

AGGREGATION – A REMINDER TO SELECT THE RIGHT WORDING

The Supreme Court has recently handed down judgment in the case of **AIG Europe Limited v Woodman and Others** [2017] UKSC 18 regarding the scope of an aggregation provision in the Law Society's Minimum Terms and Conditions of Solicitors' Professional Indemnity Insurance.

Introduction

Clause 2.5(a)(iv) of the Minimum Terms provides that all Claims arising from "similar acts or omissions in a series of related matters or transactions" will be regarded as one Claim.

The debate in the lower courts centred around the meaning of the word "related". The first instance court held that it required the transactions to be conditional or dependent on one another, whereas the Court of Appeal decided that an "intrinsic" relationship between the transactions was necessary (as opposed to an "extrinsic" relationship with a third factor).

Judgment

The Supreme Court did not find it necessary or satisfactory to interpose a requirement for an intrinsic relationship in the clause. In so doing it noted that the Law Society did not choose to limit the phrase "a series of related matters or transactions" by reference to any further criteria, following a process of negotiation with the insurance market after the House of Lords decision in *Lloyd's TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd* [2003] 4 All ER 43 – a case where the policy contained similar aggregating language. Aggregation was permitted in the TSB policy in respect of claims resulting from "a related series of acts or omissions", but on the facts claims totalling some £125m did not aggregate, such that there was no cover since no claim on its own exceeded the deductible.

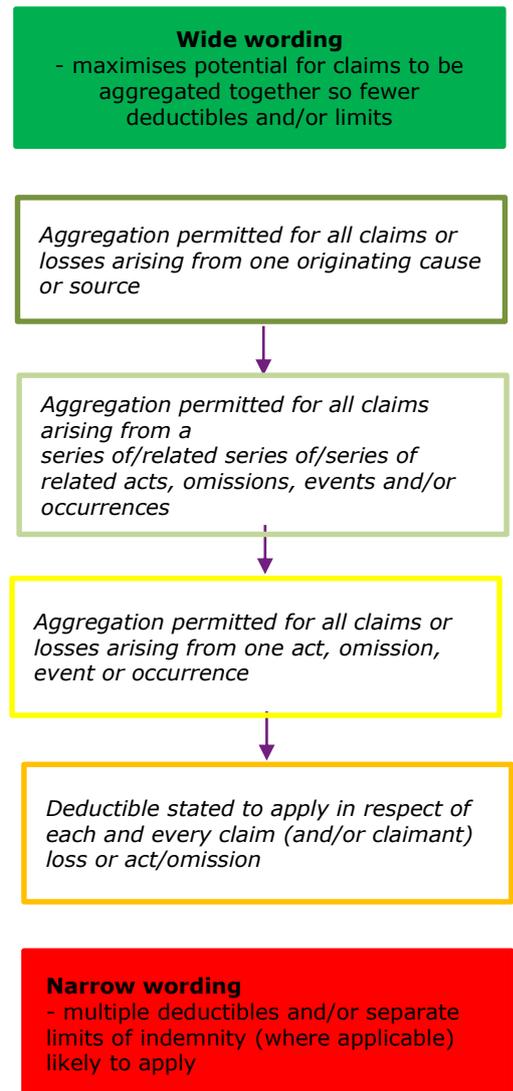
The Supreme Court in *AIG v Woodman* reached the conclusion that determining whether matters or transactions are "related" is "an acutely fact sensitive exercise". The process starts with identifying the relevant matters. Then, noting the potential for aggregation clauses to benefit either insurers (by capping the indemnity limit) or insureds (by capping the excess payable), the Supreme Court decided that the clause must be applied objectively on the basis of relevant facts.

Comment

The judgment is a useful reminder of the importance in selecting the words of an aggregation clause carefully given that the wording will be applied objectively.

The importance of the broker's role should not be underestimated – the Court in *AIG v Woodman* emphasised that aggregation language can be expected to have been carefully negotiated by the

Aggregation spectrum



parties having regard to the range of alternative wordings available in the market. Brokers should therefore clearly understand the choice they and their policyholder clients are presented with.

For brokers the hard work lies in selecting a clause which is most likely to suit their clients' anticipated exposure e.g. if there is a risk that the client will face lots of similar small claims which are unlikely to exceed a deductible alone, then wide aggregation language should be selected. If larger claims are anticipated then it might be more appropriate to choose a narrower aggregation clause.

It is also an area where it is recommended to select an established formulation for an aggregation wording which is appropriate in the circumstances rather than to attempt novel drafting. Please see our summary (above) which ranks commonly-used wording permitting aggregation in a narrow or wide set of circumstances. However, it is important to note that surrounding words may add or strip meaning, such that economy of language is advisable.

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