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)
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 Insco

*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
<table>
<thead>
<tr>
<th><strong>1,338</strong></th>
<th><strong>1st</strong></th>
<th><strong>281</strong></th>
<th><strong>27</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Lawyers and fee earners worldwide</td>
<td>Law Firm of the Year</td>
<td>Partners worldwide</td>
<td>Offices across Europe, Americas, Middle East, Africa and Asia.</td>
</tr>
</tbody>
</table>