

Addressing the Emergent Reinsurance Claims Challenge

Proactive Loss Exposure Analysis and Response

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Reinsurers today are too often called upon to address major claims in a factual vacuum. Economic pressures in recent years have had an adverse impact on cedents' performance of notice, reporting and defense obligations. As a result, reinsurers have experienced a growing volume of unpleasant claims surprises. Notice from reinsureds is often tardy, updates on the progress of litigation is often incomplete, claims are not defended with the same rigor evident devoted in earlier times and the results (settlement and verdict amounts) are increasingly unsatisfactory.

The modern reality is that on any given day, a reinsurer might receive news about a litigated claim that radically and belatedly requires revision of its loss exposure analysis. "Bad news" reports often arrive on the eve of trial, in the midst of trial or pending appeal of an adverse judgment, providing the reinsurer with no genuine opportunity to analyze the situation and react. The reinsurer's window of opportunity in such circumstances closes quickly.

When a cedent does not adequately perform its notice, reporting and defense duties under the reinsurance agreement, the critical balance in the relationship between reinsured and reinsurer is disrupted. Under these circumstances, the results can be very unpleasant, unless the reinsurer is prepared to step up and take control. This article discusses why a more proactive approach by reinsurers may be appropriate in the current claims environment and how reinsurers can best prepare to meet this emergent challenge.

The emergent claims challenge.

The challenge for reinsurers dealing with the emergent claims environment can be described by five basic characteristics of cedents' modern operating practices. In recent years, reinsureds have made deep cutbacks in personnel and claims handling resources. Claims employees of the cedent companies now have less time to deal with greater numbers of claims, with less training, experience and supervision than did their predecessors. The consequences of these financial and management policies have fallen largely upon the reinsurers. Vital functions traditionally allocated and assigned to the reinsureds are not being performed or are being performed inadequately:

- A. Notice.** Notice of claims today often tends to be later than it should be and later than was formerly the practice. Claims now tend to be reported toward the end of the litigation timeline, leaving reinsurers less time to thoughtfully analyze and then intelligently address the claims. The increase in caseloads and diminishing experience level of cedents' claims handlers make it less likely that proper notice will be given.
- B. Reporting.** Apart from the question of notice, reporting on the progress of litigation appears to be less timely and less adequate than in the past. As a result, "problem" claims are identified later, leaving less opportunity for reinsurers to affect the result. The steadily increasing workloads of cedents' claims employees tends to have a direct negative impact on the frequency and detail of their reports to reinsurers. In addition, the highly competitive nature of today's reinsurance market undoubtedly gives cedents a feeling that they can easily move their

reinsurance business, making it seem less important for them to please their current reinsurers.

- C. Abrupt evaluation shifts.** Even on claims where notice and reporting may be generally timely, abrupt increases in damages evaluations occur far more frequently than may be expected. For all practical purposes, late revisions in a cedent's valuation of a claim may have the same negative effect as late notice and reporting. Significant revisions of loss exposure valuations on the eve of trial, or even during trial, are now commonplace, due to the decreasing resources and experience level of cedents' claims personnel and defense counsel.
- D. Defense and settlement efforts.** It is a common perception that cedents' defense and settlement efforts do not receive the same level of attention and expertise as in the past. Frequently, reinsurers' review of claims reveal basic inadequacies in the defense of claims, which directly impact the reinsurer's exposure. The problem stems, again, from the fact that the cedents' claims handlers and defense counsel are more burdened with work responsibilities and less experienced than their predecessors.
- E. Results.** Settlement and verdict amounts have increased at an alarming rate, particularly with certain types of claims. Reinsurers can either accept this as an inevitable trend, or take affirmative steps to avert the natural consequences of cedents' late notice, inadequate reporting, shifting claims evaluations and inadequate defense and settlement efforts.

What reinsurers can do to meet the challenge.

When a reinsurer first learns of a problem claim after it is assigned out to trial, the situation always appears bleak. However, a reinsurer can take two important initial steps to prepare for these situations. The first is easy and purely attitudinal: learn to expect late notice, poor reporting and late shifts in case evaluations from your reinsureds. There is no objective reason today for believing that the conditions that produce these practices will change any time soon. The second requires planning and effort: to develop capabilities to effectively handle high exposure surprise cases.

The time element cannot be overemphasized. If a problem claim first appears on the reinsurer's radar screen when the case is at or near trial, the reinsurer must analyze the coverage and liability issues within a matter of hours or days, depending upon the trial schedule. This is possible, but the only way to accomplish it is to have a detailed plan and "strike team" personnel ready for the task in advance.

Coverage analysis

Logically, the first thing that should be done is to analyze whether the claim is covered under the reinsurance agreement. The goal is to determine, quickly, whether the coverage issue is clear. If it is clear that there is no coverage for the claim, the reinsured should be so informed and nothing

else need be done. If it is clear that coverage does exist for the claim, then an analysis of the loss exposure and adequacy of the defense should be commenced. If the coverage question is not clear, then an analysis should be initiated to evaluate the relative merits of various coverage positions and the efficacy of becoming actively involved in efforts to resolve the claim. At times, the greatest leverage a reinsurer has to become involved in the defense or settlement of a claim may be a prompt and focused reservation of rights.

Since the coverage analysis is the first thing to be done, it should be given the highest priority. If there is no doubt that the reinsurer's in-house personnel will have the experience and availability to perform the coverage analysis within the required timeframe, the task should be kept in-house. However, if there is any doubt about the availability of the in-house coverage analysts, prior arrangements should be made with outside counsel who will agree to give such assignments immediate attention. The appropriate lawyer for this position is one with established coverage experience and a willingness to provide you with immediate access 24/7.

Loss exposure analysis

If there is coverage or an issue as to coverage, a prompt and thorough analysis of the loss exposure should be undertaken. The goal of this analysis is to determine the extent of the risk and to evaluate the adequacy of the defense and settlement efforts, while opportunity remains for the reinsurer to limit the exposure.

A. Questions to be asked

Broadly speaking, perhaps the most difficult challenge facing any reinsurer in receipt of an emergent claim, is to identify the right questions to ask of outside counsel and underlying insurers. While most reinsurers are familiar with relatively rote Case Analysis forms that tend to ask for a global opinion on liability, adverse verdict potential and settlement value, these traditional constructs don't tend to ask many of the questions that need to be addressed by reinsurers who have been pressed into an uncomfortable, quick-response posture. Rather, specific and focused inquiry and opinion are required by the analyst in order to ensure an intelligent and thoughtful claims response. Reinsurer claims strategy requires knowledgeable inquiry and opinion on each of the following:

1. Is there a defense strategy in place? While it may seem fundamental to ask this rather basic question, it tends to be the one most avoided by counsel. This avoidance is generally underpinned by the fact that most lawsuits are neither prosecuted nor defended with a strategic plan in place to guide the litigation. Without a planned focus, it will be very difficult for the reinsurer to get a firm grip on where the case has been and where it is likely to be headed. Most people wouldn't begin a long and arduous journey without a road map. Lawyers do it with impunity. If the response to this basic inquiry is, in effect, that no articulable defense strategy exists, claims personnel will have its first sign of a red flag.

An included sub-inquiry is whether the defense strategy has made provision for all facets of an effective defense... liability, proximate causation and damages.

Damages strategy and control is like the ugly cousin of the traditional liability defense... you know its out there but no one wants to talk about it except it hushed tones and whispers. In reality, however, many a fine liability case has been lost by the failure to effectively plan for and challenge the opponent's damages proofs. Consequently, reinsurers are often stuck with ill conceived and often "seat of the pants" damages defenses that lack both evidentiary support and a reasoned vehicle for deployment.

2. Is the defense strategy adequate? The old adage that insightfully questions the success of "the best laid plans of mice and men..." reigns prescient in the litigation world. The inquiry into the adequacy of the chosen defense plan requires a careful analysis of the interplay between the applicable legal principles, political postures and desires of the parties, evidentiary availability and strengths/weaknesses, venue considerations (judicial habits, bias and prejudice, jury pool characteristics, dynamics of available alternative dispute resolution, local political, cultural and economic dynamics), opposition counsel (preparedness, litigation-negotiation savvy, resources—financial and legal—and the ability to marshal them). Whether the defense strategy will be adequate to maximize the defense team's ability to reach the desired goal is also a fluid inquiry. Strategies, while fundamentally sound, may need minor tweaking or major adjustments throughout the course of a lawsuit in order to respond to a changing case dynamic or to proactively take advantage of newly perceived vulnerabilities in the opponent. This is often a complicated calculus that requires an experienced practitioner's review to present a complete picture of the attendant risks and likely dispute outcome based upon a continuation of present strategy or a proposed change in course.

3. Has the defense plan been effectively executed? This is really a multi-faceted matter of whether the round peg has fit nicely into the round hole, the square peg has been effectively pounded into the round hole or the peg just won't fit. The problem with any kind of litigation is that sometimes the evidence just isn't what it was hoped to be. This can be the result of disappointing witnesses, smoking gun documents, years of faulty practices, or sometimes just poor preparation. Ultimately, what needs to be known by the analyzing reinsurer is whether the players with the proper and necessary knowledge and skills have been identified, secured (by legal, procedural or financial means) and made available. Do the attorneys have the necessary capabilities and skills? Have the "right" experts been retained? Has an effective evidentiary presentation been constructed? Does the defense case have the necessary "pop" to prevail in front of the selected finders of law and fact?

B. Essential elements of the loss exposure analysis

Once the initial three questions discussed above have been fully explored, the reinsurer should be in a better position to weigh the remaining traditional inquiries relating to (a) **Liability** - the likelihood of successfully defending the case on the merits before the

given judge, jury, mediator or arbitration panel; (b) **Adverse Verdict Potential** – the likely exposure to the insured, underlying insurer, any excess carriers and reinsurers; (c) **Settlement Value** – the amount of money an objective and reasonable person would pay to resolve the dispute; (d) **Settlement strategy** – the most appropriate manner in which to approach the opponent with an offer of monetary settlement or other resolution of the dispute; (e) **Necessary Future Preparation** – those additional items of preparation that stand a reasonable chance of favorably advancing the defense strategy; (f) **Suggested Legal or Procedural Maneuvers** – suggested ways in which legal principles or available procedural rules may be applied or challenged in order to effect either a substantive or strategic advantage.

C. The nature of the “strike team.”

With a clear picture of the questions in need of answers, reinsurers need to identify whether the team designated to determine the answers will come from “in-house” or an outside source. While smaller exposures can often be effectively assessed by in-house personnel, significant claims arriving at the reinsurer’s doorstep on an emergent basis, generally cry out for outsourcing. Because the emergent claim strike team is largely needed only sporadically, emergent claims often do not justify a fulltime staff being paid continuously to keep quick analysis available. Additionally, when the team does act, the effort typically requires a large amount of dedicated time and energy that would likely disrupt the ongoing operations of any reinsurer. Finally, outsourcing emergent case analyses can provide a high degree of specialization and expertise in specific legal fields without an expensive in-house investment in litigation strategy training and substantive application of laws.

D. A real-life example of the approach in operation

One specific example of the outsourced approach is **Iwan•Cray’s “LEAP” Program**. Fashioned as a Loss Exposure Analysis Program, this construct provides a dedicated partner-level comprehensive coverage and loss exposure assessment that focuses on answering each of the questions detailed above. The program is offered on a worldwide basis and emphasizes an emergency response in any venue, whether the claim is contractual, quasi-contractual, commercial loss or tort in nature. The **LEAP** program encourages as much, or as little, involvement in the analysis process as is desired by the reinsurance professional. Analyses are provided by prompt written report, unless the reinsurer or the context otherwise requires. Nothing is done by rote. Every case is individually considered and responded to with the degree of legal acumen and emergent responsiveness required. **The goal... to provide the reinsurer with (1) the right questions to ask, and (2) the answers the reinsurer should expect to receive.**

Conclusion

The reality of the reinsurance claims environment has unquestionably changed. Reinsurers may hope for the best, but they should expect that in the near future cedents will continue to: (a) give untimely notice, (b) fail to provide detailed timely status reports, (c) surprise reinsurers with last-

minute reevaluations of exposures, (d) make questionable defense and settlement decisions and (e) present claims for unanticipated runaway settlements and verdicts.

When a cedent fails to perform its duties in the handling of a claim, the reinsurer will be doomed to pay the resulting damage, unless it steps in to take control. A problem claim that appears on the reinsurer's desk on the eve of trial (or even pending appeal) calls for an immediate analysis of the coverage issues and the loss exposure. Depending upon the results of those analyses, the reinsurer may need to take action to limit the exposure. Detailed plans and the identification of a problem claim "strike team" are essential to the development of these capabilities. Because the time constraints with such claims are so severe, readiness is key for the reinsurer.