

**TO EXCLUDE OR NOT TO EXCLUDE, THAT IS THE QUESTION:
INSURANCE COMPANIES' ABILITY TO SHIFT THE BURDEN
OF PROOF BY NOT EXCLUDING A CUSTOMER ENTIRELY
SMITH V. AM. FAMILY LIFE ASSURANCE CO. OF COLUMBUS,
NO. 08-31032, 2009 WL 3066660 (5TH CIR. SEPT. 28, 2009)**

Highlight

Todd Moody

In *Smith v. Am. Family Life Assurance Co. of Columbus*, the appellant, Aflac, sought review of a summary judgment motion granted in favor of the appellee, Angela Smith.¹ Smith's husband worked on an oil platform in the Gulf of Mexico.² A chartered helicopter service picked up Smith's husband and other workers to transport them to the platform.³ The operator of the helicopter flew Smith's husband on an "as needed" basis and under an "On-demand Air Taxi" certificate from the FAA.⁴ On March 14, 2006, the helicopter crashed soon after take off, and Smith's husband died.⁵ Smith had an insurance policy through Aflac, which would pay Smith a cash sum if her husband died in an accident.⁶ Under the policy, Smith received \$40,000 if Aflac classified the accident as an "Other Accident" and \$150,000 if the accident was a "Common-Carrier Accident."⁷

Part of Aflac's definition of "Common-Carrier Accidents" stated that "[c]ommon-carrier vehicles are limited to airplanes, trains, buses, trolleys, and boats that operate on a *regularly scheduled basis* between predetermined points or cities."⁸ Appellant defined "Other Accidents" as all accidents not falling within the "Common-Carrier Accident" definition and those not excluded entirely from coverage.⁹ Because the Aflac determined that Smith's husband perished in an "Other Accident," Smith received only \$40,000 under the policy.¹⁰ Smith sued for \$110,000—the difference between the payment she received and the \$150,000 "Common-Carrier Accident" payment.¹¹ The district court had to determine whether the "Common-Carrier Accident"

¹ *Smith v. Am. Family Life Assurance Co. of Columbus*, No. 08-31032, 2009 WL 3066660, at *1 (5th Cir. Sept. 28, 2009).

² *Id.*

³ *Id.*

⁴ *Id.* at *2.

⁵ *Id.* at *1.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* (emphasis added).

⁹ *Id.*

¹⁰ *Id.* at *2.

¹¹ *Id.*

definition was ambiguous.¹² The court granted Smith's motion for summary judgment and denied Aflac's motion.¹³ Aflac challenged that decision.¹⁴

Aflac argued, on several grounds, that the district court erred in both the granting and denial of the summary judgment motions before it.¹⁵ The Fifth Circuit declined to review most of Aflac's points of error, and it rested on the conclusion that the meaning of the words "regularly scheduled" was not ambiguous, and Smith "failed to produce any evidence that her husband's helicopter had operated on a regularly scheduled basis between predetermined points or cities."¹⁶ The court, in very conclusory fashion, held that Aflac's use of the words "regularly scheduled" in its definition of "Common-Carrier Accident" was not ambiguous.¹⁷ The court then pointed out that Louisiana law places the burden of proving that a claim is covered by a policy on the insured.¹⁸ The court reasoned that because insurance companies only carry the burden of proof in Louisiana when they are excluding a customer entirely, Smith carried the burden in this situation because Aflac paid her \$40,000 under the "Other Accident" provision of the policy.¹⁹ Looking to other courts' holdings in similar situations, and Smith's arguments, the Fifth Circuit held that Smith did not carry her burden of proof.²⁰

While much of the court's discussion centered on whether or not the wording of the policy was ambiguous, the significance of this case lies in the shifting of the burden of proof.²¹ Here, the Fifth Circuit endorsed the practice of allowing insurance companies to shift the burden of proving coverage to the insured by giving some kind of payment to the policyholder. Allowing insurance companies the latitude to avoid the burden of proof by giving some type of payment on a policy gives the insurance company greater control over the process of settling disputes. Nothing in the decision indicates that an insurance company cannot simply write in a provision to all policies that could allow them to make some type of nominal payment in order to avoid a larger payout as well as the burden of proof should litigation arise. To insurers: take heart. To those insured: beware.

¹² *Id.* at *3.

¹³ *Id.* at *2.

¹⁴ *Id.*

¹⁵ *Id.* at *3.

¹⁶ *Id.* at *5.

¹⁷ *Id.* (stating that "[t]he definition's 'regularly scheduled' requirement was not ambiguous, and Mrs. Smith failed to satisfy it.").

¹⁸ *Id.* (citing *Dickerson v. Lexington Ins. Co.*, 556 F.3d 290, 295 (5th Cir. 2009)).

¹⁹ *Id.* (citing *Doerr v. Mobil Oil Corp.*, 774 So.2d 119, 124 (La. 2000)).

²⁰ *Id.* at *5-7.

²¹ *Id.*