

Covered in Encino
Naked in Reno



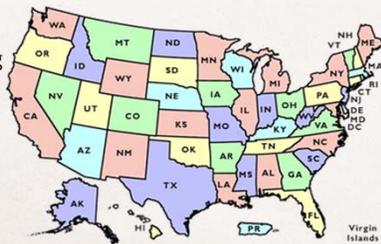
Aviation Insurance Coverage Turns
On A Patchwork of State Laws

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The Disparate States of Insurance Law

- Coverage law
- Claims handling requirements
- Statutes
- Regulations
- Case law
- Choice of law



Why No Federal Insurance Agency?

- *Paul v. Virginia*, 75 U.S. 168, 183, 8 Wall. 168, 183 (1869)
 - “business of insurance” ≠ “commerce”
- *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944)
- The McCarran-Ferguson Act
 - Limited antitrust immunity
 - Reverse preemption



The Disparate States of Insurance Law

Standard	Specialty Lines
	

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Examples of Differences

- Scope of coverage
 - Most basic – business of insurance
- Claims handling procedures
 - Obligations re: handling

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Policy Structure: ANY Versus THE Insured Exclusions

"The Insured"	"Any Insured"
Expected or intended injury (a)	Liquor liability (d)
Contractual liability (b)	Pollution (f)
Workers' comp (d)	Aircraft, Auto Or Watercraft (g)
Employer's liability (e)	Mobile equipment (h)

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Separation of Insureds

- Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:
 - a. As if each Named Insured were the only Named Insured; and
 - b. Separately to each insured against whom claim is made or "suit" is brought.
- Intent: treat each "the insured" separately



Any Insured Exclusions

- Majority rule – applies separation of insureds clause to "the insured"
 - Different treatment for "any insured"
 - Gives meaning to different phrases
- Minority rule – finds ambiguity in separation of insureds clause
 - Construes against insurer
 - IN, KS, MS, UT



The Employee Exclusion

- "Bodily injury" to:
 - 1) An "employee" of the insured arising out of and in the course of:
 - a) Employment by the insured; or
 - b) Performing duties related to the conduct of the insured's business; or
 - 2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.
- Intent: not to duplicate WC or EL coverage
- Should work under Maj. or Min. rule



The Employee Exclusion in PA, etc.

- Since 1967 “An ‘employee’ of the insured” = an employee of the named insured
- Result:
 - No coverage for claim against additional insured air carrier when sued by employee of ground handler
 - PA, KS, KY, NV, ND, SD, WA



Faulty Workmanship Claims

- Split as to whether faulty workmanship can constitute an "occurrence" when damage is confined to the work or product
- 2013 Decisions (Yes (subk)/No)
 - 2d Cir. (CT) 3/2013 6th Cir. (KY) 2/2013
 - ND S. Ct. 4/2013 3d Cir. (Pa) 3/2013
 - CT S. Ct. 6/2013 Ala. S. Ct. 5/2013



Faulty Workmanship Claims [cont'd]

- Four states have statutes that provide for faulty workmanship as an occurrence
 - Arkansas
 - Colorado
 - Hawaii
 - South Carolina



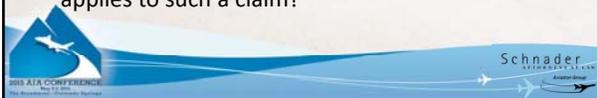
Audience Participation

- What standard CGL “business risk” exclusion is not included in many aviation manufacturer’s policies?
- Why is it not included?



Aircraft Product Claims

- If the “your product” exclusion is not in a manufacturer’s policy, is there coverage when the insured’s product damages itself and the insured is sued for damages b/c of the property damage?
- What if the law of a jurisdiction that does not recognize faulty workmanship as an occurrence applies to such a claim?



Adjuster Licensing

- Where is a license required?
- When is a license required?
- Reciprocity
- Exemptions



Claims Handling/Bad Faith



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Claims Handling/Bad Faith

- First Party Bad Faith Claims
 - Majority Rule
 - Minority Rule

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Claims Handling/Bad Faith

- First Party Bad Faith Claims
 - Basic Standard or Elements
 - Statute vs. Common Law
 - Tort vs. Contract
 - Remedies

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Claims Handling/Bad Faith

- First Party Bad Faith Claims



I need a card that says, "I'm sorry I sold the subsidiary for less than it's worth. But I'm not malicious--just stupid."

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Claims Handling/Bad Faith

- First Party Bad Faith Claims
 - Defenses
 - Converse of the standard
 - No coverage
 - Advice of counsel
 - "Fairly debatable"



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Claims Handling/Bad Faith

- Third Party Bad Faith Claims
 - Majority Rule
 - Minority Rule



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Claims Handling/Bad Faith

- Statute of Limitations
 - Shortest
 - Longest



Two Important Rights of Insurer in the CGL Policy

- The right to select counsel
- The right to control the defense



Audience Participation

- When does the insurer lose these rights?



Three general approaches to insurer's loss of control of the defense

- "Reject the defense" jurisdictions (minority)
- Never (almost extinct)
- It depends (majority)



No Reservation – Interests Aligned

- Insurer defends insured
 - Both desire a defense judgment
 - Or minimization of damages
- Insurer will pay any judgment within limits
- Insurer has no interest in insured having excess liability



Reasons Given for "Reject the Defense" Rule

- Steering – depends on basis of reservation
- Token defense
- Confidential information bearing on coverage



Basis for the Majority (“It Depends”) Rule

- Tripartite relationship
 - Appointed defense counsel represents both insurer and insured
 - Issue is whether defense counsel has a conflict of interest



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Cumis Rule (now statutory)

- When an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest may exist.
 - Prototypical: negligent and intentional
- No conflict of interest from punitive damages or excess sought
 - logical



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Choice of Law Conundrum

- Applicable Law
 - Insured’s home
 - Venue of suit
- Applicable Rule
 - Reject the defense (always)
 - Never
 - It depends



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In Summary

- Most insurance issues are governed by state law



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- State (and DC and territorial) laws are spread across statutes, regulations, and case law and are different in every jurisdiction



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- Most insurance issues are governed by state law
- State (and DC and territorial) laws are spread across statutes, regulations, and case law and are different in every jurisdiction
- It is imperative to know what the law requires before, not after, the claim is handled



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QUESTIONS?

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