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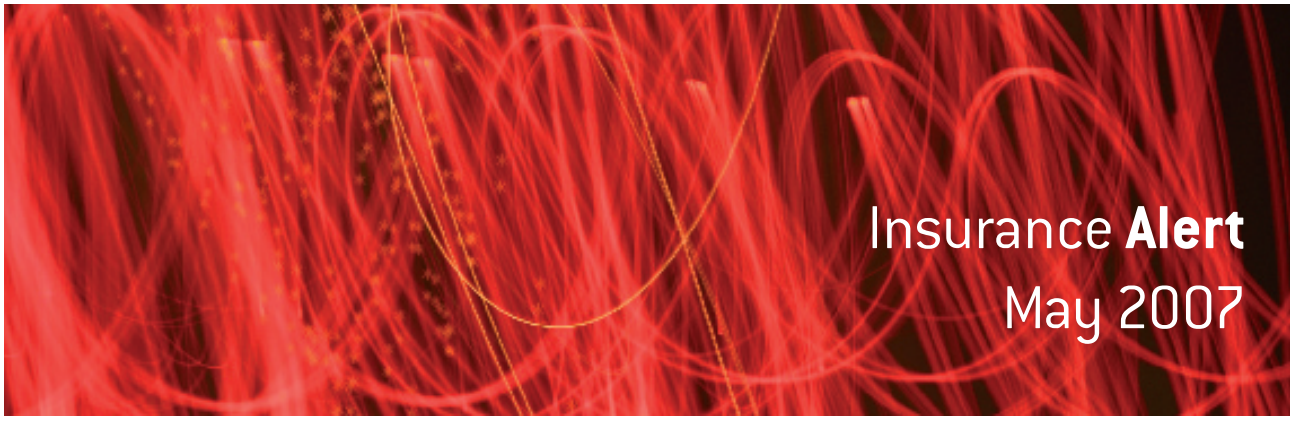

Non-Disclosure - Am I "Bovered" ?

"This judgment is important when considering the wording of relevant non-disclosure exclusion clauses in claims made policies."

Refusal to Allow Insurer to Decline for Non-Disclosure.

CGU Insurance Ltd v Porthouse [2007] NSWCA 80

We recently acted for a solicitor in professional indemnity litigation where the insurer for a co-defendant barrister unsuccessfully appealed a verdict requiring it to indemnify him under under his policy of insurance.

The New South Wales Court of Appeal considered the interpretation of a non-disclosure exclusion clause in the barrister's professional indemnity policy of insurance. The policy excluded claims arising from "known circumstance(s)", which was defined by the policy to mean:

"Any fact, situation or circumstance which:

(a) an Insured knew before this policy began; or

(b) a reasonable person in the Insured's professional position would have thought before this policy began,

which might result in someone making an allegation against an insured in respect of a liability, that might be covered by this Policy".

The barrister had acted for a plaintiff who sustained personal injury while carrying out a community service order prior to 2001. The relevant personal injury legislation stated that the plaintiff had rights to recover common law damages as modified by the provisions of the Workers Compensation Act 1987. The barrister was retained to provide advice in mid 2001 but did not advise the plaintiff of the effect of certain amendments to the Workers Compensation Act applicable from 27 November 2001, which required proceedings to be commenced before that date to preserve common law entitlements.

Proceedings were commenced two weeks or so after the relevant date of 27 November 2001. Whilst the plaintiff was successful at first instance, the defendant appealed and put the barrister on notice that it disputed the plaintiff's entitlement to damages given the failure to commence proceedings before 27 November 2001.

The barrister did not dispute that he was aware of this defence prior to his application for insurance. After the insurer accepted his proposal for insurance, the defendant's appeal was successful and the plaintiff's claim dismissed because of the legislative changes.

The plaintiff then brought a claim against the barrister alleging breach of professional duty. The barrister in turn sought indemnity from his insurer

which was declined by reason of the alleged operation of the above exclusion. The barrister challenged that declinature by cross claim in the professional negligence action.

The trial judge held that there was no fact, situation or circumstance which the barrister knew or which a reasonable person in his professional position would have thought might result in someone making "an allegation" against him when applying for the insurance to trigger the exclusion clause, and ordered the insurer to indemnify the barrister in accordance with the policy terms.

The insurer did not appeal the finding of the barrister's actual lack of knowledge, but did appeal the finding of what the barrister ought to have known. It submitted that the trial judge erred in finding that a reasonable person in the barrister's professional position would not have thought that there existed a fact, situation or circumstance which might result in someone making an allegation against him.

In the majority judgment, the New South Wales Court of Appeal held in interpreting the policy that the test of whether circumstances should have been known and should have been disclosed was an objective test, subject to the subjective knowledge of the actual insured barrister as the person seeking insurance being taken into account. The test articulated was whether a reasonable person *in the insured's position* [our emphasis] would have believed it appropriate to give notice of the potential claim. This was a matter for the discretion of the trial judge. Whilst it was conceivable that the barrister would have known, it was open to the trial judge to find when applying this test that the barrister did not have the requisite knowledge.

The dissenting judge however found the test was purely an objective one of a reasonable barrister in the same position. He further found in applying the objective test that on all the available evidence, the barrister should have been aware that a claim would be made if the appeal succeeded and the claim ought to have been disclosed.

CGU is contemplating seeking leave to appeal to the High Court. Whether or not leave is granted, the judgment is relevant when considering the wording of relevant exclusion clauses in claims made policies. We do not expect the High Court will overturn the decision. Even if it did and imposed purely an objective test when interpreting the exclusion, arguably its effect would be minimal given that section 33 of the Insurance Contracts Act can override the policy and the objective subjective test should prevail, consistent with section 21 of the Insurance Contracts Act.

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