



2019 CLM Annual Conference

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### **Challenges in Handling International Claims and the GDPR**

#### **I. Inception**

This presentation will focus on multinational organizations and the challenges that both the insurers as well as the insureds have to face while handling international claims. The panel, which consists of an experienced coverage and trial attorney, and experienced multinational claims adjusters, will focus on the legal differences, communication between insured and insurer, evaluating jurisdiction and the concept of data portability introduced under Article 20 of the General Data Protection Regulation (“GDPR”). The panelists will discuss how to analyze whether your foreign company can be sued in the court where the case is brought and the impact the GDPR has on the insurance industry. The presentation will also discuss how insurers should plan for the future with Brexit approaching and that transfers to the United Kingdom will become data transfer out of the EEA. As such appropriate mechanisms will need to be put in place to ensure the transfer is compliant with the GDPR.

##### **a. Notice of Claim**

###### **i. Investigation**

When a carrier is first notified of the claim, the usual first step is to undertake an investigation into coverage. Once coverage is determined, the carrier may also conduct additional investigation, which may involve site inspections, witness statements, and in some cases immediate retention of experts. In cases of severe bodily injury, it can become immediately apparent that the excess carrier should be notified. This does not always happen as soon as it should, perhaps due to a mutual misunderstanding of who has the obligation to notify the excess carrier. It is often unclear at what point, and by whom, the excess should be put on notice. Ultimately, the policy holder bears the obligation to tender their claim to their carrier for coverage, but there are other parties that can be subject to liability exposure for failure to do so. In some cases, defense attorneys could be exposed to malpractice exposure for failure to timely notify the excess carrier. Insurance agents and brokers could also be exposed to errors and omissions claims arising out of untimely excess notices and should reassess notice requirements as the facts develop.

## **b. Evaluating Jurisdiction**

The progress of evaluating jurisdiction involved communication with the Insured and a detailed analysis and understanding of the Insured's contacts with the jurisdiction where the lawsuit has been filed, and where the claim took place verses where the claim is filed. In many cases, once the insurance carrier has obtained sufficient information to determine that there is proper service on the Insured, the insurance carrier will often request that the insured or broker provide information concerning the insured's contacts with the jurisdiction. In many cases, the insurance carrier will retain defense counsel in the jurisdiction to work with the insured for purposes of evaluating jurisdiction and, if necessary, filing a motion to dismiss based on lack of jurisdiction.

## **c. Retention of defense counsel**

### **i. General Jurisdiction v. Specific Jurisdiction**

There are two types of personal jurisdiction: general or all-purpose jurisdiction and specific or conduct-linked jurisdiction. A corporation is subject to general jurisdiction in a forum in which it is "essentially at home," which the U.S. Supreme Court defines as its state of incorporation and, if different, the state in which it maintains its principal place of business. The issue of whether a corporation is subject to general jurisdiction or "at home" was again decided in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County, et al*, 377 P.3d 874 (Cal. 2016) which was heard by the United States Supreme Court in 2017. The decision by the California Supreme Court was that since the plaintiff, Bristol-Meyers, engaged in "nationwide marketing, promotion and distribution that created a substantial nexus between the non-resident plaintiffs' claims and the contacts in California", that a "new wave" of specific jurisdiction applied. The United States Supreme Court disagreed, holding that "California courts lack specific jurisdiction to entertain the nonresidents' claims." Specifically, "personal jurisdiction of state courts is "subject to review for compatibility with the Fourteenth Amendment's Due Process Clause" *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918.

A court may assert specific jurisdiction over foreign corporation only where the suit arises directly from the defendant's in-state activities. The United States Supreme Court has clarified when a foreign corporation in a product liability lawsuit has purposefully availed itself of the laws of a State that permit a court to exercise in personam jurisdiction over that corporation. See *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 131 S.Ct. 2780 (2011). In *J. McIntyre*, the Supreme Court held that a manufacturer's mere placement of goods into the stream of commerce with the expectation that the goods may be sold in any of the 50 states is not sufficient to establish in personam jurisdiction over a foreign manufacturer. According to the Supreme Court, "it is the defendant's action, not his expectations, which empower a State's courts to subject him to judgment." *Id.* at 883 (emphasis added). The *J. McIntyre* decision clarified that the defendant's transmission of goods into a state permits the exercise of jurisdiction only where the defendant can be said to have "targeted the forum." *Id.* at 882.

### **ii. Motion to Dismiss Based on Lack of Jurisdiction**

If it is determined that an individual or corporation is not subject to general jurisdiction or specific jurisdiction, defense counsel should file a motion to dismiss. In support, defense counsel should include an affidavit of the insured, which states that the insured does not have the necessary contacts with the jurisdiction to be subject to the court's jurisdiction. In the event the motion to dismiss is successful, a plaintiff may refile their lawsuit in a venue that has jurisdiction over the insured, assuming that it is timely filed within the applicable statute of limitations. Generally, the filing of a lawsuit in the incorrect venue, will not toll the statute of limitations.

#### **d. Coordination with Your Insured**

Often, non-US based insureds experience a great deal of trepidation when they are sued in the United States. They have concerns about their reputation, obligations to shareholders, and exposure to high verdicts not seen in other parts of the world. It is critical to keep the insured in the loop while developing litigation strategy to ensure you are meeting all their needs. It is important to select counsel who will be sensitive to the concerns of non-US insureds. For example, in many Asian countries, there is no direct contact with an insured. In many countries, such as Canada, inclusion of brokers on locally litigated claims does not waive privilege, and in the UK the insureds may not be involved in the claim at all and will allow their broker to manage the claim in its entirety. It is important to explain, from the outset of the claim, why certain parties will and will not be included in communications on US-litigated claims to avoid issues later. It is also important to listen to the client's needs when approaching settlement. Many non-US insureds are unfamiliar with standard rules that govern mediations as the process is very different abroad. Other non-US insureds are unaware that confidentiality as to settlement terms and settlement amount is not standard and often requires additional monetary consideration. Finally, some countries require their publicly traded companies to disclose outstanding claims as a liability on their financial statements and immediately issue a press release for claims that settle without confidentiality.

#### **e. Cultural and General Business Considerations**

Knowledge of practical general business and cultural differences can be helpful to improve communication and relationship building. For instance, when scheduling conference calls, be mindful of the time zone, working hours and holidays. If you're working with people in the Middle East, their work week is Sunday to Thursday. If you ask for documents in another country by 4/6/2020 (vs April 6, 2020) you'll receive it by June 4, 2020. Most countries use the metric system and will have no idea of yards, pounds and miles. Not all foreigners will understand sports analogies such as a "homerun". Football, Basketball and Baseball are not international sports! Even if you're speaking to a foreigner whose first language is English, slow down to accommodate for accent, word and expression differences. People from Latin America are known to small talk before business is discussed. People from Germany are generally very prompt and meticulous. When talking to Canadians, be specific on USA or CAD instead of simply referring to dollars. [www.oanda.com](http://www.oanda.com) provides a currency converter and historical exchange rates. Dean Foster Global Coulters is a good recourse for books and more on cultural differences in business.

#### **f. Legal Differences**

The foreign insured and their agent may not be familiar with pertinent legal differences influencing evaluation of claims:

#### **i. Juries**

Only the US makes routine use of jury trials in a wide variety of civil cases. Some countries, for example South Africa, Singapore, Malaysia and most Latin American countries have no jury system at all. In other countries, juries are used in criminal trials but either not available or used sparingly in civil trials. For example, in England, New Zealand and Hong Kong civil jury trials are limited to defamation, malicious prosecution or false imprisonment. In India juries are only available in divorce court. Australia is trending towards restricting civil jury trials. In Canada civil juries are available in all provinces except Quebec. In the province of British Columbia, the requesting party has to pay the cost having a jury. Although juries are much less commonly used in Canada, when used, it's usually personal injury cases. In France, Italy, Belgium, Austria and most other European countries (following a civil as opposed to common law system) as well as Russia and Japan, jury trials are limited to serious criminal cases.

#### **ii. Contingency Fees**

Contingency fees are the lifeblood of the plaintiffs' bar in the US and gives the successful attorney a percentage of the damages recovered by the attorney's client, usually 30% to 40% of the award. Use of such fee arrangements are less commonly used in foreign countries. The English legal system refers to it as a conditional fee agreement, also known as a "no win no fee". The usual form of this agreement is that the solicitor will take a law case on the understanding that if lost, no payment is made. In the alternative, the client may enter into a fee contract with the lawyer based upon hourly billing with an additional success fee to be paid in the event of a successful outcome to the litigation. In England, the success fee must be a percentage, no greater than 100% of the contractual hourly fee. Most provinces in Canada allow contingency fees, but the practice is not as prevalent as in the U.S and often a retained fee will be required for expenses. Australia bans a percentage contingency fee, but allows success fee of up to 25%. South Africa legalized contingency fees in 1997, capped at 25% of the award. Traditionally, local law firms in Japan act on a quasi-contingency fee basis, consisting of a retainer fee (set at a certain percentage of the claim amount) and a success fee (set at a certain percentage of the award obtained). In South Korea contingency fees are a widespread practice.

#### **iii. Legal Cost Orders**

Under the American rule, generally, each party pays its own costs. With a general rule that the loser pays the winner's costs in most countries, including England, Canada, South-Africa, successful litigants are entitled to cost recovery, often about one to two thirds of actual fees and expenses. In Canada, plaintiff attorneys in personal injury cases can often bring interim or provisional costs orders early in the proceedings to allow them to finance their litigation. Cost orders combined with restricted contingency fee arrangements discourages frivolous litigation.

#### **iv. US Medical Billing System**

Most foreign insureds are unfamiliar with the complexities of the multiple US medical insurance coverage systems, billing, liens and collateral source rules. Canada, UK and most European countries have socialized healthcare systems.

#### **v. Punitive Damages and Class Action Lawsuits**

Punitive damages is generally a more recent developing concept and less of a concern in other countries, including Australia, England and Canada, and even if awarded, the amounts are seldom as high as in US courts. In countries such as Japan and South-Africa, punitive damage awards are against public policy. The class action originated in the United States and is still predominantly a U.S. phenomenon, although the general trend in Canada and several European countries is moving towards ease of filing class action lawsuits.

#### **vi. Depositions**

Depositions are commonly used in litigation in the United States and Canada where it is called “examinations for discovery”. In Canada certain questions may be taken “under advisement” as a means of delaying answering the question and less information is exchanged before trial. In countries such as England, Wales, Australia, New Zealand, South Africa recording the oral evidence of supporting witnesses ('obtaining a statement') is routine during pre-litigation investigations, but having the right to pose oral questions to the opposing party's witnesses before trial is not.

## **II. General Data Protection Regulation (“GDPR”)**

### **a. What is the GDPR**

In 2018, the European Union enacted new legislation to protect its citizens’ personal data, potentially affecting every consumer brand worldwide. The General Data Protection Regulation (GDPR) requirements apply to each member state of the European Union, aiming to create a more consistent protection of consumer and personal data across EU nations. Some of the key privacy and data protection requirements of the GDPR include: (1) requiring the consent of subjects for data processing; (2) anonymizing collected data to protect privacy; (3) providing data breach notifications; (4) safely handling the transfer of data across borders; and (5) requiring certain companies to appoint a data protection officer to oversee GDPR compliance.

### **b. Who is Subject to GDPR Compliance**

Any organization that holds or uses data on people inside the EU is subject to the GDPR, regardless of where it is based. A call center handling customer services for companies that sell products in Europe or a website tracking browsing history will be impacted.

### **c. What is Personal Data**

Personal data means any information relating to an identified or identifiable natural person. In other words, any information that is clearly about a particular person. An identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identify of that natural person. In certain circumstances, someone's IP address, hair color, job or political opinions could be considered personal data.

#### **d. How to Be GDPR Complaint**

The first step toward GDPR compliance is to access all your data sources. No matter what the technology, a company must investigate and audit what personal data is being stored and used. The regulation requires organizations to prove that they know where personal data is – and where it isn't. After accessing all the data sources, the next step is to inspect them to identify what personal data can be found in each. A company must be able to parse the information to extract, categorize and catalog personal data elements such as names, email addresses and social security numbers. After the information is located, a company must establish proper policies and procedures in order to sustain GDPR compliance. Once the personal data inventory and governance model are established, it's time to set up the correct level of protection for the data. For GDPR compliance, a company can use three techniques to protect data: encryption, pseudonymization and anonymization. A company must apply the appropriate technique based on the user's rights and the usage context. The last stage in GDPR compliance involves auditing as a company will have to be able to show: (1) what personal data you have and where it's located; (2) the process for getting consent from individuals who are involved; (3) how personal data is used, who uses it, and for what purpose; (4) the appropriate processes in place to manage things like the right to be forgotten.

#### **e. GDPR Enforcement and Penalties for Non-Compliance**

In comparison to the former Data Protection Directive, the GDPR has increased penalties for non-compliance. SAs have more authority than in the previous legislation because the GDPR sets a standard across the EU for all companies that handle EU citizens' personal data. SAs hold investigative and corrective powers and may issue warnings for non-compliance, perform audits to ensure compliance, require companies to make specified improvements by prescribed deadlines, order data to be erased, and block companies from transferring data to other countries. Data controllers and processors are subject to the SAs' powers and penalties. The GDPR also allows SAs to issue larger fines than the Data Protection Directive; fines are determined based on the circumstances of each case and the SA may choose whether to impose their corrective powers with or without fines. For companies that fail to comply with certain GDPR requirements, fines may be up to 2% or 4% of total global annual turnover or €10m (~\$11 million) or €20m (~\$23.5 million), whichever is greater.

### **III. Impact of Brexit**

#### **a. Does the UK need to comply?**

Even though the UK is planning to leave the EU, the UK will still need to comply with the GDPR. One reason for this is the cross-over period between the GDPR coming into force and the UK exiting the EU. The UK will need to comply with the Regulation while it is still a part of the EU. Another reason is the extraterritorial reach of the GDPR. UK companies continuing to do business with the EU after Brexit will need to comply with the Regulation to avoid infringements.

**b. How GDPR will affect US-based multinational claims handling.**

Insureds will have a right to be informed about the collection of their information and the right to access their information via a subject access request and companies must provide this within a month. Insureds have a right to have their information erased, also known as the right to be forgotten. Insureds will have the right to object about how their data is used.