POLICYHOLDER SUCCESSFULLY CHALLENGES INSURER'S REFUSAL TO COVER 'SECURITIES CLAIM'

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Legal Briefings – By **Guy Narburgh, Anne Hoffmann and Audrey Driscoll**

In good news for policyholders defending class actions, the Federal Court of Australia has rejected an insurer's arguments that a class action settlement was not covered because:

- the units in an ASX-listed trust the subject of the proceedings were not "securities"; and
- the proceedings arose from either a Product Disclosure Statement or the provision of "professional services" for which cover was excluded.[1]

BACKGROUND FACTS

Murray Goulburn Co-operative Co Limited (**MGCL**) was Australia's largest dairy foods company. To raise funds from external investors, the Murray Goulburn Unit Trust (**MGUT**) was created. Units could be acquired in the Trust off-market prior to listing, and on-market after it was listed on the ASX on 3 July 2015. MG Responsible Entity Limited (**MGRE**) was trustee of the MGUT.

On 29 July 2015, AIG Australia Limited (**AIG**) issued a Directors and Officers (**D&O**) insurance policy with Side C cover (entity securities coverage) for MGCL with a retrospective date of 3 July 2015.

During the relevant period, MGRE also held other insurance policies, including an Investment Managers Insurance policy, and a Public Offering of Securities, Directors, Officers and Company Liability insurance policy.

Two class actions were commenced by Endeavour River Pty Ltd and Webster (trustee), with each alleging misrepresentations and non-disclosure of material information in the Product Disclosure Statement (**PDS**) and subsequent ASX announcements in 2015 and 2017. On 24 June 2019, the Endeavour River class action settled for $42 million and on 1 November 2019, the Webster class action settled for $37.5 million, with no admission of liability in either proceeding.

DECISION

WERE THE CLAIMS "SECURITIES CLAIMS"?

The D&O policy indemnified against "Loss" for any "Securities Claim". The policy defined "Security" as:

> *"any security representing a debt of or equity interest in any Insured Entity".*

AIG's principal argument was that the units in the MGUT were not "securities" as defined in the D&O policy.

The Federal Court held that the units in the MGUT were equity interests in the unit trust on the ordinary meaning of the relevant words. The policy provided that a "Trust" fell within the definition of "Insured Entity", so the class action claims fell within the meaning of "Securities Claim" under the policy.

The Court had regard to correspondence between the insurer and the policyholder's broker in relation to, amongst other things, backdating the policy to the date of listing and increasing the premium to reflect the introduction of cover for "Securities Claims" under the policy. This was relevant evidence of surrounding circumstances which provided context for the construction of the policy, and assisted to resolve any ambiguity as to the meaning of "Securities Claim". The Court specifically rejected the insurer's reliance on its underwriter's subjective understanding of various policy terms.

WAS LIABILITY FOR THE CLASS ACTIONS CLAIMS EXCLUDED?

The Court also rejected the insurer's reliance on a series of policy exclusions.

First, the Court held that the indemnity under the policy was not excluded by several professional services exclusions because the services provided by MGRE were not professional in nature (or at least, the insurer had failed to identify the relevant profession) and were not provided to a "third party" – at best, MGRE was providing services to MGCL, also an insured under the D&O policy.

Second, the policy also excluded liability for any matter arising out of, based upon, attributable to an offer made in the PDS and Prospectus. Claims in the class actions for units acquired pursuant to the PDS pre-listing were excluded from the policy. The question was whether claims in respect of units acquired after the date of listing were acquired pursuant to the PDS.

The Court held that the exclusions did not apply to the subset of class action claims where the relevant acquisition of units occurred in the secondary market after the date of listing (being the date from which D&O policy cover incepted). The objective intention and effect of the exclusions was to exclude claims of people who purchased their units 'off-market' pursuant to the offer in the PDS.

Hence, the Court accepted the policyholder's submission that the class action claims did not arise out of or were attributable to an offer made in the PDS and Prospectus. The offer under the PDS closed before the units were listed on the ASX. The mutually known commercial context included that the D&O policy was procured to insure against loss arising from trading the units on the ASX, and that the policy was procured as part of a 'back to back' insurance program (with a public offering of securities insurance policy).

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

ENDNOTES

1. *Murray Goulburn Co-operative Co Limited v AIG Australia Limited* [2021] FCA 288.

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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