Session CS-15 -- 2012 CAS Seminar on Reinsurance - Cambridge, MA

How to Avoid Being A Defendant

Managing the Risk of Actuarial Malpractice Claims

R. Timothy Muth, Esq.

Reinhart Boerner Van Deuren s.c. 1000 North Water Street Milwaukee, WI 53202 (414)-298-8210 www.reinhartlaw.com

Reinsurance Litigation Involving Actuarial Estimates

- Acquisition disputes over the sale of a reinsurer or a block of business.
- □ Disputes over the existence of risk transfer in a reinsurance transaction and proper financial recording.
- & E&O litigation arising from the insolvency of a reinsurer.
- Securities law claims and stock drop lawsuits related to a
 publicly-traded reinsurer.
- □ Disputes over requirements to fund collateral trusts or other money transfers based upon a reserve estimate.

"First, sue all the consultants."

Business Week magazine - June, 2000

Relevance to In-house Actuaries

- While you are unlikely to personally be a defendant in a malpractice suit, you do not want to be:
 - ø The central witness in a trial over a failed corporate merger.
 - Attacked for not informing management of key material facts relevant to a securities fraud lawsuit.
 - The opining actuary on the last statement of opinion before your employer is put into receivership by the state insurance department.

Key Steps to Legal Risk Management

- Before You Start:
 - · Know Your Client
 - · Evaluate Assignment Risk
 - · Avoid Conflicts of Interest
 - · Get a contract which protects you
- While Doing The Work
 - · Know Your Client's Business
 - · Limit Third Party Exposure
 - · Be Careful What You Write
- If a problem arises
 - · Do's and don'ts

Identifying Risk

Risk can be managed, but only if you learn to identify it.

Know Your Client and Its Business

Identifying Risky Clients Is An Important Part of Managing Litigation Risk

- ℞ A client's sophistication, tendency to sue, financial situation and experience all influence the possibility of suits.

Risky Clients

- · Client operating at the edge of the law
- Client/user in bad financial shape
- Inexperienced / incompetent client
- · Clients "fired" by their previous professionals
- Clients experiencing rapid change in their business
- Appearance that a user needs a particular result

Different Assignments Have Different Risk Profiles

- Being an expert in securities documents
- Mergers and acquisitions
- Statutory opinions and valuations
- Complex software work
- General consulting
- Ask yourself Is someone going to be investing, buying, selling, funding, or changing their financial position in reliance on the advice I am giving? Would they lose money if my advice is wrong?

Avoid Conflicts Of Interest

Professional Guidelines

• The actuarial profession has the Professional Code of Conduct

Jury Guidelines

· Were you loyal to your client?

"Prosecutor Ethics"

• Did you receive money from someone you recommended?

Examples of Conflicts

- Reviewing the work of a colleague for a different client.
- Working on opposite sides of an acquisition from a colleague.
- ₩ Working for competing bidders.
- ∀ Taking a referral fee from someone you were hired to evaluate for a client.

Managing Conflict Risk

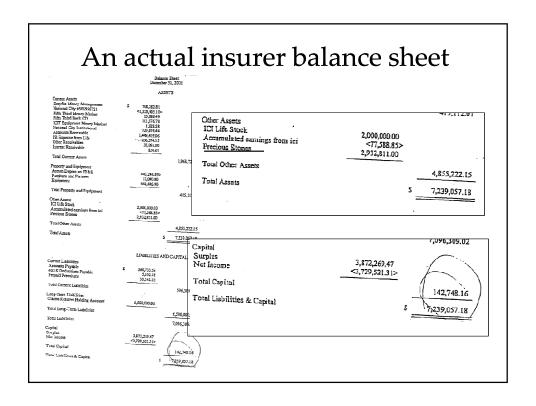
- & Get written waivers of the conflict of interest.

A contract to protect you

- & Alternate Dispute Resolution
- & Limits on Distribution of Work Product
- & Allocation of Responsibility for Data

Once the engagement begins:

Be aware of the overall context of your client's business



Understand what the client is doing

- Get an understanding of the client's business and its plans
- Watch for red flags "precious stones"
- Learn how the client intends to use the work you provide

Manage Third Party Exposure

Third Party Liability exists when a professional is liable to a non-client (third party) for malpractice.

Increased Risk From Third Party Liability

- 1.More people to sue you
- 2. Increased possibility of misunderstanding by user
- 3. No chance to screen out unwanted clients
- 4. No reservoir of client goodwill

Managing Third Party Liability Risk

- & Understand client's intended use of your work
- The condition for your consent will be the third party's agreement not to bring suit against you.

Be Careful What You Write

Plaintiffs and prosecutors love e-mail

"Why people still send e-mails is beyond me, but please continue - it makes my job easier."

Elliott Spitzer

A Non-Privileged Memo from a real case

 $\underline{P} \ \underline{H} \ \underline{O} \ \underline{N} \ \underline{E} \qquad \underline{N} \ \underline{O} \ \underline{T} \ \underline{E} \ \underline{S}$

<u>From:</u> J. Dunleavy

<u>Date:</u> 12/7/2003

Notes:

Received call from Mark. Discussed situation with union pension plan. Problem is with interpretation of plan provisions. From our review the damage to the plan is partly our fault.

Next Action Item: Pray

More e-mail lessons

- Apply the New York Times test when deciding what to write –
 "Would I be comfortable reading this on the front page of the New York Times?"
- Sending an e-mail gives it immortality. It is virtually impossible to delete all evidence of an e-mail which has been sent from your computer.
- Voice mail attachments to e-mail carry the same risk. Offices
 which deliver voice mail through the e-mail system need to make
 sure employees are aware those attachments are discoverable in
 litigation.

What goes in the file?

- & Everything you sent to or received from the client
- & Workpapers necessary to show what you did.
- № The front page of the NY Times test
- & Apply these principles when you close up a project.

Questions?

Additional Info:

ActuaryLaw.com – blog on legal issues related to actuaries.

Also on Twitter -- @ActuaryLaw