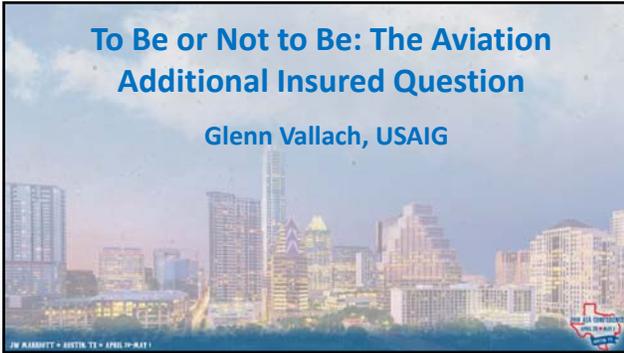


**To Be or Not to Be: The Aviation  
Additional Insured Question**

Glenn Vallach, USAIG



J.W. MARSHETT • AUSTIN, TX • APRIL 19 - MAY 1

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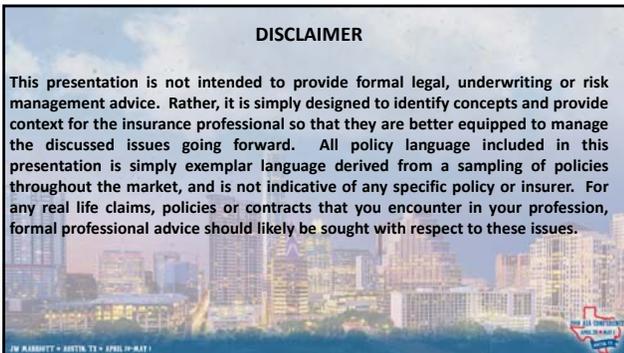
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**DISCLAIMER**

This presentation is not intended to provide formal legal, underwriting or risk management advice. Rather, it is simply designed to identify concepts and provide context for the insurance professional so that they are better equipped to manage the discussed issues going forward. All policy language included in this presentation is simply exemplar language derived from a sampling of policies throughout the market, and is not indicative of any specific policy or insurer. For any real life claims, policies or contracts that you encounter in your profession, formal professional advice should likely be sought with respect to these issues.



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**The Aviation CGL Policy, Generally**



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### The Aviation CGL Policy, Generally

- Location Declaration
  - “Location of premises owned, rented to or occupied by the Named Insured ...”
  - Specific locations
  - Also, often “Any premises necessary or incidental to the **aviation operations** of the Named Insured.”
- Principal Coverages
  - Bodily Injury and Property Damage Liability (Coverage A)
  - Personal and Advertising Injury Liability (Coverage B)
  - Medical Payments (Coverage C)
  - Hangarkeeper’s Liability (Coverage D)
  - Products-Completed Operations Hazard (Part of Coverage A)

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### The Aviation CGL Policy, Generally

#### COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

##### 1. Insuring Agreement

- a. We will pay those sums that the Insured becomes legally obligated to pay as damages because of “**bodily injury**” or “**property damage**” to which this insurance applies resulting from your “**aviation operations**” ...
- b. This insurance applies to “**bodily injury**” and “**property damage**” only if:
  - (1) The “**bodily injury**” or “**property damage**” is caused by an “**occurrence**” that takes place in the “**coverage territory**”; ...

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### The Aviation CGL Policy, Generally

#### COVERAGE D. HANGARKEEPER’S LIABILITY

##### 1. Insuring Agreement

- a. We will pay those sums that the Insured becomes legally obligated to pay as damages because of loss to “**aircraft**” (subject to the deductible shown in the Declarations if applicable unless such loss results from fire or explosion while the “**aircraft**” is dismantled or being transported) occurring while such “**aircraft**” is in the care, custody or control of the Insured for safekeeping, storage, service or repair ...

\*\*This coverage generally does not apply to damage to aircraft while in flight, either via language in the Coverage D insuring agreement or a separate Coverage D exclusion.

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### The Aviation CGL Policy, Generally

#### 19. "Products-completed operations hazard":

a. Includes all "bodily injury" and "property damage" occurring away from premises you own, lease or rent and arising out of "your product" or "your work" except:

- (1) Products that are still in your physical possession; or
- (2) Work that has not yet been completed or abandoned ...

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### Exclusion G and Related Exclusions




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### Exclusion G and Related Exclusions

#### g. "Aircraft," "Auto" or Watercraft

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any "aircraft," "auto" or watercraft owned or operated by or leased, rented or loaned to **ANY** Insured. Use includes operation and "loading or unloading" ...

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### Exclusion G and Related Exclusions

- Exclusion G, or similar exclusions, can also apply to Hangarkeeper's Liability.
  - Either via policy language that Exclusion G, which is a Coverage A exclusion, also applies to Coverage D; or
  - Via the addition of a separate Coverage D exclusion with identical wording to Exclusion G; or
  - Via the addition of a separate Coverage D exclusion that applies to "loss or damage to 'aircraft' or parts of any 'aircraft' that is: (1) owned by, leased to, rented to or loaned to **THE** Insured or partner(s) of **THE** Insured or (2) owned by, leased to, rented to or loaned to an officer or employee of **THE** Insured unless the property is an 'aircraft' in your custody under an agreement for which a charge has been made."

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### Practical Applications ... for Policyholders and AIs




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### Practical Applications

- Classic Examples and Applications
  - **Damage to policyholder's owned aircraft**
    - \* PD + ownership/maintenance/use + aircraft owned by any insured (policyholder) = Exclusion G
  - **Damage to policyholder's managed or leased aircraft**
    - \* PD + ownership/maintenance/use + aircraft operated by/leased to/rented to/loaned to any insured (policyholder) = Exclusion G

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### Practical Applications

- Classic Examples and Applications
  - **Third party BI or PD liability claims caused by the policyholder's owned aircraft**
    - \* BI or PD + ownership/maintenance/use + aircraft owned by any insured (policyholder) = Exclusion G
  - **Third party BI or PD liability claims caused by the policyholder's managed or leased aircraft**
    - \* BI or PD + ownership/maintenance/use + aircraft operated by/leased to/rented to/loaned to any insured (policyholder) = Exclusion G

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### Practical Applications

- **Liability claims for damage to aircraft by owner against policyholder manager/lessee/operator**
  - Perhaps, an attempt to shift risk from another insurer's aircraft policy.
  - Or, in an attempt to circumvent a first party coverage exclusion.
    - \* Entity distinctions between policies can become key.
  - PD + ownership/maintenance/use + aircraft operated by/leased to/rented to/loaned to any insured (the policyholder) = Exclusion G
  - Hangarkeeper's coverage can also be excluded too, if ...
    - \* Exclusion G also applies to Coverage D or the Coverage D aircraft exclusion otherwise applies.

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### Practical Applications

- **Adding an AI onto an Aviation CGL can alone trigger Exclusion G**
  - If the AI is the owner, operator, lessee or renter of an aircraft, BI/PD exposure related to the aircraft may fall under Exclusion G.
    - \* Because, said owner/operator/lessee/renter of the aircraft becomes "any Insured", which is important trigger language for Exclusion G.

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### Practical Applications

- **Example 1: Aircraft hangaring agreement**
  - By insisting on being an AI on the hangar owner’s CGL, the aircraft owner/operator becomes “**any insured**” on that policy.
  - So, if the hangar owner damages the aircraft, the aircraft owner/operator’s PD liability claim against the hangar owner may be excluded under the hangar owner’s CGL per Exclusion G, if Exclusion G applies to Coverage D.
  - PD + ownership/maintenance/use + aircraft owned/operated by any insured (now, the AI) = Exclusion G
  - This does not extinguish liability for the claim, it just removes the insurance that would have been standing behind the hangar owner.
    - \* Important for the aircraft owner/operator; REALLY important for the hangar owner.
  - Or, if third party BI/PD liability claim arises, Exclusion G may preclude Coverage A.

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### Practical Applications

- **Example 2: Aircraft maintenance/repair contract**
  - By insisting on being an AI on the maintenance shop’s CGL, the aircraft owner/operator becomes “**any insured**” on that policy.
  - So, if the shop damages the aircraft, the same issues exist for the owner’s PD claim as in Example 1.
  - Importantly, third party products-completed ops. claims are now potentially excluded by Exclusion G, which almost always applies to Coverage A!
  - BI/PD + ownership/maintenance/use + aircraft owned/operated by any insured (now, the AI) = Exclusion G.
    - \* Again, significant for owner/operator; but even more so for shop.

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### Practical Applications

- **Other possible “AI + CGL = Exclusion G” scenarios**
  - Fueling
  - Tie-down/parking
  - Really, ANY relationship in which the CGL policyholder is going to be touching, servicing and/or moving an aircraft and the aircraft owner/operator is requesting to be added as an AI onto the CGL.

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**Case Law Interpretations**

- **Rationale in favor of AI/any insured Exclusion G application**
  - The use of “**any insured**” in Exclusion G is intentional ... and matters! Otherwise, the exclusion would have used “**the insured**.”
  - \* “ ...owned or operated by or leased, rented or loaned to **any Insured**” means the exclusion applies so long as ANY entity which qualifies as an insured on the CGL is the owner/operator/lessee/etc. of the subject aircraft, regardless of who is seeking coverage for the claim.
  - \* Substitute “**the insured**” in for “**any insured**” and the exclusion only applies if the specific party who is seeking liability coverage for the claim is the owner/operator/lessee/etc. of the subject aircraft.

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**Case Law Interpretations**

- **Rationale in opposition to AI/any insured Exclusion G application**
  - Separation of Insureds Clause
    - \* “ ... as if each Named Insured were the only Named Insured.”
    - \* “ ... separately to each Insured against whom claim is made ... ”
  - Precluding coverage to policyholder simply because the aircraft owner/operator happens to be AI is not applying insurance separately to each Insured against whom claim is made.
  - Is “**any insured**” ambiguous or unambiguous in Exclusion G?

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### Case Law Interpretations

• **“Any insured” = unambiguous**

– Evanston Ins. Co. vs. OEA, Inc. (E.D. Cal.2005) 2005 U.S. Dist. LEXIS 39412, \*24-\*25

\* “As several courts that have examined the issue closely have explained, the purpose of ‘separation of insureds’ clause is ‘to provide each insured with separate coverage, as if each were separately insured with a distinct policy, subject to the liability limits of the policy.’ ... Such a clause is not, however, intended to change the meaning of ‘any insured’ language in an exclusionary clause ... In fact, its purpose is the exact opposite. The clause became part of the standard insurance industry form contract in 1955, and its purpose was aimed at ‘clarifying what insurance companies had intended all along, namely that the term ‘the insured’ in an exclusion refers merely to the insured’ claiming coverage’ ... The history of this clause makes clear that **the ‘separation of insureds’ clause only affects exclusionary clauses referring to ‘the insured,’ not ‘any insured.’** Interpreted in such a way, the separation of insureds clause and the employment exclusion are consistent with one another ...”

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### Case Law Interpretations

• **“Any insured” = unambiguous**

– Transamerica Ins. Co. vs. South (7th Cir. 1997) 125 F.3d 392, 399-400 (insolvency exclusion using “an insured” applies and is distinct from exclusions using the definite article “the” to modify “the insured.”).

– Barba vs. Allianz Global Risks US Ins. Co. (S.D.N.Y. 2016) 2016 U.S. Dist. LEXIS 147179, \*16-\*23 (per Alaska law, Exclusion G applies to preclude coverage under aviation CGL policy for aircraft crash BI case against both aircraft owner and president of ownership entity, both policyholders; separation of insureds clause argument rejected).

– Strouss vs. Fireman’s Fund Ins. Co. (E.D. Penn. 2005) 2005 U.S. Dist. LEXIS 2639, \*14-\*19 (“any insured” intentional acts exclusion is unambiguous and applies to preclude coverage to innocent insured).

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### Case Law Interpretations

• **“Any insured” = ambiguous**

– Minkler vs. Safeco Ins. Co. of America (Cal. 2010) 49 Cal. 4th 315

\* “Applying California principles of insurance policy interpretation, we now conclude that an exclusion of coverage for the intentional acts of ‘an insured,’ read in conjunction with a severability or ‘separate insurance’ clause like the one at issue here, creates an ambiguity which must be construed in favor of coverage that a lay policyholder would reasonably expect. **Given the language of the ‘separate insurance’ clause, a lay insured would reasonably anticipate that, under a policy containing such a clause, each insured’s coverage would be analyzed separately, so that the intentional act of one insured would not, in and of itself, bar liability coverage of another insured for the latter’s independent act that did not come within the terms of the exclusion.**”

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### Case Law Interpretations

- **“Any insured” = ambiguous**
  - Century-National Ins. Co. vs. Garcia (Cal. 2011) 51 Cal. 4th 564, 569-572 (“any insured” ambiguous in the context of separation of insureds clause; intentional acts exclusion invalid as to innocent insureds).
  - West Am. Ins. Co. vs. AV&S (10th Cir. 1998) 145 F.3d 1224 (applying Utah law, auto exclusion using “any insured” ambiguous due to separation of insureds clause; only applicable to single insured which owned/operated vehicle).
  - Am. Family Mut. Ins. Co. vs. Bower (N.D. Ind. 2010) 752 F. Supp. 2d 957 (failure to supervise claims against parents of child molester not excluded by sexual molestation, criminal acts and intentional acts exclusions within homeowner’s policy using “any insured” language).

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### Risk Management Considerations




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### Risk Management Considerations

- Understand Exclusion G and check to see if/how it applies to Hangarkeeper’s.
- Awareness of ALL potential applications of Exclusion G, including via AIs, with respect to contract at issue.
- Important for AI aircraft entity ... crucial for CGL policyholder.
- Beware blind AI reflex! Consider letting contractual indemnity do work.
  - Recognized as **“insured contract”**
  - An evaluation of the indemnity provision becomes even more important.
  - Beware blind **contractual indemnification** reflex!

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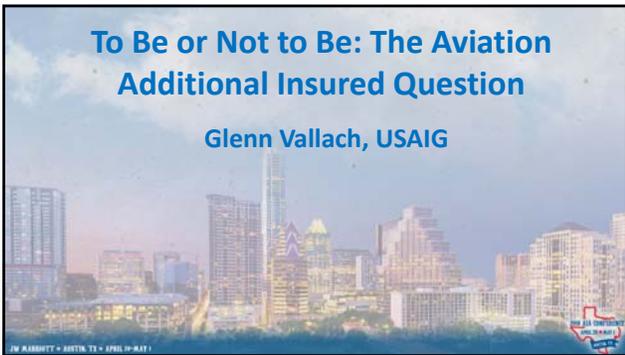
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