, precise, and imperative, they should be followed strictly and exactly, and a violation of definite instructions cannot be excused by a custom or a usage in the business. More specifically, an insurance agent should confine his acts to the scope of his actual authority, and although he may, within his apparent or ostensible authority, bind the insurer to risks which his instructions forbid him to assume, he is liable to the company if he issues a policy in violation of his instructions and thereby subjects the company to a liability which it has forbidden him to assume for it. Annot. "Lia-

bility of Insurance Agent, for Exposure of Insurer to Liability, Because of Issuance of Policy Beyond Authority or Contrary to Instructions," 35 A.L.R.3d 907, 912 (Emphasis added).

Another leading authority has stated the rule regarding custom as follows:

> It has been held that the courts should not resort too freely to custom or usage to control the true intention of the parties, and such evidence is not admissible to vary the terms of an unambiguous contract, nor is it admissible where the terms of the contract exclude the usage. . ..
>
> The true test of admissibility is whether there is in the contract something doubtful which can be explained by usage, and, if the contract is plain and unambiguous, evidence of custom is inadmissible to vary or contradict it. . ..
>
> * * *
>
> Further, evidence of a usage is not admissible where an agent's, factor's or broker's contract is clear and unambiguous as to his duties or his compensation, and so, where a principal has given express instructions, usage will not justify or excuse a departure therefrom. 25 C.J.S., Customs and Usages, Sections 21-30. (Emphasis added).

Utah statutory law follows this rule. Section 70A-1-205, U.C.A. states the following:

> The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade. . .. (Emphasis added).

This Court in Barnett v. State Automobile and Casualty Underwriters, 487 P.2d 311 (Utah 1971) also recognized this principle and quoted numerous authorities holding that trade custom or usage is not admissible where there is no ambiguity in the contract. This Court concluded that an insurance contract expiration date was clear and unambiguous and that it was error to instruct that custom of the agency could vary the date.

In Barnett the action was between an insured and the insurance company; the effect of the decision was to deny any coverage to the insured because of his reliance upon the custom and usage of his agent. In this case, however, the insured plaintiffs admit to not having relied upon any course of conduct with Ranger. (Tr., pp. 357-358). Besides, they have been given full judgment against Dyson on the basis of Dyson's failure to provide insurance coverage. Therefore, the instant case does not involve the equities and hardships found in Barnett since the agreement being litigated is that between the insurance company and its own agent. Certainly, an agent should be bound by the express terms of his agency contract if an insured, as in Barnett, is held to the terms of the insurance contract even though the insured's reliance on his agent caused him to suffer a loss.

This Court in Ephraim Theatre Company v. Hawk, 321 P.2d

221 (Utah 1958) stated the following rule for interpretation of contracts:

> Unless there is ambiguity or uncertainty in the language so that the meaning is confused, or is susceptible of more than one meaning, there is no justification for interpretation or explanation from extraneous sources. It would defeat the very purpose of formal contracts to permit a party to invoke the use of words or conduct inconsistent with its terms to prove that the parties did not mean what they said, or to use such inconsistent words or conduct to demonstrate uncertainty or ambiguity where none would otherwise exist. Id. at 223.

See also Mason v. Tooele City, 484 P.2d 153 (Utah 1971); Martin v. Christensen, 454 P.2d 294 (Utah 1969); and Pulsipher v. Tolboe, 370 P.2d 360 (Utah 1962).

Courts in every jurisdiction recognize the rule that custom, usage, and course of dealings cannot vary the terms of an express agreement. See Corbin-Dykes Electric Company v. Burr, 500 P.2d 632 (Ariz. 1972); Williams v. Elliott, 273 P.2d 953 (Cal. 1954); Bassett Construction Co. v. Schmitz Painting Contractors, 533 P.2d 503 (Colo. 1975); Puget Sound National Bank v. C.B. Lauch Construction Company, 245 P.2d 800 (Ida. 1952); Rachou v. McQuitty, 229 P.2d 965 (Mont. 1951); Asbury Transportation v. Consolidated Freightways Corporation, 501 P.2d 321 (Or. 1972); and S.L. Rowland Construction Company v. Beall Pipe and Tank Corporation, 540 P.2d 912 (Wash. 1975).

In this case Dyson claims that the company consistently

"backdated" insurance policies to the date of application rather than the date of acceptance and that this alleged practice therefore impliedly gave Dyson binding authority from the time of application to the time of acceptance or rejection of the risk by the company. This argument, of course, flies directly in conflict with the express provision in the agency agreement stating that Dyson had no binding authority. Thus, Dyson's position is directly contradicted by all legal authorities including numerous decisions from this Court.

It should be noted at this point, that this is not a case where a policy date is in question such as where a loss occurred prior to the acceptance of the risk by the company. In this case there was never an acceptance of the risk by the company at any time. Dyson is therefore attempting to impute binding authority on the insurance agency in order that the company which never accepted the risk will be responsible for the damage.

C. The Traveler's Case Relied Upon by Appellants is Distinguishable As To Its Facts From the Instant Case.

Dyson's only authority for his unorthodox position is the New Jersey Traveler's Insurance Company case cited extensively in Appellants' brief. (Appellants' brief, pp. 11-16). This case, however, is not only directly contrary to the numerous authorities cited above including this Court's own decisions but is clearly distinguishable upon its facts.

Lewis v. Traveler's Insurance Company, 239 A.2d 4 (N.J.

1968) is the only case cited by Appellants both at the time of trial and in this Court standing for the proposition that as between an insurance agent and his company the agency agreement may not always be controlling. Respondents believe that this is the only case in the nation in which the clear rule that conduct cannot alter the express terms of a contract is not scrupulously adhered to.

Respondents have no quarrel with the holding in Traveler's based upon its own facts since the facts in the Traveler's case are dramatically different from the facts in the instant case and, for this reason, the case is not persuasive even as a minority position.

The Traveler's case involved an action by an insured who sued both his insurance agent and Traveler's Insurance Company. The agent had expressly given the insured an oral binder of coverage before the loss occurred. The court awarded a judgment to the plaintiff against Traveler's on the basis that the agent had apparent authority to act for Traveler's and that the insured justifiably relied upon the agent's representation.

The trial court ruled in favor of Traveler's against the agent holding that the agent acted without actual authority to bind the company and therefore had to indemnify Traveler's for the amount of the loss paid to the insured. The Appellate Court reversed.

The following is an analysis of the New Jersey Court's opinion in the Traveler's Case as contrasted with the facts in the instant case. The Traveler's case is distinguishable from the instant case in the following respects:

1. In Traveler's the agent alleged that a letter he had received from the company stating the company would furnish him with necessary binding authority expressly modified the contract provision. In this case, Dyson denies that any express binder or modification was ever communicated to him. (Tr., p. 368).

2. In Traveler's the agent testified that he was led by the practice of backdating to believe that he was actually authorized to bind the risk while the company considered the application and consequently he expressly gave an oral binder to the insured. In this case, however, no binder was ever issued by Dyson to the plaintiff nor did Dyson ever think he had binding authority. (Tr., pp. 385-386, 484-486). In addition, it was undisputed that while A.O.A. has 5,000 agents throughout the country soliciting insurance, only six have binding authority. (Tr., p. 643). It was for this reason that the Dyson agency would routinely call A.O.A. for an oral binder if a material risk change was occurring. (Tr., p. 497).

3. The court in Traveler's implied that the express authorization given to the agent was ambiguous and that

the agent had the 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 intent." 239 A.2d at 8. In this case, however, there was no finding nor even a claim that Dyson's agency agreement was ambiguous or that subsequent writings had in any way modified the original agreement. Dyson agreed that the agreement was not ambiguous. (Tr., p. 385).

4. The Supreme Court of New Jersey was concerned with the practice of Traveler's Insurance in accepting a premium for a backdated policy from the time of the backdating even though the policy had been accepted by the company at a later date. The court stated:

> [T]he application would hold the interim risk if Traveler's should reject the application after a loss, while Traveler's, 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 Traveler's knew there had been no loss and of course no risk. Id. at 7.

In the instant case the evidence was consistent that any backdating only occurred when no additional premium was involved. In other words, the company would backdate applications of additional pilots as long as no new risk requiring a greater premium was involved. If, however, the risk increased then the company required that the agent approve the increased premium and did not issue coverage until it received the agent's appro-

val. (Tr., pp. 630-631; 704-707). In other instances oral binders were given and both coverage and premiums took effect. Thus, unlike the Traveler's Insurance Company, Ranger Insurance did not "have its cake and eat it too" by charging an insured a premium for a period of time which had already passed at the time the risk was accepted.

5. The Traveler's decision was based upon conduct in which 300 identical cases of backdating new coverage were accepted by the company without a single exception. In the instant case, Dyson failed to show a single instance where Ranger backdated policies on new risks, let alone a "course of conduct". The proof relied upon by Dyson as to this issue consists of approximately 10 transactions with Ranger Insurance Company but even those are clearly distinguishable. They consisted of renewals, renewal policies, new business policies, endorsements, changing of aircraft, changing pilots, adding pilots, and changing uses. (Tr., p. 639). These policies were issued from the inception of the agency in 1968. (Ex. 2DD). Such a small number of divergent and differing types of coverage amply justifies the trial court's conclusion that "The thread which Dysons seek to grasp to support their contention that a course of dealing was established does not run through the policy cases upon which evidence was given." (Tr., p. 261; App., p. A-19). A more thorough examination of this evidence

will be made in Point II of this brief infra.

6. The court in Traveler's circumvented the express agreement in the agency contract by stating that such agreement could always be modified by conduct or a new understanding. 239 A.2d at 9. While it is true that parties can always modify a written agreement as this Court has held in the cases cited in Appellants' brief (Appellants' brief, pp. 18-19) the theory of modification cannot apply in this case. First, modification has never been plead or raised by Appellants in the lower court and under Rule 8(c), U.R.C.P. cannot now be raised. Second, and more importantly, Dyson himself admitted that there was neither oral nor written communication from the company changing his binding authority. (Tr., pp. 385-386). Thus, the traditional express modification of a written agreement that is found in those cases cited by Appellants does not exist in the instant case nor was there a showing that any new consideration was given for a modification.

It should also be noted that in Traveler's much of the language and many of the authorities cited by the New Jersey Supreme Court concerned cases involving apparent authority of agents as affecting an insurance applicant. The authorities are uniform that an insurance company may be bound to insure an applicant if its agent misleads the applicant into believing that the agent has bound a risk. The courts hold that under the doctrine of apparent authority a company is liable for the

actions of its agent when it appears to innocent third parties that the agent has the authority to bind the company, even if the agent in fact does not.

This Court in numerous cases has held that the doctrine of apparent or ostensible authority is applicable to third parties if the principal allows his agent to be placed in a position where the third party appears to have authority to act for the principal. Santi v. Denver & Rio Grande Railway, 442 P.2d 921 (Utah 1968); Malia v. Moulton, 114 P.2d 208 (Utah 1941).

However, the situation involving innocent third-party applicants is far different from an action between the insurance company and its agent. In such a case the agent knows the extent of his authority and cannot claim that he was mislead by the principal.

For these reasons, as a matter of law, the trial court was correct in finding that the express provisions of the contract controlled and that therefore coverage was not afforded to the Shannon pilot risk at the time of the accident.

POINT II

EVEN ASSUMING ARGUENDO THAT COURSE OF CONDUCT WAS RELEVANT, THERE WAS NO EVIDENCE SHOWING THAT A COURSE OF CONDUCT EXISTED BETWEEN DYSON AND RANGER WHICH COULD HAVE IN ANY WAY AFFECTED THE COVERAGE IN THE INSTANT CASE.

Even if it is assumed, for the sake of argument, that course of conduct evidence is relevant, an examination of the record re-

veals that no custom or course of conduct existed under any standard, which would require Ranger Insurance Company to insure Shannon in the operation of the airplane.

A. The Burden is on the Appellants to Establish a Course of Conduct.

If Appellants are to rely upon a course of conduct or custom with the insurance company they must present clear evidence to establish it. The burden of proof rests with the appellants. A custom or course of conduct must be clearly proved Where the evidence is uncertain and contradictory the custom is not established. 25 C.J.S., Customs and Usages, Section 33, p. 128.

In order to be relevant to a particular instance, the course of conduct relied upon must consist of the same or similar facts and circumstances. Evidence of conduct in a particular situation or in a few instances is not sufficient to establish custom. Hercules Powder Company v. Automatic Sprinkler Corporation of America, 311 P.2d 907 (Ct. App. Cal. 1957).

Appellants have failed to meet this burden and the trial court properly ruled that no course of conduct had been established.

B. The Instances Relied upon by Appellants as to this Aircraft Policy and Other Policies Do Not Show a Course of Conduct and are Not Analogous to the Risk Involved in the Instant Case.

Appellants' theory throughout this proceeding has been that when an insurance company adopts the practice of backdatin

endorsements for a change in insurance coverage to the dates that the soliciting agent requested the coverage, that the company has impliedly extended binding authority to the agent. (Appellants' brief, p. 11). Under Appellants' theory, this implied extension of authority can be used not only by the third-party insurance applicant but also by the insurance agent himself.

The trial court rejected a finding of such a course of conduct. The court stated:

> In support of these contentions counsel points to the course of dealing on the policy in question as well as in the issuance of six other policies about which testimony was given. I have considered the testimony with respect to those 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. The facts of each policy so issued varies and the effective date of the coverage granted on those policies was not tied solely to receipt of completed pilot information forms. Some of the policies relied on to show such course of dealing did not deal with adding pilots to policies and in some the effective date was made in conformity with a specific request for making the effective date that of a specific date. The thread which Dysons seek to grasp to support their contention that a course of dealing was established does not run through all of the policy cases upon which evidence was given. (Emphasis added) (R., p. 261; App. pp. A-18 - A-19).

During the trial Dyson relied upon two alleged courses of

conduct in support of his theory of implied binding authority. The first group consisted of the transactions occurring to the Dyson policy itself. The second group included other policies issued to various individuals and companies by Dyson through Ranger Insurance Company.

An examination of the record will show that in all examples given, the following occurred: (1) In many instances a new risk had been bound orally by telephone; (2) An additional risk was never bound until all information was received by Ranger and until the insured knew and accepted the amount of the premium; (3) Policy endorsements would be "backdated" only if no new risk was involved and no new premium was charged. This is in contrast to the transaction involving the addition of Shannon as a pilot since such did involve an additional risk and premium--yet no oral binder was requested or obtained nor did the insured accept the additional premium. The following synopsis supports the contentions concerning the transactions at issue:

1. Transactions Involving the Dyson Policy Itself.

a. The Issuance of the Original Policy.

The policy involved in this litigation insuring the aircraft which Shannon was piloting at the time of the accident was initiated by a call from Mary Cartwright to A.G.A. in Cody, Wyoming. (Tr., p. 490). Pursuant to that conversation an ap-

plication for insurance was sent in by Mrs. Cartwright to A.G.A. in Cody, Wyoming. (Ex. 4DD). The application together with a cover memorandum were dated March 22, 1975 and requested that the application be effective March 21, 1975. (Ex. 23DA).

The application was received by A.G.A. on March 26, 1975 at which time the application was modified by Mr. Dave Brannon of A.G.A. who wrote in the amount of premiums, corrected the number of passenger seats listed, noted that an open pilot clause was to be included, and changed the effective date from March 21 to March 26. (Ex. 35DA).

Brannon then quoted the premium to Mrs. Cartwright by telephone and upon approval issued a thirty-day binder. (Tr., pp. 712-714; Ex. 24DA). The binder was sent to A.O.A. so that the copy was in its office on March 31. (Tr., p. 628).

Thus, even though the policy was typed on April 1, it was "backdated" to March 26 since a binder had been issued on that date and Ranger Insurance was therefore liable during the 30-day interim period. The difference in the date of the typing and the date of the coverage was attributable to an oral and written binder issued on the date of the policy.

b. Addition of Stephen Kesler as Pilot.

Mary Cartwright on July 21, 1975 telephoned Dave Brannon at A.G.A. and requested that Stephen Kesler be added as a pilot and also that the coverage be extended to commercial use. (Tr., pp. 428-429). Since A.G.A. did not have binding authority as

to commercial use (Ex. 33DA), Brannon called Thomas Dougherty, Vice President in charge of underwriting of A.O.A., and requested coverage. (Tr., p. 574). Authority was given and Brannon then wrote a confirming memorandum dated July 21, 1975 changing use to include rental and adding the name "Stephen Kesler" as a pilot. (Ex. 7DD).

On the same date of July 21, 1975 Mary Cartwright wrote a memorandum to A.G.A. in Wyoming changing her request for commercial coverage but stating that Kesler should still be added as a pilot and noting that he had approved the $21 increase in premium. (Ex. 8DD).

On August 20 a request was made from A.O.A. to Dyson for more pilot information on Kesler concerning his number of total hours in various types of planes. (Ex. 9DD).

On September 9, 1975 Tom Dougherty was called by Mrs. Cartwright who told him that Dyson had again changed his mind and that commercial coverage should be added to the policy. At that time she was quoted what the new premium for commercial coverage would be. (Tr., pp. 588-589; Ex. 28DD). On September 17, 1975 A.O.A. advised Dyson by memo that an endorsement adding Kesler and changing the policy to commercial use was being typed. (Ex. 10).

The endorsement was issued September 17, 1975 effective as of July 22, 1975, the date of the original binding phone call. (Ex. 11DD).

The trial court correctly noted that even though the policy was issued on September 17 it was made effective July 22 because of the oral binder given by A.G.A. to Dyson. (Tr., p. 578). The trial court stated:

> In Kesler's case the effective date of the risk of July 22, 1975, was based upon A.O.A.'s specific acceptance through Dougherty in his telephone call from Brannon at A.G.A. of the risk as to Kesler as a pilot, even though it took until September 17, 1975, to get the required information to A.O.A. to issue the endorsement. (R., p. 262; App. p. A-20) (Emphasis added).

Thus, once again an oral binder had been issued and accounted for the backdating of the policy.

c. Addition of Tim Bissell as a Pilot.

On August 26, 1975 Mrs. Cartwright sent a memorandum to Dave Brannon at A.G.A. in Cody, Wyoming requesting Tim Bissell be added to the policy. (Ex. 6DD). On September 17, 1975 A.O.A. wrote to Dyson requesting Bissell's first name be provided. (Ex. 10DD).

On September 24 Sara Broughton, an assistant underwriter at A.O.A., wrote to Dyson on the reply portion of the August 26 memorandum and stated the following: "Before we can approve the above pilot please have the attached pilot form completed by Tim Bissell." (Emphasis added) (Ex. 12DD).

The Dyson Agency then forwarded a completed Pilot Experience Form to A.O.A. (Ex. 13DD; Tr., p. 670). An endorsement was issued on December 2, 1975 effective as of November 13,

1975, the date that the information was submitted to A.O.A. (Ex. 14DD). No additional premium was charged on Bissell's addition. (Tr., p. 630).

Thus, even though the initial request in Bissell's case was made in August of 1975 the effective date of coverage was not until November 13, 1975 when all of the information had been submitted. In Bissell's case there had been no oral binder by either A.G.A. or A.O.A. prior to the receipt of the Pilot Information Form. The effective date in this case then was based upon the date that the last information necessary for completion of the risk was submitted to A.O.A.

d. Addition of Gary Ferguson as a Pilot.

On December 4, 1975 Mrs. Cartwright sent a memorandum directly to A.O.A. in Dallas, Texas enclosing a Pilot Experience Form on Ferguson, requesting that Jim Breeze be deleted from the policy, requesting a confirming memo on coverage, and stating that she did not believe that an additional rate would be needed because of Ferguson's experience. (Ex. 15DD). An endorsement was issued for December 4, 1975 showing Bissell, Dyson, Kesler, and Ferguson as the pilots covered. (Ex. 16DD). No additional risk was involved so no additional premium was charged. (Tr., p. 630).

Here, as in the Bissell case, the effective date of the policy was related to the day that the necessary information for rating Ferguson as a pilot was submitted to A.O.A. Again,

like in Bissell, no additional premium was charged since no new risk was considered by the company to have occurred. (Tr., p. 630).

e. Addition of Kenneth Shannon as an Insured Pilot.

On December 8, 1975 Mrs. Cartwright forwarded an office memorandum to A.O.A. in Dallas, Texas enclosing a Pilot Experience Form on Shannon stating that he was to be included as a pilot under the policy and requesting an endorsement to that effect. (Ex. 17DD).

On December 15, 1975 Sara Broughton wrote to Dyson on the reply portion of the December 8 memorandum and stated the following:

> This risk has reached a flying club exposure. To add this pilot it will be a fully earned premium of $100. Please advise if you want him added. (Ex. 34DA).

No further written communication was made between Dyson and A.O.A. and no endorsement adding Shannon as a named pilot was ever issued. (Tr., pp. 632, 634).

Mrs. Cartwright testified that in talking to Tom Dougherty in connection with a Don Rich file on December 16, 1975 she asked Dougherty about the endorsement on Shannon and he told her that he would look into it. (Tr., p. 442). Dougherty could not remember discussing the Shannon endorsement and his note showed no reference to such subject matter on the December 16 telephone conversation. (Tr., pp. 598-599, 635). Mrs. Cart-

wright also thought that she talked to Dougherty about the Shannon endorsement in a conversation concerning Dick Reynolds. (Tr., p. 441). However, the record shows that the Reynolds file was not effective until almost 11 months after the plane had crashed. (Tr., p. 635). Mrs. Cartwright must have been mistaken on that point.

The trial court found the following with regard to the alleged conversation regarding Shannon on December 16, 1975:

> If Dougherty received this call and did in fact look into it, a reasonable inference is that he would have seen Broughton's reply of December 15, 1975, set out above and may reasonably have assumed Cartwright would be receiving it shortly. (R., p. 259; App., p. A-15).

The evidence shows that the following policy procedures were utilized by A.O.A. in determining the date of coverage: (1) When an oral binder of coverage was given, the company would charge a premium from the date of the binder and would insure the risk as of that time regardless of when the application was finalized into a policy as an endorsement, (Tr., p. 578); (2) When a new risk was added to an existing policy and an additional premium was required, coverage would not be effected until the additional premium had been approved by the agent and sufficient information was available to the underwriter, (Tr., pp. 633, 704); and (3) If no new risk was involved and no oral binder had been given the policy would be dated

as of the time that information necessary to rate the risk had been submitted to A.O.A. or on the specific date requested by the agent--but no new premium would be charged. (Tr., pp. 611-671).

Applying these principles to the aforesaid examples reveals the following: (1) As to the original policy an oral binder was given and a premium was charged as of that date since a risk had been assumed; (2) As to Kesler and the change to commercial usage an oral binder had been given by A.O.A. so that this became the effective date of the endorsement and included an additional premium since the additional risk was bound as of that date; (3) As to Bissell there was no oral binder issued, and upon receipt of the Pilot Information Form the endorsement was issued as of the date the form was submitted by Dyson but because no additional risk was incurred the company did not require a higher premium; (4) As to Ferguson no cral binder was made, and upon receipt of the Pilot Information Form the date of submission was again used since it was determined that no additional risk was incurred and therefore no additional premium was charged; (5) As to the addition of Shannon, no oral binder was requested and the information received by the company showed that an increased risk resulted causing an increase in premium which required approval of the insured before the requested endorsement could be effectuated.

It can readily be seen from the foregoing transaction of this policy that Ranger Insurance Company had no regular course of dealing with the Dyson Agency which would have justified Dyson into believing that it had an implied authority to bind coverage. In addition, unlike the insurance company in Traveler's, Ranger Insurance Company received no premium advantage from any backdating since a premium was only charged concurrently when a risk was assumed. For these reasons, there was no evidence showing that the transactions in the policy case itself created a course of dealing or custom which justified coverage by the company. In fact, the dealings negated any inference of binding authority in Dyson. Otherwise, why did Dyson find it necessary to obtain an oral telephone binder when a new risk was involved such as with the issuance of this policy and the addition of Kesler.

2. Other Insurance Coverage Instances Relied Upon by Dyson as Showing a Course of Conduct.

Dyson attempted to cite previous experiences with the company as tending to show the practice of backdating policies. An analysis of these cases once again shows that the instances were not analogous because they involved different types of coverage or complied with the criteria listed in the previous section as to when a policy would be issued and did not create a uniform backdating practice as found in the Traveler's case.

a. Coverage of Rex Anderson.

Dyson claimed that his company requested an endorsement to be dated May 5, 1972 although the request was made May 22, 1972. (Tr., pp. 512-513).

Mr. Dougherty, upon examination of his files, found that the Rex Anderson policy involved a request for substitution of an aircraft and that the effective date of coverage was not material because the policy provision allowed for a 30-day substitution clause which would have covered the airplane in any event. (Tr., pp. 698-699).

b. Coverage of Norman Anderson.

Appellants claimed that in this case Dyson requested from the company a broadening of the pilot clause of the policy. His files showed that on June 26 he wrote a letter to the company requesting that coverage be changed as of June 10, 1973. The company accordingly issued its policy on July 2, 1973 but made the coverage effective as of the requested June 10, 1973 date. (Tr., pp. 514-515).

Mr. Dougherty testified that the Norman Anderson case involved the issuing of a new policy which was to be continued from the insureds previous company. After having received the needed information and quoting the premium the policy was typed with an effective date of May 31. It should have been typed with a date of June 10. Subsequently, Dyson wrote to the company and requested that the correct date be inserted and the

company accordingly corrected the time of coverage pursuant to their instructions. (Tr., pp. 700-701).

c. Coverage of R. W. Walsh.

This involved a renewal policy of a previously insured pilot. The policy was typed on June 22, 1976 but was made effective June 5, 1976. (Tr., pp. 517-518).

Mr. Dougherty explained that this renewal had been telephone bound on May 29 and that a request for a June 5 date had been made by the Dyson Agency. (Tr., p. 701).

d. Coverage of Don Rich.

This case involved the addition of a pilot to a policy. The policy was typed on April 30, 1976 and the endorsement was dated April 16, 1976. (Tr., p. 527).

Mr. Dougherty testified that in the Don Rich case a telephone binder had been made previous to the effective date of coverage and that the effective date was that requested by the agent. The policy was typed several weeks thereafter. (Tr., p. 702).

e. Coverage of Dick Reynolds.

This involved a new insurance policy on a pilot. A memo request was dated November 15 from Dyson to A.O.A. Dyson testified that no binder was issued on that policy. He further stated that while the policy was typed on December 13 it had an effective date of November 15, the date of the initial request. (Tr., pp. 527-528).

Mr. Dougherty testified that on November 15 he received a telephone call from the Dyson Agency and orally bound the coverage. On November 18 he received the application and pilot history and on December 13 the policy was typed effective the date it had been orally bound. (Tr., p. 702).

These examples relied upon by Dyson to show a "course of conduct" completely fail to meet the burden Dyson was obligated to meet even if it is assumed that such evidence was relevant to the issues in this case. These examples once again show that the company would "backdate" new risks only when an oral binder had been given or when the agent specifically requested that coverage be effective as of a certain date. In these instances the risk was assumed as of those dates and a premium was accordingly charged. In the Shannon case, however, neither an oral binder nor a specific request for a coverage date was made. Thus, these examples are not applicable to the Shannon coverage question and do not show a course of conduct or custom which Dyson could have relied upon.

It should be noted that Dyson cited only five separate cases of insurance coverage as a basis for his "course of conduct" theory. Even if each and every one of the five instances was analogous to the Shannon policy such a small number (compared to the 75 transactions Dyson claimed to have had with the company) would be legally insufficient to show any pattern upon which Dyson could rely. In this case, however, even these five

instances are inapplicable.

In summary, neither the previous transactions of this policy nor the examples of other policies showed a course of conduct upon which Dyson can now claim implied authority to bind coverage. All of the examples were varied and differed under the factual context of each policy or endorsement. This evidence is hardly the type of conduct relied upon in the Traveler's case in which 300 analogous and consistent transactions had previously occurred.

C. Tom Dougherty Did Not Make an Admission Which was Conclusively Binding Upon Respondents.

Dyson in his brief quotes several answers to leading questions in which Mr. Dougherty, Senior Vice President in charge of underwriting, allegedly admitted that the company would always date a risk as of the time when all of the information needed was submitted to the underwriter. (Appellants' brief, pp. 19-21). Dyson argues, therefore, that since the Shannon application contained all of the necessary information to rate Shannon as a pilot that coverage automatically attached as of December 8, 1975, date of the request.

The fallacy in Dyson's argument rests in the fact that the addition of Shannon as a pilot resulted in an increased risk to the company (Tr., p. 668) which required an additional premium. Mr. Dougherty stated in other testimony that when an additional risk occurred with the addition of a pilot and an

additional premium was required it was the company policy to request that the agent authorize the additional premium before the endorsement would be issued. (Tr., p. 633). Thus, in the case of Shannon the company did not have all of the information necessary to add Shannon as an insured pilot, i.e., it did not have the authorization of the insured to increase the premium.

Mr. Dougherty's testimony concerning this area is as follows:

> Q. (By Mr. Wadsworth) You are saying when you send this memo back saying this would increase the premium $100 and asking if they still wanted, that was a request then from your office for further information, wasn't it?
>
> A. It is a request whether or not they want it. It would not have required us to suspense the file for follow-up.
>
> Q. You are asking for information, right?
>
> A. Yes. (Tr., p. 597)(Emphasis added).
>
> * * *
>
> Q. (By Mr. Poelman) Do you ever write coverages without the insured knowing in advance what it is going to cost him?
>
> A. No. The insured will know what it is going to cost him. (Tr., p. 633).
>
> * * *
>
> Q. (By Mr. Poelman) Clarify that question further: Were you certain the request was still outstanding at that time?
>
> A. The request was outstanding because we had a premium factor that was still

not resolved, that would have permitted us to go any further.

Q. Did you need to know at this time whether they really wanted that type of flying club coverage?

A. No, we didn't know.

Q. So you needed more information, is that correct?

A. Yes.

Q. Was that the purpose of the memorandum of Sara Broughton?

A. Yes. (Tr., p. 634) (Emphasis added).

Mr. Dougherty also gave two examples where a pilot addition was requested and where an additional premium was being charged because of such addition. The first instance involved the Rocky Mountain Sales policy where an effective date of October 29, 1974 was given to the coverage. On May 2, 1975 a request was made to add an additional pilot. At that time a premium of $25 was quoted to the agent who then agreed to it and a binder was issued as of that date. (Tr., p. 652).

The second example involved the addition of Kesler as a pilot. (Tr., p. 654). Dyson's own memorandum sent to A.G.A. in Wyoming showed that the additional premium had been quoted to Kesler in that the memo of July 21, 1975 stated "We have quoted him the $21 increase. Please send us an endorsement adding him as a pilot." (Ex. 8DD). Likewise, when the policy was changed to limited commercial coverage the September 9 tele-

phone conversation between Dyson and A.O.A. included the amount of the additional premium. (Tr., pp. 589-590).

It can be assumed that Mr. Dougherty's testimony quoted in Appellants' brief was substantially correct--that is, a policy would be dated at the time all information had been received presuming no specific request had been made by the agent of another date or an oral binder had not been issued. However, Mr. Dougherty's later testimony showed that all of the information in the Shannon case was not in and that the approval of the additional premium was as necessary for the underwriter to issue coverage as was receipt of the Pilot Information Form. In both cases coverage would be withheld until the information was received from the agent.

Respondents do not believe it necessary to quote authorities concerning judicial admissions. Appellants' own authority, 31A C.J.S., Evidence, Section 381 (Appellants' brief, p. 21) adequately states the rule. A judicial admission is not binding on a party unless the statement is unequivocal, unexplained, and uncontradicted. In this case, Mr. Dougherty's further testimony concerning the need of premium addition approval supplemented his previous testimony and was entirely consistent with Respondents' position throughout the trial.

For this reason, the trial court did not err in refusing to conclude that Mr. Dougherty had made a judicial admission

contrary to the position of respondents.

POINT III

IT WAS THE DYSON AGENCY, NOT A.O.A. NOR RANGER INSURANCE COMPANY, WHICH BREACHED ITS DUTY TO COVER KENNETH SHANNON AS A PILOT.

Dyson quotes several authorities in his brief as to the duty that an insurance agent or a broker has to a person seeking insurance. (Appellants' brief, p. 26). In the Consolidated Sun Ray case the following quotation is cited by Dyson:

> 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. (Appellants' brief, p. 27).

Dyson argues that he has assumed the role of an insured and that A.O.A. and Ranger are the equivalent to his broker or agent. Such an assumption is totally erroneous. In this case it is clear that Shannon and the other owners of the airplane were the insureds and that Dyson acted as their broker. A.O.A. and Ranger were merely companies from which Dyson could obtain insurance. By no stretch of the imagination can A.O.A. or Ranger be defined as a broker or agent of Dyson.

Utah State law defines a broker as:

> Any person who, on behalf of the insured, for compensation as an independent contractor, or commission, or fee, and not being an agent of the insurer, solicits, negotiates, or procures insurance or reinsur-

ance or the renewal or continuance thereof, or in any manner aids therein, for insureds or prospective insureds other than himself. Section 31-17-2, U.C.A.

This is contrasted to an "agent" who works directly for the company. Section 31-17-1, U.C.A.

The agency agreement between Ranger Insurance Company and Dyson and Associates provides that Dyson shall receive a 15 per cent commission for all pleasure and business insurance policies written. (Ex. 2DD). The statement of premium sent to Dyson by A.G.A. also reflects a 15 per cent commission of $112.20 for the initial policy coverage. (Ex. 5DD).

Likewise, the testimony at trial clearly shows that Dyson was acting as an independent agent on behalf of the airplane owners and that Dyson breached his duty to procure coverage for Shannon as a pilot. Dyson himself admitted that it was his business as an insurance agent to obtain the type of insurance desired by an applicant and that it was Dyson's responsibility for obtaining the proper insurance from the appropriate company. (Tr., p. 395). Dyson stated that he represented three separate companies writing aviation coverage. (Tr., p. 530). Thus, Dyson had no allegiance to Ranger Insurance Company and could have placed this risk with any company he desired.

Mr. Dougherty stated that there were approximately 5,000 insurance agencies throughout the country which had contracts with A.O.A. for soliciting of insurance. (Tr., p. 643). How-

ever, only six were given binding authority. (Tr., p. 643). The other 5,000 agents did not even have the company's rates available to them and had to call either A.O.A. or one of the six general agents to obtain quotations. (Tr., p. 627). Even the six general agents which had binding authority had to notify the company by the next day of any binders issued. (Tr., p. 627).

Dougherty also testified that A.O.A. administers 20,000 policies covering 30,000 separate planes. (Tr., p. 709). Dougherty stated that it is impossible for his company to monitor requests for insurance and that it is the responsibility of the soliciting agent to follow through as to any request for insurance. (Tr., pp. 597, 711). Dougherty stated that the soliciting agent can always call the company and obtain an oral binder if they are concerned about coverage and the delay which may ensue in the issuance of an endorsement. (Tr., p. 661). He stated that Dyson could have called in this case and Shannon would have been orally bound had the increased premium been approved. (Tr., p. 663). Mrs. Cartwright stated that she would call and obtain an oral binder if a new risk was being added to a policy. (Tr., p. 497).

It is only equitable and logical that the responsibility for obtaining coverage rests upon the soliciting agent. In this case, for example, Dyson admitted that he gave the keys of the

airplane to Shannon although Dyson did not know whether coverage had been extended to Shannon. (Tr., p. 556). Mrs. Cartwright testified that she did not know that Shannon was flying the plane at the time the request for coverage had been submitted to A.O.A. (Tr., p. 762). Certainly Dyson was the person who knew the status and urgency of obtaining insurance coverage for Shannon. He knew that Shannon was operating the plane and that a risk was being assumed by the owners unless insurance coverage had been extended to cover Shannon. A.O.A. and Ranger Insurance Company, on the other hand, had no knowledge as to the activities of Shannon or the plane and could not know of any urgency in extending coverage.

The trial court made the following findings concerning the responsibility of obtaining the insurance coverage:

> A.O.A. had 5,000 agencies such as Dyson with which it had contracts, only six of which had authority to bind without written acceptance of the risk by A.O.A. The responsibility of monitoring a request for a change in coverage must of necessity rest upon the agency submitting that request. Six weeks expired between Cartwright's last oral inquiry and the crash of the plane with no further effort on Cartwright's part to obtain the endorsement for coverage of Shannon. (R., p. 263; App. p. A-21).

As to the negligence of the Dyson Agency and to Dyson personally the court stated:

> As to the claims of Kesler, Bissell, McClain, Oborn, Walker, and Ferguson against the Dysons, I find that Donald Dyson both as a partner and as an agent of L. F. Dyson and Associates

> breached his contract with his partners to obtain insurance coverage for all pilots flying said plane. I also find that Donald Dyson individually and as an agent for his company was negligent in allowing Shannon to fly the plane until coverage was accepted on Shannon by A.O.A., and also because he knew or in the exercise of reasonable care should have known that Mary Jane Cartwright had not yet obtained insurance coverage for Shannon. I further find that such negligence was a proximate cause of the damages sustained by the plaintiffs. (R., p. 264; App. pp. A-21 - A-22).

When Dyson agreed to obtain insurance coverage on the airplane he was acting as the agent of the owners and not the agent of A.O.A. or Ranger Insurance Company. Barnett v. State Automobile and Casualty Underwriters, 487 P.2d 311 (Utah 1971). As such, therefore, he violated the duty referred to in Appellants' brief and was accordingly found liable to the owners for this breach. The trial court was correct in its decision.

POINT IV

> THERE WAS SUFFICIENT EVIDENCE AND INFERENCE TO SUPPORT THE MAILING OF THE SARA BROUGHTON MEMO.

Dyson in his brief once again misconstrues the duties and roles of the various parties in this case by wrongfully comparing them to other legal cases and authorities involving different factual contexts. As noted in the preceding section, the Dyson Agency had the burden of obtaining insurance for the airplane owners and had the duty of follow-up after the application was sent to A.O.A. It was the responsibility of Dyson, not A.O.A., to inquire why the coverage had not been written.

As such, therefore, the authorities cited by Dyson in his brief are inappropriate since they concerned situations in which an insurance applicant is suing his insurance agent for failure to obtain insurance coverage. (Appellants' brief, pp. 30-34). Had A.O.A. done nothing after receipt of the application, it still would have been Dyson's responsibility to inquire from A.O.A. as to why a coverage endorsement had not been issued. For this reason, the mailing of the Sara Broughton memorandum does not assume the critical aspect that it would in the case where an agent is attempting to shift the responsibility for failure to obtain insurance back to the insured client.

The mailing of the memo can only go to any claim that A.O.A. was negligent in its conduct. As stated previously, however, A.O.A. was under no duty to take affirmative action. Dyson's failure to follow up on his request amounted to negligence even if it were assumed the memo had never been sent.

In addition, there was ample evidence that the Sara Broughton memorandum had been mailed to Dyson. Miss Broughton did not personally appear at the trial. Her deposition had previously been taken in Texas and was read into the record. Appellants' counsel did not attend the deposition nor did they submit written questions pursuant to Rule 31 U.R.C.P. to the officer taking the deposition.

Sara Broughton testified that after preparing the hand-

written memorandum she "mailed it back to the agent". (R., pp. 739-740).

Since no foundational objection was made at the time of the deposition it can be presumed that Sara Broughton actually deposited the memorandum in the U.S. mail. Rule 32(d)(3)(A), U.R.C.P. provides that objections to the competency, relevancy, or materiality of testimony are not waived by failure to make objections before or during the deposition "unless the ground of the objection is one which might have been obviated or removed if presented at that time." Had Appellants' counsel objected to the failure of establishing sufficient foundation as to the "mailing", Respondents' counsel could have then inquired into Miss Broughton's statement further to determine whether or not a sufficient foundation existed.

Appellants cannot fail to object to such a statement and then shift the burden upon the other party after the witness is no longer available for further testimony. The fact that Mr. Dougherty stated that he did not believe Sara would be the person who would actually place the memo in the mail box is merely a conflict in testimony between the two witnesses and the trial court could choose to believe Sara's statement when there was no showing to the contrary.

Thus, since the memorandum mailing was not a critical factor in this case and since, in any event, there was sufficient evidence to show that A.O.A. mailed the memorandum the

trial court was correct in concluding that A.O.A. was not liable to Dysons

POINT V

A.O.A. AND RANGER INSURANCE COMPANY CORRECTLY DENIED COVERAGE FOR THE LOSS IN QUESTION.

Dyson in his brief argues that A.O.A. and Ranger Insurance Company wrongfully denied coverage in this case and cites several inter-office communications and correspondence from the company to the Dyson Agency. (Appellants' brief, pp. 35-36). Dyson observes that the reasons given for the denial of coverage were (1) that Shannon had not been endorsed as a named pilot, and (2) Dyson had warranted in his application that he was the sole owner of the aircraft. (Appellants' brief, p. 36).

Dyson seems to contend that the insurance company did not have the right to question the endorsement coverage nor the ownership and that such challenge in some way harmed Dyson.

It should first be noted that the trial court held that Ranger and A.O.A. had not accepted the risk on Shannon as a pilot since no endorsement was specifically made nor was a course of conduct shown to impliedly cover Shannon. (R., p. 263; App. p. A-21). Thus, Dyson's discussion concerning the question of ownership and any waiver by the insurance company by failure to request specific information is irrelevant to the results of

this decision.

The record shows that upon notification of the accident A.O.A. received a memorandum from Mary Cartwright requesting that Shannon be added as a pilot and stating, "Actually Mr. Dyson sold his interest in this craft to Mr. Shannon". (Ex. 19DD). Up to that time A.O.A. and Ranger Insurance Company had no knowledge that Dyson was not the sole owner of the aircraft.

Dyson admitted at trial that he made no effort to notify the company of the additional owners. (Tr., p. 389). He also admitted that had he added Shannon and requested his removal from the policy, that a new policy would have to have been written since he no longer would have qualified as a named insured. (Tr., pp. 418, 421). Mr. Dougherty also stated that had the company known that Dyson sold his interest to Shannon it would have required that a new policy be written. (Tr., p. 637).

Thus, the fact that A.O.A. and Ranger raised the problem of ownership as a reason for denying the claim was perfectly legitimate and shows no bad faith on the part of the company. Obviously, this contention was not relied upon by the trial court in concluding that Ranger and A.O.A. had no obligation to the insureds. Whether A.O.A. and Ranger waived a right to contest the ownership provision is a moot question since the answer would have no effect whatsoever upon the outcome of this case.

For these reasons, Dyson's claim of wrongful denial is ob-

viously without merit since the trial court found the sufficient grounds to deny coverage.

POINT VI

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING A TRIAL BY JURY

Rule 4-2 of the Rules of Practice in the District Courts states the following:

> Cases will be set for jury trial only upon the filing of a written request for trial setting and the payment of the required statutory fee. Such written request for trial setting, or written demand, and demands for jury trial must be filed at least ten (10) days prior to trial or at such other time as the trial judge may order.

Dyson admits that the granting or denying of an application for jury trial not made strictly in accord with the rules of the court is a matter of discretion. (Appellants' brief, p. 40).

There is no showing that the trial court abused this discretion in denying the jury trial. Appellants requested no hearing as to this matter nor advanced any reasons why a request had not been previously made.

The preparation for a jury trial including instructions, exhibits, and the method of proof is entirely different from a trial to a judge alone. Obviously, the parties would have had to make enormous preparation to enlighten a jury of lay people as to the various intricacies of the insurance industry and the numerous transactions which occurred in this case. A trial to

a judge alone, however, would not require such preparation because the court had sufficient knowledge and expertise in contractual and insurance law that such elaborate explanation and proof were not required.

In light of the type of case this matter involved and the complex legal questions presented, the trial court did not abuse its discretion in denying Appellants' eleventh-hour request.

CONCLUSION

Both Respondents and Appellants admit that the facts in this case are basically undisputed. There is no doubt, for example, that the agency agreement between Dyson and Ranger prohibited Dyson from binding coverage without the approval of A.O.A. It is also undisputed that no express, written, or oral permission was ever granted to Dyson by either A.O.A. or Ranger Insurance Company changing this provision.

Dyson's sole contention at the trial was that the course of conduct between Dyson and Ranger in the past and with this particular insurance policy constituted an implied binding authority.

The law is clear that course of conduct, custom, and usage cannot be used to vary the express terms of the written agreement. Thus, regardless of what transactions previously occurred Dyson cannot legally as an agent claim he was mislead from the

express authority he was given by the insurance company.

Dyson cannot step into the shoes of an insured applicant and claim apparent or ostensible authority against the insurance company and his authorities and arguments to the contrary are therefore invalid. The Traveler's Insurance case, cited by Dyson in his brief, is the only case found by the parties allowing an agent to recover from the principal by an implied binding authority caused from course of conduct.

While the Traveler's case is not the law in Utah it is easily distinguishable on its facts since the insurance company in this case never mislead Dyson into believing that he had binding authority, never accepted premiums after the risk of loss had passed, and never conducted enough transactions with Dyson concerning endorsements of additional pilots to constitute a course of conduct.

A review of the transactions involved in this policy and the other cases relied upon by Dyson show that in each instance the date of coverage was dependent upon either a specific request by the insurance agent, an automatic renewal date as provided in the policy, a date when all information (including the approval of the premium) was available to the underwriter, or when an oral binder had been made by the company. These varied circumstances did not give rise to a course of conduct, even assuming such to be relevant, which would mis-

lead Dyson into believing he had binding authority.

It was Dyson, not A.O.A., who breached the duty to the airplane owners. It was Dyson's responsibility to obtain the insurance since he was the only person who knew the exigency of the situation and the requirements of the owners. The trial court's finding that Dyson had failed to follow up properly on this application and had even given Shannon the keys to the airplane without confirming coverage is amply supported by the record.

Likewise, the attempt of Dyson to shift the blame upon the company regarding the mailing of the Sara Broughton memorandum is equally ineffectual. It was Dyson's duty, not A.O.A.'s or Ranger's, to follow up and see why coverage had not been afforded to Shannon. In any event, however, there was sufficient evidence for the trial court to conclude that the memorandum had in fact been mailed to the Dyson Agency and that A.O.A. acted in good faith.

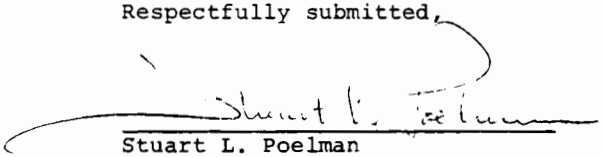
Dyson's claim that coverage was wrongfully denied is also without merit. The fact that Dyson failed to inform the company as to the true ownership of the plane and the fact that the company was justifiably concerned with this question did not show bad faith in denying coverage. However, since the trial court only ruled that no specific endorsement had been made covering Shannon as a pilot the question of ownership was moot

and is not relevant to this appeal.

Finally, the trial court did not abuse its discretion in refusing to grant Appellants a jury trial in view of the lateness of the request, the complexity and difficulty of the case, and the hardship which would otherwise have been imposed on the other parties.

For these reasons, the judgment of the trial court should be affirmed and costs awarded to Respondents.

Respectfully submitted,



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(R., p. 249)

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DONALD A. DYSON, ET AL, Plaintiffs, vs. AVIATION OFFICE OF AMERICA, ET AL, Defendants.	)	MEMORANDUM DECISION Civil No. 234988

The above entitled case came on for trial before the Court on September 20, 1977, continued through September 23, 1977, and was argued on October 4, 1977, following which the Court took the case under advisement. At the trial Raymond A. Hintze appeared as counsel for plaintiffs Kesler, Bissell, McClain, Oborn, and Walker and R. Clark Arnold appeared as counsel for intervening plaintiff Ferguson. H. Wayne Wadsworth appeared as counsel for third party defendants LeRoy F. Dyson and L. F. Dyson and Associates, Inc., with Wallace R. Lauchnor appearing as counsel for Donald A. Dyson as plaintiff and third party defendant. Stuart L. Poelman appeared as counsel for defendants and third party plaintiffs Aviation Office of America (hereinafter referred to as AOA) and Ranger Insurance Company (hereinafter referred to as Ranger).

Since the case involved third party complaints and cross

claims a brief summary of the pleadings appears necessary to help put the issues in focus. The case arises out of the crash of an airplane, a twin engine Cessna Turbo Skymaster, FAA No. N 2496S, which occurred on February 1, 1976, in Salt Lake County. The plane was purchased in March, 1975 under an oral and rather informal partnership arrangement by five of the original plaintiffs, Dyson, Kesler, Bissell, McClain and Oborn. The purchase price was $27,000.00 and was entirely financed by Walker Bank and Trust Company with said five parties all signing a promissory note. The bank required full insurance coverage which Dyson as an insurange (sic) agent associated with his father, LeRoy F. Dyson, in L. F. Dyson and Associates, a Nevada Corporation, assured his partners he would and did obtain.

(R., p. 250)

Dyson readily admits his responsibility to obtain such insurance and likewise readily admits his liability or that of his agency to his partners and their assignees if it be determined that the plane in fact was not covered by the insurance policy at the time it crashed on February 1, 1976, because it was then being flown by defendant Shannon. Walker appears as plaintiff in this case by reason of an agreement between him and McClain by which Walker purchased McClain's interest in the plane, but with McClain remaining liable on the note to the bank and Walker not being a signator thereon. Ferguson appears as an in-

tervening plaintiff by reason of the fact that under an agreement dated October 15, 1975, plaintiff Oborn contracted to sell his interest in the plane to Ferguson, but with Oborn remaining liable on the note to the bank and Ferguson not being a signator thereon.

The Dyson insurance agency had an agency contract with AOA who in turn were underwriters of insurance for Ranger. AOA dealt exclusively with aviation insurance. Donald A. Dyson through his own agency obtained a policy of insurance covering said plane, the details concerning which and the endorsements thereto will more fully be hereinafter set forth. Donald A. Dyson alone was the named insured. Dyson contracted to sell his interest in the plane to defendant Kenneth R. Shannon in December, 1975, and it was Shannon who was flying the plane on February 1, 1976, when it crashed in Salt Lake County. AOA and Ranger denied the claim for damages to the plane which was totally wrecked but which brought a salvage value of $4,236.00, which amount, when received, was paid over to Walker Bank. The reason for Ranger denying coverage was its claim that Shannon was not an authorized pilot under the policy, as will more fully be set out in a summary of the evidence which follows.

(R., p. 251)

After the claim was denied attorney Hintze filed a complaint on behalf of Dyson, Kesler, Bissell, McClain, Oborn and Walker naming AOA, Ranger and Shannon as defendants. Mr.

Hintze later withdrew as counsel for Donald Dyson individually as the insured and attorney Lauchnor filed an appearance as counsel for Donald Dyson. By this complaint the plaintiffs therein allege the policy was in full force and effect and covered Shannon as pilot and thus they seek to recover the face amount of the policy of $27,000, costs, other relief as may seem just, and, as added by amendment, interest on the value of the aircraft from the date of loss to the date of payment. In a separate count of the complaint it is alleged that Shannon was negligent in his operation of the plane and plaintiffs seek to recover the sum of $29,000, the alleged fair market value of the plane, and costs from Shannon.

Based upon a motion filed by attorney Hintze for his clients the Court on September 2, 1976, entered an order authorizing service of summons on Shannon by mail pursuant to Rule 4(f)(2) and said service was effected by the County Clerk's office mailing a copy of the summons and complaint to Shannon on September 9, 1976. Shannon filed no answer to the complaint and his default was ordered entered by the Court. Neither Dyson, AOA or Ranger filed any pleading against Shannon and Donald Dyson never obtained service on Shannon.

In response to plaintiffs' complaint AOA and Ranger answered, denying liability or coverage with Shannon as pilot, denying Dyson had authority to bind coverage, alleging express refusal to cover Shannon and setting forth other defenses. Said

parties also filed a third party complaint against Donald and LeRoy Dyson and the Dyson Corporation, alleging the filing of the complaint and asserting that if said parties were determined to be liable under the policy, said third party defendants were liable to them for negligence, breach of duty as agents to third party plaintiffs and intentional misrepresentation of facts in the various particulars alleged.

(R., p. 252)

In answer thereto the Dysons denied liability to AOA and Ranger, or that they acted wrongfully, and affirmatively allege an estoppel as a defense, based upon an alleged establishment of a course of conduct with respect to endorsements on changes in coverage, and contributory negligence.

Following the filing of the third party complaint by AOA and Ranger against the Dysons, plaintiffs Kesler, Bissell, McClain, Oborn and Walker filed a cross claim against the Dysons, alleging breach of Donald Dyson's agreement to obtain insurance coverage on the plane, seeking damages including attorney's fees. In reply the Dysons allege their agency did all they were obligated to do in obtaining insurance coverage on the plane and allege negligence by these plaintiffs as a defense: (At the trial these defenses were dropped and the Dyson agency admitted liability to said plaintiffs if no insurance coverage was found to exist)

Based upon the cross claim of said plaintiffs against the Dysons, the Dysons filed a counterclaim against AOA and Ranger alleging that if they were found liable to those plaintiffs, AOA and Ranger were liable to them, asserting that AOA failed to reject an application to add Shannon as a pilot covered by the policy, and that by reason of a prior course of conduct and a failure to davise the Dysons to the contrary, they impliedly agreed to such coverage. Further the Dysons allege AOA had a duty to advise the Dysons that Shannon was not covered by the policy and that such failure constituted negligence for which AOA and Ranger should be held liable to them. In reply to this counterclaim AOA and Ranger deny such liability and by way of affirmative defenses, said parties allege contributory negligence of Dysons, plead estoppel for failure to diligently respond to correspondence and inquiry about coverage of Shannon, allege misrepresentations of Dyson concerning ownership, and assumption of risk.

(R., p. 253)

At a pretrial settlement conference held on September 12, 1977, it was stipulated by all counsel that plaintiff Ferguson could intervene as Oborn's vendee. He has done so and stands in the same shoes as the other individual plaintiffs other than Donald Dyson.

In this memorandum I shall not undertake to summarize the testimony of the respective witnesses as called, but rather will

summarize what I consider to be the material and relevant facts as established by the evidence.

AOA underwrites aviation insurance for Ranger and other insurance companies, and as such has agency contracts with some 5,000 agents throughout the country, only six of whom have written authority to bind AOA and its insurers on aviation policies without the prior approval of AOA. On February 14, 1968, Ranger through AOA executed an agency agreement with LeRoy and Donald Dyson, dba L. F. Dyson and Associates by which the Dysons were appointed "agent" of Ranger for aviation hazards only. The agreement, among other things, contained the following provision:

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

The agency agreement remained in force throughout the period relating to this case. On December 30, 1974, Ranger through AOA entered into an agency agreement with Aviation General Agency (hereinafter called AGA) of Cody, Wyoming appointing AGA as an agent with authority to bind AOA and represented insurance companies on "business and pleasure" risks, but with no authority to bind on "limited commercial" risks, within the stated limits of coverage. Dyson was advised of the availability of AGA as an agency authorized to act for AOA.

In march, (sic) 1975, Donald Dyson, Kesler, Bissell, McClain and Oborn orally agreed to purchase the Cessna plane in question as equal partners for $27,000. They borrowed the full amount of the purchase price from Walker Bank & Trust Company on March 18, 1975, and jointly signed a promissory note, on which they each became jointly and severally liable, for the face amount of $38,519.88 (interest rate of 10.58%), payable in 84 successive monthly installments of $458.57 each commencing April 25, 1975. The note was secured by a security agreement on the plane. At the time of the transaction Walker Bank stated that the plane must be fully insured. Donald Dyson agreed with his other four partners that he would take care of obtaining the required insurance coverage on the plane, it being known by his said four partners that he was then in the insurance business as an insurance agent, and he then knew that they were relying upon him to do so. At the trial the Dysons acknowledged that Donald Dyson had a duty to obtain the required insurance coverage. At this time only Donald Dyson was a licensed pilot and it was the intent of the other four partners to learn to fly the plane and to be licensed therefor.

Donald Dyson then had prepared, and he signed, an "application" for aircraft insurance on an AOA form, requesting insurance on the Cessna plane with a liability coverage of $27,000 on the plane for all risks while in motion. The application

showed only Donald A. Dyson as the insured, marking it as an "individual" ownership rather than a "partnership" ownership. In section 7 of the application it named Donald A. Dyson and Jim Breeze, an FAA Examiner, as pilots with "additional pilots to be added as they qualify". Walker Bank was shown as mortgagee.

On March 22, 1975, Mary Jane Cartwright, an employee of Dyson, forwarded the written application to "Aviation Office of America, P. O. Box 7, Cody, Wyoming," which was the address of AGA. It stated that an application "to be effective 3/21/75 covering a 1968 Cessna for Donald A. Dyson was enclosed, requesting a policy at the earliest convenience, stating the purpose was "pleasure" and suggesting language for the pilot clause. (R., p. 255)

On March 26, 1975, AGA insured binder 1020 confirming it had bound with AOA insurance coverage on the plane for 30 days effective March 26, 1975. Based upon said application, policy No. AC Al-198882 was issued by Ranger to Donald Dyson as the named insured, under date of April 1, 1975, and effective from March 26, 1975 to March 26, 1976. The total premium was stated as $748.00 with $400.00 thereof being charged for the $27,000 liability for all risks while in motion. The pilot clause provided that "Only the following pilot or pilots holding valid and effective pilot and medical certificates with ratings as required by FAA for the flight involved will fly the craft".

Then followed the names Donald A. Dyson or Jim Breeze (together with private or commercial pilots with a minimum number of logged hours which phrase admittedly did not cover any of the parties hereinvolved).

The policy contained a provision in paragraph 19 thereof which provided as follows: "...nor shall the terms of this policy be waived or changed, except by improved endorsement issued to form a part of this policy, signed by the authorized company representative".

In April, 1975, the premium due on the policy was billed to L.F. Dyson and Associates by AGA.

Mary Jane Cartwright handled the processing of insurance for the Dyson agency and Donald Dyson had nothing to do with contacting AOA or Ranger on the policy.

The first steps to effecting a change in the policy occurred on July 21, 1975, when a request was made of AGA by Cartwright to add plaintiff Kesler as a pilot to be covered. Cartwright did not recall how her contact with AGA was made to initiate this change but on that date AGA through David Brannon sent a handwritten communication to Tom Dougherty at AOA "confirming our telcon of today" and stating effective "7-22", AOA was to change use to include rental and also adding Stephen Kesler as a named pilot and stating liability premium was increased $21.00 and the Hull coverage by $203.00.

Also on July 21, 1975, Cartwright typed a written note to Dave Brannon in Cody saying "Sorry - change signals again" and telling him to delete the earlier request to cover rental of the plane commercially. She then stated it was necessary to change the pilot clause to include Kesler, stating some facts about his experience, saying the $21.00 increase had been quoted to him and concluding by saying "Please send us an endorsement adding him as a pilot."

By a memo dated August 20, 1975, from the AOA office in Beaumont, Texas, to L. F. Dyson and Associates a request was made to forward pilot information on Kesler as AOA needed to know specific information "before we can add as approved pilot."

On August 26, 1975, Cartwright wrote Brannon at AGA in Cody requesting addition of Tim Bissell as a pilot and also stating therein that "we had previously requested that you add Stephen Kesler, however we have not received any confirmation from you that these are being added. We would appreciate a note to that affect (sic) for our file." This was received in the AGA office on August 28, 1975, and on a copy thereof, under date of September 24, 1975, Sara Broughton of AOA in Texas wrote "before we can approve above pilot please have the attached pilot form completed by Tim Bissell."

On September 9, 1975, Tom Dougherty made a written record of a telephone conversation he had with "Dyson" requesting a change of use to limited commercial and to add two pilots, Bis-

sel and Kesler.

On September 17, 1975, the AOA office in Texas sent a communication to L. F. Dyson and Associates requesting advice as to Bissell's first name so he could be added as a named pilot and stating that an endorsement adding Kesler as pilot and changing use to limited commercial was then being typed. That endorsement was issued, dated September 17, 1975, showing Kesler as an added pilot and the purpose of use as "limited commercial" with a total additional premium of $302.00, with the effective date of the endorsement being July 22, 1975, which was the date, as noted above, that it had been agreed by Dougherty (AOA) in his telephone communication with Brannon (AGA) on July 21, 1975, would be the effective date for adding coverage on Kesler as a pilot.

(R., p. 257)

The requested pilot experience form, updated, was filled out, signed by Bissell, and submitted so that an endorsement was issued December 2, 1975, by AOA for Ranger amending Item 7 of the policy to add "Tom Bissell". The effective date of this endorsement was November 13, 1975, which was the date the pilot information sheet was forwarded to AOA in Dallas by Cartwright on Bissell. No additional premium was required on Bissell.

As noted supra, McClain had sold his interest to Walker and Oborn had sold to Ferguson under a contract dated October 15, 1975, in which Ferguson agreed to pay Oborn's share of the

amount due Walker Bank.

After the contract of sale to Ferguson on November 5, 1975, Mary Jane Cartwright sent a memorandum to AOA, but addressed it to P. O. Box 7 in Cody, Wyoming, stating they had another name to add to the policy - Gary Ferguson - and for this they needed additional pilot information forms to be completed and requested a small supply for Dyson's use. Brannon at AGA replied to this by directing that they "use Item #7 of the regular application."

On November 13, 1975, in Cartwright's memorandum to AOA in Dallas enclosing Bissell's pilot information sheet (mentioned supra), she also requested more pilot information forms "as we have another commercial pilot to be added to this policy".

Thereafter, Mary Jane Cartwright forwarded on December 4, 1975, a memorandum to AOA in Dallas, Texas, enclosing a pilot's statement on Ferguson, requested that Breeze be deleted, requested a confirming memo and stated that since Ferguson had so many hours, it was doubtful the rate would be affected.

(R., p. 258)

Under date of December 10, 1975, AOA issued an endorsement effective December 4, 1975, amending Item 7 to show Bissell, Dyson, Kesler and Ferguson as the pilots covered. No change in premium resulted.

Also, about December 1, 1975, Dyson sold his interest in the plane to Kenneth Richard Shannon on a contract under which

Shannon agreed to assume Dyson's obligation to Walker Bank. Dyson's partners in the plane voiced concern about Shannon's qualifications and ability, but he made some inquiry, advised them he was licensed by FAA and experienced and assured them they were protected in their investment by insurance coverage. However, Dyson did not advise either AOA or AGA of the sale of his ownership interest to Shannon nor did he request any change in the policy. He only told Mary Jane Cartwright to take the necessary steps to get Shannon's name added to the policy as a pilot. Dyson did not tell Cartwright to have his own name dropped as a pilot or as the insured nor did he tell her he had sold his interest in the plane to Shannon. Dyson either gave Shannon a key to the plane or left it with Cartwright for Shannon to pick up although Cartwright had no recollection that she received the key from Dyson or gave it to Shannon.

Thereafter, on December 8, 1975, Cartwright forwarded an office memorandum to AOA in Dallas, Texas, enclosing a pilot experience form on Shannon stating he was to be included as a pilot under the policy and requesting an endorsement to this effect. This communication was received by AOA in Dallas and on December 15, 1975, Sara Broughton, an employee of AOA whose underwriting duty it was to make changes in existing policies, wrote in reply thereto the following:

> "This risk has reached a flying club exposure. To add this pilot it will be a fully earned premium of $100. Please advise if

you want him added."

(R., p. 259)

In a deposition taken in Dallas, Texas on September 13, 1977, Sara Broughton testified she mailed this response to the Dyson agency. Mary Jane Cartwright denied ever seeing this response or having received it in the mail. Dyson too denied ever having received or seeing it. Thus, no further written communication was sent in response thereto and no endorsement adding Shannon's name was ever issued by AOA. Cartwright testified that in talking to Tom Dougherty in connection with a file on one Don Rich on December 16, 1975, she asked him about the endorsement on Shannon, stating he said he would look into it. Dougherty did not personally recall this telephone conversation with Cartwright but did not deny having it as his file on Rich contained notes of a telephone call from Cartwright on December 16, 1975, but they contained no reference to Shannon. If Dougherty received this call and did in fact look into it, a reasonable inference is that he would have seen Broughton's reply of December 15, 1975, set out above and may reasonably have assumed Cartwright would be receiving it shortly. Cartwright also testified she recalled asking Dougherty about the Shannon endorsement in talking to him on a policy for one Dick Reynolds. However, Dougherty's file on Reynolds shows his policy was not effective until November 15, 1976, some 10-1/2 months after the plane crashed on February 1, 1976.

The crash occurred on that date with Shannon at the controls and flying it. As noted, the plane was totally wrecked. A notation on a claim form dated February 2, 1976, indicated the accident occurred because while landing, the runway was missed, and the plane hit power lines and crashed. It appears Shannon's wife and two children were injured in the crash and hospitalized as a result thereof.

On February 15, 1976, Cartwright wrote a letter to Dougherty at AOA enclosing a copy of the Dyson memo "dated December 7, 1975" (actually dated December 8) wherein "we requested that you add Kenneth Shannon as a pilot to the above captioned policy in the name of Mr. Dyson."

(R., p. 260)

She further stated: "We have never received a confirming memo or endorsement to the policy. Actually Mr. Dyson sold his interest in the craft to Mr. Shannon. We would appreciate an endorsement at your earliest convenience", adding a postscript "Perhaps this request hit your office when you were in the process of moving and thus the delay. We would appreciate the endorsement."

The move by AOA from Beaumont to Dallas had in fact been made in the summer of 1975.

Dougherty replied on March 1, 1976, noting that "we quoted the amount of premium required to add pilot but did not receive a response". He also said it was not customery (sic) to assign

policies and advance approval of the company would be needed. Dougherty's files also contained notations dated March 1, 1976 of a telephone call with Tom Lehman (manager) General Adjustment Bureau, Albuquerque, New Mexico) (sic) in which he recorded that they did not add the pilot because they had "no reply to Sara B's 12/15 memo".

It was stipulated that the proof of loss or claim required under the policy had been duly filed.

By letter dated March 30, 1976, to Donald A. Dyson, Tom Lehman advised that he regretted to advise him that there was no coverage under the policy for the claims arising out of the accident, as Shannon was not a named pilot under the terms of the policy nor did he qualify under the open pilot endorsement. It further stated that Dyson had warranted under the application for aircraft insurance that he was the sole owner, but that the records of the FAA and their own further investigation indicated this information was incorrect.

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. It is also apparent that Donald Dyson did nothing more to get Shannon's name added to the policy as a pilot than to direct Mary Cartwright to do it and that he released the key to Shannon without ever making any inquiry of her as to whether the coverage for Shannon had in fact been effected. Cartwright testified that

at this time her work load in the office was heavy and that perhaps she was not following up on endorsement requests as she should have done.

(R., p. 261)

Counsel for the Dysons contends that in the course of dealing between Dyson and AOA, whether it be through AGA or direct, binding coverage was effected by the submission of a completed pilot information form together with a request for issuance of an endorsement making such change, and that the issuance or receipt of a signed endorsement making such coverage effective was not necessary. In support of this contention counsel further contends that AOA's alleged established practice of making the effective date of the coverage the same as the date of the submission of the request for coverage and the completed pilot information form, rather than the date the endorsement was issued, shows that coverage was binding upon Dyson's submission of such information and that Shannon was covered notwithstanding the lack of issuance of a written endorsement.

In support of these contentions counsel points to the course of dealing on the policy in question as well as in the issuance of six other policies about which testimony was given. 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 forms. Some of the policies relied on to show such course of dealing did not deal with adding pilots to policies and in some the effective date was made in conformity with a specific request for making the effective date that of a specific date. The thread which Dysons seek to grasp to support their contention that a course of dealing was established does not run through all of the policy cases upon which evidence was given.

(R., p. 262)

The strongest element in Dysons' argument is the practice of AOA in making the effective date of the endorsement or policy that of the date of submission of the request together with the required information, rather than the date of typing such endorsement or policy. Counsel cites Lewis v. Travelers Insurance Company, 239 A.2d 4 as a case in point. In that case the practice of "backdating" the policy to the date of the request was shown to have existed in some 300 policies and the Court ruled that this practice implied, as between principal and agent, authority in the agent to bind a risk pending "the principal's decision on the application". The Court goes on to say that notwithstanding a written contract that in effect requires written authorization or acceptance, the parol evidence rule did not bar proof of changes subsequent to the execution of the integrated writing.

Accepting those principles, in the case at bar it cannot be said that the proof submitted establishes a confirmed practice of "backdating" from which can be implied the authority of Dyson to bind the risk on a new pilot merely by the submission of a pilot information form. In Kesler's case the effective date of the risk of July 22, 1975, was based upon AOA's specific acceptance through Dougherty in his telephone call from Brannon at AGA of the risk as to Kesler as a pilot, even though it took until September 17, 1975, to get the required information to AOA to issue the endorsement.

In Bissell's case the initial request was made in August, 1975, at which time it is by no means clear that Mary Jane Cartwright even was aware of the requirement for submission of a pilot information form. In the weeks that followed the endorsement when finally issued was made effective November 13, 1975, the date the information form was finally submitted by Cartwright.

In Ferguson's case the endorsement was requested December 4, 1975, and was issued December 10, 1975, dropping Breeze from coverage and adding Ferguson without any change in premium.

(R., p. 262)

In Shannon's case the request involved a change in the coverage to a "flying club" status, as well as an additional premium, and it is apparent from the memo of Sara Broughton of December 15, 1975, that the status change was of major signifi-

cance although the matter of additional premium payments was uniformly discussed and agreed upon before an endorsement effecting a change was agreed to and issued by the company. 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.

AOA had 5,000 agencies such as Dyson with which it had contracts, only six of which had authority to bind without written acceptance of the risk by AOA. The responsibility of monitoring a request for a change in coverage must of necessity rest upon the agency submitting that request. Six weeks expired between Cartwright's last oral inquiry and the crash of the plane with no further effort on Cartwright's part of obtain the endorsement for coverage of Shannon.

I therefore find that as of February 1, 1976, when Shannon crashed the plane while flying it, AOA and Ranger had not accepted the risk on Shannon as a pilot, had issued no endorsement and are not liable to Donald A. Dyson individually as the insured under the policy nor to the Dyson agency under the policy in question. As to AOA and Ranger as against all other parties, I find the issues in favor of AOA and Ranger and render a judgment of no cause of action.

As to the claims of Kesler, Bissell, McClain, Oborn, Walker and Ferguson against the Dysons, I find that Donald Dyson both as a partner and as an agent of L. F. Dyson and Associates

breached his contract with his partners to obtain insurance coverage for all pilots flying said plane. I also find that Donald Dyson individually and as agent for his company was negligent in allowing Shannon to fly the plane until coverage was accepted on Shannon by AOA, and also because he knew or in the exercise of reasonable care should have known that Mary Jane Cartwright had not yet obtained insurance coverage for Shannon.

(R., p. 264)

I further find that such negligence was a proximate cause of the damages sustained by the plaintiffs.

As to damages plaintiffs seek recovery for loss of their plane as well as interest on the value of the aircraft since the date the claim was denied by Ranger, interest paid to Walker Bank and which must yet be paid pending final settlement, and attorney's fees incurred by the litigation in question.

For loss of the plane said plaintiffs are entitled to damages for breach of contract in the amount of the insurance coverage plaintiffs would have received had Donald Dyson obtained insurance coverage for Shannon's flying of the plane. This would be 4/5 of the insurance coverage of $27,000.00, less salvage value. For damages caused by Dyson's negligence plaintiffs would be entitled to 4/5 of the fair market value of the plane as of February 1, 1976, less salvage value. The maximum recovery allowed would be the greater of either of these two amounts.

As to interest, plaintiffs are entitled to recover from defendants Dyson interest on the amount of their recovery at 6% per annum from February 1, 1976, until paid. No recovery for interest paid by plaintiffs to Walker Bank is recoverable since they are allowed interest on damages from the loss of the plane and would have paid interest to Walker Bank irrespective of the loss of the plane.

As to attorneys' fees, counsel for said plaintiffs claim they are entitled to recover such fees under the rule as stated by the Supreme Court of Utah in Pacific Coast Title Insurance Co. v. Hartford Acc. & Ind. Co., 7 U 2d 377, 325 P 2d 906, wherein the court said the general rule that attorney's fees are not generally recoverable unless expressly provided for by contract or authorized by statute applies

> "...to claims for attorney's fees within the action itself...",

but that the rule as to what damages are recoverable for breach of contract is based upon the concept of reasonable forseeability that loss of such general character would result from the breach.

(R., p. 265)

Therefore, to be compensable, the loss must result from the breach in the natural and usual course of events, so that it can fairly and reasonably be said that if the minds of the parties had adverted to breach when the contract was made, loss of such character would have been within their contemplation.

Is this rule applicable under the facts of the case now before the court?

In the case just cited the defendant Hartford had furnished a bond for a general contractor on which the plaintiff, a title insurance company, was made obligee with the bond reciting it would save the title insurance company harmless from defaults on the part of the contractor with respect to each lot in the subdivision involved therein. When the contractor failed to pay material and labor costs on various lots, liens were filed and foreclosed which the title insurance company had to defend, settle and pay. This involved incurring attorney's fees in resolving the lien claims and in holding that such attorney's fees were recoverable under the aforementioned rule, the court said that applying the rule to the case, it could reasonably be foreseen that the natural and usual consequence of the contractor's failure to pay the laborers and materialmen would bring about the series of events which occurred; namely that liens would be filed and legal proceedings instituted to enforce them; that the plaintiff title insurance company, having the duty to keep the titles clear, would interpose defenses and attend to some disposition of the claims which would require the services of attorneys and court costs incidental thereto and which was the type of loss for which Hartford's bond was given to guard against.

(R., p. 266)

In the two ALR annotations cited by Mr. Arnold in his brief (45 ALR 2d 1183 and 4 ALR 3rd 270) the fact situations described to which the Hartford case rule applies all suggest that the claim for attorney's fees must be fees incurred in a separate prior litigation with third parties which the party claiming attorney's fees was required to defend because of the negligence or breach of contract of the party against whom recovery of such fees is now being sought. The annotation at 45 ALR 2d 1183 puts it this way:

> "It (exception to the general rule) involves the question whether plaintiff, having been involved in litigation with others through the tortious act of the defendant, may in a separate action recover as part of the damages the attorney's fees incurred by him in the earlier litigation with such third person.
>
> "In order that this question may arise the following elements must be present: (1) Plaintiff must have incurred attorney's fees in the prosecution or defense of a prior action....(2) The litigation must have been against a third party and not against the defendant in the present action. (3) Plaintiff must have become involved in such litigation because of some tortious of the defendant..."

To answer the question stated supra, we must examine the facts of the case. When the five original partners purchased the plane, no written partnership agreement was ever drawn up and Donald Dyson's four partners looked to him as a partner and insurance agent to obtain the required insurance coverage on the plane. He did so but failed to complete the necessary steps

to get coverage on Shannon before releasing the plane to Shannon to fly at Shannon's will. However, the policy he obtained named only Donald Dyson as the insured, with him representing in his application that he as the named insured was the sole owner of the plane. (Item 9 of the policy). Dyson never advised AOA or Ranger of any ownership interest in Kesler, Bissell, Oborn or McClain, nor in Walker as McClain's vendee, nor in Ferguson as Oborn's vendee, nor in Shannon as his own vendee. Thus, none of these parties were a named insured under the policy and none of them would have been entitled to receive or recover the policy coverage had coverage for Shannon been effected. Walker Bank as the mortgagee would have been entitled to first claim on the proceeds and the individual partners or their vendees would have had to look to Dyson for their share of the insurance proceeds, if any, over and above the amount payable to the bank.

(R., p. 267)

The significance of this fact is that from the beginning none of the partner-owners except Dyson had any claim against AOA or Ranger on the policy. The claim, if any, was solely Dyson's as the named insured. But when the lawsuit was started, the complaint was filed by Donald Dyson, Kesler, Bissell, McClain, Oborn and Walker as plaintiffs and AOA, Ranger and Shannon as defendants. It was not until after AOA and Ranger filed their answer and their third party complaint against the Dysons

and their company, that counsel for plaintiffs withdrew as attorney for Donald Dyson and thereafter asserted a claim on behalf of the other plaintiffs against Donald Dyson, his father and their company. They nevertheless pursued their claim against AOA and Ranger notwithstanding the fact that none of them were named insureds under the policy and had no evidence that either AOA or Ranger was aware of their ownership interest in the plane.

Their remedy in this case was against the Dysons, not AOA or Ranger, a fact which appeared to have been recognized at the time of trial with the Dysons assuming the burden of trying to establish coverage of Shannon under the policy in the trial. At the beginning of the trial it was stipulated that if coverage for Shannon was not established, Donald Dyson and his company, having the duty to obtain coverage in the first place, would be liable to plaintiffs if he had indeed failed to do so.

Thus it seems apparent to me that the attorneys' fees incurred by the plaintiffs were incurred in the pursuit of their claim against the Dysons and are fees claimed

"within the action itself",

not in a prior action, so as to render them non-recoverable under the general rule that such are not recoverable unless expressly provided for by contract as stated in the Hartford case.

Not being named insureds under the policy, it does not appear to me that it can be said that under such circumstances it could be reasonably foreseeable that plaintiffs would incur attorneys' fees in pursuing a claim against AOA and Ranger on a policy in which they had no legal interest. Their remedy is and always has been against the Dysons for breach of contract and negligence, under neither of which cause of action can they recover attorneys' fees, and I so find.

As to Ferguson, he stands with Oborn in the same pair of shoes and can recover no more in this case than Oborn. One thing more needs to be said in regards to Ferguson's claim for attorney's fees. He intervened as a plaintiff at the pretrial hearing held a week before trial upon stipulation of counsel that his rights in the case were no more than those of Oborn. In his memorandum in support of his claim for attorney's fees and expenses of litigation, counsel states that the bulk of his fees arose "when Ferguson was forced to join the instant litigation". This position is based upon a suggestion made at the pretrial settlement conference that if he did not join as a party, he might be collaterally estopped from asserting any future claim in the case. I cannot accept the suggestion made by the pretrial conference judge as either an order that he must join or a ruling that if he did not do so, collateral estoppel would bar him from future recovery on any claim he may have to assert.

However, he did join as an intervening plaintiff in a case that involved a claim against AOA and Ranger as well as the Dysons and the foregoing ruling made with respect to recovering attorney's fees for his vendor, Oborn, and the others must apply equally well to him.

While it is regrettable under the facts of this case that plaintiffs incurred attorneys' fees by ending up pursuing their rights against the Dysons, the court cannot for the reasons stated allow attorneys' fees as an element of damage in their recovery against the Dysons.