

ACCESSING A DEREGISTERED POLICYHOLDER'S COVER, AND THE NEED TO CONSIDER EXCLUSIONS CAREFULLY IN CONTEXT

26 March 2019 | Australia

Legal Briefings - By **Mark Darwin and Brendan Donohue**

A recent case¹ in the financial services sector illustrates that:

1. A counterparty being deregistered is not the endpoint for insurance claims. Claimants can access liability insurance policy proceeds even when the policyholder is in liquidation and deregistered.
2. Exclusions should be carefully assessed. When considered in the context of the entire policy (including endorsements), the exclusion may not actually exclude cover.

FACTS

The plaintiffs commenced proceedings against a policyholder alleging that the policyholder's authorised representative had breached duties owed to the plaintiffs relating to securities trading. The policyholder had been liquidated, and was deregistered, and did not file a certain defence. As a result, the plaintiffs obtained judgment by default.

The plaintiffs then commenced proceedings against the policyholder's insurer under section 601AG of the Corporations Act 2001 (Cth). That provision enables a plaintiff to recover from the insurer of a deregistered corporate policyholder if: (a) the corporate policyholder had a liability to the plaintiff and (b) the policy issued by the insurer covered that liability immediately before the policyholder's deregistration.

In the present case, the insurer admitted the policyholder had a liability to the plaintiffs at the time the policyholder was deregistered. The insurer also admitted that the policyholder's Financial Institutions Civil Liability Professional Indemnity Policy covered the policyholder's liability to the plaintiffs, subject to the application of an exclusion.

THE INSURER'S ARGUMENT

The conduct which led to the claim was committed by an 'authorised representative' of the policyholder. The policy excluded cover for claims 'based upon, attributable to or in consequence of' a conflict of interest (the **conflicts exclusion**). A 'conflict' was essentially defined as circumstances where an 'insured' acted for a client whilst being subject to a contrary interest such as another client's interest. The definition of the 'Insured' included 'any person who is or was ... [an] Employee' and an endorsement provided that the policyholder's authorised representatives were covered 'as if' those authorised representatives were 'Employee[s]' under the policy.

As the authorised representative had acted in a conflict of interest, the insurer argued that cover was excluded – since the authorised representative was to be treated 'as if' that authorised representative was an 'Employee' (and therefore an 'Insured') for all purposes under the Policy, including for the purposes of the conflicts exclusion.

DECISION

Chief Justice Quinlan of the Supreme Court of Western Australia did not accept the insurer's argument. His Honour held that the endorsement deemed the policyholder's authorised representative to be an Employee – and therefore an Insured – for the purposes of the endorsement extending coverage to conduct by that representative, but the endorsement did not go so far as to deem such an authorised representative to be an 'Employee' for all purposes including the purpose of the conflicts exclusion. For example, the endorsement could have extended cover to authorised representatives by varying the policy's definition of 'Employee' to expressly include authorised representatives, but that was not what the parties did and it was not the language that they chose.

The insurer was therefore obliged to cover the claim despite the conflict of interest by the policyholder's authorised representative.

ENDNOTES

1. *Young Investment Group Pty Ltd v QBE Insurance (Australia) Limited* [2019] WASC 74.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



MARK DARWIN
PARTNER, BRISBANE

+61 7 3258 6632
Mark.Darwin@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2022

SUBSCRIBE TO STAY UP-TO-DATE WITH INSIGHTS, LEGAL UPDATES, EVENTS, AND MORE

Close

