

INSURANCE



LEGAL UPDATE

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CONTENTS	Identity fraud an increasingly complex risk	01
	Who owns the lawyer?	02
	Wrongful birth claims: duty of care to an unborn child	03
	Insurance policies discoverable	04

Identity fraud an increasingly complex risk

Identity fraud is a disturbing phenomenon arising out of an information dependent society. As organisations become larger and further removed from the individuals they deal with, the risk of identity fraud grows. Victims will look to various sources to recover compensation for damage caused to them.

Key message

Victims of identity fraud are now looking to recover compensation for damage, and that pushes the risk back to the service supplier.

One of the principal sources will be banks and other finance providers. The law in respect of whether a finance provider owes a duty of care to the victim of an identity fraud is by no means clear – the credit provider may not be in a contractual or tortious relationship with the victim.

Another fertile ground for identity theft is in relation to property. We have seen what may be the tip of the iceberg in cases involving various forms of fraud to obtain money from lenders. These involve a chain of companies purchasing properties at fictitious prices to inflate valuations or fraud involving forged title deeds and solicitor's certificates.

Typically, the fictitious borrower will default immediately, and the lender will seek to recover against the secured property. The lender will then be faced with a significant shortfall, or a true owner who has already mortgaged the property to another lender, and the lender will seek damages against other parties.

These parties can include real estate agents, mortgage originators, solicitors and mortgage brokers. Sorting out who is responsible may involve an expensive

analysis of service level agreements and potentially expert evidence (see, for example, *ING Bank (Australia) Limited v Australia City Finance Pty Limited*, unreported, NSWDC 6 June 2005, Rolfe J).

It may be impossible for each of the parties involved to have discovered a fraud. However, an insurer and insured may not relish the prospect of public litigation and the associated legal costs, and may end up reaching a commercial settlement. Lenders who seek recovery are sophisticated commercial litigators who are fully aware of how the court system works and the cost calculations that insurers and their insureds will make.

An insured and its insurer may be faced with multiple claims in respect of a string of properties (especially when a particular area is targeted by a scam), eroding insured limits and causing significant deductible problems to insureds.

For further information, see *Bankers' Liability for Negligent Enablement of Impostor Fraud and Identity Theft* Toby Blyth [2004] 2 JIBLR 40.

Toby Blyth | Senior Associate

Who owns the lawyer?

It is common for an insurer, on receipt of notification of a litigated claim, to retain a lawyer to investigate (and report to the insurer) on indemnity issues and to take steps to protect the insured's interest in the context of the proceedings.

Key message

In a litigated claim it is often not easy to determine who is the client of the lawyers engaged in the action. This is causing some concerns across the industry, but the 'ownership' is normally, or at least should be, covered in the policy documentation.

Frequently the lawyer is required within a short period of time, to file an appearance or defence on behalf of the insured, or to take some other step in the proceedings in the name of the insured.

These steps are commonly taken before the lawyer has had an opportunity to complete his or her investigation of the underlying facts and issues, and consider and report to the insurer on policy response.

This situation generates a number of issues for insurers and their lawyers.

The applicable principles are:

» if the lawyer files an appearance or a defence in the name of the insured, a solicitor/client relationship between the insured and the lawyer comes into existence. This relationship might also arise if the lawyer takes other steps in the proceedings in the name of the insured

» the solicitor/client relationship between the lawyer and the insured arises even where the lawyer is retained by the insurer and the insurer is paying the fees. In these circumstances, the lawyer has two clients

» the lawyer owes independent duties of loyalty and confidentiality to each of the two clients. On issues of policy coverage, the lawyer is in a position of conflict

» where the insured discloses information to the lawyer (which is potentially problematic to the insured on indemnity issues) that information is confidential and the lawyer is not entitled to disclose it to the insurer. In this situation the lawyer should cease to act for both parties

» the lawyer is not entitled to continue to act for the insurer on any dispute with the insured over policy response.

These general principles can be varied by particular and clear provisions in the insurance policy or, potentially, in a separate agreement with the insured.

It would be a useful exercise for insurers to review their documentation and procedures in the context of these issues.

Greg Couston | Partner



Wrongful birth claims: duty of care to an unborn child

Doctors and their insurers are awaiting the High Court's reserved decision in two cases heard by it last year involving injuries suffered by unborn children.

Key message

The reserved decision in two High Court cases will play an important role in determining the future of wrongful birth claims.

It is well accepted that a medical practitioner treating prospective parents owes a duty of care to the child. In these cases, the High Court has been required to consider whether the duty encompasses conduct which, if it had been properly performed, would have led to the termination of the pregnancy or non-conception.

In the first case, *Harriton v Stephens*, Mrs Harriton was not advised to undergo a rubella test when she was pregnant. She subsequently gave birth to Alexia who was exposed to the rubella disease in utero.

In the second case, *Waller v James & anor*, Mrs Waller underwent IVF and conceived Keeden. Mr and Mrs Waller were not advised that a genetic deficiency in Mr Waller could be transmittable to their child, who was born with the genetic deficiency.

Both children suffer from severe disabilities, which are presently incurable.

In both cases, it was accepted that the medical practitioners failed to follow standard medical practice. It was also accepted that the parents would have sought a lawful termination and (in Keeden's case) delayed IVF or sought a different sperm donor had they been appropriately advised by the medical practitioners.

The claims failed at first instance and on appeal to the NSW Court of Appeal (Mason P dissenting). The courts returned to the first principles of negligence and damages.

It was found that the medical practitioners did not owe a duty of care to the unborn children with respect to the type of loss suffered by them, namely, being born. Spigelman CJ commented that the duty asserted on behalf of the plaintiffs should not be accepted, as it did not reflect values generally, or even widely, held in the community.

The courts also considered that damages could not be assessed in these cases because it was impossible to compare the current disabled state with that of non-existence. There was no "legally cognisable damage" from the children's perspective.

The High Court decision is now eagerly awaited. We will report on the decision in a subsequent edition of the Middletons Insurance Legal Update.

Sheila John | Solicitor

Insurance policies discoverable

From time to time, a plaintiff will seek production of documents relating to the defendant's entitlement to insurance. This is particularly the case in large professional negligence claims where the known assets of the defendant might not be sufficient to meet a judgment. Alternatively, claim forms or loss assessors' reports might include admissions to the advantage of the plaintiff.

Key message

Insurance underwriters may not be keen to reveal insurance details, but they may not be able to suppress the information during legal discovery.

As the courts have recognised “professional people and their underwriters are anxious not to publish details of their insurance cover”. This information might act as a ‘magnet’ for claims, which could result in adverse publicity and increased insurance premiums: see, for example, *Beneficial Finance Corporation v Price Waterhouse* (1996) 9 ANZ Ins Cas 61–327.

In the ordinary course, production of insurance documents will be resisted on the basis that the documents are not relevant to a matter in issue in the proceedings and are not liable to be produced during discovery or on subpoena.

The recent case of *Venacom Pty Limited v Morgan Brooks Pty Limited* [2006] NSWSC46, provides an example of a situation in which a plaintiff might be entitled to access to a defendant's insurance documents.

The proceedings involved a factual question of whether a particular individual had actual or ostensible authority to operate a business

related to the defendant company. The plaintiff argued that documents such as an insurance proposal or an insurance policy itself could give information about the authority of people to act on behalf of the organisation and the internal structure of the organisation. Justice Campbell accepted this submission and held that the defendant was required to discover documents relating to its professional indemnity insurance.

The decision in *Venacom* turned on the facts of the case. Whether an insured or his insurers are liable to produce insurance documents is still a vexed question raising issues of legal professional privilege, the rules of discovery and more substantive issues, such as whether an insurer is liable to be joined to proceedings in its own right and the apportionment of liability in civil cases.

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Further information

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