Aviation Policy Sublimits:

A Survey of Cases "Busting" and Sustaining Them

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Introduction

As is well known under the rules of construction, any ambiguities in a contract will be construed against the drafter. Ambiguous insurance contracts, having been drafted by the insurer, will thus generally be construed against the insurer. This doctrine of contra preferendum, in combination with the general tendency to construe policies to favor coverage, requires that the insurer use absolute care in drafting policy exclusions and limitations on coverage. Courts will interpret an insurance policy by applying the plain meaning to policy language, not the meaning which might be utilized by an insurance company executive or an attorney.

This survey examines the issue of policy sublimits. Specifically, aviation liability policies often contain limits per occurrence with a separate "sublimit" per passenger or per seat in an aircraft. The clear intention of these sublimits is to limit the liability for all damages attributable and related to a single passenger's death or injury to a sum certain regardless of how many individuals may have a right of recovery at law for this death or injury. Three examples of the intended result follow, all of which will presume a sublimit of US$100,000:

Scenario #1: Injury to unmarried occupant having no dependents or individuals entitled to assert a consortium or "derivative" claim. In this claim, the occupant may recover provable damages up to US $100,000.

Scenario #2: Injury to married occupant. In this case the occupant and his/her spouse may recover no more than US$100,000 collectively. Although there are two distinct claims and legal "causes of action": one for personal injury and the other for loss of services/consortium, the total indemnity paid with respect to the injured occupant cannot exceed US$100,000 regardless of the number of claims or claimants. The spouse is not entitled to a separate recovery and separate limit of US$100,000.

Scenario #3: Deceased occupant with multiple dependents/beneficiaries/distributees. In this case, the cause of action reverts to the representative of the estate of the deceased occupant. In New York, there will be at least two distinct elements to the claim: the wrongful death claim for economic losses only; and the "survival action" consisting of the deceased passenger's claims for pre-death pain and suffering. In addition, the claim may be brought on behalf of numerous individuals having a right of recovery under the applicable wrongful death statute – in New York, the intestate "distributees" of the deceased occupant. Again, the intention of the sublimit is to limit all indemnity with respect to the deceased occupant to a total of US$100,000 regardless of the number of claims and claimants. Obviously, the situation to be avoided is for a separate limit of US $100,000 to be applied to each person deriving rights under an applicable wrongful death statute.

In addition to policy limits being "busted" by multiple derivative claims, some courts have seized upon policy ambiguities to hold the sublimit inapplicable to a particular accident as a whole. In this situation, the applicable limit will typically be the "per occurrence" limit in the policy – often a figure exponentially higher than the per seat/occupant limit. The typical bases for busting the limit on this basis are ambiguities or inconsistencies in the policy. Examples include inconsistencies within the body of the policies and inconsistencies as between the policy and its accompanying endorsements and schedules.

A. Ambiguity - Generally

In every case in which a policy sublimit is busted, it was clearly the intention of the insurer that this sublimit be inclusive of all claims arising from or related to the death or injury of a single person/passenger. To justify busting this limit, courts will seize upon any inconsistency or ambiguity in the policy, construe that ambiguity against the insurer/drafter, and apply the general rule favoring coverage over non-coverage. The result: coverage extended beyond sublimits and [likely] beyond the reasonable expectation of BOTH parties. Not surprisingly, inconsistent and ambiguous language is a theme running through nearly every case involving a busted policy sublimit.

In general, a carrier relying on sublimits can expect its insured - if represented by savvy counsel - to carefully scrutinize the applicable policy for inconsistencies and ambiguities. The Gonzalez case, discussed immediately below, is a typical example of sloppy or inconsistent language providing a basis for busting sublimits.

B. Sublimit Busted – Inconsistent and Insufficient Definitions

In Gonzalez v. Mission American Ins. Co., 795 S.W.2d 734 (Tex. 1990), the carrier's failure to consistently pair the term "bodily injury" with the term "death" proved fatal to the policy sublimits.

Plaintiffs in Gonzalez were the relatives of three passengers killed in an aircraft accident; Defendant was a liability insurer for the aircraft owner. Id. at 735. The insurance policy at issue contained language stating that Defendant insurer "will pay all damages arising out of one occurrence up to $1,000,000." Id. at 736. An endorsement (entitled "Endorsement 1") to the policy provided that the insurer "limits its liability for bodily injury sustained by a passenger to $100,000 per seat." Id. Plaintiffs sought a declaratory judgment that the coverage limits for wrongful death actions were $1,000,000 while Defendant insurer argued that its liability to Plaintiffs was limited under the policy to $300,000 (i.e., in accordance with the $100,000 per seat sub-limits set forth in Endorsement 1).

Holding in favor of Plaintiffs, the Texas Supreme Court found that the subject policy contained several areas of ambiguity and inconsistency. Gonzalez, at 736-7. "Where an insurance policy's provisions are ambiguous or inconsistent, and are subject to two or more reasonable interpretations, then that construction which affords coverage will be the one adopted." Id. at 737. Specifically, the Gonzalez Court found that neither the policy nor the endorsement stated that "[the insurer's] liability for all damages resulting from each passenger's death is limited to $100,000." Id. at 736. The Court also noted that the terms "bodily injury" and "death" were used "in tandem" throughout the policy but, only the term "bodily injury" was used in Endorsement 1. Further, the policy contained "no technical definition of the terms 'bodily injury,' 'sickness,' 'disease,' 'death,' or 'including'" and consequently, "these words should be given their plain, ordinary and generally accepted meanings." Id., citing Western Reserve Life Ins. Co. v. Meadows, 152 Tex. 559, 261 S.W. 2d 554, 557 (1953).

Lessons Learned – Gonzalez v. Mission Insurance Co.

The Gonzalez Court relied on the two critical rules of interpretation consistently applied against insurance carriers: 1) Any ambiguity is interpreted against the insurer; and 2) any ambiguity will be interpreted in such a way as to favor coverage. "If Mission (i.e., liability insurer) intended to limit its liability for payment to $100,000 for all damages resulting from any one passenger's bodily injury, including death, then Mission had the duty to make such an intention in its policy clear and unambiguous because the terms, language, and conditions of the insurance policy were selected by Mission itself to express the terms and conditions on which the policy was issued." Gonzalez, at 737 (emphasis added).

The Court in Gonzalez suggested the following corrective language to cure the ambiguity in the policy:

"The company's limit of liability for all damages, arising out of bodily injury, sickness or diseases, including death at any time resulting therefrom, sustained by any one passenger shall not exceed $100,000."

Id. at 737.

By focusing on total recoverable damages rather than "liability" the proposed language, at least by the standards of Supreme Court of Texas, would have eliminated any ambiguity as to the scope of potential recoveries.

C. Sublimit Busted – Inconsistent Policy Language "persons v. passengers"

In Old Republic Insurance v. Durango Air Service, Inc., 283 F.3d 1222 (10th Cir. 2002), the plaintiffs (respective estates and surviving kin of two passengers killed in an accident involving a small commercial aircraft) were able to bust insurance sublimits by exploiting inconsistencies between the coverage afforded to "passengers" and "persons." Although the claims of the family members were clearly derivative of the decedent passengers' wrongful death claims, failure to distinguish these derivative claims for mental anguish from third-party claims (e.g., an injured bystander) created sufficient ambiguity for the decedent's families to recover for mental anguish well beyond the policy's US$100,000 sublimit.

The Old Republic plaintiffs obtained a $4.05 million judgment in Colorado state court for claims sounding in wrongful death and survivorship. Id. at 1223. The defendants in those proceedings were Durango Air Service ("Durango"), owner and operator of the accident aircraft, Donley E. Watkins ("Watkins"), president of, and a substantial shareholder in Durango and, the Estate of the accident pilot. Id. The defendants were insured under two policies issued by Old Republic Insurance Co. ("Old Republic"); an Aviation Policy and a CGL Airport Policy. Id. Upon entry of the state court judgment, Old Republic paid out $200,000 pursuant to the Aviation Policy's $100,000 per passenger liability limit, and paid nothing under the CGL Policy. Id.

Old Republic then filed a declaratory judgment action in the U.S. District Court for Colorado, seeking a determination that "it had discharged the full extent of its obligation to indemnify the Insureds" under the Aviation policy and that the Airport Policy was inapplicable to the subject accident. Id. at 1224. Applying Colorado law, the district court entered judgment for the insureds on their indemnification counterclaims,

ruling that insurer owed $1.7 million under the two policies combined; insurer appealed. Id. at 1226. The 10th Circuit Court of Appeals affirmed the district court's holding. See Id.

Under the Aviation Policy, Old Republic's exposure for bodily injury sustained by passengers was limited to $100,000 for each passenger, subject to an overall occurrence limit of $1,000,000. Id. at 1226-7. Old Republic argued that the "per passenger" sub-limits were applicable to all claims made in connection with each given passenger arising from the accident, including claims for mental anguish sustained by the decedents' kin. Old Republic asserted that "these claims derive from the actions for bodily injury to each passenger" and "could not have been made but for the injury to the particular passenger." Id. at 1227.

The Court rejected Old Republic's argument, finding that the Aviation Policy "clearly provides coverage for non-passengers' claims of emotional distress." Durango at 1227. Thus, derivative though they may have been, these claims were nonetheless being asserted by "persons" under one plausible interpretation of the policy - the favored interpretation, the one favoring coverage.

The Policy defined "bodily injury" to include "mental anguish sustained by any person" and, "the general liability provision expressly states that coverage is available to 'any person' who suffers from mental anguish that is 'caused by an occurrence and arising out of the ownership, maintenance or use of the aircraft.'" Id. The Court held that the non-passenger mental anguish claims "clearly arose from the 'use' of the crashed aircraft, and are therefore covered by the Policy's general liability provision" separate and apart from the US $100,000 per passenger sublimit.

Lessons Learned– Old Republic Insurance v. Durango

While Old Republic clearly intended to limit all claims arising from bodily injury/death of a passenger to $100,000, the policy language it drafted provided plaintiffs with a means to bust the sub-limits. By including mental anguish in the definition of the term "bodily injury" and stating that "coverage is available to 'any person' who suffers from mental anguish, the policy furnished sufficient ambiguity to bust the US$100,000 sublimits. "In short, if Old Republic had meant to limit its coverage for mental anguish and other non-economic injuries to non-passengers by including such claims within the scope of coverage for injury to passengers, it could have done so explicitly." Durango at 1227.

D. Sublimits Busted – Sloppy Endorsements and Aircraft Schedule

U.S. Fire Ins. v. Gentile, 147 Ariz. 589, 590, 712 P.2d 436, 437 (Ariz.App. 1985) also involved a US $100,000 sublimit. In this case, the insurer's downfall was sloppy policy revisions and failure to list the accident aircraft among those to which the sublimit applied.

In 1971, plaintiff Cochise College (at times, "College") obtained liability coverage for its aviation instruction program under a policy of insurance written by Ranger Insurance Company. Id. at 590. Each year until 19831 the College renewed its coverage. From 1977 through 1983, the policy was issued by U.S. Fire Insurance. From 1976 through 1983 the policy was written by the same underwriter ("Underwriter"). On December 3, 1981, a Cessna 210, Reg. No. N93956 was involved in a fatal accident during a training flight. The Passenger's estate commenced a wrongful death action and the college sought to "maximize" its insurance coverage.

Paragraph 4 of the policy declarations page, entitled “Coverages,” contained a schedule of coverages (A through E) and corresponding limits of liability. Coverage D provided “Single Limit Bodily Injury and Property Damage Liability Including Passengers” with limits of liability in an amount of “$1,000,000 each occurrence.” Id. at 591. Coverage D also referred the reader to endorsements one (No. 1) and four (No. 4). Endorsement No. 1, entitled “Special Provisions Endorsement” contained a conspicuously placed typed-in notation indicating that its terms were applicable “WITH RESPECT TO N-6015M ONLY.” N6015M refers to the FAA Registration Number of a Stinson aircraft that was purchased by the college for mechanic’s training; it was not intended to be flown. Paragraph 9 of Endorsement No.1 provided that passenger liability is limited to $100,000 per person and $500,000 per occurrence. Id.

Endorsement No. 4, entitled “Declarations Amendatory Endorsement” indicated by typed-in notation that, with regard to N-6015M coverage for “Single Limit Bodily Injury and Property Damage Excluding Passengers” had limits of liability in an amount of $1 million per occurrence. Id.

U.S. Fire argued that, notwithstanding the typed-in notations in the policy, the limits of liability for passenger injuries and death as set forth in Endorsement No. 1 were intended to apply to all insured aircraft.

The Underwriter testified that “general company policy was to write no more than $100,000 per passenger liability on instructional and rental type operations” and that, although “he intended passenger liability to be limited to $100,000,” he “never discussed liability limits with the college's agent until some months after the accident.” Id. at 592. The insurance agent for the college, confirmed that Underwriter “had never told him he could not write more than $100,000 per seat passenger coverage” and that “he thought the limits were increased around 1978” and “understood passenger liability coverage to be $1 million at the time the policy was renewed in June 1981 and at the time of the accident.” Id. at 591-592.

Plaintiffs sought a declaration of coverage up to the full US$1,000,000 occurrence limit subject to no US $100,000 sublimit. The Arizona appellate court affirmed the decision below and ruled that the sublimits was inapplicable to the aircraft involved in the accident Id. at 593.

Lessons Learned- Gentile

As our [futile] efforts to summarize the critical language demonstrate, the policy at issue in Gentile was, quite simply, a mess. The court ended up concluding that the US$100,000 sublimits - to the extent enforceable - applied only to an aircraft that was never intended to fly, let alone carry passengers! However, language in the policy suggesting that the sublimit was intended to apply only to this aircraft, overrode the common-sense interpretation that the per-passenger sublimits must have been intended to apply to passenger-carrying aircraft. As such, the case demonstrates that when faced with an ambiguity a court will adopt even a dysfunctional interpretation of the policy in favor of the insured and in favor of coverage.

The most significant factor underlying the Gentile Court’s decision in favor of the policyholder and against enforcing the policy sublimits was the fact that Endorsement No. 1 contained a specific limitation to the “maintenance training” aircraft, N-6015M. If the general rule at the company was to offer no more than

$100,000 per seat passenger coverage, this should have been spelled out to the insured both in the policy and in a separate cover letter with each renewal.

E. Belts, Suspenders & Velcro, Sublimits Enforced! - Saunders v. Mortenson

In Saunders v. Mortenson, et al., 101 Ohio St.3d 86, 801 N.E.2d 452 (2004), policy sublimits were ultimately sustained on appeal, reversing the trial court that had seemingly bent over backwards to bust these limits. In Saunders, Plaintiff was insured under an auto liability insurance policy purchased from defendant Nationwide Mutual Fire Insurance Company. The Nationwide policy included Endorsement 2352 provided for uninsured and underinsured motorist (UM/UIM) coverage with limits of $100,000 per person and $300,000 per occurrence. Id. at 87.

While the policy was in force, the insured's son (Patrick) was injured in an auto accident with an underinsured motorist. Id. at 87. After obtaining a judgment against the underinsured driver, the insured filed an action against Nationwide for UIM coverage under the Nationwide policy. Id. Specifically, the insured sought a declaration that Patrick's claim for personal injuries and the derivative claims of the insured and his wife constituted three separate claims subject to the Nationwide policy's per-occurrence limit of $300,000. Id. Defendant Nationwide argued that its liability to the plaintiff was capped at the sub-limit of $100,000 because "Endorsement 2352 unambiguously provided for a single, per-person limit of coverage for all persons who have sustained legal damages resulting from a single person's bodily injury, including all derivative claims." Id. at 87.

In pertinent part, Endorsement 2352 to the Nationwide policy provided as follows:

"(1) The bodily injury limit shown for any one person is for all legal damages, including all derivative claims, claimed by anyone arising out of and due to bodily injury to one person as a result of one occurrence.

(2) The per-person limit is the total amount available when one person sustains bodily injury, including death, as a result of one occurrence. No separate limits are available to anyone for derivative claims, statutory claims or any other claims made by anyone arising out of bodily injury, including death, to one person as a result of one occurrence.

(3) Subject to this per-person limit, the total limit of our liability shown for each occurrence is the total amount available when two or more persons sustain bodily injury, including death, as a result of one occurrence. No separate limits are available to anyone for derivative claims, statutory claims or any other claims arising out of bodily injury, including death, to two or more persons as a result of one occurrence."

Id. at 88-89.

Notwithstanding the apparent specificity of the Endorsement, the trial court determined that the language was ambiguous and "construed the supposed ambiguity in favor of the insured," holding that plaintiffs had three separate US$100,000 claims (personal injury and derivative) up to the $300,000 per-occurrence limit of coverage.2 Id. at 87. Specifically, the court construed the first paragraph as "providing per-person coverage for any person suffering damages as a result of bodily injury," but determined that the second paragraph, "which limits all claims as the result of bodily injury to one person to the per-person limit, 'appears to take away what is given in the insuring agreement and in the first paragraph.'" Saunders at 87.

Previous intermediate appellate decisions in Ohio had interpreted this language differently, and the Erie County Court of Appeals in Saunders affirmed the trial court but, sua sponte, certified the issue of the sublimits interpretation to the Ohio Supreme Court.

The Supreme Court of Ohio, in a four-to-three decision, reversed the Erie County Court of Appeals stating, "[t]he construction of a written contract is a matter of law that we review de novo ... our primary role is to ascertain and give effect to the intent of the parties." Saunders at 88. Acknowledging that Ohio law expressly permits auto insurers to include policy provisions "that consolidate all claims arising out of any one person's bodily injury into a single claim" the Saunders Court cautioned that "the language must clearly and unambiguously consolidate such claims in order to give effect to the limit." Id. at 89.

The Saunders Court further stated that "a contract is to be read as a whole and the intent of each party gathered from a consideration of the whole … [and] if it is reasonable to do so, we must give effect to each provision of the contract." Id. at 89 (citations omitted). In accordance with this principal, the Court held that Endorsement 2352 "clearly and unambiguously limits all claims derived from one person's bodily injury to the single per-person limit of the policy" inasmuch as "[t]he plain language of the provision states that the 'bodily injury limit shown for any one person is for all legal damages.'" Id. The Court further noted that the Endorsement defines the term "all legal damages" to include "'all derivative claims, claimed by anyone,' that arise out of the bodily injury to 'one person' as a result of 'one occurrence.'" Id. at 89.

The Saunders Court also found that "the first paragraph is supported by the plain language of the second paragraph, which unambiguously provides, 'the per-person limit is the total amount available when one person sustains bodily injury … [n]o separate limits are available to anyone for derivative claims ….'" Reading the provision as a whole, the Supreme Court was able to determine that "the intent of the parties in Endorsement 2352 is to limit all claims arising out of one person's bodily injury to the single, per-person limit of the policy." Id.

Lessons Learned - Saunders

Saunders is an example just how far a court might go to expand coverage and seize upon an ambiguity, despite clear language as to the intent of the sublimits. Ultimately, the Saunders Court recognized that a reasonable insured should have understood that the carrier's liability was limited to no more that US$100,000 notwithstanding the number of derivative claims. We note, however, that had one Judge ruled differently, the finding of "ambiguity" below would have been sustained and the coverage extended to US$300,000.

Playing devil's advocate and applying even the slightest ambiguity against the insurer, one can find some ambiguity as between ¶ 1 of Endorsement 2352 and those following. In using language like "for any one person" and "claimed by anyone" this paragraph is not the model of clarity. Fortunately, the majority opinion

took a holistic approach to the policy and determined that the subsequent paragraphs were consistent with the intention to limit all damages relating to a single injury or death.

F. Policy Stacking3

Most “stacking” cases involve either multiple policies or multiple policy years. In either event, the insured argues that multiple occurrences have occurred invoking more than one per occurrence limit. Because of the sudden nature of the typical aviation accident, occurrences over multiple policy years would be unusual. However, in one case, plaintiff alleged that a single aviation accident in fact consisted of multiple occurrences.

In Flemming ex rel. Estate of Flemming v. Air Sunshine, Inc. 311 F.3d 282, 293 -294 (3rd Cir. (Virgin Islands) 2002) plaintiff, the surviving spouse of a commercial airline passenger who had drowned following an ocean crash, brought a wrongful death action, individually and as a personal representative of the deceased passenger's estate, against the insured airline and the pilot. The parties entered into a complex settlement agreement which paid plaintiff's estate $500,000, but left the door open for additional settlement proceeds if the court were to rule that Flemming's death was the result of multiple occurrences.

The policy stated that the liability for bodily injury “as the result of any one occurrence shall not exceed” $10,000,000, which is “the limit of liability stated in the Declarations as applicable to ‘each occurrence.’” Id. at 357, 362. The Declarations further limited liability “as respect any one passenger” to $500,000. Id.

Unlike the cases discussed above, plaintiff’s efforts in Flemming focused on the number of “occurrences” giving rise to the claim rather than the per passenger limits. Thus, under plaintiff’s theories, various events or acts of negligence could be “stacked” to give rise to a separate limit of US$500,000 for each distinct occurrence. The court noted that no clear policy language prevented stacking. Moreover, the policy language failed to state clearly that the “each person” limitation is an independent cap that works separately from the “each occurrence” limitation. The applicable language was deemed, at best, ambiguous as to whether the $500,000 sublimit applied to a single passenger regardless of the number of occurrences to which that passenger was subjected. Once again, any ambiguity in the policy was interpreted in favor of expanded coverage.

Mrs. Flemming alleged four separate “occurrences”: 1) negligent operation of the aircraft and resulting crash; 2) the failure to provide a pre-flight safety briefing; 3) the failure to notify passengers of the impending crash and provide emergency safety instructions; and 4) after the crash, the failure to provide James Flemming with a life vest or other safety equipment, the failure to provide him any aid or assistance in exiting the plane or in any other fashion, and the pilot's “taking the life jackets and swimming off” instead of providing assistance.

Thankfully, the appellate court determined that there was only one accident and, hence, one occurrence, that caused Flemming’s death.

Lessons Learned – Flemming v. Air Sunshine

From the perspective of the insurer, the critical failure of the policy was to expressly preclude "stacking" of occurrences. Had this been accomplished, the court would have had no need to address whether Flemming's death had, in fact, been caused by multiple occurrences. The court concluded: "The policy is at best ambiguous as to whether the $500,000 'each passenger' cap applies to a single passenger regardless of the number of occurrences to which the passenger is subjected." Flemming, 311 F.3d at 294.

1 The policy was not renewed in 1975 because the State provided coverage that year. Gentile, 147 Ariz. at 590.

2 No doubt had the aggregate limit been US$400,000, another aggrieved relative would have stepped forward to claim the otherwise left-over US$100,000.

3 Policy "stacking" more traditionally refers to attempts to stack coverage over multiple policies or consecutive years of the same policy. See Windt, Insurance Claims and Disputes: Representation of Insurance Companies and Insured § 16.12-16.13 (West 4th ed. 2001); see also Employers Insurance of Wausau v. Granite State Insurance Co., 330 F.3d 1214 (9th Cir 2003) (applying California law and stacking multiple policy years' coverage during which pipe ruptures caused property damage – insured paid US$7.7 Million despite annual per occurrence limit of US$2 Million); Riley v. United Services Auto. Ass'n, 161 Md.App. 573, 575, 871 A.2d 599, 600 (2005) (stacking coverage over multiple policy years for lead exposure).

Although prepared with due care, this paper is presented for purposes of education and discussion only. It is not legal advise. In summarizing the various cases included herewith, details have necessarily been omitted. These details may prove critical to any given case.