"HOT TOPICS IN REINSURANCE"

OCTOBER 2014

I will start with the round up and conclude by looking forward – a little crystal ball gazing, although rather than a crystal ball, it may be better likened to a pebble skimming the surface of some very deep seas. I will be looking at emerging risks. Following the first case of illness related to working with nanomaterials, I will look at some of the risks and numerous benefits of nanotechnology. I will also look briefly at the emerging cyber insurance market.

PART I - SOME RECENT REINSURANCE CASES

These are not all reinsurance cases, nor are they all of the reinsurance cases this year, but they are cases that I hope will be of interest to those involved in reinsurance. As ever, "follow the settlements" features. There is "follow the leader" too. Jurisdictional issues have also arisen - a product of international business, especially if contracts do not include clear law and jurisdiction clauses. Finally, brokers' duties to maintain records, account and remit funds have been clarified.

FOLLOW THE SETTLEMENTS

Tokio Marine Europe Insurance Limited v Novae Corporate Underwriting Limited [2013] EWHC 3362 (Comm)

Claims arising from the Thai floods were made by Tesco under a local policy issued by ACE INA Overseas Insurance Company Ltd and a Master Policy issued by ACE European Group Ltd.

Tokio reinsured ACE European and the local ACE companies ("the Reinsurance") and, in turn, took out a retrocession ("the Retrocession") with Novae Corporate Underwriting Limited ("Novae"). The Retrocession, under which Tokio sought to recover from Novae, contained an unqualified follow the settlements clause. On hearing five preliminary issues, the Court found that:

(1) Although the Master Policy made no reference to local policies, the retrocession still covered liability under the local policy. Hamblen J considered that in the commercial circumstances of the policy, it would have made "little commercial sense" for Tokio to have bought cover in respect of

the Master Policy only, and to leave itself vulnerable in relation to the same risks arising from the local policies.

(2) *"Loss Occurrence"* in the Retrocession should be given the same meaning as *"Occurrence"* in the Master Policy. Had the parties intended otherwise, they should have clearly spelt out the different meaning.

(3) *"Reinsurers agree to follow all settlements … made by original Insurers arising out of and in connection with the original insurance…"* meant that Novae had to follow the settlement of ACE under the original policies, not Tokio under the reinsurance.

(4) Tokio had to demonstrate only that the claim arguably fell within the terms of the Retrocession not that it did so on the "balance of probabilities" (the usual civil standard of proof). In so finding Hamblen J considered himself bound by the Court of Appeal's decision in Assicurazioni Generali SpA v CGU International Insurance Plc, although he stated that it was difficult to see why a lesser standard of proof than the balance of probabilities should apply.

(5) Novae was bound by a determination by the original insurer, ACE, as to the construction of the aggregation provisions in the Master Policy (again applying Generali).

Although the case confirms the burden of proof on a reinsured merely to show that the settlement was arguably within the reinsurance cover, it is unsurprising in the light of Hamblen J's express dissatisfaction with the Generali case, by which he considered himself bound, that Novae have appealed on the grounds that Generali was wrongly decided. The story is not yet over.

Tokio Marine Europe Insurance Ltd v Novae Corporate Underwriting Ltd
[2014] EWHC 2105 (Comm)

In the same case as above but at separate hearing, Novae asserted that ACE had not taken *"proper and businesslike steps"* in the settlement of the claim and that, in accordance with Insurance Company of North Africa v SCOR (UK) (Lord Goff's "second proviso"), Novae was not therefore bound by the "Follow the Settlements" clause. The Court found that, in circumstances where the settlement fell well below the projected final adjusted loss, ACE was entitled to conclude that nothing would have been gained by further investigation. As that aspect of Novae's defence had no real prospect of success, summary judgment was granted.

Amlin Corporate Member Ltd & others v Oriental Assurance Corporation [2014] EWCA Civ 1135

In this reinsurance claim concerning the loss of a vessel in a typhoon, the Court applied Philippine law in construing the typhoon warranty, the same law as applied to the warranty in the original policy. Given that the typhoon warranty in the Original Policy was in almost identical terms to the warranty in the Reinsurance Policy, the court found that where there was a follow the settlements clause and it was common ground that there was no material difference between English law and Philippine law with respect to policy interpretation or the effect of a breach of warranty, the two clauses should be construed identically (applying Vesta v Butcher [1989] 1 A.C. 852 and WASA International Insurance Co. v Lexington Insurance Co [2009] UKHL 40. In doing so, the court also observed that the Judge was entitled to look at the underlying factual evidence himself and did not need to accept the differing conclusions of Philippine tribunals.

AstraZeneca Insurance Company Ltd v (1) XL Insurance (Bermuda) Ltd (2) ACE Bermuda Insurance Ltd [2013] EWCA Civ 1660

This was an appeal from the first instance decision of Mr Justice Flaux ([2013] Lloyd's Rep IR 290. AstraZeneca Insurance Company ("AZIC") claimed under its reinsurance in respect of its settlement of 3

inwards claims to the underlying policy. The underlying policy was a Bermuda Form contract, which is usually governed by New York law with London arbitration, but here there was an express choice of English law and English Courts.

The Court of Appeal upheld Flaux J's judgment that AZIC needed to demonstrate actual liability under the policy. It was not enough (absent suitable follow the settlements language) merely to show arguable liability. The court also upheld the decision that, on the basis of this particular wording, defence costs were not covered if there was no actual liability.

FOLLOW THE LEADER

San Evans Maritime Inc & others v Aigaion Insurance Co SA [2014] EWHC 163 (Comm)

A "follow the leader" clause in a marine hull and machinery policy required Aigaion to follow lead insurers under a parallel policy covering a different proportion of the risk in the settlement of claims.

The “follow the leader” clause provided:

“Agreed to follow London’s Catlin and Brit Syndicate in claims excluding ex-gratia payments”.

Catlin and Brit settled a disputed claim with the insured. The settlement agreement stated:

“The settlement and release pursuant to the terms of this Agreement is made by each Underwriter for their respective participations in the Policy only and none of the Underwriters that are party to this Agreement participate in the capacity of a Leading Underwriter under the Policy and do not bind any other insurer providing hull and machinery cover in respect of the St. Efrem.”

Nevertheless, the Court held that the insured could still rely on the “follow the leader” clause in claiming from Aigaion its share of the loss under its policy. Aigaion had entered into the “follow the leader” agreement with the insured. Although the insured’s settlement agreement with the syndicates stated that it was not binding on other insurers, the Lloyd’s syndicates were not settling on behalf of Aigaion. Aigaion was held to its agreement in its contract with the insured that it would follow a settlement entered into between the insured and the syndicates.

BROKERS’ DUTIES

Equitas Limited v Walsham Bros [2013] EWHC 3264

The broker had made various reinsurance collections on behalf of Lloyd’s syndicates over a number of years, but had not remitted the funds, either to the syndicates prior to September 1996 or to Equitas thereafter.

The Court held that the broker owed an absolute duty to its principal, Equitas, to remit funds reasonably promptly – a higher standard of care than merely exercising reasonable diligence. It is a general principle of the law of agency that an agent who holds or receives money for his principal is bound to pay it over and account for it.

The Court also found that a broker owes a duty to take reasonable care to maintain proper and adequate records (which would allow the syndicates at any stage to ascertain the true state of the account with

them and what sums were owed to them by their reinsurers), as well as to preserve and produce such records on request. The broker owes a duty to take reasonable care to maintain proper and adequate 4

records (which would allow the syndicates at any stage to ascertain the true state of the account with them and what sums were owed to them by their reinsurers), as well as to preserve and produce such records on request (although such a defence may apply to claims for interest and loss of investment income on those funds). The Judge found that interest is payable on the funds held by the broker and that such interest should be compounded on a basis reflecting the commercial terms that would have been available, unless that would produce an unfair result in a specific case. The entitlement of the broker to retain interest on funds held in its Insurance Broking Account ("IBA") under the Lloyd's 1998 Code of Practice for Lloyd's Brokers was found to apply only to the relatively short period until the broker was obliged to remit the funds to the client.

Equitas also claimed by way of damages its loss of investment income on the funds withheld for the period from September 1996. The Court found that, in principle, such damages could be claimed if within the contemplation of the parties in a particular case. Issues of mitigation were not required to be considered at this hearing.

The case established important principles that a broker owes continuing duties to account and maintain adequate records, and that the duty to remit funds reasonably promptly is absolute. If the broker fails to do so, it may be liable to pay compound interest, or possibly damages for loss of investment income, on funds remitted late.

JURISDICTION

Starlight Shipping Company v Allianz Marine & Aviation & others (The Alexandros T) [2014] EWCA Civ 1010

Insurers settled a claim brought by the insured in the English Court. The settlement agreement was expressly subject to English law and the exclusive jurisdiction of the English Court. Nevertheless, the insured brought proceedings against insurers and others in the Greek Courts claiming damages in tort for alleged defamation and malicious falsehood. Insurers sought damages in the English Court for breach of the exclusive jurisdiction clause.

The insured relied on Articles 27 and 28 of EU Civil Regulation 44/2001, the effect of which is that, if the same cause of action arises in two parallel cases in different jurisdictions, the Court first seized must hear the application first. The Supreme Court concluded that the cause of action in tort in the Greek Courts was not the same as the claims for breach of contract in the English Courts, so a claim to damages for breach of the exclusive jurisdiction clause was permissible. Hence, the English Court had discretion not to stay the

English proceedings. On remission to the Court of Appeal, summary judgment against the insured for damages to be assessed for breach of the exclusive jurisdiction clause was confirmed. The case is an important one in upholding the enforceability in England of settlement agreements that are subject to English law and jurisdiction.

The Insurance Company of the State of Pennsylvania ("ICSP") v Equitas Insurance Ltd [2013] EWHC 3713 (Comm)

The case concerned reinsurance contracts which did not contain clear jurisdiction provisions. ICSP commenced proceedings against Equitas in both England and New York. In the English Courts, ICSP issued an application for a stay of its own English proceedings in favour of the New York proceedings and Equitas made an application for an anti-suit injunction restraining ICSP from proceeding in New York.

The Court refused to grant either application.

The Court considered that ICSP had acted in a "*most unsatisfactory"* manner by issuing in New York having given the impression, which Equitas relied on, that it was only contemplating English proceedings. However, Equitas had not been sufficiently prejudiced by this to render it unjust for ICSP to proceed in New York.

On the other hand, the Court also held that this was not one of those special or rare circumstances in which a claimant should be granted a stay of its own proceedings.

PART II – EMERGING ISSUES

1. CYBER RISK

Now more than ever our lives are being affected for better or worse (and probably both) by areas of knowledge that are developing so fast that, although they affect our everyday lives, most of us have trouble keeping up with them, or indeed the risks that accompany them. In astrophysics, there is much talk of dark matter, which is omni-present but cannot be seen and is said to account for the gravitational effects that appear to be the result of invisible mass. Just as astrophysicists have dark matter, we have the "dark web". This is the web that ordinary search engines don't access. The black market of the internet. Data can be purchased on the dark web. It was reported in June 2014 that 360 million newly acquired details were for sale on the dark web. Where do they come from? In large part, from internet security

breaches. There are numerous breaches of security on the internet, and a few mega breaches. The 2013 Target breach, for example, involved some 70 million records.

Following the Target breach, batches of up to 1 million credit cards were available for between $20 and $100 per card. It is estimated that it cost credit companies and banks $200 million to reissue 21.8 million cards and that Target will spend $100 million upgrading their payment terminals to support chip and PIN technology. It has been estimated that the hackers may have made $53.7 million from the sale of cards. It is thought that a new variant of the same malware was responsible for a data breach at Home Depot last month.

Cyber crime is a big topic among insurers and reinsurers. A strange thing is that we have not seen a major claim in the English Courts yet – although there have been a couple in the USA, which generally tends to lead the way on these things. However, given the potential size of the problem, in both numbers and values, it is believed to be a matter of when, rather than whether. The financial losses arising from these breaches can be direct or indirect – Target is reported to have suffered a 40% drop in profit in the 4th quarter of 2013 compared to the 4th quarter of 2012.

Cyber risk is now recognised as going beyond merely data privacy concerns (of which we have heard much in the news this week in relation to photographs). Policies have been created covering property damage, business interruption and even bodily injury arising from a hacking event. I understand that even a "gap" policy has been produced to cover cyber risks that fall between the cracks of other policies. But there may be insurance coverage under traditional policies too. A traditional liability policy may cover, for example, causing property damage. In USA, the Court of Appeals of Minnesota has held that the data on computer tape (in itself perhaps a quaint concept now) was integrated completely with the physical property of the tape. So, is data property? In American Guarantee and Liability Insurance Company v Ingram, the Arizona Court held that *"physical injury"* to property *"is not restricted to the physical destruction of or harm to computer circuitry but includes loss of access, loss of use and loss of functionality".* The Court also said:

"When a computer's data is unavailable, there is damage; when a computer's services are interrupted there is damage; and when a computer's software or network is altered, there is damage".

Some US Courts have an innate ability to stretch wordings to their limits, and some would say beyond, in a quest for coverage. Eyeblaster Inc v Federal Insurance Company (a US Court of Appeals, 8th Circuit, case) concerned coverage of *"physical injury to tangible property"* and *"loss of use of tangible property that is not physically injured".* It also excluded from tangible property *"any software, data or other information that is in electronic form".*

The underlying claimant alleged that its PC was corrupted by an Eyeblaster website. Coverage was denied on the basis that the claim did not include one for *"tangible property".* The Court of Appeals found that there was coverage because, although the computer hardware was not actually damaged *"the plain meaning of tangible property includes computers, and the complaint alleges repeatedly "loss of use" of the computer"*. So there is uncertainty as to what policies might be hit by cyber risks, in addition to the increasing number of policies that are actually taken out to cover it.

In Eyeblaster, just one claimant claimed against one company website owner. But, of course, large numbers of site visitors could be affected in a short period of time, all claiming losses against different insurers which may accumulate under reinsurances.

The scale of a mega breach of data security, and the potential values involved, may therefore give rise to aggregation issues – but do the four unities really operate well in cyberspace? A large scale breach of a system might, for example, involve:

- Data obtained from one system being used to exploit the same vulnerability in other systems (e.g the heart bleed bug).

- Hacking of commercial data causing not only direct losses, but also third party claims by, for example, owners of confidential information that was compromised.

- Compromised data centres holding information from multiple insureds, in turn causing increased accumulation of risk.

The 2011 World Economic Forum named cyber attacks as one of the top 5 threats facing the world. Of course, an increasing number of policies are being issued specifically aimed at cyber risk. Can their wording keep up with the equally rapidly developing exposures? Equally, exclusions to standard liability policies are developing – but can they keep up with the Courts' ability to find ways round them, especially in certain US States?

In the energy market, Willis published a review this year which raised the problem of aggregation of cyber risk. It postulated that a cyber attack could infiltrate a control system managing a multiplicity of different platforms in the North Sea. A single event could result in overall loss way in excess of what insurers would write, generally based on maximum exposure for any one platform. They asked whether a multi-platform attack would be a single loss or multiple losses. An attack could cause losses to multiple energy companies,

with different insurers. Would they aggregate at the reinsurance level? Willis also highlighted the potential role of political violence and terrorism markets, as cyber attacks can be, and indeed have been, used to support political activism. One *"hacktivist"* can be the cause of damage to large numbers of victims. However it evolves, we can probably look forward to issues concerning coverage and aggregation of losses from different reinsureds arising from the same event or occurrence or cause. 7

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2. NANOTECH RISK

Let's move on to something else that you cannot see, hear or touch, but which is going to play a large part in our future lives. That is things that happen on the nano-scale. The nano-scale is 1,000 times smaller than the micro-scale, which is the scale traditionally associated with the electronics industry. One nanometre is one billionth of a metre.

That is the size of 10 hydrogen atoms. The same size as you will get to if you split a human hair about 80,000 times. Naturally occurring objects on the nano-scale include, for example, the cold virus (25 nanometres).

Lloyd's Emerging Risks Team in their report "Nanotechnology, recent developments, risks and opportunities" describe nano products as:

"A class of products containing materials built on the atomic scale".

The National Nanotechnology Initiative, which coordinates the nano-scale sciences of 26 federal US agencies, defines nanotech as:

"The understanding and control of matter at dimensions of roughly one to one hundred nanometres, where unique phenomena enable novel applications".

So what is special about nanomaterials, other than their nano size, which enables these novel applications? The chemical reactivity of a material is related to its surface area as compared to its volume. Hence, dissecting a one centimetre cube of material into one nanometre cubes, increases total combined surface area some 10 million times. Nanoparticles can therefore be much more reactive than larger volumes of the same substance. The properties of materials change when brought to the nano-scale. This can include changes in colour, conductivity, reactivity, electrical, magnetic and toxicity. As reactivity increases, so the harmful affects of a substance may also increase.

The problem is that little is known of the risks of nanotechnology. A 2004 report by Swiss Re stated:

"There are indications that certain nanomaterials are a potential health hazard. The danger is most probably not of an acute but of a chronic nature, and it could be some time before it manifests itself. That is where the real risk for insurers lies …"

The Lloyd's Emerging Risks Team concluded:

"Given that nano sized objects tend to be more toxic than their large scale form it would be unwise to allow the unnecessary build up of nanoparticles within the body until the toxicological effects of those nanoparticles are known. Such studies are still speculative but insurers would be prudent to consider adverse scenarios when agreeing terms and conditions and when determining pricing and capital. In particular, whether a claims made trigger as opposed to an occurrence trigger is appropriate and whether limits should have an aggregation limitation".

Although the field is in its relative infancy, it is growing at great speed. In 2008, there was already some 32 billion US Dollars worth of nano enabled products globally. By 2011, this had grown to 336 billion US Dollars. In 2013, there were around 5,400 nanotech firms globally, the largest proportion being in the USA (especially California), but also a significant proportion in the UK. It has been estimated that, by 2015, the figure for nano products would become US$2.6 trillion and that nanotech would be used in relation to 15% of all products on the market. Of course, it remains to be seen whether that estimate has proven accurate. 8

What it emphasises is that there are a lot of products out there. So what are they and what risks might they pose?

What are these products? There are some 5,000 types of nanomaterial. Their possible uses involve numerous fields, including drug delivery, diagnostics, tumour killers, small powerful batteries, materials 100 times stronger than steel and 8 times lighter, cars that absorb more impact, super efficient fuel cells, the facilitating of environmental clean-up and many others. The potential benefits of the application of nanotechnology are enormous.

There are also uses in every day life. Indeed, most nano products are to be found in sports, household and food industries. They can help the concentration of cocoa flavour in a milkshake. They can be used in tennis balls and tennis rackets. Plasters with a nano coating of silver promote the quicker healing of wounds. Nanoparticles are used in container liners for foods and can assist the easier flow of tomato sauce from the bottle. They can enable anti-ageing products to seep into our pores. They are used in sunscreens to similar effect and this is why lifeguards and various sportsmen are no longer seen with white stuff on their noses. It is the titanium dioxide nanoparticles in the sun cream that make it more effective, clearer and longer lasting. But the Lloyd's report noted concern that nano sized particles once rubbed into the skin would be able to enter cells and damage them. It notes that titanium dioxide exposed to sunlight can act as a photocatalyst which can be very toxic to the surrounding cells:

"The short term affects on cells is that if the nanoparticles can penetrate the dead layer of skin that protects the body then titanium dioxide may be toxic when exposed to sunlight. The long term effect is unknown and requires further research"".

Of course, it is not just in the use of these products where the long term effects are unknown. Nanoparticles, depending on their nature and use, can be ingested, absorbed through the skin or inhaled. For example, frequently used carbon nano tubes ("CNTs") (e.g. in energy storage, automotive parts, sporting goods, coatings and electromagnetic shields) bear similarities in shape to asbestos fibres. The Lloyd's Emerging Risks Team comments that research into their toxicity is fragmented, but the risk of inhalation should be taken seriously. It considers the short term effects of certain other nanoparticles and concludes:

"Long term exposure is still a big unknown however. If these nanoparticles can cause similar short term response in the lung as asbestos it is possible that they may induce the same long term effects as well. Workers who produce these particles would be at the greatest risk and appropriate safety precautions, such as wearing nano related masks, would reduce their exposure. This is still speculative and studies will have to be conducted to find a stronger link, but as an insurer it would be prudent to include this as a potential scenario when determining pricing and reviewing capital requirement".

There has been some further research. It was suggested in 2013 that the risk of asbestos-like behaviour could be ameliorated by shortening the CNTs, but a paper accepted by the Royal Society of Chemistry in August 2014 and published in its Journal on 29 September is summarised by the Royal Society of

Chemistry's Blog as suggesting that *"if inhaled, CNTs may deposit in the respiratory system and cause a health risk similar to that of asbestos".*

One of the reinsurers that has been monitoring the situation for some time now is Gen Re. Charlie Kingdollar, Vice President of the Emerging Issues Unit of its Treaty Department, has produced various publications on the nanotech risk. Recently, on 4th June 2014, he published a paper which can be found on the Gen Re website entitled "First US case of illness arising from occupational exposure to nano materials". 9

This concerned a report that appeared in the American Journal of Industrial Medicine authored by Shane Journeay and Dr Rose Goldman. A 26 year old chemist working with nickel nanoparticle powder, with no protective measures, developed throat irritation, nasal congestion, post nasal drip, facial flushing and skin reactions to, for example, her earrings. Charlie Kingdollar cautions:

"Keep in mind that laboratory workers were believed to have less exposure to powdered nanomaterials due to better controls than may be typically found in a manufacturing setting … as the Chicago song goes, "this may be only the beginning".

On May 13th 2014 Nanotoxicology Inc in the Magic City Morning Star described the report as "game changing"."

Jolinda Cappello in an article published online by the American Society of Safety Engineers ("overview of nanotechnology: risks, initiatives, and standardisation"), makes the point that:

"*More than 2,000,000 US workers are exposed to nanoparticles on a regular basis, and that figure is expected to double as nanotechnology related industries increase worldwide. This raises fears that the growth of nanotechnology may outpace the development of appropriate safety precautions".*

Indeed, Charlie Kingdollar has, in presentations on the subject, drawn attention to the lack of such precaution taken both by researchers into nanoparticles and those involved in the manufacturing processes utilising them. Inter alia, he has also pointed to studies indicating, for example, that children's lungs are more susceptible to nanoparticles, that plastic nanoparticles are transported through the aquatic food chain, affecting fish metabolism and behaviour, that poorly soluble nano sized nickel particles may cause cancer in humans, that nanoparticles could disrupt immune cell function, that direct contact of nano zinc oxide with colon cells cause death of cells and that silver and titanium dioxide nanoparticles damaged testicular cells and DNA.

The conclusions of the Lloyd's report are that there are unknown impacts on health and the environment, as well as many positive effects of nanotechnology. Herein lies a danger:

"… because the benefits are so seductive society may rush to capitalise on them before adequately assessing safety. The insurance industry must ensure that its own financial health is not compromised by systemic aggregations of loss from these technologies".

The potential dangers are identified as being both to health and to the environment. I have focused above mainly on the health risk, but potential environmental risks are also plausible. For example, nanoparticles can have a propensity to stick together (aggregate) or to fuse (agglomerate) effectively creating larger particles. This, in turn, will reduce its properties that are related to its size, such as chemical reactivity. When added to water, 50%-60% of copper nanoparticles aggregated and sank to the bottom. Hence, if a large number of nanoparticles were released into a water system (and remember one of the uses is for efficient environmental clean-up of other toxic waste), the particles that agglomerate and sink can be absorbed by plants and animals. Once absorbed, they may behave in the same way as DDT and PCBs, namely by travelling up the food chain to larger animals, remaining in the environment for a long time. The

concentration in animals and birds can then become toxic and cause organ injury and birth defects. At present there is no evidence that *"biological magnification"* of this nature would occur with nanoparticles, but equally it is a plausible prognosis based on the experience of DDT and PCBs, and there is no evidence that it would not happen. As with the situation so often, studies are required. 10

Subject to the proviso that the likelihood of such events is unknown due to lack of available research and knowledge of the risks, the Lloyd's Emerging Risks Team put together a list of speculative possible scenarios that could result in large scale impacts to the insurance industry were they to occur. These were:

 Pollution spill from a nanoparticle production facility.

 Nanoparticle manufacturer workers developing chronic illness (this was, of course, before the reported case in June of this year).

 Nanoparticles leech from products to accumulate in the environment.

 Product recall due to research findings indicating a product is a hazard.

 Liability claims on a company, directors and officers regarding a product that was indicated by research to be unsafe, but subsequently released to the consumer world.

The Lloyd's Team points out that each of these scenarios may require the insurer to pay for:

 Clean-up costs of land and water contamination.

 Medical costs of treatment of human exposure.

 Liability claims from persons directly affected, environmental groups and shareholders.

 Unexpected life, health and workers compensation.

 Latent liability claims of persons affected.

 Business interruption whilst facilities are investigated.

 Cost of product recall.

This implicates a multiplicity of claims covering a number of different classes of insurance business and different insureds and insurers within those classes, potentially coming together as accumulations and aggregations of loss at the reinsurance level.

A CRO emerging risks initiative paper, available on the Swiss Re website, reaches similar conclusions to the Lloyd's Emerging Risk Team's report as to the nature of risks and the insurances that may be impacted. Essentially, this can be summarised as:

Health:

Nanoparticles can be inhaled, ingested or absorbed through the skin. There is evidence of differing adverse reactions to differing nanoparticles in animals and, at least in the short term, humans. Insufficient is known about the long term health consequences, but plausible risks can be identified from what is known and from applying past experience in other fields. 11

Environmental risks:

Nanoparticles released into the air during production or use or as a waste by-product, may accumulate in soil, water and vegetation. Again, there is not enough known to establish whether this gives rise to a new non-biodegradable pollutant in itself and, if so, what its effects will be.

Financial:

The CRO report also identified the possibilities of securities claims and claims for financial loss, including those that could result from a collapse of stock prices. It points to the 3 securities class actions that have already been brought in the USA arising from alleged false and misleading statements about the promises of nanotechnology. The settlement of the actions is reported to have been covered by professional indemnity insurers.

In jurisdictions such as the USA, insurers' obligations include paying for the defence of any claims making allegations that may potentially be covered by the policy in question. The CRO paper points out that:

"Furthermore, the carrier has an affirmative duty to investigate the claims and look beyond the complaint to determine whether there is any potential liability for covered damages. The expense of the defense obligation often comes in addition to the limits of liability on the policy. As an emerging technology, nanotechnology may present previously untested loss scenarios, prompting claimants to advance novel legal theories and interpretations of policy language".

Hence, there is a significant exposure of insurers to defence costs, even if there turns out to be no liability. Moreover, there can be exposure to indemnity payments not only in respect of damages, for example for causing disease, but also for fear of disease. The CRO paper again points out that:

"At least three US Courts have addressed the issue of whether cell damage, without any associated symptoms or disability, is covered as "bodily injury" under standard liability policies. In the early stages of nanotechnology development, the lack of definitive scientific knowledge may increase the potential for claims alleging a "fear of future disease". Although decisions to date have been mixed, a significant number of US Courts may some day rule that such claims are both legally viable and covered by some policies".

The direct policies implicated in the above include Public Liability, Property, Employers Liability/Workmens Comp, Environmental Impairment, Life and Health, Product Liability/Product Recall, Directors & Officers and Professional Indemnity. Potential losses range from the immediate to the latent, with possible uncertainties as to which products caused a problem and when, giving rise to multiple potentially responsible insureds. The number of different ways in which a product might cause a claim, the number of products, different potential insureds and claimants that might be involved, and the different policies and insurers impacted, all add up to potentially large accumulations and aggregations of loss, with all the issues that brings at the reinsurance level. There may be issues of aggregation, allocation to reinsured periods, trigger issues, occurrence issues and, no doubt, follow issues.

So it is clear that there is potential for significant liabilities arising from the use of nanotechnology. But not all feared emerging risks actually do emerge. What are the chances of such fear being realised? That, of

course, is a question that is, of its nature, difficult to answer given the lack of available research and knowledge of the risks involved. However, Charlie Kingdollar of Gen Re has pointed out that, if only 1% of the current (and increasing) 5,000 nanomaterials turns out to be toxic, that means that 50 new toxic substances will have been created. If 97% of nanomaterials are benign, that means 150 new toxic substances have been created. Furthermore, if 15% (and increasing) of manufactured goods involve the 12

use of nanotechnology, then most of us are probably exposed to nano products in some shape or form. The potential is therefore clearly there and is in the sights of insurers and reinsurers.

As to regulation, it seems that the USA and Japan still prefer a light touch, whereas headway is being made in the European Union. As we have seen with asbestos, pollution, agent orange and various other products' claims, the biggest insurance exposures often arise in the USA and have a tendency to end up reinsured in the London market.

The effects of asbestos and the way that the claims emerged to almost catastrophic effect on the insurance market, has of course made insurers more aware of the potential for such developments. Charlie Kingdollar of Gen Re, whilst powerfully drawing attention to the risks, the need for risk management and the potential for claims is reported by the Casualty Actuarial Society as saying that, although *"by and large our industry is pretending this is something in the future, it's already here. The question is what we are doing about it" but "I don't think there will be another asbestos. We move a whole lot faster than we did years ago".* Hopefully, those words will prove to be prescient.

"Disputes as to jurisdiction are one of the plagues of modern litigation" (Phillips LJ, New Hampshire v Phillips Electronic (1998)

A series of jurisdictional disputes in insurance cases have been reported in 2012. The following is a summary of the recent decisions in this area.

1. Differences between US and English law as to recoverability of asbestos losses - Faraday v Howden North America (2012, Court of Appeal)

The English courts do not see eye to eye with the American (including the Pennsylvania) courts on insurers' liability for asbestos claims. The English courts do not accept the triple trigger of liability, nor do they

accept that insurers are liable if the relevant trigger does not occur within the strict time limits of the policy. Further, in the case of an insurance which does not contain an express choice of law clause, the two legal systems could come to different conclusions as to whether US or English law governed the contract. Therefore, the recoverability of asbestos losses can depend on whether the claim is pursued in the English or US courts.

In this case, Howden was an engineering group, supplying fans, rotary heat-exchangers, compressors and gas cleaning equipment. Faraday was the successor in title to an insurer that subscribed various lines on Howden's excess public and products liability insurance program.
Numerous asbestos claims were pursued against Howden. During the 2000's Howden was engaged in coverage disputes in the US courts with its insurers, albeit not with Faraday. In August 2010, Howden gave notice of occurrences which it said might entitle it to claim under the cover provided by Faraday. In response, in December 2010, Faraday issued English proceedings, taking the example of a policy covering a period in 1998/98, and seeking declarations (amongst other matters) that (a) the policy was governed by English law and subject to the jurisdiction of the English courts and (b) as a matter of English law, effect must be given to the periods under each policy granted to Howden. This judgment related to an application by Howden to set aside service of the English proceedings on Howden in the USA.

Originally, Howden's case was that it was not arguable that the policy was governed by English law. However, the Judge at first instance held that the policy was, in the light of its many connections with London, governed by English law. Howden did not challenge this on appeal.

The point Howden took, and argued again on appeal, was that Faraday had failed to show that the English proceedings were justified and served a useful purpose. Howden argued that Faraday had instituted the English proceedings in order to try to establish "issue preclusion" on governing law and the effect of the policy under English law; however, a judgment by the English court would not achieve that purpose. After being served with the English proceedings, Howden applied to join Faraday as an additional Defendant to the Pennsylvania proceedings.

In the Court of Appeal in the English proceedings, the key issue was whether there was any utility to the English proceedings. The Court of Appeal upheld the decision of the Judge at first instance and found that the English proceedings did serve a useful purpose. The Court's reasoning was firstly that, despite the Pennsylvania court's preliminary assessment that it was unlikely that English law would be held to govern the policy in issue, there was nevertheless a good arguable case that an English court, if the proceedings in England continued, would hold that English law governed the policy. That was a position which the court in each country had to accept.

Secondly, it was inappropriate to resolve issues of preclusion under Pennsylvanian law at an interim stage in English proceedings. The English court was entitled to take a broad view of the suitability of the proceedings for determination by the English court. It had been for Faraday to show that the proceedings did have utility and Faraday had so shown. Faraday could, therefore, continue with its declaratory proceedings in England.

2. ACE, HDI-Gerling, New Hampshire, Portman, QBE and Swiss Re v Howden Group (2012, Commercial Court)

In a sequel to the above litigation, a number of other non-US insurers, who also participated in excess layers of Howden's public and products liability insurance program, issued English proceedings in 2011, (two years after some of them had been joined to proceedings in Pennsylvania) seeking the same declarations as Faraday.

The central issue here also was as to whether the English proceedings were useful, and some solid practical benefit would ensue, such that they should be allowed to continue.
The Commercial Court held for the insurers, concluding that, although the Pennsylvania court had held in the course of dealing with one specific application that it was unlikely that English law would apply, there remained a real prospect that English law would be held to be the governing law, in which case it was reasonable to assume that the Pennsylvania court would find the English court's judgment to be of assistance. The declarations sought would also be useful in resisting enforcement of a judgment that ignored the express or implied choice of law of the parties. The insurers were, therefore, permitted to continue the English declaratory proceedings.

3. Loss of EU consumer protection rights - Sherdley v Nordea Life & Pensions (2012, Court of Appeal)

Mr and Mrs Sherdley entered into a form of equity release scheme with Nordea, a company based in Luxembourg. Capital sums, raised on the security of the Sherdley's properties, were invested by Nordea. Unfortunately, the investments went wrong. The Sherdleys wished to sue Nordea in the courts of England & Wales, an important reason for doing so being that they could then retain solicitors on a conditional fee agreement, which would not be available to them in the other possible jurisdictions.

The contractual documents entered into by the Sherdleys with Nordea were muddled as to the jurisdiction in which disputes were to be resolved. The application form provided for the exclusive jurisdiction of the country of commitment. This was defined as the country of habitual residence of the investor as at the

commencement of the contract. At the time, the Sherdleys were resident in Wales and British nationals. However, the application form also stated that the choice of law (and therefore of jurisdiction), was subject to any other provisions to the contrary. The Sherdleys later signed Nordea's "proposal" which contained a Spanish jurisdiction clause.

To complicate matters further, Nordea's General Conditions, which the Sherdleys also signed, contained the provision that, where the country of commitment allowed a free choice of law (as English law does), the law of Luxembourg (and therefore Luxembourg jurisdiction) would apply. What therefore appeared to be a choice of the insured's country for resolving disputes ultimately resolved itself into a choice of the insurers' home jurisdiction.

The final complication was that the Sherdleys accepted that, by the time they commenced proceedings, they had become habitually resident in Spain, although they continued to be British nationals.

The rules of jurisdiction relating to disputes between nationals of different EU Member States are to be found in the Judgments Regulation (EC No 44/2001). The primary rule (Article 2) provides that persons domiciled in a Member State should, whatever their nationality, be sued in the courts of that Member State. That would have involved the Sherdleys suing Nordea in Luxembourg.

However, there is a special rule to assist insureds in their disputes with their insurers (Article 9), which extends jurisdiction to the courts for the country where the insured is domiciled. Further, insureds are protected against attempts by insurers to remove that advantage from them in the contract documentation (Article 13). This is part of a wider concern of the Regulation to protect insureds and other consumers with more favourable rules of jurisdiction.

The Sherdleys' argument was based on residence in Wales at the time the agreement was entered into and on the point that their initial agreement with Nordea had provided for English jurisdiction, as the country of their habitual residence at the time of contract, which agreement was never displaced.

However, the Court of Appeal held that, even though (a) the purpose of the EU Regulation was to protect the consumer, (b) Nordea's contractual documentation was complex and (c) the Sherdleys had been domiciled in England and Wales at the time of the negotiations, they were not entitled to rely on the Regulation to bring proceedings in England & Wales after they had become domiciled in Spain. By the time of the Court of Appeal hearing, the Sherdleys had returned to Wales but this did not assist them as they had not argued that at the time of commencing proceedings they were only temporarily resident in Spain.

4. Which country's rules for assessing damages will apply? Cox v Ergo Versicherung AG (2012, Court of Appeal)

Katerina Cox, widow and sole dependant of Major Christopher Cox, brought proceedings in the English court for compensation arising out of an accident occurring in Germany at a time when the Coxes were living there and Major Cox was stationed with HM Forces. Major Cox was knocked off his bicycle by a car, causing him injuries from which he died. The driver of the car was a German national, who was a resident and domiciled in Germany, and was insured by Ergo.

It was not in dispute that German law governed the liability of the driver. However, Mrs Cox argued that the quantification of damages recoverable from Ergo was governed by English law and, in particular, the Fatal Accidents Act 1976 ("FAA"). Ergo, on the other hand, argued that the principles for quantifying the damages were those applicable to a claim under S.844 Bürgerliches Gesetzbuch ("BGB"), being part of the German Civil Code. The FAA provisions would produce a much more generous result for Mrs Cox. The BGB required various mitigating factors to be taken into account, for example maintenance from Mrs Cox' new partner, and the possibility or prospect of her remarrying or co-habiting with a new partner.

The Court of Appeal held that Germany was the country in which the events constituting the tort had occurred, since the accident had occurred there. Under the general rule in the Private International Law (Miscellaneous Provisions) Act 1995, German law was the applicable law governing the substantive aspects of Mrs Cox' cause of action. The heads of damages recoverable by Mrs Cox was a matter of substantive law and so governed by German law as the applicable law under the 1995 Act. The actual assessment of those damages was procedural, and so governed by English law as the law of the forum. However, the principles involved were governed by German law. Under German law, the principle was compensation for loss of maintenance on a net basis. That was not the same as compensation for loss of dependency, which was the principle under the FAA. It would be wrong to interpret the head of loss under the BGB so widely as to encompass loss of dependency under the FAA: that would be contrary to comity and principle. The duty to mitigate was a matter of substantive law, governed by the German Code.