**BRIEFING NOTE**

# Can the Insurance Industry Improve its Claim Function? Of course, but how can Robin Hood help?

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**16 June 2026**

## Introduction

Can the insurance industry improve its claim function and if so, how? These were the questions raised at what, in this author's humble opinion, was the most incisive insurance market summit arranged in Singapore for years. Why was that summit so insightful? Because it brought leading insurers and their service providers, loss adjusters and defence law firms, together and, in putting claims front and centre, asked how the industry could improve.

At first, it was not entirely clear why I had been asked to attend. Much of this firm's work is for cover holders, not insurers, and even then, given that we do not impose billing targets and cannot offer pure contingency fee arrangements, we will not prosecute a weak claim.

The answer became clear as the debate unfolded. If the Sherriff of Nottingham is to be told that reducing taxes will benefit his economy then who better to tell him than Robin Hood? Because if Robin will tell the Sherriff how the Sherriff can put Robin and his Merry Men out of business, will not the people of Sherwood Forest rejoice and pay their taxes most willingly?

## Friar Tuck, Maid Marion and Robin Hood

With any complex challenge, and any industry that dates back almost 400 years presents a complex challenge, the solution requires a combined approach. Here, that approach must address wordings, the application of those wordings and the quantification of the indemnity amount that turns on those wordings. Again, as with any complex challenge, some of the steps in meeting that challenge are easy, some more difficult but none are insurmountable.

## Friar Tuck: Drafting the Wordings

Wordings are the ingredients of every policy. When taken together and read in the context of the policy as a whole, as they should, they comprise the insurance product. Much is the same in making a hearty beef and ale stew. There are mushrooms that enhance the flavour, mushrooms that cause hallucinations and mushrooms that are fatal. So care must be taken.

Wordings that cause hallucinations would include the London Engineering Group's LEG3/96 wording. The insurance industry says that the industry knows what that wording means and how it should be applied. And there lies the hallucination. Because at least two District Courts in the United States have found that wording, or a derivation of the same, to be unworkable and have applied the wording against the insurer and in favour of the cover holder.

Wordings that are fatal often come in the guise of a jurisdiction clause. Ironically, the very clause that is included to resolve disputes arising out of the policy wording generates a

preliminary fight by referring all disputes to both litigation and arbitration and/or if to arbitration, then only once coverage is decided by litigation and even then to two arbitrators.

Some of the fixes are difficult, such as the "defect exclusions" which have become entrenched in policy wordings, but others are very easy. If the parties agree to arbitration, then remove all references to litigation and include an arbitration clause published on the website of any leading arbitration institution's websites. Friar Tuck does not have to make the stew, he can go and get one ready made from the local supermarket, and it is free of charge.

**Maid Marion: Applying the Wordings**

Once premium has been paid and the insurance policy has been issued, it will only be applied if a claim arises. And then with a punch in face or the reassuring touch of the hand? By way of an example, many insuring clauses require "sudden and unforeseen" damage to have occurred to insured property during the insuring period to trigger the obligation to indemnify.

But how those three words are applied can vary enormously. The punch in the face comes when the claim is denied on the basis that the cause of the damage occurred over time and/or that the damage was objectively foreseeable long before the damage occurred.

Both grounds for declining the claim are wrong. Whether the occurrence of the damage, not the cause of the damage, was sudden (as opposed to gradual) is the issue that falls to be considered. Similarly whether the insured subjectively, not the reasonable third party objectively, anticipated the damage when the damage occurred, not with hindsight.

And what is the solution here? Many of the uninformed and equally uncharitable will blame the lawyers for raising those defences. But lawyers act under the instructions of principals, namely the insurer or reinsurer that is contesting liability to indemnify. In those jurisdictions where punitive damages are available, those defences should be punished. Elsewhere, the broker should place risks with insurers who raise defences that are not groundless in the law.

**Robin Hood: The Amount of the Indemnity**

Assessing the amount of the indemnity falls in the first instance to the loss adjuster or forensic accountant. I say first instance because it tends to be a three part process.

First, assessing the actual amount incurred in repairing or replacing the damaged property, or the lost revenue or lost profit. Second, in assessing the reasonable amount that should have been incurred in the repair, replacement or financial loss. Third, in assessing the amount that is covered by the policy, being the amount payable by the insurer if liable to indemnify.

Where this tends to go wrong is when one party or another overreaches. For example, if a loss adjuster opines on coverage issues which largely turn on legal principles. Conversely, if legal counsel raises objections to requests for information or documents that are required to support the claimed amount. Then (inevitably) all parties express diverging opinions as to reasonableness, from whether the repair should have been undertaken by the original equipment manufacturer or independent service provider to the number and qualifications of the independent service providers invited to tender for the repair or replacement.

The solution is full disclosure of all relevant documents, invoices and receipts to enable an accurate assessment of the actual costs or loss incurred. That produces “figures as figures” without any admissions as to liability and satisfies stage one. Then an identification of the issues that determine reasonableness without identifying any percentage reduction. That satisfies stage two as far as it can be satisfied subject to the obligation to indemnify. Finally, leave the coverage issues, if any, to be determined separately. If they cannot be resolved then identify a list of issues that are relevant to coverage. The lists of issues produced at stages two and three, when applied to the gross quantum amount, gives the best chance of resolving those issues commercially or at least most cost effectively through litigation or arbitration.

Excessive or delayed document requests, restrictive or confused document responses, opining on areas beyond professional expertise, obfuscating the issues within professional expertise, grandstanding and bringing an army of colleagues, service providers and associates to each and every meeting is not helpful to the process. The two key issues are whether the loss is indemnified and, if so, what is the indemnity amount and rarely does the resolution of those two issues require more than a handful of focused and informed professionals.

**Concluding Words**

As Robin of Locksley once said:
“*Nobility is not a birthright. It's defined by one's actions*.”

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