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Résumé de l'article

M. Eric A. Pearce a été toute sa vie un spécialiste de la réassurance, reconnu par le marché anglais pour sa compétence professionnelle et pour la qualité de son jugement. Il nous apporte la quatrième partie de son étude sur certaines clauses du traité de réassurance. Cette fois, il nous présente celles qui ont trait à l'assurance dite de responsabilité des produits.

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The use and development of the phrase "each and every occurrence" in excess of loss reinsurance contracts

by

ERIC A. PEARCE, F.C.I.I.

M. Eric A. Pearce a été toute sa vie un spécialiste de la réassurance, reconnu par le marché anglais pour sa compétence professionnelle et pour la qualité de son jugement. Il nous apporte la quatrième partie de son étude sur certaines clauses du traité de réassurance. Cette fois, il nous présente celles qui ont trait à l'assurance dite de responsabilité des produits.

Part 4. Products Liability

In previous articles, I have referred to the methods of defining the "occurrence" when the associated event is immediate (e.g., a motor accident); and when the "occurrence" results from an event which continues for a period but where the losses are apparent within a reasonably short time (e.g., a windstorm). There is another category of "occurrence", namely that which results from an event, the effects of which may not immediately manifest themselves and which, when the effects do become apparent, may continue to appear over a long period, possibly months or years. Occurrences in this category are likely to arise under Products Liability policies.

It is probable that the pharmaceutical industry is the first which springs to mind in this sector, but it can be very much more wide ranging, as is shown in the following clause defining the scope of one particular form of reinsurance contract.

Clause No. 1.

This Agreement applies to all Products Liability insurances underwritten by the Company to indemnify retailers, wholesalers, distributors and manufacturers of food, drink, medicines, drugs, cosmetics, soaps or any pharmaceutical

products in respect of the liability arising out of the possession, consumption, use, employment or handling of any food, drink, medicine, drug, cosmetic, soap or pharmaceutical product manufactured and/or sold and/or distributed by the Original Insured.

This clause may, indeed, appear to be restrictive, for it makes no mention of engineering and similar products which have caused serious losses over the years. In fact, every product carries the possibility of error and responsibility for such error, which entails liability to indemnify.

There are difficulties in dealing with this type of insurance under excess of loss reinsurances, not the least of these difficulties being how to define the "occurrence". In establishing liability, legal practice may vary greatly from one country to another and although it might seem that the original error, for example in the formula, in the design or in the manufacture, was the event which gave rise to the "occurrence or series of occurrences", legal action might be taken against the retailer or wholesaler or other party in the chain of distribution and sale of the product, and it would be the policy issued to the party which was sued successfully which would be subject to loss.

It is evident that such loss may be remote in time and in fact from the original error and in an endeavour to provide proper indemnity for the insured, the insurance policy is likely to be based on losses discovered by the insured, or claims made against the insurer, during the term of the policy. As an extension of this method, it is frequently found that in similar manner excess of loss reinsurance applies to losses discovered or claims made during the period. Each, as the case might be, would then be the "occurrence".

A recognized method of reinsuring Products Liability policies, and perhaps the most satisfactory, is a form of aggregate excess.

The deductible and limit of liability are expressed as follows:

Clause No. 2.

The Reinsurers agree to pay to the Company the amount by which the aggregation of losses under each original policy separately in any one year of original insurance commencing during the period of this Agreement exceeds (a stated sum).

The liability of the Reinsurers under each original policy separately in any one year of original insurance commencing during the period of this Agreement is limited to (a stated sum).

The operative or "occurrence" clause (if so it may be termed) reads:

Clause No. 3.

This Agreement applies to losses arising under original policies having their inception or annual anniversary date on or after the 1st January 1980 and on or before the 31st December 1980 and shall apply to each policy separately in respect of the aggregation of losses which attach to the insurance term from inception or annual anniversary date to termination or next annual anniversary date (whichever is the sooner) not exceeding twelve months, plus odd time, if any.

As an alternative to this, it is sometimes found that discovery is considered to be the basis of the reinsurance, in which case the main sentence will read:

"—— ·in respect of the aggregation of losses discovered by the Original Insured during the insurance term—— "

A ceding Company would wish to consider quite carefully the implications of these alternatives. Taking Clause No 3 at its face value it would seem that it follows the conditions of the original policy whatever those conditions may be. For example, where the original basis is "happening during the period" then happenings are covered irrespective of when they come to light, but if the policy applies to "discoveries during the period" the discoveries are covered irrespective of the date of the event.

However, in the second case, losses discovered, the reinsurance applies only to discoveries, including the effects of any prior happening, but excluding any happening during the period unless the relative discovery is also during the period.

This latter method has its attractions. It is neat and relieves the ceding Company from the necessity of proving to the Reinsurers that the event did in fact attach to one insurance term rather than another. To this extent all is well whilst the reinsurance continues in force, possibly for many years. However, when eventually it is terminated, the ceding Company is protected for the run-off period of each policy until its termination or next annual anniversary date, but not beyond that time. Its seems a little doubtful whether (except in special circumstances) Reinsurers could be expected to grant more than a very limited period thereafter in respect of later discoveries. Naturally if there is a new reinsurance which comes into force on similar terms to those of the previous reinsurance, the problem of run-off does not arise.

In some reinsurances in respect of Products Liability there is a clause which provides that all damage resulting from one same error malfunction or fault whatever shall be considered as forming one and the same loss. The importance of such a clause to the ceding Company cannot be over-emphasized.