



Episode 3: Batch Coverage

[MUSIC PLAYING]

KIRSTEN BEASLEY: You know, it's a stunning convergence of events that we're dealing with. And I keep saying to people, we're in health care. It's a health care crisis. And it's a hard market. Of course we're going to be feeling it, and our clients are going to be feeling it, I think a little bit more than anywhere else.

SPEAKER 1: Welcome to the Willis Towers Watson podcast Vital Signs, Risk and Insurance for Health Care, where we discuss the risk management and insurance trends and issues facing the US health care industry. We'll speak with our industry experts and clients in search of ways to improve your risk and insurance vital signs.

MARYANN MCGIVNEY: Welcome, everyone, to Willis Towers Watson's podcast Vital Signs, Risk and Insurance for Health Care. Today's podcast represents episode three of our first podcast series. In this series, we're looking at HPL coverage issues in a hard market. And today, we're going to be discussing batch coverage.

My name is Maryann McGivney, and I head up Willis Towers Watson's health care industry practice. Today, I have Kirsten Beasley joining me, and she leads our health care broking team. Welcome, Kirsten. How are you today?

KIRSTEN BEASLEY: Hey, Maryann. I'm great. Thanks for having me.

MARYANN MCGIVNEY: Good. Well, thank you for joining me. Today, I wanted to discuss batch coverage. And really because when batch coverage first started to creep into HPL policies, there was a lot of confusion regarding the best way to word batch. Now that our industry has lived through a number of batch claims, and of course with the pandemic, producing large frequency of claims, you know that our HPL underwriters are talking about the structure of batch wording again. So if you've read an HPL policy, you may never actually see the word batch, but Kirsten, help us with, what does batch mean? And what does it mean when you batch a claim?

KIRSTEN BEASLEY: Sure. So batch means essentially related claims. Claims with multiple claimants that essentially share similar factual allegations. And when you quote unquote "batch" a group of claims together, it is essentially trying to group claims that are related factually or have similar factual allegations together for insurance purposes so that multiple claims, 10, 100, whatever the number, are treated as one claim.

MARYANN MCGIVNEY: Why don't we take a minute and talk about, why would somebody be interested in having batch coverage on their policy?

KIRSTEN BEASLEY: A really great and really pertinent question, I think especially now. And the first part of my answer has to do with the broader why. And I think it really speaks to the systemic risk that truly permeates the health care industry, things like opioids, sexual abuse, a global pandemic perhaps. These big, broad issues that are permeating the industry but are also enterprise-wide-type in scope.

So it's not just this portion of your clinic that you have exposure in. It's potentially your entire operation. And that type of systemic exposure really speaks to the wide potential for volume of claims. So if you have risk that could present to you a high volume of claims that are potentially related to each other because of a similar fact pattern or a systemic exposure, you're exposed to potentially, depending on your insurance structure, having to pay through your SIR over and over and over.

So a scenario would be 100 claims at \$10,000. So if you have an SIR of \$500,000, 100 claims at \$10,000 is going to be absorbed 100% by you, the insured. If you can group those claims together and have those 100 claims be treated as one claim at \$1 million, yes, you're going to pay through that \$500,000, but then your insurance is going to kick in and pay the other \$500,000. So it allows you to take these smaller claims that would all be absorbed within your deductible, take them north, and get the insurance coverage to kick in and be able for you to sort of transfer some of that exposure and lay it off.

MARYANN MCGIVNEY: Which would be really important in the situation where you have unaggregated retentions. And there is no annual cap on what you potentially could pay out of your retention.

KIRSTEN BEASLEY: Absolutely. Absolutely. So there's structural reasons, there's operational reasons, and there's coverage reasons to be able to pursue batch coverage.

MARYANN MCGIVNEY: And I think the terminology actually comes from the manufacturing world, where you would have a lot or a batch rolling off an assembly line, and if there was a mistake or an error, it would impact all of the product in that one particular batch.

KIRSTEN BEASLEY: Yeah. Absolutely. And it's a concept that, as you say, sort of arose in the products liability world that has now been adapted to sort of more the service industry world. And instead of being the batch being the product, the batch becomes the service, and then the batch then translates to the claims themselves.

MARYANN MCGIVNEY: Sure. The concept seems simple enough. So why is there so much conversation around batch?

KIRSTEN BEASLEY: Yeah. Yeah. It's a great question, and there's a number of reasons for that. First and foremost, because how a batch functions fundamentally impacts the attachment point of a claim and the coverage that's available and the limit within the insurance tower. So it's a very core insurance structural issue that's at play. Secondarily, is because we're starting to see a rise in the frequency of the amount of batch claims that are being reported and the severity of them.

So if you ask any one insurance carrier, sort of 10 years ago or 15 years ago even the frequency of batch claims that they were seeing, you would have heard something like they priced it at a 1 in 20-year event. So they expect one of those batch-type scenarios to happen sort of every 20 years, is how they're pricing it. You ask them now for their frequency around these batch events, and although they may not give you a specific it's a one in two-year kind of event, it's along those lines. They're starting to see them as more frequent and more severe.

And so the conversation around batch is core to, in the carrier's minds, to the sustainability of the product, and it's a fundamental part of what we're seeing playing out in their loss ratios and a sort of core part of the medical malpractice hard market. So and again, when it comes to sort of why it's so important and why grouping claims is so important, you can have 500 \$50,000 value claims, or you can have one \$25 million value claim. And that difference is at the very substance of why batch can be so very important to our clients, to the insurance towers that we put together.

MARYANN MCGIVNEY: Yeah. And that makes sense. It makes a lot of sense. You know, I could see where claims severity going up on an individual claim is problematic for carriers, but then you throw in combining multiple incidents and calling it one claim is really going to drive a lot of severity into that loss.

I also struggle with the fact that the term batch, and I mentioned this before, it doesn't always show up in a policy. It's not always universally defined. So what are the key clauses or phrases that our insureds should pay attention to?

KIRSTEN BEASLEY: So yeah. And you've hit on something really important there. There's a great deal of variance in the batch language world, and I was just talking to a colleague about that and how to hunt down batch within a policy, where to look for it, what keywords to look for that really help you hone in on whether there is or is not batch coverage. The breadth of the potential variance in language is part of the problem.

So a couple of key things to look for. You should be looking at insuring agreements and limits of liability sections for language like 'related', 'related claims' or a 'series of claims' or 'to more than one person.' Those kinds of language can, not always, but can indicate some type of batch coverage. Also, terminology like 'logically' or 'causally-related', also huge signifiers of batch oftentimes can be embedded within forms in various ways but also and frequently in endorsement structures because of the complexity and the amount of different clauses that need to interact with batch clauses. They're often sort of built-out standalone within endorsement structures.

MARYANN MCGIVNEY: So let's talk about COVID because that's obviously the hot topic of the day right now. Can you, and note I'm saying can you, not should you, but can you batch COVID claims on an HPL form?

KIRSTEN BEASLEY: So this is a point of much discussion in the marketplace, as you well know. There is a great deal of variance in how the markets are approaching this and the approach that they're taking and the dialogue that they're having with us and with their clients. The simple fact is is that potentially, you can, in some forms, and in other forms, you may not be able to. So in short, it depends.

There's a great deal of language that potentially impacts how COVID gets batched, what happens with it, and whether or not a policy is going to respond. First and foremost in that, in my opinion, is the knowledge piece. Central to whether or not COVID can be batched is knowledge because COVID is happening over a number of different policy periods, right? And what our carriers are looking to avoid is getting batched in policy year one, getting batched again in policy year two, and so on and so forth.

Because we don't know when the pandemic is going to end. We don't know how the claims are going to manifest. So there's that sort of twinned uncertainty of the fact that this is now happening potentially over multiple policy periods. It's now happening with great deal of uncertainty about the timeline around it, a great deal of uncertainty around how these claims are going to manifest, and the knowledge piece.

Coming back to that if I can. The knowledge piece is central because does knowledge of the pandemic now, as we start to go into potentially policy year two, preclude you from noticing? Is that a known event at this stage? So that's one piece of this.

The other piece of it, is it enough that the disease state is the central sort of reason for being causally related or grouping claims together, or is it the disease state in a pandemic that makes this sort of able to be batched together? And a lot of these conversations, I think, are being had in the marketplace. There's no sort of landing point at this stage in how it's all going to play out and how the markets are going to respond.

That being said, batch notices have been put in. We've walked our clients through this in detail in lockstep with coverage council, with our claims advisory team, and batch notices have been put in, specific to COVID. The markets have sort of accepted those notices at this stage and are looking to have a great deal of dialogue around understanding those groups of incidents, how they're connected, and what's going on. In those instances where there have been large batches into the marketplace, we have seen that COVID exclusions can sometimes start to be a feature of the go-forward policy as markets seek to again prevent themselves from being batched in year one and then batched again in year two and batched again in year three.

Where there's uncertainty around batching COVID is, again, back to the relatability mechanism. Are these related claim, because they're all COVID claims, or do we have to group claims within an individual facility,

group them within an individual state, can we group them regardless of where they're happening or some other common factor? So that's a very long answer to a short question, but there's a lot still to play out in the COVID and batch sphere.

MARYANN MCGIVNEY: Yeah. And I think you're right. I think the discussion around knowledge of a claim and the discussion around notice of a claim and what are the notice provisions are really big for impacting batch reporting.

KIRSTEN BEASLEY: Absolutely. The timeline piece is particularly critical, the time elements that are contained within batch provisions and reporting windows. And COVID gives a great example to really talk batch through. Again, because you're having an event that's potentially happening over multiple policy years, and largely the intent within most policy forms as regards to the batch clause is not to batch and rebatch. Most of these policy forms have mechanisms, sort of these time elements, that either-- that pull all the claims that are related into one policy year.

Most forms pull back to the first year that an incident was reported if it's been reported over a series of years, as we may see play out with COVID. But there are other policy forms that have what we call a permissive notice that allow the client to declare, within certain specified time periods, what year the batch is going to apply in. So those notice provisions become particularly important when something is playing out over a period of time.

The other element to that time is sort of what we call a reporting window. So there's going to be an end to the cutoff that some policies put in place, wherein you can't report claims anymore. It becomes a sort of known stale issue, and you're only given a certain amount of time to be able to report claims that are related to that batch. Because the assumption is, pre-COVID, the assumption is after a certain period of time, you know that there's an incident, and you've mitigated the circumstances that have caused that incident, caused that series of claims to arise to begin with. So they're going to put a window on your ability to report.

I'm interested to see how that plays out in a pandemic situation, where many of the variables are beyond the control of our clients to be able to mitigate, i.e. community compliance in the spread of a pandemic, et cetera, et cetera. So how will that play out in a reporting window scenario? And again, it's this sort of neverending piece that has a lot of our markets, particularly focused on batch, and particularly concerned about the ramifications in a pandemic state.

MARYANN MCGIVNEY: Yeah. And this is really great coverage discussion and information about how policy forms respond. But I think the other piece that we should talk about is the marketplace. This is, quite frankly, one of the hardest markets that I've seen in my career, and carriers are taking a really hard look at coverage terms in general. So are carriers making changes in regards to batch that you're seeing?

KIRSTEN BEASLEY: You know, it's a stunning convergence of events that we're dealing with. And I keep saying to people, we're in health care. It's a health care crisis. And it's a hard market. Of course we're going to be feeling it, and our clients are going to be feeling it, I think a little bit more than anywhere else.

I think this is exactly what we're talking about. So batch was an issue before the pandemic. It was an issue before the hard market. And probably was a contributing factor to the hard market in a medical malpractice sort of sense.

So as you know, you and I have had multiple conversations with the markets over the course of the last 18 months, specific to batch. There have been a hu-- there's been a huge focus on the elements that we've talked about. What constitutes a batch and how claims can be batched? What should and should not be batched? When can we batch? All those pieces.

We've had detailed conversations with markets. It is absolutely on their radar. It is absolutely something that they're going to be looking to try and corral, is the best word that I can put to it. They're not-- I don't think they're looking to eliminate the coverage. What I think they're looking to do is create a little bit more certainty, a little bit more sustainability around the coverage and the product for our clients.

I think they're grappling with the how a little bit. How do you create sustainability without sort of cutting the legs out for the coverage itself, right? How can they create something sustainable yet still substantive in the coverage? And so we have yet to see any real moves around pullback in coverage or any sort of real advances in new language.

Where we have seen new language is around COVID. We've started to see COVID-specific batch exclusions, where they're applying sort of per patient, each and every, essentially, which effectively eliminate batch as regards COVID in a pandemic state. We've also seen carriers start to pull back and say there has to be more than. So you can batch COVID, but it has to be COVID and some other scenario, some other situation that causes-- that caused the loss. So it's kind of like a COVID-plus.

Similarly so with around single providers or rogue employees, there's started-- that's probably the single biggest driver of batch claims. So there's started to be a pushback around those rogue employees. A great example of that is you have a physician. They're proficient in 10 different surgical procedures-- or they do 10 different surgical procedures, and in all of those 10 different surgical procedures, completely different types of patients, types of surgeries, there's an issue.

A lot of carriers are starting to resist that being quote unquote "batchable" because they want there to be something more causally related. The same procedure. The same sort of implant that they're using that's going wrong. And they don't like the idea of it just being batch because it's the same physician. So we're starting to see little nuanced pushback like that, but not wholesale, and not across the market.

MARYANN MCGIVNEY: Right. And I understand that capacity players in particular, those folks that sit higher up on the towers, this is probably one of their bigger exposures, is a claim that could come in that could be batched because that's really going to drive coverage through the tower.

KIRSTEN BEASLEY: Absolutely. And the key piece of this is, how do you rate for it? How can you price for this kind of exposure? How do you underwrite to it? What data can you collect that help you understand, as a market, where a client sits in the spectrum of risk, if you will, when it comes to batch?

Because a lot of these issues that have arisen that caused the carriers concern outside of the rogue employee are systemic. So there's concern around opioids. There's concern around sexual abuse. How do you underwrite to these exposures that, when they play out, it's almost like the perfect storm scenario? You could have never scripted the scenario.

So how can you underwrite to something that's so profoundly unforeseeable? And that really, I think, is part of the issue that a lot of the carriers grapple with. They don't know how to price for it, yet it's a huge driver of risk the higher up you go, and rates are thinner up there. So you're right. It's been a substantial contributor to the loss ratios, particularly in the high-access layers.

MARYANN MCGIVNEY: Right. Kirsten, what advice would you give to our health care clients if they're trying to understand their own batch coverage, particularly if their underwriters are looking at terminology, maybe suggesting some tweaks to terminology? What types of questions should they be asking to better understand what they have?

KIRSTEN BEASLEY: Yeah. Really important. And it's definitely, to me, it's definitely a dialogue. I think this starts with making sure you're being multidisciplinary about it. Have your insurance broker there, coverage counsel.

Have you had a real-life batch experience that you can talk through? But fundamentally, do I have batch? If so, what is the scope of coverage? And that scope of coverage, you have to hunt through the form. You have to look at it in context of other language elements like the knowledge exclusion, the criminal acts exclusion, all those kinds of things.

You have to look and make sure that it's congruent up the tower. Everybody thinks that they're batch wording is the greatest, and they want to fight for their batch wording, but what that does is, if it's

incongruent up the tower, it can cause erosion issues. It can cause, obviously, for an incongruence of how claims get paid, and I think that's a really difficult situation. And fundamentally, and this is the tough part, I think it takes sitting down with the carriers and having really frank conversations around the intent of what is and what is not batchable. Until we have those conversations and try to overcome the hump around this very fundamental understanding around what can be related logically, causally, or otherwise, and how clients expect the policies to respond and how the markets expect them to respond, if that delta of understanding continues, we're going to continue to have issues.

So I think having those conversations can really help everybody be on the same page about expectations. I say all that in the same breath that I say you cannot foresee some of these situations. So you don't have these conversations to try and plan out everything because that's an impossibility. But what I think is important is to have a dialogue and have that dialogue established and an open door with the markets before the issue comes in the door.

MARYANN MCGIVNEY: Yeah. Great point. One thing that is really challenging with batch is that the myriad of situations really determines whether and how the coverage will respond. So that's often pretty difficult to say with any concrete fashion up front, this would be covered, that wouldn't be covered, because there's just so many nuances.

KIRSTEN BEASLEY: Yeah.

MARYANN MCGIVNEY: But thanks, again. I appreciate your joining me today. I know you and I have had the opportunity to discuss batch regularly, especially this year, and I always enjoy a good batch conversation with you. So thank you for joining me

KIRSTEN BEASLEY: No problem. Thanks for having me, Maryann.

[MUSIC PLAYING]

MARYANN MCGIVNEY: I'd also like to thank our audience and those that tuned in to join our discussion today. As I mentioned earlier, this is the third podcast of a five-part series addressing HPL coverage and some of the more important exclusions and coverage terms. So we hope you will join us again next time on Vital Signs, Risk and Insurance for Health Care.

SPEAKER 1: Thank you for joining us for this Willis Towers Watson podcast, featuring the latest thinking on the intersection of people, capital, and risk. For more information, visit the Insights section of willistowerswatson.com.

Disclaimer

Each applicable policy of insurance must be reviewed to determine the extent, if any, of coverage for COVID-19. Coverage may vary depending on the jurisdiction and circumstances. For global client programs it is critical to consider all local operations and how policies may or may not include COVID-19 coverage. The information contained herein is not intended to constitute legal or other professional advice and should not be relied upon in lieu of consultation with your own legal and/or other professional advisors. Some of the information in this publication may be compiled by third party sources we consider to be reliable, however we do not guarantee and are not responsible for the accuracy of such information. We assume no duty in contract, tort, or otherwise in connection with this publication and expressly disclaim, to the fullest extent permitted by law, any liability in connection with this publication. Willis Towers Watson offers insurance-related services through its appropriately licensed entities in each jurisdiction in which it operates. COVID-19 is a rapidly evolving situation and changes are occurring frequently. Willis Towers Watson does not undertake to update the information included herein after the date of publication. Accordingly, readers should be aware that certain content may have changed since the date of this publication. Please reach out to the author or your Willis Towers Watson contact for more information.