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Duties of solicitors appointed by insurers

While insurers retain control over the conduct of a litigated claim under a policy they will always involve the insured where possible in the decision making process. This makes sound business sense in an increasingly competitive market where client care is an imperative. Insurers though carry the risk and must have the greatest say but what is insurers obligation if a conflict arises between insurer and insured during the case?

The Policy

The policy of insurance is the basis for the relationship between insurer and insured. All policies have conduct of claims clauses of varying specifities but there will be one constant - the insurer retains the entitlement to take over and conduct in the name of the insured the defence or settlement of any claim. As a general rule, an insurer will appoint its own solicitors from a panel of law firms retained by it and those solicitors will act on insurers' instructions. The appointment of the solicitors by insurers to act on behalf of the insured involves an unusual form of retainer and creates an interesting dynamic.

The Solicitor's Retainer

The appointment of a solicitor by insurers puts in place an unusual type of arrangement along the following lines:-

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- the appointed solicitor becomes the insured's solicitor for the purpose of defending the claim. As far as the outside world is concerned, the relationship is the usual one between a solicitor and his client and their communications are protected by legal professional privilege;

- at the same time, a separate relationship of solicitor and client comes into existence between the solicitors and insurers;

- by accepting the legal representation made available in accordance with the terms of the policy, the insured waives its rights as against the insurers to claim legal professional privilege in relation to communications about the claim between it and the solicitors. The nature of the retainer carries with it an implied waiver of privilege by the insured, the effect of which is to entitle the insurer to information provided by the insured to the solicitor.

Waiver of Privilege

An insured's duty of co-operation and continuing duty of good faith under a policy means that the insured has a requirement to give full and candid disclosure of all information required by the insurer or the insurers' solicitor to respond to a claim. Documents given by an insured to the solicitor acting in the claim can be passed on to insurers and the insured cannot assert legal privilege or a right to confidentiality over them to prevent the solicitor reporting to insurers. The rationale for this is that once the insured accepts representation in accordance with the terms of the policy, the insured waives its right as against the insurers to claim legal professional privilege. This waiver of privilege and entitlement to information provided by the insured to the solicitor is not unlimited. Usually privilege would not attach to information relating to the subject matter of the claim and to the handling of the claim. The case of *TSB Bank Plc .v. Robert Irving and Burns Colonia Baltica Insurance Limited [2000] 2.ALL E.R.A26* is a useful example as to how the courts have limited this waiver of privilege.

This case involved a professional indemnity claim where solicitors were appointed by insurers' so the joint retainer was in place. The solicitors initially considered policy coverage issues but decided that there was insufficient evidence to pursue that particular angle. Later in the case a meeting was arranged with the insured who had no idea that cover was an issue. Both solicitors and counsel were at this meeting (counsel having been briefed that cover was in question) and without warning the insured was questioned relating to an issue that had earlier been investigated as regards cover. After this meeting insurers refused to indemnify the insured relying mainly on what the insured had said at that meeting.

The Court of Appeal in London ultimately dealt with the case and held that insurers were not entitled to rely on anything said by the insured at that meeting. The joint retainer implied that the insured had agreed to waive legal professional privilege as regards insurers. However, there was also an implied term in that agreement that that waiver of privilege would cease the moment an actual conflict of interest arose between the insurers and the insured. The Court of Appeal held that the actual conflict arose once the solicitors sought advice from counsel as regards the right to refuse indemnity. From that point on any statements made by the insured were privileged. The court also held that the solicitors should have told the insured that policy issues were being considered and that counsel was conducting a conference considering these issues.

One other point that is worth mentioning which arose from the judgment in this case and that is for the waiver to end there has to be an actual conflict of interest rather than a possible conflict of interest. The Court of Appeal said *"it is of the essence of the original joint retainer and the basis for the applied waiver that there is as such a possible conflict of interest".* Then went on to say *"without such a waiver I can see that it would be very difficult for a solicitor ever to accept a joint retainer in a case such as this … It is only where, as here, there is an actual conflict of interest that the waiver comes to an end….."*

The Role of the insurer

More often than not the likelihood of a conflict between insurer and insured does not arise. Adequate financial limits under the policy and disputes over cover being the exception rather than the rule allows the interests of both to coincide and obviate the need for the insured's involvement. A potential for conflict can arise where there is, for instance, a possible breach of a limit of indemnity. In other words the financial limits under the policy may not be sufficient to cover the claim. It is at this point that the insurer's conduct of the claim comes into focus. In a situation like this there is no doubt that insurers must have regard to the separate interest and exposure of the insured. The insurers position is perhaps best summed up in an extract from the case of *Cormack .v. Washbourne 2000 LIyods Reports PN459* which states :-

> *"if and when a significant conflict arises, say when there is a realisation that if the matter proceeds the cover limit may be exceeded, the Insurer should have regard both to it's own interests and to the separate interest and exposure of the Insured. This may, depending on the circumstances, require the Insurer to pay greater attention to the Insured's expressed concerns or to involve him more in the making of decisions… These may include, for example, whether and when to seek settlement and for how much rather than to continue the proceedings. The manner and extent of*

such greater involvement of the Insured are clearly matters for judgment and balance depending on the facts of each case."

The insurer appointed solicitors have an onus to advise insurers of this duty to the insured as well as advising the insured of any potential conflicts.

Conclusion

When starting out with the defence of any case insurers and insured usually have a common aim - to defeat the plaintiff's claim and ensure that insurer's exposure is controlled. There will be times when unfortunately conflicts arise and insurers need to be very aware of their obligations to the insured

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