

# ARIAS US 2020 Fall Conference

Date: 11/05/2020

Times: 2:35 PM - 3:25 PM &

3:30 PM - 4:20 PM

Session Type: Breakout Sessions

Session Title: Covid-19 Pandemic – Emerging Reinsurance Issues From The Arbitrator’s Perspective – What Companies and Counsel Should Know To Prepare For Potential Disputes

Description: The Panel will address what types of reinsurance disputes might arise, including the likelihood of state variances (judicial/legislative/regulatory) in determination of direct coverage issues. What factors should arbitrators anticipate regarding potential variability in coverage outcomes across the 50-state judicial environment.

Moderator: Mark Gurevitz

Presenters: John Cole

Paul Dassenko

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I. CATEGORIES OF DIRECT CLAIMS LIKELY TO RESULT IN REINSURANCE CLAIM DISPUTES

1. Types of Direct Claims Which May Result in Substantial Reinsurance Claims/Disputes

A. Business Interruption/Extra Expense - Commercial Policies – First Party Coverages.

B. “Super Spreader” Claims - Exposures (ex. Meat Packing Plants, Work or Social Exposures)

C. Riot/Civil Commotion

D. Liability Claims Based on Failure to Adopt/Apply/Enforce CDC Regulations and “Guidelines” (Hospitality, Cruise, Entertainment, Retail Sectors)

E. 50 State Coverage Variance – Notice to Reinsurers and Timely Advice

2. Reinsurance Contracts Potentially At Risk

- Property Per Risk
- Excess of Loss/Surplus Treaties
- Catastrophe Covers
- Clash
- Facultative (Including Obligatory)

3. Impact of U. S. Multi-District Litigation (MDL) Proceedings to Date

4. Impact of the UK’s Financial Conduct Authority Business Interruption Test Case

5. Early trends regarding key coverage issues and the absence of Appellate Court guidance to date – State Supreme Courts will eventually “rule” – separately – potential for disparate outcomes

II. Anticipated Reinsurance Issues – Exclusions, Aggregation and Non-Concurrency

1. Generally expect to see issues related to scope of coverage under reinsurance contracts, aggregation of loss, interplay between direct outcomes and reinsurance, role of follow the fortunes and whether traditional concepts apply in the same manner to these new types of claims

2. Reinsurance Contracts Potentially At Risk – Principal Target – “Business Interruption” Claims.

- Property Per Risk
- Excess of Loss/Surplus Treaties
- Catastrophe Covers
- Clash
- Facultative

3. Whether Pandemic – Related Property/Liability Claims Are Covered Under The Reinsurance Contract

- Whether Pandemic claims arise from natural perils
- Whether Pandemic losses are covered under an “all risk” cover
- Pandemic triggers under Securitized Cat Bonds
- Reinsurance exclusions (virus or pandemic) that might preclude reinsurance coverage
  - evidence of underwriting intent in placement information or insurance department filings

- interplay between exclusions in underlying policy and reinsurance contract

#### 4. If Claims Are Arguably Covered By The Reinsurance Contracts, Aggregation Issues Could Arise

##### a. Differences In Reinsurance Wordings – Nuances Matter

- All losses arising out of any one disaster, casualty or occurrence
- Arising out of one event
- Arising out of one and the same event
- Having a common origin and traceable to the same act or omission
- Series of acts or omissions
- One originating cause
- “Common cause”
- Hours clauses (72,168)

##### b. Non-concurrency between direct policy wording and reinsurance on aggregation

##### c. Effect of civil authority orders – how might this expand or limit the ability to aggregate losses

##### d. Factual differences as to how the underlying claims are settled

#### 5. The Role of the Follow the Fortunes Doctrine

- What if Insurance Departments strong arm companies to pay otherwise uncovered claims, or influence claim decisions in other ways
- Can cedents settle claims and expect them to be paid or do they need to litigate the claim to ensure coverage?
  - especially where individual state law may not be developed at the appellate level for several years

6. Relevance of caselaw, especially past precedent concerning asbestos, pollution or other toxic tort

III. What Cedents and Reinsurers Can Do to Maximize Their Positions When Pre-Arbitration

- Should cedents be involving reinsurers in their decision making?
- Should reinsurers be asking cedents to explain their claim handling and cession philosophy?
- Should both sides be doing an inventory of their reinsurance contracts?
- Management preparation to assure coverage issue consistency

IV. Can and Should Panels Hold Virtual Hearings to Decide These Issues or Wait Till It All Blows Over

- What should a panel do if one party objects to a virtual hearing
- Whether panels have the authority to order a virtual hearing
- What factors should be considered in making a determination of whether to go virtual