



Outline

- Basics of reinsurance aggregation
- Words of aggregation
 - case law
 - Principles
- Limitations
- More expansive aggregation
 - sole judge clause
 - bespoke clauses
 - letter of understanding

Basics of aggregation

Each and every loss arising out of one

- event
- occurrence
- cause
- originating cause

Key English decisions

- Caudle v Sharp (1995) (CA)
- Axa Re v Field (1996) (HL)
- Scott v Copenhagen Re (2002) (CA)
- American Centennial v INSCO (1996)
- Countrywide v Marshall (2003)

Caudle v Sharp (Court of Appeal)

Each and every occurrence arising out of one event

- Underwriter writes 32 unlimited stop losses
- Underwriter's "blind spot" was not an "event"
- Writing of each contract was an "event"

Axa Re v Field (House of Lords)

- Event or Occurrence: something that happens at a particular time, at a particular place, in a particular way
- Originating cause: can be a continuing state of affairs or an omission

The use of the word "originating" "*opens up the widest possible search for a unifying factor in the history of the losses which it is sought to aggregate*"

Scott v Copenhagen Re (Court of Appeal)

- “Arising from” connotes a significant causal link between event and losses
- Applies the test of “unities” - of cause, place, time and intention

American Centennial v Insko

Series of events or occurrences originating from one cause affects more than one policy... issued to different insureds

- S&L's officers approve poor loans; S&L collapses
- Was collapse an “event” or “cause”?
- No: it was officers' acts and omissions that rendered reinsured liable

Countrywide v Marshall

Series of occurrences consequent upon or attributable to one source or original cause

- Pensions mis-sold by bank's sales force
- The insured's failure to ensure a proper system of training constituted one source or cause
- The misselling claims were attributable to this

Summary of case law

Event

- something that happens
- must be quite closely linked to losses
- courts may apply different tests to first party and liability:
 - first party: what caused the losses?
 - liability: what made the insured(s) liable?

Cause

- can be omission or state of affairs
- can be further back in chain of causation

Clash and catastrophe: Limitations of traditional words of aggregation

Example 1

- A major project overruns due to defects in design, engineering, construction
- Architect, engineers, contractors each responsible for its own failings
- Can the resulting claims be aggregated?

Example 2

- Several banks sued for pensions mis-selling
- Can these claims be aggregated?

How to broaden aggregation

- “Sole judge” provision
- Bespoke clauses
- Letter of understanding

“Sole judge” provision

The Reinsured shall be sole judge as to what constitutes an “event”

- The Reinsured’s interpretation will bind reinsurers provided it is reasonable (Brown v GIO, Court of Appeal)
- So gives more latitude, but not carte blanche
- e.g. would probably not allow aggregation of pensions misselling claims

Bespoke clauses

- Several versions in catastrophe market, with variations
- Different approaches adopted

Bespoke clauses: considerations

- No case law to fall back on, so careful drafting required
- How ambitious?
 - Aggregate unrelated claims arising from a single project?
 - Aggregate claims of the same generic type against different insureds?
- Danger of going too far
- Multiple bases for aggregation probably required – by reference to
 - why insureds are liable
 - how third party claimants incurred their losses
 - what connects insureds (e.g. project)

Letter of understanding

- Illustrates intended scope of aggregation in non-contractual language
- Examples must be chosen carefully
- Include examples where claims will not be aggregated
- May allow for simpler aggregation clause

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