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Elliott M. Kroll, a partner with law firm Arent Fox L.L.P. in New York, represents clients nationally and internationally in all major areas of the insurance industry. He also has served as an officer and director for several major insurers and reinsurers. He recently discussed issues in reinsurance litigation with *Business Insurance* Senior Editor Judy Greenwald. Edited excerpts follow.

Reinsurers tackle risk transfer, M&A activity as litigation issues evolve

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Q What are some of the hot issues insofar as reinsurance litigation is concerned?

A There continue to be issues related to the question of business risk transfer in dealing with agents and managing general underwriters as to which entity is ultimately responsible, because you have so many new capital market companies working with domestic carriers on new programs. Reinsurance contracts are more sophisticated on many issues today, but we still wind up with disputes regarding collateral requirements and who is making the decision as to those collateral obligations. Is it the agent, is it the insurance company, is it the reinsurance company? Is there a process for resolving those disputes without arbitration? We've seen cases addressing those issues as well.

The other thing that I don't think we've seen yet, but I think is going to be a bigger issue going forward, are going to be issues relative to privacy and cyber security, (which) will affect access by the reinsurers to the books and records of the insurance company.

Q What impact has the capital markets' involvement had on reinsurance litigation?

A Generally, to the extent there are companies that are coming into the working layer of the casualty business, they are going to be pretty sophisticated players, and I think they will choose to partner with sophisticated companies ... I suspect there will be fewer disputes, because there'll be more involvement with outside counsel in drafting the various reinsurance and agency agreements than in the past.

Q&A

Q What is happening insofar as the use of arbitration is concerned?

A I continue to see companies moving toward litigation. Arbitration is no panacea. Arbitration can be just as costly. In many situations, I think litigation can be preferable, because arbitrators are allowed by the law to make mistakes of law and make mistakes of fact, and it's not appealable as a practical matter.

Q What impact will the wave of merger and acquisition activity that's sweeping the industry have on reinsurance litigation?

A I've seen M&A activity that has resulted in litigation and arbitrations because people didn't realize that liabilities were as significant as represented or as expected, and I've seen other situations where, because of a desire to sell an entity, companies have been more flexible, more willing to settle disputes to clean up the balance sheet so that a sale could be achieved.

Q What has been the impact of the soft market?

A The reality is, there is always going to be a certain level of disputes. But we should have learned lessons from what we experienced, and make sure that our contracts are clear and that everybody's expectations are managed, and people should really make sure they consider the dispute resolution process so there are no surprises.