
Claims Handling – Can the Market Improve its Practices?

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Challenges In Handling Satellite Insurance Claims

- **Independent Investigation and Settlement of Claims:**
 - Multiple insurers on a placement, but no Leader, thus no Leading Underwriter Clause (aka Claims Leader Follow Clause);
 - Potential for disparate responsiveness and disparate coverage positions;
 - For the insured, duplication of effort in responding to questions, giving proof, and addressing legal and technical issues; and
 - For the insurers, serial duplication of legal and technical evaluations, potential for information deficits (vis-à-vis other insurers).
- **Claims Handled by Committee:**
 - Committees have in the past handled claims efficiently and effectively;
 - Committees have streamlined communication and expedited resolution; and
 - Committees allow for greater coordination, cooperation, responsiveness, and predictability.

Vic Pino's First Question: "Claims Committees – Good or Bad Idea?"

- The easy response: The claims handling status quo does not provide swift and efficient settlement of claims
 - The proposed "Protocol" of the Space Risk Study Group of the Union of Aviation Insurers is recognition of this situation
- Whether Claims Committees are part of the answer depends upon matters that are not fleshed out in the Protocol
 - This presentation identifies some of them to facilitate further discussion
 - Salvage, as part of the claims handling process, is also discussed

Operator Perceptions of Claim Handling

- Need for greater appreciation by insurer-partners of dynamics of insured's business
 - Claims settlement is one step in the operator's post-loss process, not the conclusion it may be for insurers. Time passage can be experienced very differently by insurers and insureds.
- Process for the sake of process
 - “Underwriting information” can be very broadly understood and policies are not specific as to claims handling
 - Yet, *efficacy* is what is insured in the space industry: ***Is the stated communications capacity available, or is it not?***
- Much information and discussion, if relevant at all, bears upon salvage – but delays payment following plainly compensable loss
 - “Tail wags dog” from the operator perspective (more below)
- Investigation relating to subrogation rights may inform underwriters' questions but also appropriately should not delay claims settlement

Space and Satellite Claims Best Practice Protocol

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 World Space
Risk Forum

Space and Satellite Claims Best Practice Protocol

- Proposed by the Space Risk Study Group of the International Union of Aviation Insurers.
- **Overarching Objectives:**
 - Maximize cooperation and coordination;
 - Facilitate communications with the insured and broker, and allay present frustrations;
 - Reduce claims-related costs (all paying fractional share, instead of shouldering alone); and
 - Improve the claims experience for all.
- **Key Features:**
 - Not mandatory; even protocol adherents can deviate from it, when desired; however, adherents commit to follow with regularity and predictability the outlined best practices;
 - Advocates for designation of claims leader at time of placement OR, when no leader named, for formation of Claim Coordinating Committee (or designation of leader) upon notification of claim;
 - Leader, or CCC, is given only that limited authority expressly granted to him/it; in no event can he/it obligate an insurer on matters of coverage or payment; and
 - Designation of Emergency Risk Contact to address situations involving immediate corrective measures, or a last-minute change in the risk.

The Committees (and the Insurance Policies) are Flexible Enough to Assuage Any Concerns

- **As Always, Policy Wording Will Be Tweaked to Effectuate Desired Ends**
 - If claims are to be handled by committees, then policy would set forth contours of committee's power and authority
- **Claims Leader Would be Granted Such Authority as the Insurers Desire**
 - Underwriters would never "cease to be leaders for their own accounts"
 - Protocol suggests only that leader take charge and make non-binding recommendations (anything more only upon agreement of participating insurers)
 - Designation of Claims Leader in other lines has never affected reinsurance market appreciably (or at all), and would not do so here
- **No Significant Legal or Regulatory Obstacles Implicated**
 - Underwriters would not cede authority, but would simply delegate certain tasks
 - This is routinely done in cases of claims leaders and underwriters' representatives
- **Uniformity and Predictability in Space Claims Handling is Both Necessary and Achievable**
 - All subscribe to same policy wording
 - The market participants know one another well
 - There have been many claims handled (well), and thus well-established claims practices

Not All Followers Follow The Leaders

- Will followers now follow the leaders?
- If not, what would be the function and effect of claims coordination committees?
- Will European and Japanese insurers cede decision-making when U.S. “national security” is in play? Will U.S. underwriters cede authority when confronted with European defense programs or issues?



Policies Resulting From Individual Negotiation And Agreement Do Not Make Provision For Coordinated Claims Handling

- Current policies provide for each insurer to receive technical and other information
 - Presentation of information to a claims coordination committee would not satisfy this requirement
- Would insurers be willing to waive this requirement on a cases-by-case basis and cede this role to a claims coordination committee?
 - If not, operators' information presentation obligations may be increased, not streamlined.
- Would insurers agree to designate a “claims leader” in new policies?
 - If so, would underwriters ceding settlement authority to a claims leader be negatively affected in the reinsurance market? With what implications for capacity and premiums?

Is it Practically and Legally Possible For Individual Insurers To Cede Real Power To Claims Committees?

- Risks are complex, and insurers may have individual assessments for information requirements at placement and subsequently
- Space groups may have less autonomy for claims determination within larger insurance concerns than was typical when space insurers could make “solo determinations”
- Legal and regulatory requirements may be implicated*
- Possible implications for reinsurance availability and pricing if underwriters cease to be leaders for their own accounts

* Sarbanes-Oxley, for example, makes officers of public companies responsible for the accuracy of the financial statements, *and other financial information included in the report*. See § 3.02

The Comparison To Aviation

Claim Committees are common in Aviation, in which:

- Risks are more uniform, allowing for comparatively “standard” policy wordings
- Many more claims occur, resulting in common experience and more routine claims handling practices
- Leaders are appointed on the basis of track record and experience
- The concept of followers exists from the slip stage through claims determination

Can Operators Be Assured Of Speedy Claims Handling?

- From proposed Protocol paragraph 8:
 - “Before communicating with the broker or policyholder on issues of coverage or claim payment, the CCC members shall advise the Satellite co-(re)insurers of any proposed communication, and shall give each Satellite co-(re)insurer the opportunity to adopt or to reject the communication.”
- If all insurers must participate to this extent, how much real change would result from use of CCCs?
- Might the practical, if informal, claims handling leadership of some markets be impaired rather than enhanced by a CCC process requiring all insurers to participate in each communication?

If Committees Are The Answer, Why Just For Claims?

- If new policies will result in the creation of claims committees, why not a lead for agreeing on salvage?
- Why should there not be a lead for negotiating the policy?

Salvage

Difficulties in Arriving at Fair Salvage Figures

- Insureds desire full insurance payment, and want to keep the satellite with minimal offset.
- Insurers often have insufficient information to accurately assess salvage value.
- Means to Address Insurers' Concerns:
 - Greater substantiation of insured's assessment of present revenue-generating capabilities; and
 - More access and inspection toward this end.
- **Possible Solution:** Binding Independent Appraisal provided for in the policy.

Salvage Negotiations

- Operators may have a real and immediate need for satellite capacity – even limited use
- But operators also may have concerns about tethering future business to a damaged satellite.
 - *E.g.*, there may be loss of redundancy in addition to compensable losses
- Insurers may seek to maximize salvage value to minimize claims
 - Request for information relating to salvage during claims process can frustrate or delay claims determination
 - The availability and extent of salvage may become the “tail wagging the dog” from the insured’s perspective



Salvage Presents Unique Issues in Each Circumstance, Including:

- Redundancy of satellite operations
- Availability of operating alternatives
- Amount of damage to satellite
 - Is the damage close to a constructive total loss?
- Delays in building and handling replacement capacity
- Cash flow needs of operators
 - For operator, receiving cash payment for constructive total loss may be more desirable than limited use of damaged satellite

Enabling Insurers to Take Title to Satellites

- Upon payment of a total loss or constructive total loss, Insurers have the right to take title to the satellite.
- Host of issues and tasks presented:
 - Licensing, orbital slot, regulatory compliance;
 - Contracting with operator for stationkeeping, TT&C;
 - Contracting with broker, or making direct entreaties to 3rd party purchasers, lessees; and
 - Interfacing with insured during handover phase.
- Nearly impossible to make preparations for taking title on an *ad-hoc*, post-claim basis (too little time, too much groundwork to be laid).

The Timing of Salvage Determination

- The words of a policy (emphasis added):
 - “The insurers shall have, at their option, the right to receive the maximum salvage, if any, from or take title to the satellite **provided that the insurers have paid a claim** for a CTL or a TL ...”
- The comparison to other lines of business
 - Insurers take title to badly damaged cars.
 - Insurers have rights to recover sunken treasure after payment for cargoes lost at sea.
 - But, in the space industry, salvage is typically quantified and treated as an offset prior to claim payment.
- Would there be advantages to interim operating agreements and post-settlement determination of salvage?
 - The difficulties associated with salvage would not have to be a part of claims handling
 - Salvage negotiation/determination could follow – removed from distorting pressures of an outstanding claim
 - If appropriate, salvage value could be held back or escrowed

THANK YOU.

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Rudolph V. Pino Jr. is the founding and senior partner of Pino & Associates, LLP, a law firm based in White Plains, New York. Mr. Pino counsels American and international clients on contractual and regulatory matters, and litigates (and arbitrates) product liability, aviation, space, and insurance coverage disputes both in the U.S. and abroad. He earned his Bachelor of Arts from Fairfield University and his Juris Doctorate from New York Law School. Admitted to the New York Bar in 1978, Mr. Pino is a member of The Association of the Bar of the City of New York, the New York State Bar Association, and the American Bar Association. Mr. Pino has authored numerous articles concerning litigation, aviation, product liability, general insurance coverage, and telecommunication satellite insurance coverage. He has also spoken at numerous international conferences and prepared course materials for a variety of organizations.

Mr. Pino has served as the Chairman of the Insurers' 702 Forum Committee that coordinated six Boeing 702 satellite insurance claims totaling \$1.5 billion. He also served as counsel to the Insurers' Claim Coordinating Committee for claims of constructive total loss made by the operators of the XM Rock & Roll, Galaxy 11, PAS 1R, Atlantic Bird 1 and Superbird 6 telecommunication satellites. On behalf of 22 insurers, Mr. Pino recently arbitrated an action against a major satellite manufacturer, seeking to recover amounts paid in connection with the operator's claim for total loss. Mr. Pino is presently a member of the Space Risk Study Group, which is a sub-committee of the International Union of Aviation Insurers.

Pino & Associates, LLP

Pino & Associates, LLP is a White Plains, New York-based law firm focusing on all facets of civil and commercial litigation. Founded in 1992 by Rudolph V. Pino, Jr., the firm is proud to represent scores of distinguished international insurers (and their insureds), and equally proud of our achievements on behalf of individual clients. We regularly handle high-profile, high-exposure cases for manufacturers of aircraft, industrial machinery, home appliances, and firearms. Additionally, we have a thriving insurance coverage practice, including the regular representation of the domestic and international insurers of telecommunications satellites. We appear throughout the country before courts of original and appellate jurisdiction, often in multi-jurisdictional disputes, as well as domestic and international arbitration. While called upon often in matters of product liability, aviation, and space law, and all associated regulatory issues, we are equally adept, and have achieved notable success, in pursuing large-loss subrogation cases.

The firm was and is a pioneer in space law. Some 15 years ago, we assisted in manuscripting one of the earliest satellite launch and in-orbit policies. Since that time, we have represented scores of satellite insurers. From coverage work, to claims investigation and negotiation, to litigation, the firm has extensive experience in the satellite business. We have represented most all of the insurers and reinsurers writing these lines, and know well the principal operators, manufacturers, and launch providers. The firm regularly serves as counsel to the Claim Coordinating Committees formed by the insurance market to evaluate satellite losses, several of them reaching into the hundreds of millions. We were among the first to pursue a subrogation action against satellite manufacturers, and were able to obtain a significant settlement.

Michael D. Nolan



Michael D. Nolan is a partner in the Washington, DC office of Milbank, Tweed, Hadley and McCloy LLP. Mr. Nolan's practice has a particular focus on international arbitration and litigation. Mr. Nolan has represented clients in arbitrations under AAA, ICC, ICSID, UNCITRAL and other rules.

Mr. Nolan also has substantial experience in the aerospace and communications industries. He has represented satellite operators in disputes involving insurance coverage and satellite operators, space segment manufacturers and communications companies in disputes of other kinds.

Mr. Nolan has taught as an adjunct professor of law at the Georgetown University Law Center both the introductory course on international commercial arbitration and seminars on investor-state arbitration. He is listed in *Euromoney Guide, Experts in Commercial Arbitration* as well as *Chambers USA*. Mr. Nolan is a graduate of Harvard College and of the University of Chicago Law School.

Milbank Tweed Hadley and McCloy LLP

Milbank is a leading international law firm which has been providing innovative legal solutions to clients throughout the world for more than 140 years. Headquartered in New York, Milbank has lawyers operating out of 10 offices in the US, Europe and Asia.

Milbank's lawyers are leading legal advisors to the space business. Milbank provides maximum value to its clients by combining a thorough understanding of the space and satellite industry with strong finance, contracts, insurance, regulatory, trade and dispute resolution capabilities.

U.S. and English law qualified Milbank lawyers have extensive experience in all aspects of satellite projects. Milbank routinely advises satellite operators and insurance underwriters and brokers in managing space project risks and structuring risk management programs. Milbank lawyers have structured, analyzed and negotiated over 300 satellite purchase agreements, launch services contracts, operations and maintenance agreements, gateway and TT&C contracts, and transponder and capacity agreements involving every major manufacturer and services provider.

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