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COURT REFUSES TO AGGREGATE DEDUCTIBLES FOR A POLICYHOLDER BANK THE SUBJECT OF A CLASS ACTION*

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Legal Briefings – By **Mark Darwin, Guy Narburgh and Travis Gooding**

*Note that this decision has been appealed and is the subject of an updated article on our website – click here to read.

The NSW Supreme Court has applied a strict interpretation of the aggregation clause in a liability policy by refusing to deem the claims of group members in a class action to be a single claim for which only one deductible (or excess) applied.[1] This meant that the policyholder's coverage for a $6 million settlement was cancelled out by the multiple deductibles held to be applicable, leaving the bank effectively without insurance cover.

Policyholders need to be aware of the risk that their insurance policies may not aggregate claims arising in class actions, meaning that a separate deductible could apply to each claim. Whether the policy will operate this way will depend on the interpretation of the aggregation clause, the definition of 'claim' and similar terms.

The case is important given the rising risk of class actions. Unless aggregation clauses make it clear that only one deductible will apply, the cumulative effect of multiple deductibles may render the liability policy useless in responding to class actions.

BACKGROUND FACTS

The Bank of Queensland offered a 'Money Market Deposit Account' whose terms included a requirement for signed written instructions and a promise to question suspicious instructions. A financial planner (independent of the Bank) acted as authorised signatory for at least 192 of its clients who held such accounts, and withdrew funds via email instructions. It became evident that the financial planner was operating a Ponzi scheme (in which it would withdraw one customer's money for its own purposes or to pay another to give the illusion of a return on funds invested).

The 192 account holders signed a Class Member Registration Form and brought a class action against the Bank and its agent, alleging that it failed to question suspicious transactions, wrongly accepted email instructions and allowed withdrawals that were not authorised. The Bank and its agent each agreed to pay $6m in settlement of all the claims.

The Bank had a $2m deductible under its liability policy for '*each and every Claim*', so lodged claim for $4m with its insurer. The insurer pointed to the various actions of the financial planner for various customers and argued that at least 3 'Claims' were made in the class action, therefore wiping out the entire $6m settlement.

DECISION

WERE THERE MULTIPLE CLAIMS?

The aggregation clause of the policy provided that '*all Claims arising out of, based upon or attributable to one or a series of related Wrongful Acts shall be considered to be a single Claim*'. 'Claim' was defined to include '(i) *any suit or proceeding, including any civil proceeding… against the insured… or (ii) any verbal or written demand… of any specified Wrongful Act*.'

The Court held that each of the 192 Class Member Registration Forms was a 'written demand' [2] so there were therefore multiple 'Claims' to be considered for aggregation.

COULD THOSE CLAIMS BE AGGREGATED?

The Court held that for Claims to be aggregated they must arise from '*a series of related Wrongful Acts*'. '*Wrongful Act*' was broadly defined to include acts, errors, breaches of duty, omissions or conduct committed, attempted or allegedly committed or attempted by the Insured. Each individual failure to question a withdrawal etc which gave rise to a loss and each claim was therefore said to be a separate Wrongful Act.[3]

The critical question for the Court was then whether these multiple Wrongful Acts were a '*series of related*' Wrongful Acts. It decided that to be part of a related series, there must be a logical or causal relationship between the various Wrongful Acts. To satisfy this requirement, the Court held that there must be a unifying factor or common cause at a level no more remote than the act or omission that actually constituted the cause of action.[4]

In this case, most of the Wrongful Acts were separate acts, made on different occasions, from a different account, causing loss to different parties and in response to different and separate purported instructions. The Court's view was that the mere fact of their occurrence was within the broader, more remote scheme of a fraudulent practice by the same financial planner was not sufficient to create a causal relationship between them. It held that the series of Wrongful Acts were therefore not related and could not be aggregated, meaning that multiple deductibles applied.

In contrast, to demonstrate what may qualify as a series of related Wrongful Acts, the Court used an example where a single email gave several instructions each of which separately constituted a Wrongful Act.[5] In those circumstances, the claims may be aggregated.

Despite this example, in our view the distinction is somewhat unclear and this is a harsh decision against the policyholder. While in many respects it comes down to the facts behind the class action, if this is the approach to be taken by insurers to the application of deductibles in the class actions they are charging increasing premiums to insure, we expect this to be the subject of further controversy.

At the time of writing, it is not known whether this recent decision will be appealed.

ENDNOTES

1. *Bank of Queensland Ltd v AIG Australia Ltd* [2018] NSWSC 1689, [5].
2. Ibid at [85].
3. Ibid at [137] to [141].
4. Ibid at [162].
5. Ibid at [160].

KEY CONTACTS

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

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