

The joint retainer: conflicts, privilege, insurers' powers
The "Do"s and the "Don't"s

The "Do"s

- **DO** bear in mind that if the interests of insurers and insured are deemed to conflict, then information provided by insureds to jointly-retained solicitors could be privileged against insurers¹. This means the insurer will not be able to use that material against the insured in any coverage dispute.
- **DO** recognise that the extent of waiver of privilege (by the insured) under a joint retainer will depend on the terms of the professional indemnity policy. Whilst disclosure to insurers of information provided from the insured to solicitors jointly-retained is necessary to "*enable Insurers to make an informed decision about whether to make an offer of settlement or payment into court or to defend the claim*"², it has been said that

*"The fact that insurers fund the cost of legal advice and representation and have a common interest in the defeat of the claim against their insured does not necessarily mean that they are entitled to see all the documents passing between the insured and his solicitors"*³

- **DO** keep in mind when retaining a solicitor whether there is an immediate and real coverage issue that may cause conflict between the interests of the insured and those of insurers
- **DO** recognise that an insured who is seen to be unfairly treated, or stitched-up, is likely to attract the court's sympathy⁴
- **DO** remember the importance where appropriate of warning an insured at an early stage of the fact that coverage is under review, and that all information and documents provided to the solicitor will be passed to the insurer. A warning after an admission is made is likely to be too late. Such a warning may also help to attract judicial sympathy in the event of a subsequent repudiation and a challenge as to whether the insurer was acting fairly. It may often be made alongside a reservation of rights

¹ *TSB Bank PLC v Robert Irving & Burns & Colonia Baltica Insurance Ltd (2000) 2 All ER 826*. A distinction has been made to date between an actual conflict, following which privilege is no longer waived by the insured, and a potential conflict. As a further and recent example of a court addressing such issues in a coverage dispute in a professional indemnity context, see *Zurich Professional Ltd v Karim & Others [2006] EWHC 3355*

² Per Lord Hoffman in *Brown v Guardian Royal Exchange Assurance PLC (Times, January 27, 1994)*

³ Per Lord Justice Neill in *Brown*. In that case, on its facts and a construction of the relevant clauses, the solicitors were entitled to express to the insurers a view as to whether the solicitor insured had been "fraudulent, negligent or neither" as an intelligible report could not have been produced without such information

⁴ It would be "manifestly very unfair" to cross-examine an insured in order to elicit information to justify a repudiation of insurers' liability where the insured was to assume coverage was not in issue: see Lord Justice Morritt's judgment in *TSB*

- **DO** consider asking a retained solicitor who is unable to advise on coverage issues, nevertheless to identify issues arising on which insurers may require separate independent advice
- **DO** be aware of the old caselaw⁵ which suggests that a clause in the policy which allows the insurer to have:

“absolute conduct and control of all or any proceedings against the assured”

may not extend to allowing an insurer to admit liability without the insured’s consent⁶
- **DO** be aware that there is little caselaw on whether the insurer may settle without the insured’s agreement. The terms of the policy will need to be construed, although if the insured is opposed to settlement, the *Groom v Crocker* answer that an insurer may do something where it is in good faith and the common interest of insured and insurer may be difficult to distinguish. There will be issues for solicitors acting under a joint retainer to address⁷
- **DO** remember that correspondence between insurers and solicitors may be requested and seen by insureds, unless privilege can be validly asserted. Analysis of any privilege of the insurer would inevitably have to recognise the fact that the insured will usually be taken to have waived privilege in the other direction

The “Don’t”s

- **DON’T** feel obliged to instruct separate solicitors for coverage and claims work as a matter of course
- **DON’T** expect to recover any privileged information created after a joint retainer ends following a conflict of interest⁸
- and finally... **DON’T PANIC!**

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This guidance note is not a substitute for detailed advice on specific cases and should not be taken as providing legal advice on any of the topics discussed.

⁵ *Groom v Crocker* [1939] 1 KB 194

⁶ In the *Groom* case, reference was made to a “class of things” which this clause enabled the insurer to do, including “the right to decide upon the proper tactics to pursue in the conduct of the action, provided that they do so in what they bona fide consider to be the common interest of themselves and their assured”. The analysis will therefore return again to the issue of conflict of interests between insurer and insured

⁷ The California Court of Appeal decision in *San Diego Federal Credit Union v Cumis Insurance Society Inc* 208 Cal. Rptr. 494, (1984) has been cited in UK insurance law textbooks

⁸ See *TSB and Brown*; confirmed in the TAG litigation, *Winterthur Swiss Insurance Company & others v AG (Manchester) Ltd (In Liquidation) and others* [2006] EWHC 839 (Comm)