An Expert Divided

A Cautionary Tale of Joint Retention of Experts in Property Subrogation Claims

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Julie is a subrogation professional.
She might be a carrier’s claims representative, a subrogation attorney, or a third-party administrator.
Ms. Scholl reports to Julie that she hired roofer B.B. Wolf Roofing, Co., who was performing repairs to her roof on the day of the fire.

investigate. She also receives a friendly call from Mrs. Goose’s insurance carrier, who proposes jointly retaining Jack Beanstalk and splitting his fees. Feeling confident that B.B. Wolf is a viable subrogation target, Julie sees no harm in sharing her expert and agrees.

During his investigation, Jack Beanstalk determines that B.B. Wolf did a terrible job and started the fire while using a torch during his roofing work. In fact, B.B. Wolf isn’t even a licensed roofer, just a wolf in roofer’s clothing! Julie pursues B.B. Wolf to recover her damages; Mrs. Goose’s carrier does the same. The two continue to jointly share expenses and consultant costs in their recovery efforts.

Unfortunately, this story does not have a fairy tale ending. Julie finds out that B.B. Wolf has neither insurance nor assets to pay for the damage he caused and begins to close down her subrogation investigation. Just then, the phone rings – it is Mrs. Goose’s claims representative stating that it is suing Ms. Scholl. Julie is stunned. Apparently, Ms. Scholl knew all along that B.B. Wolf was unlicensed, and Mrs. Goose’s claims representative, however, used Mr. Beanstalk to investigate the liability of Ms. Scholl. A signed joint retention agreement could have confined Mr. Beanstalk’s investigation only to B.B. Wolf’s liability from the beginning, preventing Mrs. Goose’s claims representative from discussing other subrogation targets with him.

Sample Language*:

No party to this agreement will consult with or retain Jack Beanstalk for any services outside of this joint retention agreement if those services relate to the fire that occurred at the Scholl property on the aforementioned date.

A joint retention agreement is useful to allocate expense payments either based on a pro rata share of the amount of damages incurred by each party or a 50/50 split of all costs. If a pro rata agreement is preferred, the exact amount of property damages isn’t always readily known—especially in this example where the fire had only...
recently occurred. In that event, the parties can agree to balance the final amounts upon conclusion of their adjustments.

Sample Language*

Fees and costs of jointly retained consultants shall be divided on a pro-rata basis based upon the payouts plus current reserves of each party. If a party settles a claim, the pro rata share shall be recalculated. The costs and fees shall be adjusted from time to time, based on the payments made.

A sunset provision can also be included to establish how long the agreement will stay in effect. An optional extension clause may allow for the parties to maintain the joint retention past the time period originally contemplated by the parties if the arrangement continues to be beneficial for both parties.

The joint retention of experts raises questions about how to handle information which might otherwise be privileged. A well-worded joint retention agreement will discuss the implications of privilege and waiver of that privilege should the matter proceed to litigation. These privileges differ based on jurisdiction. In California and Florida, if two parties share common legal interests, they may share privileged information between the two of them without waiving that privilege if the communications were intended to be confidential. *Oxy Resources Cal. LLC v. Super. Ct., 115 Cal. App. 4th 874, 887-888 (Cal. Ct. App. 2004); Visual Scene, Inc. v. Pilkington Bros., 508 So. 2d 437, 440 (Fla. 1987). For example, if counsel is retained who needs to speak with both claim representatives about the case, privilege would attach even if counsel is only retained by one of the parties. Other jurisdictions, however, are not so flexible. In Texas, for example, there is no common interest until it is clear the parties are jointly aligned in litigation. *In re XL Specialty Ins. Co., 373 S.W.3d 46, 51 (Tex. 2012).

While joint retention agreements are the best solution, Julie did not have one in place when she agreed to share Jack Beanstalk. What recourse does she have now? A good first option is to seek a **post hoc** agreement with the carrier for Mrs. Goose which would limit the parties’ use of the expert’s findings. Julie could propose to limit Jack Beanstalk’s retention to encompass the origin and cause investigation and findings as to B.B. Wolf’s liability only.

Assuming that Mrs. Goose’s claims representative would not agree to such a restriction, Julie has another option. She can seek to disqualify Jack Beanstalk as a testifying expert if the matter is eventually litigated. While the U.S. Supreme Court has not adopted a standard for determining whether an expert should be disqualified on the basis of conflict, many federal courts recognize their inherent power to disqualify an expert on the basis of his/her past relationship with an adversary in the litigation, including when an expert has switched sides during the course of the same action. *E.g., Am. Empire Surplus Lines Ins. Co. v. Care Ctrs., Inc. 484 F. Supp. 2d 855, 956-857 (N.D. Ill. 2007). If Jack Beanstalk is disqualified, however, neither party can benefit from his origin and cause investigation which can be equally detrimental if the scene has already been released.

Subrogation professionals may reap the benefits of cooperation while simultaneously fulfilling their ethical obligations to their employer, client, and insured by executing joint retention agreements. For a happy – or at least conflict free – ending to your property loss investigation, consider using joint retention agreements.

*The language provided is a sample based on a case study and is not intended to form any attorney-client relationship; constitute legal advice or constitute legal work product. Prior to entering into any signed agreement, consult with a subrogation attorney.

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