CPCU SOCIETY

Reinsurance Interest Group

Reinsurance Encounters

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Chairman's Message

by Wade E. Sheeler, CPCU, CIC, CRM, ARe

Wade E. Sheeler, CPCU, CIC, CRM, ARe, is corporate risk manager for Grinnell Mutual Reinsurance, a Midwest-based reinsurance and direct lines carrier. He has held various positions with Grinnell Mutual over the past several years, including ones in product development, auditing, reinsurance services, and education. He has served as an adjunct instructor at Drake University, Buena Vista University, Grandview College, and Des Moines Area Community College.

Sheeler served as president of the CPCU Society Iowa Chapter from 2006 to 2007. He is a past regional governor and director for the CPCU Society. Sheeler also served as a member of the Budget and Finance Committee from 2002 to 2007 and rejoined the Committee in 2010. Sheeler has served as a member of the Loman Board of Trustees, currently serves on the Mentoring Advisory Council at the Vaughan Insurance Institute at the University of Iowa, and is a past president of the Heartland Chapter of Insurance Compliance Professionals. Sheeler is a graduate of Drake University with a bachelor of science in business administration in insurance and risk management, a bachelor of arts in economics, and a master of business administration degree. He earned the CPCU designation in 1995. In addition to earning the CPCU and ARe designations, Sheeler has also earned the AIAF, ARM, ARP, ARC, AIM, API, AIS, and AIM designations.

This is my first message as chair of the Reinsurance Interest Group.

I was greatly honored when asked if I would be willing to serve as chair. We have a great group of individuals who serve on the Reinsurance Interest Group committee, and I am looking forward to working with so many talented reinsurance professionals. I would like to welcome to our committee the following individuals: Andrea Feliciano of Am Trust North America; Lindsay Zumbrunnen of Guy Carpenter; Randi Kaplan of Berkley Facultative; and Melissa Jubinville of XL Reinsurance America.

I hope each of you has marked your calendar to be with us on March 13 and 14 for the Philadelphia Reinsurance Symposium. The event starts with a networking reception at the historic Union League on the evening of March 13. The next day promises to be full of informative sessions on various topics of interest to reinsurance professionals. Frank Nutter, CPCU, president of the Reinsurance Association of America, will start the day with the executive panel discussion, "Views from the Top." Dr. Guntram Werther, professor of strategic management at Temple University will share how "black swans" may be mitigated by the recognition of holistic assessment techniques to improve foresight solutions and event emergence timing.

During our noon luncheon, we will honor the new ARe designees. We congratulate each of you and look forward to sharing in your accomplishments. Our afternoon presentations will be on global climate change, with speaker Mark Way from Swiss Re, followed by a presentation on Insurance Linked CAT Bonds by William Dubinsky with Willis Capital Markets.

If you have not already sent in your registration, I encourage you to do so soon. Don't miss one of the premier reinsurance educational events that will be held during 2013.

The Reinsurance Interest Group committee is also working on plans for a workshop and luncheon at the 2013 Annual Meeting and Seminars to be held in New Orleans on October 26 through 29. Watch your next issue of *Reinsurance Encounters* for details.

As we begin a new year, the one thing that each of us can be assured of is change. The past few years have provided many challenges to our industry through weather-related events and struggles in our economy. This morning as I write this column, there are news reports of a major earthquake off the coast of Japan. The losses from Hurricane Sandy are still being tallied, with estimates ranging from $10 billion to $20 billion. Only time will tell how these events affect our industry. However, we can

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be assured that having earned the CPCU designation and being a member of as great a professional organization as the CPCU Society have given each of us the tools that we need to deal with these challenges.

Best wishes to each of you, your families, and your associates for a great year in 2013!

"Change is the law of life, and those who look only to the past or present are certain to miss the future."

—John F. Kennedy

P.S. If you have any thoughts, comments, or suggestions that you would like to share with the Reinsurance Interest Group committee, please drop me an email at wsheeler@gmrc.com.

CPCU SOCIETY | PHILADELPHIA Reinsurance Symposium

The CPCU Society and the Reinsurance Interest Group proudly present:

Emerging Issues and New Challenges

Please join us and other reinsurance and insurance professionals at the twentieth annual Reinsurance Symposium, sponsored by the CPCU Society's Reinsurance Interest Group. In addition to featuring outstanding panelists and speakers, the luncheon program will recognize the achievements of the 2012 class of Associate in Reinsurance (ARe) program graduates.

When

Wednesday, March 13, 2013
5:30–7:30 p.m.
Networking Reception

Thursday, March 14, 2013
8:00 a.m.–4:30 p.m.
Educational sessions and luncheon

Where

The Union League of Philadelphia
140 South Broad Street
Philadelphia, PA 19012
(215) 563-6500

To Register

To register, please call Member Resources at (800) 932-2728.
Registration will be available via CPCUSociety.org later this month.

Agenda

Wednesday, March 13, 2013

5:30–7:30 p.m. Networking Reception—Sponsored by Mintz Levin and Swiss Re

Thursday, March 14, 2013

8:00 a.m.	Registration and Continental Breakfast
8:30 a.m.	"A View From the Top"—Executive Panel Discussion Frank Nutter—president, Reinsurance Association of America (RAA), will lead an executive panel made up of a reinsurance intermediary, a direct reinsurer, a broker reinsurer, and a reinsurance buyer. Panelists include: Steve McElhiney—President, EWI Re John Keane—Vice president and chief operating officer of Nonprofits Insurance, Alliance Group John Vasturia—President, Regional Clients, Munich Reinsurance America, Inc. Jean-Paul Conoscente—Chief underwriting officer, SCOR Re
10:15 a.m.	Break
10:30 a.m.	"When Black Swans Aren't—Improving Extreme Risk, Large Impact and Rare Event Foresight and Assessment"—Guntram Werther, PhD Werther will explain how extreme risks or large impact and rare events, commonly termed "black swans," may be mitigated by recognizing alternative holistic assessment techniques to improve foresight solutions and event-emergence timing.
12:00 p.m.	Luncheon and ARe Designation Ceremony—Sponsored by Munich Re Engaging the Next Generation—"Perspective on the Opportunities and Challenges That Lie Ahead for the Insurance Industry and College Recruitment" Luncheon Speaker: Michael E. Angelina, ACAS, MAAA
1:30 p.m.	"Global Climate Change"—Mark Way, Director of Sustainability and Political Risk Management at Swiss Re
2:30 p.m.	Break
2:45 p.m.	"Insurance-Linked Securities and CAT Bonds"—William Dubinsky, Managing Director, Head of Insurance-Linked Securities at Willis Capital Markets & Advisory
4:00 p.m.	Adjournment

Editor's Comments

by Richard G. Waterman, CPCU, ARe

Richard G. Waterman, CPCU, ARe is president of Northwest Reinsurance Inc., a Minnesota-based management consulting firm specializing in the fields of insurance, reinsurance, and alternative dispute resolution. In addition to working with both ceding and assuming companies in his consulting practice, he has served as an arbitrator or umpire on more than 130 panels to resolve industry disputes, as well as a neutral mediator, facilitator, and fact-finder assisting parties to work out differences in a confidential setting. Waterman has been a member of the CPCU Society since 1978 and has served on the Reinsurance Interest Group Committee for more than ten years.

The year 2012 is now history. All of us have differing forward-looking dreams and aspirations. Without doubt, navigating what has become known as the "new normal" will require updated knowledge and new thinking to adjust our course to the reality of today. Welcome, 2013!

Our leadoff educational event for 2013 is our Reinsurance Symposium on March 14 at the Union League of Philadelphia, preceded by a networking soiree on March 13. We have invited an outstanding faculty of leading industry professionals, who will offer their insights concerning emerging risk management challenges for a risk-taking industry that is dominated by randomness and irregular events. This symposium attracts attendees with a wide range of interdisciplinary backgrounds to network and learn from each other. You are encouraged to register early for this premier symposium.

This edition of *Reinsurance Encounters* features three diverse topics: underwriting and claim clauses in reinsurance agreements, coverage and claim issues in the aftermath of Hurricane Sandy, and the significant role of non-lawyers in the arbitration process.

In the first article, "Underwriting and Claims Clauses in Reinsurance Agreements," Larry P. Schiffer, a prominent reinsurance attorney with Patton Boggs, LLP, in New York, explains that reinsurance agreements come in all shapes and sizes and contain many specialized underwriting and claim clauses and provisions that determine coverage for losses that may occur during the term of a reinsurance agreement. Furthermore, the author points out the importance of communicating all underwriting and claim requirements made part of reinsurance agreements to reduce the possibility of a future claim recovery dispute with a reinsurer.

Hurricane Sandy was one of the largest and most powerful storms on record. Given the wide range of policies and types of losses that occurred, including wind damage, flood losses, and the loss of power, Sandy can be expected to give rise to various coverage issues. In his article "The Next Storm—Reinsurance Claim Issues as a Result of Superstorm Sandy," Andrew S. Boris, a leading reinsurance attorney with Tressler, LLP, in Chicago, explains several categories of potential insurance and reinsurance coverage questions that may result from claims arising out of Superstorm Sandy and offers suggestions to evaluate potential claim recovery issues.

In the past, reinsurance disputes were resolved by industry professionals serving on arbitration panels. The final article, "Where Non-Lawyers Fit in the Arbitration Process," by Fred G. Marziano, is about reinsurance arbitration and the important role of non-lawyers in the process. Marziano is a former industry executive with substantial experience serving on arbitration panels to resolve industry disputes. He offers a thoughtful analysis concerning the benefits of selecting experienced non-lawyers to serve on arbitration panels.

We are excited about the year ahead, and we look forward to meeting many members of the Reinsurance Interest Group at upcoming educational seminars. We also welcome hearing from you with your comments, which you can email to the editor, and we especially solicit your articles. Your voice provides appreciated feedback and valuable content for future editions of *Reinsurance Encounters*. Happy new year! ■

Underwriting and Claims Clauses in Reinsurance Agreements

by Larry P. Schiffer

Larry P. Schiffer is a partner in the New York office of Patton Boggs LLP, where he practices commercial, insurance, and reinsurance litigation; arbitration; and mediation. He also provides advice on coverage and contract wording issues for a wide variety of insurance and reinsurance relationships.

Schiffer is active in legal and industry associations, where he has held various leadership positions. He has lectured in the United States and the United Kingdom, and his work regarding reinsurance, insurance, litigation, and technology topics has been widely published in various national and international journals and publications. He serves as an expert commentator on reinsurance for IRMI.com (the International Risk Management Institute website) and coauthored the chapter on reinsurance in the New York State Bar Association's Insurance Law Practice treatise. He has been recognized by Chambers USA, Euromoney Guide to the World's Leading Insurance and Reinsurance Lawyers, The International Who's Who of Insurance & Reinsurance Lawyers, The Legal 500, and Super Lawyers. Schiffer received his bachelor of arts degree, magna cum laude, from Brooklyn College of the City University of New York. Schiffer received his juris doctorate from Albany Law School, where he graduated cum laude and was a member of the *Albany Law Review* and the Justinian Society.

Introduction

Reinsurance agreements come in all shapes and sizes. Some are large corporate treaties covering the entire book of business of the ceding insurer. Others are single-minded facultative certificates of reinsurance covering a specific risk of a specific insured. Some are focused on risk transfer and related claims issues and others are focused on providing financial capital from the reinsurer to the ceding insurer.

Because of the wide variety of reinsurance needs, many reinsurance agreements have customized clauses drafted specifically for that reinsurance relationship. The level of customization or use of manuscript wording in a reinsurance agreement will depend on the relationship of the parties, how generic the reinsurance agreement is, the level of involvement of the reinsurer in the business of the ceding insurer, the sophistication of the ceding insurer, whether the business is fronted, the attachment point where the reinsurance is accessed, the reinsurance intermediary, and myriad other factors.

Underwriting and Claims Clauses Generally

One area of customization that arises with some frequency is where the reinsurance agreement has a specific underwriting and/or claims-related clause. These clauses may be as broad and detailed as the imagination of the reinsurance underwriter. They are used for many purposes, but typically to put some guidance into the reinsurance agreement about how the underlying business should be underwritten and/or how the underlying claims should be handled.

Having documentation in a reinsurance agreement on how the underlying business should be written and/or how claims should be addressed is a great idea. The problem is that it is very difficult to anticipate all circumstances. It is also very difficult to predict whether the underwriting and claim guidance will make sense as the business develops over time. As the market changes for the underlying insurance product, rules put in place may need to be changed and circumstances may dictate that the business has to move forward in a way that technically violates the underwriting and/or claims clauses in the reinsurance agreement. For these and other reasons, special care needs to be taken when developing these clauses and amending them as necessary because of business realities.

One of the biggest problems with underwriting and claims handling clauses is the lack of communication between those negotiating and drafting the reinsurance agreement and those who handle the day-to-day underwriting and claims handling duties. Most line underwriters and claims handlers have little familiarity with the company's reinsurance agreements. When disputes arise, it is not uncommon for underwriting and claims witnesses to testify that they never saw the reinsurance agreement and had only a summary (if lucky) of the requirements that affected their duties. This problem becomes exacerbated when a reinsurance contract is in place for a long time and personnel change with frequency.

Underwriting Clauses—Guidance or Warranties?

Whether a reinsurance agreement includes a clause addressing how the ceding insurer will underwrite the underlying business and the details of that clause depends on many factors. For a broad corporate reinsurance agreement covering multiple lines of business, the Business Covered clause will describe the risks assumed and there likely will be very little if anything said about how the ceding insurer should underwrite.

On the other hand, where the reinsurance agreement covers a specific underwriting unit of a company and the reinsurer is assuming a significant portion of the risk, it is more likely that the reinsurance agreement will set out some details on how the reinsurer expects the ceding insurer to underwrite the business.

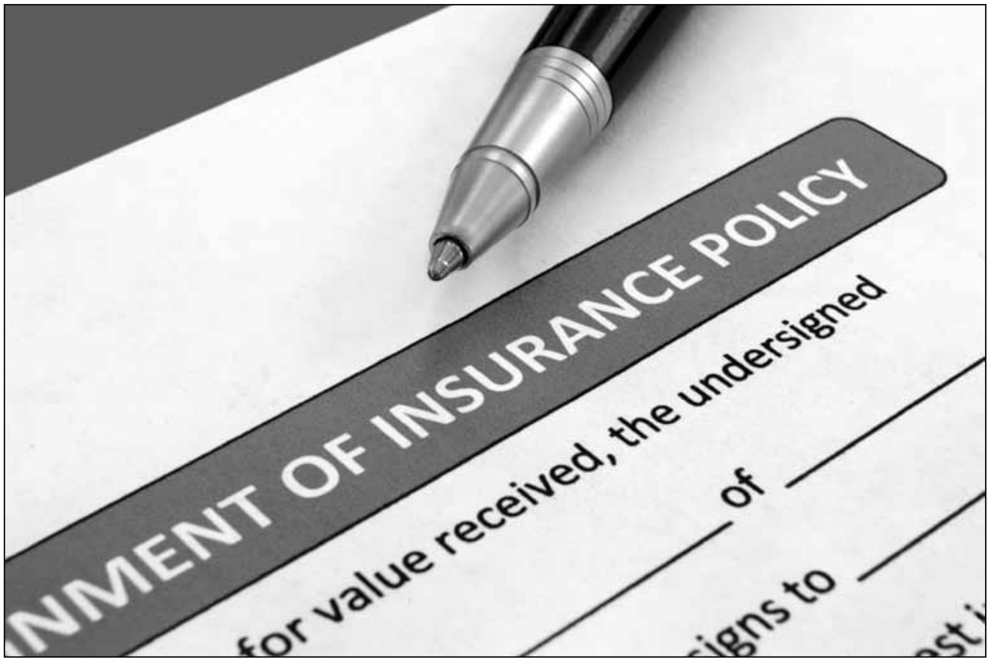
Underwriting clauses may merely provide guidance and aspirational suggestions or may be drafted as a strict warranty of behavior. Clarity on this point is pretty important to both parties to avoid disputes over whether the ceding insurer followed the underwriting clause in the reinsurance agreement. If the clause makes compliance with underwriting rules a representation and/or warranty, the reinsurer will have an easier time enforcing the rules.

There are many examples of clauses that express the underwriting requirements that the reinsurer seeks to impose upon the ceding insurer. Some incorporate underwriting guidelines and manuals into the reinsurance contract. Others lay out the detail of what is an acceptable risk under the reinsurance contract. Some clauses will restrict reinsurance cessions to the size of the underlying premium, the geographic location of the risk, or the requirement that a specifically named underwriter remain in charge of the ceding insurer's underwriting activities for those policies.

One example is requiring the ceding insurer to use certain standard forms for its underlying polices and to place certain exclusions or endorsements on each of those policies. For example:

> Warranty
>
> For every CGL policy issued by the Company, the Company warrants to the reinsurer that it will use ISO CGL Coverage Form (xxx) and shall include ISO Total Pollution Exclusion Endorsement (xxx).

When the underwriting requirement is drafted as a warranty, the reinsurer has the contract right to expect the ceding insurer to comply



fully with that warranty. It is critical that requirements like the example above are communicated to the ceding insurer's line underwriters so that they understand that every policy they write for which they intend to seek reinsurance contains the required forms. Where the reinsurance agreement is negotiated and drafted without the input of the ceding insurer's underwriting personnel, the possibility of violations of the warranty are more likely. This only leads to disputes down the road.

A common way of controlling the underwriting of the ceding insurer is to require that all risks of a certain kind or nature be presented to the reinsurer for approval. Essentially, this makes the reinsurance agreement a facultative agreement because each risk must be agreed by the reinsurer before it is bound by the ceding insurer if the ceding insurer wants to have reinsurance protection for that risk.

When the underlying program is being produced and underwritten by a third-party managing general underwriter or other underwriting manager, it is typical to have a clause in the reinsurance agreement requiring that the business ceded to the reinsurance agreement be written under specific restrictions. For example, reinsurers that support MGA programs may require in the reinsurance agreement that the only business that may be ceded to the reinsurance agreement is business underwritten by complying with a specific set of underwriting guidelines formulated by the parties and approved by the reinsurer.

This type of restrictive underwriting clause also requires that the ceding insurer's line underwriters are fully informed about the underwriting guidelines, have the guidelines at their fingertips, and know that compliance with the guidelines is mandatory. The underwriting guidelines should be specific and should be attached to the reinsurance agreement or be identified very specifically so there is no confusion years down the road about what the guidelines consisted of and whether they were agreed to by the reinsurer.

Insurance evolves as the need for coverage changes over time and the industry goes into its various cycles of hard markets and soft markets. When the reinsurance relationship is a long-term relationship, it is critical that both parties expressly adjust any underwriting requirements in the reinsurance agreement as necessary when the market dictates that

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changes are necessary. If the ceding insurer finds itself in a position where it needs to use a newer or different policy form after a few years and the reinsurance treaty was written with a warranty like the one above requiring a specific form, the ceding insurer cannot just assume that the reinsurer will be ok with the change. This is true even if the form is better for both parties from a risk assumption perspective. The ceding insurer's underwriting management must remain cognizant of the underwriting restrictions in the reinsurance agreement and should seek a formal amendment to the reinsurance agreement to make any necessary adjustments.

Claims Clauses

Like underwriting clauses, claims clauses also come in many varieties and shapes. Notice clauses are effectively claims clauses and reporting clauses also often have claims aspects drafted in them. Some claims clauses specify that claims must be handled by a certain third-party administrator. Others restrict the ceding insurer from paying claims over a certain value without obtaining the reinsurer's approval. For example:

> The Reinsurer shall be consulted prior to a final determination to pay a claim in excess of the amount shown on Schedule A. In this situation, the Reinsurer shall have three (3) working days to authorize the Company to pay the claim or take appropriate alternative action. In the case where the Company does not take action as agreed upon or authorized by the Reinsurer, then the Reinsurer, may, at its option, deny or accept liability.

This clause is more unique because the ceding insurer can go ahead and pay the claim, but the reinsurer can decide whether to accept the cession or that loss or not if it did not agree with the ceding insurer's original claim determination. Other clauses that require prior written approval before payment of a claim that exceeds a specified monetary amount are in the nature of conditions or warranties depending on how drafted, and non-compliance by the ceding insurer runs the risk of losing any reinsurance recovery for that claim payment.

Also like underwriting clauses, a claims clause may have specific claims handling requirements or refer to and incorporate claims guidelines approved by the reinsurer. These have to be made known to the claims handlers so that full compliance occurs.

Many reinsurance experts have described the process of underwriting a broad reinsurance agreement for the ceding insurer's portfolio of business as underwriting the underwriting and claims departments of the ceding insurer. In other words, the reinsurer does not know when agreeing to the reinsurance agreement the exact risks that it is assuming, but must trust the ceding insurer's underwriter and claims manager to underwrite the business as agreed and to handle the claims as agreed in the reinsurance agreement. To make this clear from a claims perspective, some reinsurance agreements contain clauses that allow the reinsurer to either terminate the reinsurance agreement or obtain some monetary (premium or discount on losses) adjustment if the claims handling changes. For example:

> If there is any change in the Company's approach, method or guidelines in the processing, settling, administering or paying of claims, the Reinsurer shall be entitled to an adjustment of the portion of the claims which is reimbursable or an adjustment to Premium.

With this kind of clause, the ceding insurer runs the risk of the reinsurer balking at paying claims for full value if in the reinsurer's opinion the ceding insurer has changed its claims administration behavior. For example, at the inception of the reinsurance agreement the reserving philosophy of the ceding insurer is to quickly settle claims and avoid going to trial. But during the life of the reinsurance agreement the ceding insurer changes its reserving philosophy to defending each case and fighting everything through trial. One can argue that this change in reserving philosophy is a change in the ceding insurer's claims administration from originally represented and under this clause the reinsurer may be entitled to an adjustment.

Conclusion

Where a reinsurer is likely going to be actively involved in paying losses on the reinsured book of business, the reinsurer will probably want certain understandings put into the reinsurance agreement about how the ceding insurer will be underwriting the business and handling the claims. The examples above demonstrate that it is important for the ceding insurer and the reinsurer to understand the underwriting and/or claims requirements built into the reinsurance agreement. It is even more important that the ceding insurer's line underwriters and claims handlers are made aware of any underwriting and/or claims restrictions, warranties, or requirements set forth in the reinsurance agreement. With everyone on the same page, future disputes should be minimized. ■

The Next Storm—Reinsurance Claim Issues as a Result of Superstorm Sandy

by Andrew S. Boris

Andrew S. Boris is a partner in the Chicago office of Tressler LLP. His practice is focused on litigation and arbitration of insurance coverage and reinsurance matters throughout the country, including general coverage, first-party property, professional liability, environmental, and asbestos cases. Questions and responses to this article are welcome at aboris@tresslerllp.com.

The devastation and personal loss caused by super storm Sandy was widespread and did not discriminate between business, individual, or socio-economical status. By way of background, super storm Sandy moved through the Caribbean and up the eastern seaboard of the United States at the end of October 2012, causing loss of life and significant property damage. In fact, it has been initially reported that the total damages resulting from Sandy could approach between $75 and $100 billion, with private insurance potentially responsible for $25 billion of the losses. While it is understood that reinsurers capably will handle the losses associated with the storm, there will undoubtedly be numerous reinsurance claim issues that will be evaluated and addressed in the coming months. The issues that may need to be evaluated are far-reaching and could include: (1) potential reinsurance cover for uninsured losses; (2) aggregation of losses as potentially one "loss occurrence" for reinsurance purposes; (3) conflicts among terms in direct policies and reinsurance contracts; and (4) issues related to proof of claims.

Several states have already announced that individual policyholders will not be subject to the deductibles that are specifically tied to hurricane-related losses because the storm was re-characterized from being a hurricane to a post-tropical system before it made landfall in the northeastern part of the U.S. An interesting claim argument may develop if cedents pursue the losses from reinsurers paid to individual policyholders that would otherwise have been uninsured but for the re-classification of the storm (such as losses that would have been subject to a hurricane deductible). Arguments about deductible and limit warranties made by the cedent in the applicable reinsurance contract and the application of the follow the fortunes/settlements doctrine intersect in addressing the question of whether a reinsurer should be obligated to provide cover for such losses.

The question of how losses associated with the storm may be aggregated as one loss occurrence will also be an issue, as it may drastically alter the amount of recovery from available reinsurance. By way of example, the cedent will want to aggregate damages to maximize (stretch) the availability of its coverage and limit its obligation to pay numerous loss retentions. Correspondingly, reinsurers may seek to minimize the availability of coverage (and the scope of aggregation), leading to a cedent responsible for more loss retentions. For some reinsurance contracts, the question of whether aggregation is proper may turn on the interpretation of terms such as "event" or "cause," as many contracts require that the losses subject to aggregation arise or result from a single "event" or a common "cause." Both sides to an aggregation dispute can often find case law support for their respective positions. In addition, many excess of loss reinsurance contracts (especially involving at least one international party) also include specific temporal limitations concerning the scope of damages that may be aggregated as a single loss occurrence. Depending on the language of the contract, a cedent will often be able to aggregate losses if they fall within a set number of hours. For instance, losses related to a hurricane that occur within a 72 hour window can typically be aggregated. Other types of losses may be aggregated if they fall within a different "hours" window—in some instances, 168 hours. The question of when the storm was considered a hurricane and what hours limitations might apply will lead to highly contentious, fact-driven reinsurance claim questions.

Undoubtedly, there will be issues concerning conflicts or discrepancies between the terms of direct policies and reinsurance contracts. For instance, terms in the respective direct policies and reinsurance contracts may be defined differently (or potentially interpreted differently depending on the law that is to apply). What if a reinsurance contract excludes losses associated with "flood," but the underlying policy does not? Does that situation lead to an argument that the losses should be characterized as "flood" when the direct insurer may not have fully

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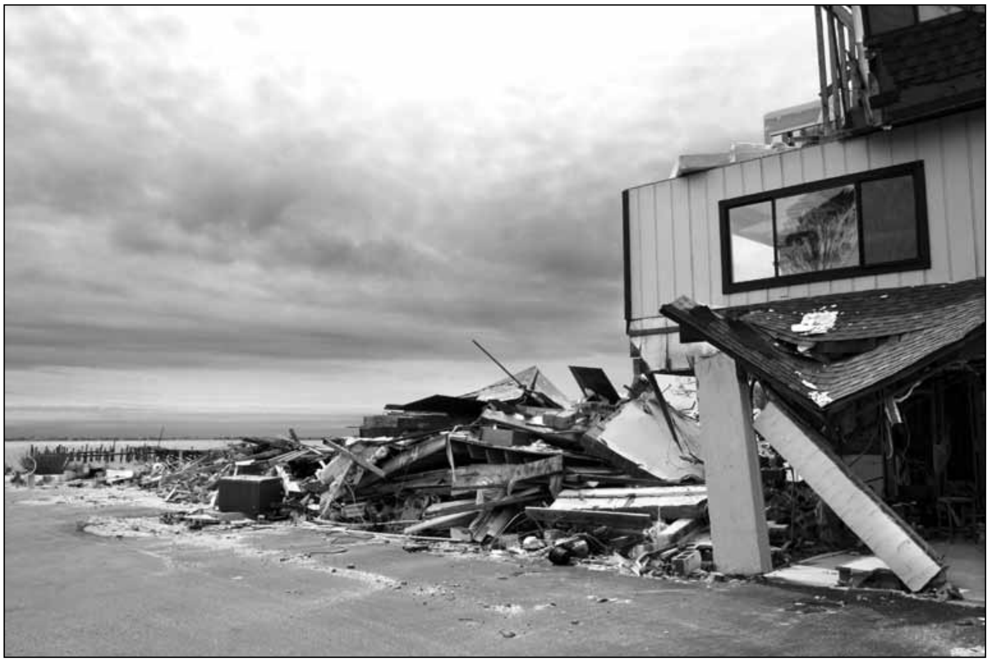
investigated the question of the cause of loss? Complicating the reinsurance claims process will likely be situations where there are questions about inconsistent effective dates for direct policies and corresponding reinsurance contracts (potentially causing additional aggregation questions based upon timing questions).

Finally, the degree of scrutiny that reinsurers use in evaluating billing submissions related to storm losses could be an issue. It can certainly be anticipated that cedents may lack significant documentation for many direct claims, especially for claims that were addressed immediately after the storm. Many of the direct claims, especially those involving business income loss or contingent business income loss, are highly fact specific and will demand close scrutiny. To what extent reinsurers approach storm claims differently may present interesting practical and administrative challenges for cedents. For instance, will some reinsurers demand a level of documentary proof that is different from other reinsurers? Will that potential difference in approach be dictated by geographic location of the reinsurer (national or international)? Will there be more requests for claims audits prior to payment of significant billings? These practical problems may only add to the significant pressures that insurers must confront with these storm claims.

Not surprisingly, beyond the loss of life and property damage, catastrophes also dramatically affect the business of insurance and reinsurance. In this instance, claim professionals will be confronted with myriad challenges as a result of the storm, ranging from practical and administrative issues to complicated claims questions. The importance of consistency and well-considered approaches to these problems will be paramount to all involved. ■



Where Non-lawyers Fit In The Arbitration Process

by Fred G. Marziano

Fred G. Marziano brings many years of practical, technical, and leadership experience and success in the property-casualty insurance and reinsurance industry to his role as arbitrator and consultant. Marziano's independent insurance/reinsurance consultancy practice, CIM, Inc., was formed to assist CEOs and CFOs in identifying ways to increase the support and confidence of stakeholders, rating agencies, and analysts, and to assist in the resolution of disputes between insurers, reinsurers, and policyholders.

Marziano held senior executive officer positions as president and CEO of Gerling Global Reinsurance Corp. of America; as president and founder of Liberty Mutual's Agency Corporation; as president of Continental Insurance Company and its international claim subsidiary, Underwriting Adjusting Company (UAC); as executive vice president and chief underwriting officer of Fireman's Fund Ins. Co. (a position which included ceded reinsurance, catastrophe reinsurance, product development, and chief underwriting officer duties); and in underwriting and managerial positions throughout the United States for Aetna Casualty and Surety Company.

Editor's note: This article was published in *ARIAS-US* Quarterly magazine, June 2012 edition.

Many non-lawyers joined ARIAS-US hoping to contribute to their industry by applying their underwriting, claims, broker and overall insurance/reinsurance expertise to the arbitration process.

This article is intended to remind my colleagues of the values associated with considering the appointment of non-lawyers as arbitrators in many cases.

In discussing the movement towards all-lawyer arbitration panels with fellow ARIAS-US members and company representatives in recent years, I have found that opinions about background requirements are summarized in two ways, depending upon the individual's professional background, with each group feeling it can offer the greatest value:

> From the perspective of lawyers: "Non-lawyers are ill-equipped to deal with lawyers who better understand law, are unable to argue legal precedents, and cannot successfully defend against rigorous arguments posed by lawyers."
>
> From the perspective of non-lawyers: "No one understands the business better than those who wrote and underwrote insurance/reinsurance products and directly handled the claims; the original intent of arbitration panels has been lost"

Since these views were based on anecdotal evidence acquired during ARIAS-US conferences, discussions with cedents' reinsurance representatives, and meetings in attorneys' offices, I decided to formally survey fellow ARIAS-US members more formally to learn how lawyers and non-lawyers are viewed by those who are charged with making the selections, and what skill differences should be considered in making an appointment.

The process included surveying twenty ARIAS-US members in November 2011, evenly split among non-lawyers and in-house and outside lawyers who represent both cedents and reinsurers. Collectively their experience included participation in 1,177 arbitrations. Promising anonymity, I asked each to share his or her views about the skills and advantages non-lawyer professionals offer in arbitration proceedings that differ from those offered by lawyers. Thoughtful responses were submitted by a large majority of those surveyed, with an almost even split among all segments.

While the results of the survey clearly revealed that not everyone is right for every case, there was consensus of opinion that for a majority of matters brought before arbitration panels a non-lawyers could be an excellent choice for a party appointed arbitrator. Key points from the survey include:

> A former in-house lawyer opined "It has been my experience that many non-lawyers with substantial experience in the insurance industry knew as much or more about insurance and reinsurance contracts/policies, policyholder contracts, producer contracts and even regulatory requirements than I did as an in-house lawyer."
>
> Another said "Concerns about non-lawyers being unable to control the process, limit discovery, consider legal procedures like summary judgment, etc. are overblown given all the training that ARIAS-US certified arbitrators have to take," and to overcome certain knowledge limitations of the legal system, "Non-lawyers can be informed on the legal requirements through briefs".
>
> Several participants were convinced that, by virtue of their having had responsibility for resolving every day, real-world insurance problems, non-lawyer professionals are excellent problem solvers, and would therefore perform well as arbitrators.

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Where Non-lawyers Fit In The Arbitration Process

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In relating support for non-lawyers, participants tied their reasons to these commonly disputed issues:

Intent of the Contract: A key issue for both parties in many arbitrations is the intent of the meaning of a contract. Many believe that non-lawyers can more easily put themselves in the shoes of the underwriters who placed the reinsurance or the claims staff who adjusted the claim. Judging that intent is clearly within the province of non-lawyers because insurance contracts are entered into and drafted by professional underwriters who decide what risks to assume, what price to charge, and which terms to provide for the exposures. It is their intent that is key and we should assume they knew what they were agreeing to. Non-lawyers are less familiar with rules of construction and contract drafting, so may be more likely to interpret contracts and enforce them as they are written, without being overly distracted by extraneous and vague evidence about intentions.

Custom and Practice: Non-lawyer arbitrators bring to the process first-hand information and knowledge of how the industry works, what the relevant customs and practices are, and a unique understanding of the business that many lawyers do not have. Some offered the view that a less adversarial approach might prevail by focusing more on industry standards, and practices.

Honorable Engagement; Intent of the Parties; Strict Rules of Law: Although "Honorable Engagement" clauses are sometimes being omitted from contracts, they nonetheless still do exist, as does the language that arbitrators are not required to follow the strict rules of law or apply a strict interpretation of the contract. The very purpose of the arbitration clause, the intent of the parties, and the past practice was to have industry—not legal—standards used to determine the outcome.

Historical Knowledge: Many non-lawyers know the historical bases for the business and reinsurance provisions, unlike some attorneys who look at reinsurance

agreements in isolation as documents that should simply be strictly enforced as written. In cases like this, lawyers' reliance on the application of law might be misplaced.

Cost and Process: Time and cost of arbitrations could be far less. A major reason for the decline in the number of arbitrations is that the original concept of arbitration, i.e. an expeditious and inexpensive process by former or current insurance or reinsurance executives as an alternative to litigation through the courts, has migrated into proceedings that are not unlike litigation, i.e. it takes a very long time to complete and is expensive.

Discovery and briefs drive up the costs of all arbitrations, even those with multi-million dollars involved. While the amount involved may justify high fees, it isn't always necessary. Non-lawyers fully understand the nature of the case and can add value in controlling the process and cost and direct it back to how it was intended to work.

The value of briefs and legal cases is sometimes questionable. While arbitrators may consider legal cases for guidance, there seems to be an overall consensus that they are not the focus and do not form the basis of arbitrator awards. Why then do companies expend huge sums of money to research and prepare briefs? This has become the practice, and if one side is doing it, of course the other side must follow suit.

There would likely be faster dispute resolution with less emphasis on process, motions, and other legal maneuvers. Non-lawyer business people (particularly with former P & L responsibility) have a different, more "bottom line" orientation that could help streamline the process.

Expert testimony often adds unnecessarily to cost. Why is it frequently necessary, if the panel is supposed to be made up of industry experts? Often it is because companies are choosing lawyers as arbitrators who don't have the expertise. Having fewer lawyers and more experienced business people would likely greatly reduce the need for expert witnesses, and thereby reduce the cost of the process if not the efficiency as well.

Relying Upon the Facts of the Case At Hand: Non-lawyers who are not trained in the importance of case precedent could help focus panels on the distinct issues of each dispute with no expressed or implied reliance on prior decisions.

And in describing circumstances best supported by lawyers, participants most often cited reasons that fit into these three categories:

Judicial Procedure: Lawyers are more familiar with judicial procedure, e.g., discovery issues, motion practice, evidence, etc.; lawyers could be better at taking charge and moving the case toward the hearing and presiding at the hearing.

Lawyers are more familiar with how to read the law, especially applicable precedents, and are more likely to render a decision that tracks with how a court would decide the case, if that is what the client wants.

Non-lawyers are disadvantaged in understanding rulings on the now ever-present motion practice by the parties.

Control the Process: Non-lawyers or young lawyer-arbitrators with little experience may feel intimidated by more experienced lawyers, and may indirectly allow lawyers to control the process, thereby reinforcing the feeling that lawyers are needed for panels.

Experience Disconnect: Not all non-lawyers are right for many cases, either. There should be concern about some non-lawyers who have little to no hands-on experience with the issue in the case.

Conclusions and Recommendations

There is room in the arbitration industry for both lawyer and non-lawyer professionals; not everyone is right for every case, and not every panel may need to be populated by all lawyers or all non lawyers.

There are many instances where company executives and outside lawyers could benefit by refocusing on the values associated with using transaction-experienced former underwriting, claims, accounting, actuarial, or broker professionals as opposed to lawyer-only panels. Given arbitration's movement in the direction of a more traditional court system, lawyers bring necessary familiarity with judicial procedure and precedents, are advantaged in understanding rulings on the ever-present motion practice by the parties, and have the requisite qualifications to read and interpret the law.

Recognizing the values each background brings to the process, a balance for much arbitration might be for lawyers to serve as umpires and non-lawyers as party-appointed arbitrators. In this way our industry benefits from the experienced professional representing and evaluating the insurance/reinsurance issues, while a lawyer assists in guiding the process through legal and precedent-related challenges. ■

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