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Acting as a Prudent Uninsured: *CGU Insurance Limited v AMP Financial Planning Pty Ltd* [2007] HCA 36

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A recent decision of the High Court has addressed the dilemma faced by companies attempting to settle a claim made against them where their insurer has not confirmed indemnity. Insurers commonly reserve their position on indemnity, telling the insured to act as “prudent uninsured”, with the insured left to its own resources to defend the claim, and negotiate any settlement.

In the above decision, AMP (insured by CGU) settled a potential claim alleged by investors who had placed funds for investment with AMP financial advisers. No legal proceedings had been brought. For commercial reasons, and in a desire to protect its relations with ASIC, AMP adopted a protocol for dealing with investors designed to avoid legal proceedings.

CGU agreed in principle to the protocol. However, the insurance policy with CGU covered “claims” defined as, effectively, legal proceedings or arbitration. A settlement was reached by AMP, without the express consent of CGU, before any proceedings were brought.

CGU then denied indemnity under the policy. This denial was ultimately upheld by the High Court which found the policy only covered claims initiated by legal or arbitral proceedings, and that AMP had not proven an underlying liability by it to investors. The High Court also rejected arguments based on estoppel, and lack of good faith.

What should insureds do?

This depends on the precise terms of the policy, the status of discussions with the insurer and status of any legal proceedings/claims. Insureds should be particularly careful where no legal proceedings have been formally brought, particularly if this is a requirement under the policy. There may be circumstances where the claimant will bring and also resolve legal proceedings as part of a settlement, although this would likely need insurer consent (to avoid breach of other policy conditions).

One factor referred to by the High Court was a “Senior Counsel” clause in the policy allowing the instruction of Senior Counsel to advise on potential liability and whether the claim should be settled. The High Court noted that, disappointingly, the parties did not avail of this provision. This highlights the necessity of insureds carefully reviewing all the above factors, including the particular terms of the policy, and seeking comprehensive legal advice, before settling any claim made against them.

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