

Maximizing Reinsurance Recoveries

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Presented by:



Insurance Resolutions, Inc.

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The reinsurance process

- ▶ Part I: Contract formation
- ▶ Part II: Reporting, settlement, and collections
- ▶ Part III: When all else fails – Litigation & Arbitration



Part I

Considerations at contract formation

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Financial strength of reinsurer

- ▶ Should be at the “top of the list” when selecting reinsurance partners
- ▶ Use financial resources available through your broker; However, understand that at the end of the day it’s your balance sheet that is adversely effected by unrecoverable reinsurance
- ▶ Be proactive in identifying acceptable reinsurance markets

Develop a long term view

- ▶ Choose reinsurers that are committed to the business for the long haul
- ▶ Seek to develop strong business relationships

Coordination of functions

- ▶ Communication between departments is critical
- ▶ Key functional areas (underwriting, claims, finance, information systems) need to understand and agree in advance on how a reinsurance program will work and be administered
- ▶ Understanding is particularly important for a new program with a “complicated structure”

Coordination of functions (cont'd)

- ▶ Don't wait until after the placement to identify process and administration
- ▶ Pro forma documents and examples may be very helpful
- ▶ Review your systems and procedures in advance

Contract documentation

- ▶ Provide for easy access by all interested parties, safekeeping, and retention of reinsurance contract documents for the entire life of the agreement
- ▶ Use “memos to file” to document interpretations, agreements, understandings, etc.

Carefully review contract documents

- ▶ Particularly true for new agreements or contracts that are unusually complicated
- ▶ Where appropriate seek clarification and change



Part II

Reporting, settlement, & collections

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Ceding company - Objective

- ▶ Maximize the value of the reinsurance asset

Reinsurers - Objective

- ▶ Minimize the outward obligation

Contract wording vs. practice

- ▶ Little change in wording over the years
- ▶ Payments based on follow the fortunes
- ▶ Current defenses by reinsurers:
 - ▶ Require additional information
 - ▶ Audits

Benefits to active collections

- ▶ Improve cash flow
- ▶ Avoid penalties in statutory financial statements
- ▶ Identify potentially financially weak companies

Accelerated collection activity

- ▶ Dedicated staff to collections
- ▶ Proactive
- ▶ Prior to settlement
- ▶ Provide information early
- ▶ Keep asking – If the claim was billed today would you be in a position to pay

Alternative collection strategies - Commutations

- ▶ Focus on financially weak reinsurers
- ▶ Net present value settlement
 - Discounted value of unpaid balances, case reserves and IBNR
- ▶ Impact to balance sheet



10 practical tips

1. Set minimum premiums as low as possible
2. Include profit sharing mechanisms
3. Minimize reinstatement premium provisions
4. Recognize all inuring reinsurances

10 practical tips (cont'd)

5. Apply extraction factors for package policies
6. Test your calculation of subject premiums
7. Be especially careful when reinsurance terms change from one period to another

10 practical tips (cont'd)

8. Have a way to combine all losses arising from the same occurrence – multiple claimants, policies
9. Have a way to ensure that facultative reinsurance is applied wherever possible
10. Establish process to verify that claims eligible for recovery have been billed on a timely basis

A word about information systems

- ▶ Many companies utilize home-grown customized software to address the requirements of their reinsurance process
- ▶ Vendor systems are available that generally address the business requirements of the reinsurance process
- ▶ Given the complexity of some reinsurance arrangements additional controls may be necessary



Part III

When All Else Fails, Litigate or Arbitrate?

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Litigation procedures

- ▶ Complaint
- ▶ Answer
- ▶ Discovery Devices
 - ▶ Document Demands
 - ▶ Interrogatories
 - ▶ Deposition Notices
 - ▶ Subpoenas



Downside of litigation

- ▶ Costly
- ▶ Drawn Out
- ▶ Formal Procedural & Evidentiary Rules, Deadlines, etc.
- ▶ Issues May Be Too Complex for Layperson Jurors
- ▶ May Need Expert to Satisfy Evidentiary Requirements to Show Reinsurance Custom & Practice



Typical arbitration clause

- ▶ Composition of Panel
- ▶ Qualification of Arbitrators
- ▶ Method of Selecting the Umpire
- ▶ Deadline to Appoint Party Arbitrators Once Arbitration Demanded
- ▶ Timing for Presentation of Case
- ▶ Decision of Majority is Binding & Final
- ▶ Costs of Arbitration to be Shared
- ▶ The Site of the Hearing is Usually Cedant's Home Office or Neutral Site by Agreement of the Parties
- ▶ Governing Law
- ▶ Written Award is Required



Benefits of arbitration

- ▶ May be:
 - ▶ More Expeditious
 - ▶ Less Expensive
 - ▶ More Private
 - ▶ Less Adversarial
 - ▶ Informal
 - ▶ Streamlined



Benefits of arbitration (cont'd)

- ▶ Emphasis on Industry Custom and Practice
- ▶ Strict Rules of Law Not Applied
- ▶ Narrow Scope of Appellate Review



Downside of arbitration

- ▶ Difficulty in Finding Qualified Umpires
- ▶ Tendency of Arbitrators to Compromise
- ▶ A Reasoned Award Not Required
- ▶ Narrow Scope of Appellate Review
- ▶ Unavailability of Sanctions for Dilatory or Egregious Conduct of Party or Counsel
- ▶ Subpoena Power of Arbitrators is Questionable for Non-Party Discovery
- ▶ Broker Not Required to Arbitrate Unless NYIE Contact is at Issue
- ▶ Strict Rules of Law Not Applied



Enforcement of arbitration agreements

- ▶ If Party Refuses to Arbitrate?
 - ▶ Enforce Pursuant to the Federal Arbitration Act (Need an Independent Basis for Federal Court Jurisdiction)
 - ▶ Enforce Under State Arbitration Acts
 - ▶ Some States Will Not Enforce Arbitration Agreements in Insurance or Reinsurance Contracts



Commencement of arbitration

- ▶ By Letter Demanding Arbitration
- ▶ The Respondent May Serve a Counter-demand and May Respond to Detailed Allegations Set Forth in the Demand



Selection of arbitrators

- ▶ Interview Party Arbitrators to Discuss Issues and Provide Some Core Documents
- ▶ Failure to Appoint an Arbitrator Can Result in One Party Naming Both Arbitrators
- ▶ Detailed Questionnaire to Obtain Full Disclosure of Panel's Prior Relationships with Parties and Counsel
- ▶ Hold Harmless and Indemnification Agreements



Prehearing procedures

- ▶ Organizational Meeting to:
 - ▶ Present Issues by Written Statements and/or Oral Presentation
 - ▶ Ensure Full Disclosure of All Relationships Between the Arbitrators and Each Other, the Parties, and Counsel
 - ▶ Establish a Schedule for Discovery, Briefing, and Hearing
 - ▶ Establish Ground Rules for the Arbitration



Procedures (cont'd)

- ▶ Ex Parte Communications with the Umpire are not Permitted Except for Housekeeping and Scheduling Matters
- ▶ Document Discovery is Usually Broad and Can be Lengthy and Expensive
- ▶ Depositions of Employees of Parties are Common
- ▶ Pre-hearing Briefs and Reply Briefs
- ▶ Hearing Exhibits and Identities of Hearing Witnesses
- ▶ Binding Decision only by Agreement



Arbitration hearing

- ▶ Locale By Contract or Other Agreement
- ▶ Opening and Closing Argument
- ▶ Live Witnesses are Preferable
- ▶ Deposition Testimony of Non-Party Witnesses May Be Used
- ▶ Panel Can Subpoena Witnesses to the Hearing



Panel deliberations

- ▶ Post-hearing Briefs May be Required
- ▶ Arbitrators May Deliberate Immediately Following Conclusion of the Hearing, at a Later Date, or by Telephone



Awards

- ▶ Written Awards Usually Required and Rendered
- ▶ Reasoned Awards are not Required
- ▶ For Money Damages, Declaratory Relief, Specific Performance, or all Three
- ▶ Unanimous or Majority Decision
- ▶ May (but Rarely Does) Include Punitive Damages



Petitions to confirm, vacate, or modify awards

- ▶ Time to Confirm: Under FAA and NY C.P.L.R., Within One (1) Year After the Award is Made
- ▶ Under the FAA a Petition to Vacate, Modify or Correct an Award Must be Filed Within (3) Months After the Award has Been Filed or Delivered
- ▶ Reasons to Confirm: Enter Judgment, Enforce and Collect



Petitions to confirm, vacate, or modify awards (cont'd)

- ▶ Venue for Petition to Confirm, Vacate, Modify - - Usually Where the Award was Rendered
- ▶ Arbitration Awards are Rarely Vacated
 - ▶ The Courts Afford Great Deference to the Parties Agreement to Arbitrate and the Arbitrators' Power to Fashion Remedies
 - ▶ Even Where the Award may Appear to Have Little Rational Basis in the Parties' Submissions



Grounds to vacate under FAA & state laws

- ▶ The Award was Procured by Corruption, Fraud or Undue Means
- ▶ The Arbitrators' Bias or Partiality
- ▶ The Arbitrators' Refusal to Hear Evidence or Refusal to Postpone Hearing Upon Sufficient Cause
- ▶ The Arbitrators Exceeded Their Powers or a Final and Definite Award Was Not Made



Grounds to modify under the FAA

- ▶ The Award Contains a Material Miscalculation or Evident Material Mistake
- ▶ An Award was Rendered on a Matter Not Submitted to Panel
- ▶ The Award is Imperfect in Matter or Form



Mediation procedures

- ▶ By Agreement of Parties
- ▶ Entirely Voluntary
- ▶ Does not Stay Arbitration or Litigation

Benefits of mediation

- ▶ Much Less Costly Than Arbitration or Litigation
- ▶ Less Adversarial
- ▶ Preserve Ongoing Business Relationships
- ▶ Confidential



Questions ?



Thank You

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