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"Reinsurance Trends to Watch in 2014" by Robin C. Dusek, John O'Bryan and Peter Steffen

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What topics will the industry be focusing on in the year ahead? Look for something relatively new: sports head injury claims – and some variations on something you have heard before: arbitration reform.

Sports-Related Head Injuries

Perhaps the hottest claims-related topic in the field of insurance and reinsurance is sports head injury claims. Developing science relating to the long-term damage caused by frequent head impacts, concussion warnings for parents of young athletes, and high profile lawsuits by former athletic superstars suing their former teams and leagues have caught the attention of concerned insurance and reinsurance companies.

Most sports head injury claims may be divided into two categories: concussion claims and chronic traumatic encephalopathy ("CTE") claims:

Concussion Claims

Concussions are a long-recognized risk of participation in many sports. Recently, however, there has been an increased focus on the possible long-term impact on the brain of repeated concussions and an increased awareness of just how common concussions can be. As a result, insurers and reinsurers can expect to see increased potential exposure relating to concussions in 2014.

Commercial general liability, medical malpractice, homeowner's (and other personal liability), and directors and officers insurance all have potential exposure to concussion claims. A concussion related claim may arguably not be "expected and intended" under a policy -- or subject to a policy exclusion -- but in most instances the event that caused the concussion is known, so assessing which policies and contracts potentially respond is fairly straightforward. There may be additional issues when multiple concussions cumulatively are thought to have caused the alleged damage.

Chronic Traumatic Encephalopathy ("CTE") Claims

The study of CTE is an evolving field and will present difficult issues for insurers and reinsurers, at least based on what is known at the present time.

Several high profile researchers studying CTE have posited that a blow to the head, even a subconcussive blow, releases tau protein, a sticky protein that holds microtubules in the brain together. If the brain is allowed to rest, the tau protein will reattach and the brain will heal. If the brain is not allowed to rest, and additional trauma to the brain occurs, the tau protein can eventually detach permanently and become insurgent, killing parts of the brain. When parts of the brain are killed, the person is said to have CTE. It is not known at present whether some people are genetically more prone to CTE than others and, at present, CTE cannot be clinically diagnosed in living individuals. The rate of CTE in athletes is also unknown, since the brains autopsied for CTE are often those of individuals who had symptoms of CTE while living, such as impulse control, aggression, and depression. Thus far, CTE has been diagnosed in individuals who played football, hockey, baseball, professional wrestling, as well as former military veterans and individuals who have a seizure disorder not controlled by medication. The youngest person diagnosed with CTE was 17 at the time of his death and at least seven individuals have been diagnosed with CTE despite never playing organized sports after high school.

It remains to be seen how lawsuits relating to CTE will play out and whether liability will be assessed against those sued. There is not universal agreement about how leagues, coaches, and players should handle the risk of CTE; who knew what when and what actions should have been taken has not been settled. 2014 will continue to present a changing landscape for insurers and reinsurers, with some high profile lawsuits relating to CTE potentially settling, and the science relating to CTE evolving.

All of this creates a challenging landscape for insurers and reinsurers looking to assess their exposure based on CTE. Because CTE cannot be diagnosed in living individuals at this time and because it is thought to be a cumulative disease that progresses over time, identifying the event, date of loss, and number of occurrences (assuming no exclusions bar coverage) will likely present issues for insurers and reinsurers. Like other claims issues, allocation will potentially be one of the most important and contentious issues impacting exposure.

At the present time, sports head injuries present more questions than answers for insurers and reinsurers assessing exposure. We will be watching developments in the science and the law over the coming year to assess how those developments will likely impact the insurance/reinsurance industry.

Revisions to the ARIAS-US Code of Conduct

ARIAS-US recently enacted a new Code of Conduct, effective January 1, 2014. Perhaps the most interesting amendment to the Code is in the Introduction/Preamble, which drops the old caveat that “Nothing in these Guidelines is intended to or should be deemed to establish new or additional grounds for judicial review of arbitration appointments or arbitration awards nor establish any substantive legal duty on the part of arbitrators.” The preamble in the new Code contains a watered down version of the caveat, stating merely that the Code is “not intended…to displace applicable laws or arbitration procedures.” Time will tell whether Courts will consider the new Code as persuasive authority when applying the FAA to reinsurance arbitrations, or whether they will simply look to general arbitration case law when evaluating reinsurance arbitrations, as they have largely done in the past.

On the substantive front, Canon I (Integrity) now mandates that a candidate for arbitrator appointment must refuse to serve “where the candidate sits as an umpire in one matter and the candidate is solicited to serve as a party-appointed arbitrator in a new matter by a party to the matter where the candidate sits as an umpire.” This new guideline seeks to avoid the situation where a party to one arbitration may appear to be currying favor with the (neutral) umpire by providing him additional work as a party-appointed arbitrator elsewhere. The Code does not impose the same restriction on party-appointed arbitrators accepting new arbitrator appointments from the party, which may seem inconsistent with a comment elsewhere in the Code that suggests that party-appointed arbitrators owe parties the same integrity and fairness obligations as do umpires: “Party-appointed arbitrators are obligated to act in good faith and with integrity and fairness, should not allow their appointment to influence their decision on any matter before them, and should make all decisions justly.” (Canon II, comment 2) Obviously, the Code continues to recognize that the impartiality (and the appearance of impartiality) of the umpire is paramount.

Another interesting addition to the new Code is Comment 6 to Canon V (Communications with the Parties), which states:

Where communications are permitted, a party-appointed arbitrator may (a) make suggestions to the party that appointed him or her with respect to the usefulness of expert evidence or issues he or she feels are not being clearly presented; (b) make suggestions about what arguments or aspects of argument in the case to emphasize or abandon; and (c) provide his or her impressions as to how an issue might be viewed by the panel, but may not disclose the content or substance of communications or deliberations among the Panel members.

One may question whether a party-appointed arbitrator communicating with his party about the "usefulness" of evidence and arguments, and "how an issue might be viewed by the panel," can avoid intimating strongly the substance of past panel deliberations. Parties that receive such communications from their arbitrator in the advanced stages of an arbitration are likely to read such permissible arbitrator communications as reflecting communications from the umpire to the arbitrator. Of course, parties concerned about keeping panel deliberations truly confidential can always limit or even eliminate party-arbitrator communications, an option expressly recognized by the Code. (Canon V, comment 1)

There are other changes to the old code and ethics guidelines, both stylistic and substantive, which can be found at www.arias-us.org.

Streamlining Arbitration

Another example of how the industry is attempting to reform and improve the arbitration process is the Dispute Resolution Procedure (DRP) introduced by the Association of Insurance & Reinsurance Run-Off Companies (AIRROC). The DRP is specifically designed to address disputes over relatively small reinsurance balances that would otherwise be too minor to arbitrate efficiently.

The main features of the DRP are:

• The parties agree to appoint a single arbitrator from a certified list who is compensated at $150/hour. The parties do not appoint their own arbitrators.

• The default rule is that there will be no discovery, though the parties can agree to conduct some discovery.

• There will be no live witness testimony, unless specifically agreed.

To initiate the proceeding, the two parties submit a simple two-page form to AIRROC regarding the basics of the dispute and whether they agree to conduct any discovery or allow live witness testimony at a hearing. The parties also can elect to allow AIRROC to administer the arbitrator selection process, or manage that process themselves.

The DRP provides parties with a middle ground between scorched-earth, years-long arbitration on one hand, and, on the other, blindly arriving at a compromise settlement because the idea of such a protracted process is simply too painful or expensive. Parties have long complained about the expense of arbitration, and the DRP provides an opportunity to streamline the process. Of course, the DRP requires a modicum of cooperation between opposing parties. It may be difficult for parties to agree in advance on the proper scope of discovery, as each casts a suspicious eye towards its counterpart and sees every position taken as an attempt to gain an unfair advantage.

The DRP is a fairly new innovation and time will tell whether it becomes a commonly used alternative to traditional reinsurance arbitrations with three arbitrators and a more robust discovery process. Obviously, parties may be wary to arbitrate a dispute with little to no access to an opponent's files and witnesses. For parties unable to reach a resolution on their own, however, the DRP provides a cost-effective process. The DRP could, theoretically, even lead to an increase in arbitrations, if parties decide that it provides a way to minimize the long-criticized downsides of arbitration while still allowing for a fair process.

While 2014 will undoubtedly present insurers and reinsurers with many new challenges and opportunities, expect to hear more about each of these issues and developments in the year ahead.
