Defending the Self-Insured Aviation Client

George Andrew ("Drew") Coats

Coats & Evans, P.C.

The Woodlands, Texas

A. Why are aviation companies self-insured?

The stereotypical aviation lawsuit involves a plaintiff or group of plaintiffs suing one or more insured defendants for negligence and/or strict liability-based causes of action. As we all know, these lawsuits can be complex, expensive and lengthy. But what happens when a company without insurance is named as a defendant? Frequently, such a defendant's very existence is threatened by the prospect of defending a complex lawsuit. Can you, as defense counsel, effectively represent a defendant without the resources of an insurer to fund the defense?

To answer the question, let's first consider why an aviation defendant would be self-insured.

i. Conscious choice due to financial and/or philosophical issues

The aviation insurance market is relatively small, yet the risks it deals with are tremendous. Taking excess and reinsurance markets into account, the aviation insurance market is interconnected at various levels and relatively small events will affect virtually all segments of the market, like a stone sending ripples across the pond into which it was thrown. The general aviation tort-crisis of the 1980s and the September 11th terrorist attacks on the United States are examples of events which had dramatic effects on the availability and expense of aviation insurance. Likewise, internal factors, such as trends in setting premiums, claims

handling and investment have had significant effects on the aviation insurance market.

As a result, some aviation businesses simply cannot obtain insurance coverage at any price. Similarly, some aviation businesses cannot afford insurance premiums which can approach, or even exceed, net earnings in any given year.

Other aviation businesses have made a conscious decision that an insurance policy represents a tempting target for a prospective plaintiff and will invite claims that would not otherwise be made. Where policy limits are typically well under a million dollars, some companies prefer to maintain their own reserves to fund a defense in the event of a lawsuit and to pay meritorious claims.

ii. Unexpected coverage issues

Other aviation businesses may discover that they have no insurance available only after a loss or claim occurs. If a claim arises from an atypical or unanticipated activity, a defendant that had been paying insurance premiums may find that their coverage simply does not apply to claim at hand.

iii. Pre-Defense Defense

The offer of a defense to an insured defendant is usually made at the time a claim is asserted. Until there has been a claim, the existence of coverage for a hypothetical future claim is itself hypothetical. But your client may need advice, counsel and representation long before a claim is made. If your client is involved in an aircraft accident, whether as an owner, operator, repair facility or otherwise, immediate legal counsel to assist with the FAA, the NTSB, the press, and even plaintiff's attorneys and their investigators may be very important. You may also

need to help your client understand their obligations to preserve documents and other potential evidence, and establish protocols for dealing with third-party inquiries.

B. What are the business considerations of the client that impact defense?

The main objective for defense counsel hired to represent a self-insured aviation defendant is to fight for the Defendant's survival, regardless of the eventual duration and outcome of the lawsuit. While insurers are increasingly cost conscious, the cost of a lawsuit, as well as a lawsuit's non-monetary impact on the defendant are of vital importance to the self-insured defendant's continued existence.

i. The cost of litigation - Choosing your battles

As defense attorneys, we are accustomed to doing everything possible to defend our clients. We depose known witnesses, we propound as much discovery as permitted, we aggressively pursue motion practice, we designate every expert appropriate for out case in order to present evidence to support every defense and to exploit every weakness in the plaintiff's case. Despite the cost consciousness of insurers and major corporations, defending a self-insured aviation business places litigation costs in a whole new light. Often, the type of defense necessary and expected when defending an insured aviation defendant, simply cannot be afforded. The attorney defending the self-insured aviation defendant must constantly be wary of winning the battle, but losing the war by financially breaking the client with the cost of a vigorous, and otherwise very reasonable defense.

ii. Understanding the client's business

In order to develop, recommend and later modify and adjust an appropriate defense strategy, you need to have a good understanding of your client's business. If possible, your first meeting with your client should be at their place of business. Take the grand tour. Learn as much about your client's business as possible. This will make you a much more effective advocate and will also help you be more efficient in deciding which strategic decisions best fit your client. This also is important for developing a close working relationship with your client.

iii. Educating and informing a client wholly unfamiliar with litigation

Be prepared to educate your client. Is this the client's first lawsuit? Typically your primary point of contact will have far less experience with how the legal system and a lawsuit works than would an insurance claims professional. Before you can have a meaningful discussion about the costs and risk associated with a lawsuit explain how the process actually works.

C. How do litigation strategies change with the self-insured defendant?

i. Budget is King

"The only thing guaranteed at the courthouse is that nothing is guaranteed at the courthouse" – Unknown.

This old lawyer saying is true when considering both the outcome and the cost of participating in a lawsuit.

a. Discuss known costs, potential costs and risks of unknown costs

Aspects of litigation you take for granted may be new concepts for your client. Once you obtain a basic understanding of the claim against your client, propose one or more alternative strategies for their defense.

In order to decide on a defense strategy, your client will need a realistic understanding of the potential costs involved. Drawing on you experience, and looking at the specific facts of the case, including its factual and legal complexity, the number and location of witnesses, develop your best estimate of the costs that can be anticipated. What does it cost to prepare for and take a deposition? To prepare a motion for summary judgment? To assert or defend a discovery motion? As much as possible, educate your client on the costs that are known, such as taking the depositions vital to the client's defense. You should also explain potential costs, such as those associated with responding to discovery which you can reasonable expect from the plaintiff. Finally, discuss the concept of unknown costs, such as the subsequent addition and defense of new causes of action, the addition of new parties, trial resettings and the like. Defense counsel typically dislike these discussions, because they can amount to trying to predict the future. Yet, it is in your best interest and your client's best interest to have a realistic understanding of the potential cost of defending a lawsuit and the variables which could change the cost of defending a lawsuit.

b. Client needs to understand

i. defense cost risk

By realistically explaining the potential costs of defense, your client can assess the business risk that defending the lawsuit poses to the survival and operation of the budget. Can your client afford even the most Spartan defense? Can your client afford a more robust, aggressive defense? What business decisions will need to be made to budget for the defense?

ii. Risk of judgment

Have a frank discussion about the risk of a judgment. Even the best defense cases can result in a plaintiff's verdict. Your client needs to understand that from the outset. What are typical verdicts for similar or analogous cases tried in the same or similar jurisdictions?

c. attorney needs to understand client's financial status

i. ability to pay for defense

Learn as early as possible what your client can afford for a defense. Has the client maintained a loss reserve? Does the client have savings or investments that can be devoted to the defense without directly and immediately impacting the client's ability to do business? Is the client planning to borrow to finance its defense, or sell assets?

ii. assets at risk

Many self-insured aviation defendants are small companies whose value is largely as a going concern. Develop an understanding immediately of the client's ability to satisfy a judgment. On the one hand, if the client has significant, readily accessible assets, you and your client will need to be prepared to defend the case through trial and beyond. On the other hand, if your client has no positive net worth, or only has value by virtue of its continued business operations, there may not be anything significant for the plaintiff to look to satisfy a judgment should they obtain one.

iii. ability to fund a settlement

If your client has savings, discuss the possibility of trying to settle the case early. This can be analogous to a "self-devouring" insurance policy. In other words, your client may have the greatest ability to fund a meaningful settlement at the very beginning of a claim, but those potential settlement funds will dwindle during the course of the lawsuit as they are used to pay defense costs. Although an early settlement may be possible for less than the cost of defense through trial, your client may refuse to consider this possibility on moral and ethical grounds if the client is convinced that it did not cause the damages alleged by the plaintiff. Additionally, depending on the particular segment of the aviation industry in which your client does business, and depending on the stature of your client in that segment of the industry, business concerns about harm to your client's reputation and/or concern that settlement of an unsubstantiated claim will invite subsequent claims, may trump the legal expedience afforded by an early settlement. While you are obligated to explain the legal options available to your client, the client's decision may ultimately be a business decision, not a legal decision.

c. Discuss doomsday options:

If the lawsuit appears too large or your client's resources to defend the case are obviously insufficient, be prepared to discuss worse case scenario options with your client.

i. Bankruptcy

Many business people will reflexively rule out the option of seeking bankruptcy protection. Despite this, it may well be in your best interest to arrange a consultation with a bankruptcy specialist to explore various bankruptcy options. Once the client understands the potential benefits, costs and risks associated with bankruptcy, the client is prepared to make an informed business decision as to the appropriateness of the bankruptcy option.

ii. Default

Be prepared to answer the question, "why should we defend this case?" While no attorney is likely to advise that a client default, the question will likely come up, especially if other defendants have defaulted and do not appear to be suffering for the decision. If a client has few assets to use in defense of the lawsuit, and is prepared to hand over existing assets should the Plaintiff come calling with a judgment, this may be an important topic of conversation.

D. Know your enemy and make sure he knows you

i. Meet with the Plaintiff's attorney as soon as possible

Once you have met with the client and agreed upon an initial defense strategy, your next step should be a visit with the Plaintiff's counsel. You client's lack of insurance may have a significant impact on how and even whether the plaintiff continues to pursue the case. Communicate the lack of insurance coverage early and clearly. Be prepared to demonstrate your client's lack of insurance through affidavits, sworn testimony or otherwise.

ii. Brief Plaintiff's attorney on:

a. Client's financial situation

Also be fully prepared (and authorized by your client), to communicate your client's financial status to the Plaintiff. If your client has no significant assets available to satisfy a potential judgment, communicate that clearly. Be prepared to support this assertion with more detailed financial records than you would otherwise have an obligation to produce, if you have your client's authorization do so.

b. Strengths of defensive position

Assuming your client has decided to defend the case, communicate that to the plaintiff's attorney. Without revealing too much of your strategy, make sure that the plaintiff's attorney knows that your client is fully prepared to use its income to fund its defense, and that you are fully prepared to aggressively defend the case.

c. What are the pros and cons for the Plaintiff keeping you in the case or not?

By the end of your visit, the plaintiff's attorney should be faced with a best case scenario of obtaining a significant judgment that cannot be collected and a worse case scenario of losing the case to you. In either instance, make it clear that the time, expense and effort to prosecute the case to conclusion will be significant. Despite this, be prepared for the plaintiff to continue forward with the case. The plaintiff may have strategic reasons why keeping your client in the case along with insured defendants is a necessity. The plaintiff may be emotionally unwilling "let your client go." The plaintiff may simply be skeptical about your client's insurance and financial status, despite assurances and evidence.

d. Early Settlement Negotiations

If the Plaintiff does not seem willing or able to consider dismissing your client from the case outright, raise the issue of settlement as early as practical if authorized by your client to do so. Explain to the plaintiff's attorney that the money your client has available to fund a settlement is the same money which will be used to fund your client's defense, thus reducing the available settlement funds as the case progresses.

D. Pick and choose

As much as possible, your client needs to understand the potential cost and benefit of each portion of litigation and specifically decide whether to authorize each portion. As you progress through then lawsuit, be prepared to differentiate for

yourself and your client defense tasks which are discretionary, necessary and mandatory.

i. Discretionary

Generally, a discretionary task will be one which is not central or crucial to your client's defense, but is potentially helpful. For instance, if the plaintiff or codefendants have noticed the deposition of an eyewitness to an accident which resulted in a products liability claim against your client, the specific details of such an eyewitness account may be just as useful if you obtain a copy of the deposition after the fact. While there would certainly be a potential benefit to your participation in such a deposition, you client may elect not to authorize your participation. Clearly there will be different degrees of discretion, which you and your client need to discuss on a case by case basis. If the plaintiff has designated an expert who has expressed opinions critical of codefendants, but has not expressed any opinions contrary to your client, your client may feel that your attendance is not necessary. If you do attend, however, you may be able to elicit testimony specifically favorable to your client, thus making the plaintiff's witness a de facto expert for you. Conversely, if you do not attend, the expert might express a criticism of your client which had not appeared in his report, or do a poor job defending his position concerning your client if pressed by co-defendants. These are the sorts of potential risks and benefits that you and your client need to discuss in deciding on your participation.

ii. Necessary:

A necessary task is one central to your client's defense, but which will not result in sanctions or default if not undertaken. For example, there may be witnesses whose deposition is central and crucial to your client's defense. Another party's

expert may have specific criticisms of your client. There may be a solid basis to assert a motion for partial summary judgment. However, if your client elects that it simply cannot afford to pursue the task despite the risks and/or benefits of failing to do so, your client is not in imminent jeopardy, despite having weakened its case.

iii. Mandatory:

Your client needs too understand that, so long as they choose to mount a defense, there are certain tasks which are mandatory and must be undertaken, no matter how great a burden. For example, if discovery is propounded to your client or your client's deposition is noticed, your client will run the risk of sanctions or default if your client does not participate. Likewise, hearings and scheduling conferences may be mandatory events, depending on the subject matter, circumstances and rules of the court in front of which you are appearing.

A. To opine or not to opine: experts.

i. Are experts absolutely necessary?

In most aviation cases, there are sufficiently technical subjects that one or more experts appears, at first glance, to be an absolute pre-requisite. However, it bears consideration of how you would try the case if you had no experts. If the case will ultimately turn on a factual issue as opposed to a technical issue, good fact witnesses may be more valuable than experts. Additionally, if you intend to incorporate your client's modest status in your defense strategy at trial, an overly polished expert may make jurors skeptical as to whether your client's status is as modest as suggested.

ii. Can the client provide no cost/low cost experts from the inside or outside?

Depending on the nature of your client's business and the specifics of the claim, the most knowledgeable people in the world about the claims against your client may be your client's own employees. Your client may also have business colleagues, consultants, vendors and/or customers who may be uniquely suited to provide expert testimony in defense of your client. Such an approach may yield high quality experts at no cost or a fraction of the cost compared to professional experts. On the other hand, your client likely has no experience as to what appeals to a jury and you need to be prepared to flatly reject a witness who would not come across well to a jury, regardless of the potential savings.

iii. Who knows the most about the subject you need an expert to address?

If you are going to have to hire an outside expert, give careful consideration to exactly what the objective is with each expert. Depending on the objective, the most knowledgeable people on the subject matter may be found in industry or academia, instead of in the ranks of professional experts, and may be available at a cost substantially less than a professional expert.

iv. Do other Defendants have a vested interest in securing expert testimony on the same subject? Have they done so?

While your client may be adverse to codefendants, there may yet be issues which all defendants have in common. For instance, in most cases, each defendant would share the same interest in proving comparative fault/contributory negligence and in defending against the Plaintiff's damages claims. If possible,

ascertain whether and how the codefendants are approaching these issues. If you know that the codefendant has retained an outstanding pilot expert or economist, you and your client may elect to focus on other issues. If your codefendant has not focused on "mutual defense" issues, you may wish to suggest experts on common issues or even suggest sharing experts on common issues.

v. Experts must understand financial condition of client from the outset and tightly adhere to a budget approved by the client.

If your client authorizes you to hire an expert, stress the unique aspects of your client's situation to the expert. If necessary, be prepared to educate the expert on working for a self-insured defendant. Require that an expert set and stick tightly to a budget so that your client does not incur significant unexpected expenses. Make sure that the expert understands that his adherence to an agreed-upon budget is crucial to your client's defense and potentially to the client's survival.

E. Opening a second front

Insured co-defendants may decide early on to "point the finger" at your client in hopes that, without the resources of an insured defendant, your client may not be able to effectively fight back. Conversely, as you learn about the plaintiff's claims against your client and the underlying facts, it may become necessary to pursue claims or aggressive defenses on behalf of your client.

i. Are there cross claims or third party claims available?

As soon as practicable, determine whether your client has cross claims against codefendants or claims against third party defendants available. On the one hand, you will need to educate your clients concerning the pros and cons of pursuing

these types of remedies. To the self-insured, the potential availability of any remedy which can offset the cost of defense and/or potential liability is extremely important. On the other hand, pursuing third-party claims and cross claims will, of course, increase the cost of litigation and may mark the self-insured defendant as a target for other non-plaintiff parties. As the attorney for the self-insured, you will also need to be cognizant of the potential business impact of asserting a third-party claim or a cross claim. If the would-be subject of such a claim is a regular vendor or customer or has some other type of business relationship with the self-insured defendant, the negative impact on your client's business may outweigh the potential benefits of such a claim. Ultimately, once briefed on the pros and cons of such claims, the decision to assert a third-party claim or cross claim will be a business decision.

ii. Are there any contractual or statutory indemnity rights available?

Depending on the circumstances of the case, be prepared to seek out and review contracts and other documents which relate to or reflect the business relationship between your client and other parties involved in the event or circumstances giving rise to the claim against your client to determine whether there is any potential right of indemnity.

In many jurisdictions, contractual indemnity is disfavored. For example, Texas applies both the express negligence test and the conspicuousness test to determine the validity of a contractual indemnity clause. *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 708 (Tex. 1987); *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993). A valid indemnity clause must specifically and expressly indemnify the indemnitee for the results of its own negligence. *Ethyl Corp.*, 725 S.W.2d at 708. Likewise, indemnification language must be

conspicuous, as opposed to being buried in fine print. *Dresser Indus., Inc.*, 853 S.W.2d at 508. Examples of conspicuousness include use of larger font than the balance of a contract, use of bold and/or italic typeface, and use of a conspicuous header at the beginning of a contract notifying any reader that the contract contains indemnity provisions.

While many states disfavor contractual indemnity, there are a variety of ways in which states seek to protect small businesses that become embroiled in expensive, complex litigation.

For example, Texas Civil Practice & Remedies Code 82.002 provides, "A manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action, except for any loss caused by the seller's negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable." "Loss" is defined to include court costs and other reasonable expenses, reasonable attorney fees, and any reasonable damages. *Id.* Damages awarded by the trier of fact, as reflected in a final judgment are deemed reasonable. *Id.* A wholesale distributor or retail seller who completely or partially assembles a product in accordance with the manufacturer's instructions is considered a "seller" for the purposes of the statute. *Id.* A seller is also entitled to recover from the manufacturer court costs and other reasonable expenses, reasonable attorney fees, and any reasonable damages incurred by the seller to enforce the seller's right to indemnification under this section. *Id.* The Texas Supreme Court has held that, where a plaintiff's pleadings join a seller in a products liability action, the pleadings alone are sufficient to trigger the manufacturer's duty under the statute, even if those pleadings are factually incorrect. *Fitzegerald v. Advanced Spine Fixation Systems, Inc.*, 996 S.W.2d 864, 867-869 (Tex. 1999)(products liability defendant accused of selling defective product entitled to statutory protection even though seller did not

actually sell product alleged). The Supreme Court has also held that a seller is entitled to protection under the statute from a manufacturer in a products liability action, even if the plaintiff's pleadings assert both strict liability and negligence claims against the seller. *Meritor Automotive, Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 91 (Tex. 2001).

The Texas statute requires a seller to give a manufacturer reasonable notice of the claim unless the manufacturer is already a party. Tex. Civ. Prac. & Rem. Code 82.002. If it is necessary to assert a claim against the manufacturer to enforce the seller's rights under the statute, such a claim can be made in the products liability case itself, as a third-party claim or a cross claim, or it can be asserted in a separate action.

Missouri takes a different approach to protecting retailers and wholesalers who are named as parties in products liability cases. Missouri's "innocent seller statute," Section 537.762, RSMo., allows a Court to dismiss claims against a defendant whose liability is based solely on its status as a seller in the stream of commerce if there is one or more other defendants remaining in the case capable of satisfying the plaintiff's claim. Such a dismissal is without prejudice and is interlocutory, so a dismissed defendant can be brought back into the lawsuit if subsequent discovery indicates liability for something other than the Defendant's status as a seller in the stream of commerce. *Id.*

F. Motion Practice – Move Early and Often

If there is an opportunity to remove your client from the case early, take it. You and your client will also need to weigh whether it makes sense to file a somewhat less than ideal dispositive motion early in the case versus waiting until the optimum motion can be filed, which may be financially too late for your client.

i. Are there jurisdiction defenses? A small, self insured defendant may be less likely to have minimum contacts in another state.

If your client has been sued in another state, small businesses may be much more likely to have jurisdictional defenses than a major corporation. Again, to determine whether a jurisdictional challenge is worthwhile, you will need to be well acquainted with your client's business. How do they advertise? Do the6y participate in trade shows? Do they sell products to customers in the forum state? What kind and how often?

The Plaintiff, as the party seeking to invoke jurisdiction, has the burden of establishing personal jurisdiction over the defendant and may not shift that burden to the defendant. *See, e.g., Mountaire Feeds, Inc. v. Agro Impex, S.A.,* 677 F.2d 651, 653 (8th Cir. 1982). A plaintiff may seek to establish either general or specific jurisdiction. Specific jurisdiction exists when your client's actions in the forum state actually give rise to the claim. For example, an aircraft operator sued as a result of an aircraft accident in the forum state is going to be subject to the specific jurisdiction of the forum state, even if the operator had never before done business in or traveled to that state. If the facts of the case indicate that specific jurisdiction exists, it most likely will not be in your client's best interest to challenge jurisdiction. It is unusual to find a case involving a "grey area" as to the existence of specific jurisdiction.

General jurisdiction, on the other hand, requires a plaintiff to plead and prove that the defendant has substantial or "continuous and systematic" contacts with the forum state. *Helicopteros Nacionales de Colombia, S.A.* v. *Hall,* 466 U.S. 408, 414-16 (1984). A federal court sitting in a diversity action may exercise

jurisdiction over a nonresident defendant only to the extent permitted by the long-arm statute of the forum state and by the Due Process Clause of the U.S. Constitution. *See, e.g., Morris* v. *Barkbuster, Inc.,* 923 F.2d 1277, 1280 (8th Cir. 1991). The nonresident defendant's conduct and connection with the forum state must be such that "he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286,297 (1980). It is essential that "'there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475 (1985). The mere commission of an extraterritorial act of negligence, without more, does not satisfy the requirements of Due Process. *Calder v. Jones*, 465 U.S. 783, 789-80 (1984).

ii. Is removal a good idea?

The removal question provides a good illustration of the value of local counsel, even for a self-insured client. Conventional wisdom has always been that an out of state defendant is better served defending a case in federal court than in another jurisdiction's state court, and thus a defendant should remove any case which is procedurally capable of removal. Given the proliferation of complex lawsuits, however, most state courts are now well accustomed to out of state parties. Conversely, in any jurisdiction, it is possible that the federal judge to whom a case might be removed may be more of a "plaintiff friendly" judge than the state judge. A good, experienced local counsel who is familiar with both the local judiciary and the differences in jury pools drawn for federal and state courts should be able to help you and your client weigh the pros and cons of removing a case.

iii. Motions for Summary Judgment and 12(b)(6) motions

As with any client, any opportunity to conclude a lawsuit against a self-insured defendant is of paramount importance. If you can parlay thorough research into the facts of the case and the law applicable to the case into a solid motion for summary judgment or 12(b)(6) motion, do so as soon as practicable. At the very least, you may educate the Court as to the strengths of your case and the weaknesses in the plaintiff's and you may help to define the major issues of the case in ways beneficial to your client. A well prepared dispositive motion can also be a powerful negotiating tool in your efforts to convince the plaintiff to get your client out of a lawsuit. At best, a successful dispositive motion can save your client tens or hundreds of thousands of dollars in litigation costs and may make the difference between your client's ultimate survival or failure.

G. Are you sure there is not coverage?

While your client may be operating under the understanding that there is no insurance coverage applicable to the claim against it, don't necessarily take this at face value.

i. Stay alert for policies

One of your very first tasks should be to review any policies in your client's possession for any conceivable source of coverage. If your client has not thoroughly reviewed its own policy, or if the client simply doesn't understand the policy, the client may bee operating under a misimpression, misunderstanding or even misinformation as to what any given policy actually covers. Also be prepared to look beyond your client's own policies. Again, knowing and understanding your client's business is very important. Are there any business

relationships which would lead to your client being named or treated as an additional insured under another party's insurance? Carefully review any policies produced in discovery. Be prepared to seek insurance policies from non-parties and from agents.

ii. Know your insurance triggers

In Texas, for example, the allegations against a defendant in a plaintiff's pleading dictate the existence or absence of coverage. If a pleading does not allege facts within the scope of coverage**,** an insurer is not legally required to defend a suit against its insured. *Nat'l Union Fire Ins Co. v. Merch. Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997). An insurer's duty to defend is determined by the allegations in the pleadings and the language of the insurance policy. *Id*. Courts give the allegations in the petition a liberal interpretation. *Id*. If the pleading does not state facts sufficient to bring the case clearly within or without the coverage**,** the general rule is that the insurer is obligated to defend if *potentially* there is a case under the pleading within the coverage of the policy. *See id*. In making this determination, courts focus on the underlying pleading's factual allegations that show the origin of the damages rather than on the legal theories alleged. *See id.* Courts will not read facts into the pleadings, nor will they look outside the pleadings, or imagine factual scenarios which might trigger coverage. *See id*. at 142. This may strike a client unfamiliar with insurance as odd, because the client is disputing the plaintiff's allegations against it.

iii. Tender Defense?

As policies are reviewed, brief your client on the potential risks and benefits to tendering coverage. Typically, the only risk to tendering coverage is the possibility that the insurer will file a declaratory judgment action against your

client to establish the absence of coverage. This is not an insignificant risk. The cost of litigating a declaratory judgment action can be significant, and will be more so if the declaratory judgment action is filed in another jurisdiction. In some states, the insurer may also be entitled to recover attorneys fees and expenses if it prevails in the declaratory judgment action. On the other hand, given the tremendous cost of defending an aviation case, your client may well decide that the risk of a declaratory judgment action is worthwhile and at least tender the claim against it to the insurer to allow the insurer to make a coverage determination. If coverage is tendered under a reservation of rights, be prepared to fully brief your client about the potential for excess exposure. Depending on the circumstances, it may be in your client's best interest for you to remain in the case as an attorney of record to monitor the case even after insurance defense counsel makes an appearance.

Some jurisdictions impose a duty on an insurer to provide independent counsel if there is a conflict of interest between the insurer and the insured, such a may exist where a defense is offered subject to a reservation of rights. See 50 A.L.R.4th 932 (1986). Among these jurisdictions, there are different approaches as to whether the insurer or the insured has the right to select independent counsel. *Id.*

H. Mediation

It is rare for a lawsuit to go to trial without having been through some form of agreed or court mandated alternative dispute resolution, such as mediation. However, a self-insured client may have little to bring to the table at mediation. You will need to visit with your client about whether and how to participate in mediation. Mediation frequently occurs late in litigation. Does your client have

sufficient assets remaining to fund a settlement? Are they able or willing to pay a settlement out over time? Are there other forms of consideration which might form the basis for a settlement?

Many mediators are accustomed to dealing solely with insured defendants and serving only to broker a dollar figure which fits within policy limits and settlement authority and is sufficient to satisfy the plaintiff's requirements. Dealing with a self-insured part that may have very little money left to fund a settlement, or may need creative approaches, such as paying out a settlement over time, or looking to unconventional forms of consideration, may be well outside the comfort zone and experience of many mediators.

While successful negotiations are almost certainly in your client's interests, your client's participation in mediation may actually make settlement more difficult, or at least rob valuable time and attention from the efforts of the mediator and the insured parties to reach a settlement. On the other hand, if participation appears to offer benefits to your client, use the opportunity to drive home to all other parties and counsel that your client has no insurance, cannot benefit any other party by being in the case through trial, and can harm the plaintiff's case at trial.

I. Trial Practice

i. Communicating trial risks to client

As it becomes apparent that a lawsuit is destined for trial, revisit the costs and risks of trial with your client. Many self-insured client representatives will have no experience with trials and will likely have only the misconceptions created by television shows. Explain how the process works. As with other phases of the case, explain the various options your client has in putting on its case and the

risks, benefits and potential costs of these options. Approach trial preparation with a clear understanding with your client as to what is authorized at trial.

ii. Trial exhibits on a shoestring

Look for creative ways to keep trial costs to a minimum. Do flashy exhibits convey the wrong message about your client's financial situation? Can you illustrate the points necessary to defend your client with lower cost alternatives? If getting reached for trial is in question, does it make sense to take videotape depositions of your own experts to avoid repeatedly paying for trial preparation?

iii. The image

As we all know, juries typically make assumptions about financial condition and insurance coverage absent any specific information concerning these issues. Even if all defendants are aligned at trial, it may benefit your client to project a separation between your client and the insured defendants.

iv. Does everyone want a jury?

Odds are good that, in complex multi-party litigation, at least one party will insist on a jury trial. However, depending on the facts of your case and the Court in which the case is pending, you may wish to at least raise the issue with the other attorneys of record. As a general rule, a bench trial will take far less time than a jury trial and could save significant trial costs.

J. CONCLUSION

The facts of every case very, as do the financial conditions of every defendant. While some defendants may find it simply impossible to survive some lawsuits, a creative and efficient defense is possible for many self-insured defendants. By working closely with your client, learning the specific details of your client's business and educating your client at every step of litigation as to the risks, benefits and costs of each element of their defense, it is possible to see your self-insured client through a complex lawsuit. If aviation insurance continues to become more expensive and more difficult to obtain, the ranks of the self-insured defendants will only continue to grow.