

## [Ninth Circuit Agrees Fuel Truck Collision Arises Out of Maintenance of Helicopter, But Selective Tender Rule Precludes Insurer's Liability for Equitable Contribution](#)

### *Aerospace Insurance Update*

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U. S. Court of Appeals, Ninth Circuit

In *XL Specialty Insurance Co. v. Progressive Casualty Insurance Company*, 2011 WL 182154 (9th Cir. Jan. 20, 2011), the U.S. Court of Appeals for the Ninth Circuit affirmed the decision of the district court in Montana, which was reported in our February 2010 [Aerospace Insurance Update](#). The court concluded that XL's policy insuring a helicopter provided coverage for a traffic accident involving the insured's fuel truck because it "arose out of" the maintenance and use of the helicopter, but that the selective tender rule barred Progressive's equitable contribution claim against XL.

In the instant case, the insured's fuel truck, while on its way to refuel the insured's helicopter, struck the underlying plaintiffs' auto. Progressive, which insured the fuel truck, defended the plaintiffs' action against the insured.

Applying Montana's expansive interpretation of "arising out of," the Ninth Circuit agreed that even though the helicopter was not directly involved in the accident, it nevertheless was the "prime accessory without which the accident would not have occurred." Consequently, the injuries "originated from, grew out of, and flowed from the maintenance of the aircraft."

The Ninth Circuit also agreed that XL was not prejudiced by the insured's late notice of the accident and underlying lawsuit. The court noted that although XL received notice only four months before trial, it declined to participate in the defense and received a significant amount of pretrial discovery from Progressive and the insured.

Finally, the Ninth Circuit affirmed the district court's determination that Progressive was not entitled to equitable contribution from XL for any portion of the damages and defense costs incurred in the underlying lawsuit. Because there was insufficient evidence that the insured had in fact tendered the claim to XL, the Ninth Circuit agreed that the selective tender rule barred Progressive's claim. According to the Ninth Circuit, the insured's informal emails to XL inquiring whether coverage existed did not "rise to the level of an affirmative request for assistance," particularly when the insured had already tendered the claim to Progressive more than a year earlier.

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