



Insurance and Family Violence- 10/4/17¹

Economic Abuse Reference Group

The Economic Abuse Reference Group (EARG) represents eight Victorian organisations who are working in relation to some finance related recommendations from the Victorian Royal Commission into Family Violence. Five organisations from other states are contributing to the group's work on national issues (including insurance). See www.earg.org.au

Members of the EARG who have contributed to this paper are:

- Consumer Action Law Centre
- Good Shepherd ANZ
- Womens Legal Service Victoria
- WestJustice
- Kildonan
- Financial Counselling Australia
- Legal Aid NSW
- CARE ACT
- Financial Rights Legal Centre (NSW)

Engagement with the Insurance Industry

We are aware that some insurance companies are considering the impact of family violence and its interaction with insurance law and practices with a view to improving outcomes for customers. In March 2017, some of the above groups attended one of the Insurance Council of Australia's community consultation meetings, and raised the issues of family violence and presented a version of this paper.

We understand this will be raised with the ICA Board, so, as yet, there is no formal response from the ICA. However, the initial informal response was positive. We look forward to working with the ICA and its members.

¹ This version is not confidential and may be shared or quoted publicly.

Good Practice Guide

The EARG has produced a Good Practice Guide for the Development of Industry Family Violence Policies which is available on our website www.earg.org.au.

While not specifically focused on insurance, this will provide some background and basic principles.

“Victim” or “Survivor”?

While the term “family violence victim” is used for simplicity in this paper, it is important to recognise that many of the women in the case studies, and the women we see, have survived the abuse are working towards independence (including financial independence). They are, in fact, “family violence survivors”.

Insurance law and practice – impact on victims of family violence.

Current insurance laws and practices result in unfair outcomes that can exacerbate the emotional and financial impact of family violence on victims.

Issues

The following insurance issues have been identified by members of the Economic Abuse Reference Group² in cases involving family violence.

Victim of family violence can't claim against policy due to conduct of the co-insured:

Under joint insurance policies, a partner is likely to be excluded from making a claim for loss if damage is deliberately caused by the co-insured, even if the couple is separated or if there is a family violence order issued by a court. In addition to not receiving compensation for loss, the victim of family violence will be liable for joint debt (such as a house mortgage) after property destroyed.

Any valid claim may be paid to the perpetrator alone if the insurance is in his name.

A claim may be rejected due to non-disclosure by one joint insured, even if the other insured was unaware of the matter that should have been disclosed.

The perpetrator may cancel the insurance without the victim's knowledge, if insurance is in the perpetrator's name alone. Even if the policy is solely in the victim's name, if the perpetrator is listed as a co-insured, he may cancel the policy without her permission or knowledge (although in 308798 FOS found that the insurer didn't have the right to cancel the policy in these circumstances).

The victim may not be able to access information about the insurance if it is in the perpetrator's name alone.

An insurance claim may be rejected on the basis that the victim invited the perpetrator into the house even if the perpetrator is not a joint-owner or co-insured. This impacts unfairly on victims of family violence who can suffer the loss of significant property

² List organisations once they approve this document.

with no access to compensation via their insurance policy. Insurance investigations may ignore the reality of family violence, for example when a partner, or ex-partner, forces his way onto property or takes property without permission or under threat.

Insurance investigators act inappropriately. This problem doesn't just arise in relation to family violence. Incorrect assumptions can be made about a person's knowledge or control in relation to the actions of a family member. Interviews can be intimidating, inappropriately handled and can take several hours after which time the interviewee is exhausted. In relation to victims of family violence, such an interview (particularly if by a male investigator) can be particularly stressful.

Policies usually exclude cover for theft or damage caused by a household member. Landlord insurance typically covers the landlord but the insurer will often make a negligence claim against the tenant/s who have caused the damage (whether intentionally or not). While a co-tenant who was not responsible for the damage could defend such an action our experience is that many tenants don't understand their legal rights in these cases and insurers often claim payment by tenants in a broad range of circumstances, sometimes where it is clear that there is no negligence involved. While this can cause detriment to all tenants, it is a particular problem when damage has been caused by a perpetrator of family violence.

Case Studies

FOS – 299529 (Financial Ombudsman cases are all from determinations which are published on the FOS website)

Issues: Damage to joint property caused by perpetrator (a co-insured), whether, due to mental illness there was intention to cause damage, FOS jurisdiction excluded majority of dispute.

The woman was separated from her husband and had obtained an AVO against him, when he caused a fire which destroyed the house and contents. At the time the house was jointly owned. The insurer rejected the claim on the basis that the fire was started by the husband (a co-insured).

The woman lodged a dispute with the Financial Ombudsman Service (FOS) on the basis that the husband was suffering from mental illness at the time of the fire and did not have the intention to set fire to the house.

The FOS was unable to determine the dispute in relation to the house insurance because the sum involved exceeded FOS's jurisdiction. However, FOS determined that it could determine the dispute in relation to contents claim (19% of the total loss).

FOS determined that the insurer pay the contents claim because the perpetrator didn't intend to cause damage based on his mental health.

It is not known whether the insurer paid the house insurance claim (which was outside FOS jurisdiction).

FOS - 314951

Issues: Deliberate damage caused to joint property by co-insured (husband), whether insurance policy composite (where interests can be separated) or joint, whether wife could claim against the policy for her loss.

The couple were separated. The wife lived in the jointly owned house, the husband was living in a shed on the property.

The husband deliberately set fire to the house. The insurance company rejected the wife's claim on the basis that the husband (a co-insured) deliberately caused the damage.

FOS considered case law to ascertain whether the insurance contract was "composite" or "joint". Had the policy been a considered to be a composite policy, the policy would protect each party's share in the assets. However, based on the insurance contract, FOS determined that the insurance contract was joint, and therefore the wife's interest could not be separated from that of her husband and the claim could be rejected on the basis that the co-insured deliberately caused the damage.

FOS 308798

Issues: Whether co-insured had the right to cancel the policy, whether policy joint or composite, whether claim could be denied because damage caused by co-insured.

The wife arranged a house and contents insurance to cover jointly owned property. The husband was named as a co-insured. The wife had been legally advised to force the husband to leave the house by way of an AVO, but agreed to let him stay in the house until there was a property settlement. The husband set fire to the house. The insurance policy had been cancelled by the husband a month earlier without the wife's permission or knowledge. FOS found that the insurer shouldn't have cancelled the policy. However, FOS found that the insurer had the right to deny the claim because the damage was caused by a member of their family and by someone who was lawfully at the address.

WestJustice 1

Issues: Husband caused house fire, wife not on insurance policy, interest on mortgage accruing while insurance matter resolved.

The victim of family violence was a single mother of two children. She suffered from a long-term illness and received a disability support pension. She experienced controlling behaviour by her husband.

The husband set fire to the jointly-owned home. It appears that he had planned to burn it with his wife inside. He was admitted as an involuntary psychiatric patient. A five-year intervention order was obtained to protect the wife and the children, who ended up living in a refuge for four months.

The wife wasn't listed as an insured on the insurance policy. There were concerns that even if the claim was paid that this may be paid to the husband, or to his family who claimed they held a power of attorney.

Following WestJustice's advocacy and pro-bono legal assistance, the insurer agreed to pay the claim and to make payment into a lawyer's trust account pending a family law property settlement.

While this was a positive outcome, it took significant work by WestJustice, and the delay in an outcome left the wife in a very difficult financial position, having paid over \$10,000, for rent and moving expenses – and interest was accruing on the mortgage which she couldn't pay.

WestJustice 2

The client is about 40, on disability support pension. She is the victim of family violence.

There is a property settlement on foot, but it is unclear whether there are any assets.

Client had an accident in a vehicle owned by her ex-partner. She believed there was insurance on the vehicle but that the policy was in her ex-partner's name. The client doesn't dispute liability.

The client was served with a court complaint relating to the accident. The client knew which insurer her husband had used in the past, and called them, but they were unable to confirm whether or not there was an insurance over the vehicle.

Thinking through solutions

While the EARG hasn't discussed all options to address these problems, the following are some initial thoughts from the members of our group.

Damage caused by a co-insured.

It is unjust (and seems to defeat the purpose of insurance) if a person cannot protect their interests in property, such as a house, against events over which they have no control.

While insurers could have family violence policies that "kick in" once family violence is reported (for example accepting damage by a family violence perpetrator as a basis for paying the victim's part of the claim), this problem is better addressed by changing the structure of household insurance policies at their inception.

The option of clearly wording household insurance policies as composite policies – where each insured can claim their share of the loss - should be considered. We understand the courts generally consider these policies to be composite policies in some countries such as New Zealand.

For such an approach to fully address this problem, mortgage lenders would need to be prepared to separate out liability for a joint mortgage. However, if family violence victims

could claim their share from an insurance claim, this issue could be raised with the banking institutions.

Damage by a family member or visitor.

While payment of claims for damage by a visitor, or family member, may increase claims and require attention to the risk of fraud, this exclusion impacts unfairly on insureds where damage is caused that is beyond their control – and particularly on victims of family violence. We believe that the insurance industry should examine this exclusion and consider options for compensating ‘innocent’ claimants.

In the meantime, insurers must better understand the nature of family violence, and that an ex-partner or violent relative may not have actually been ‘invited’ onto the property.

Industry information for family violence victims

We note that the ‘Understand Insurance’ website of the ICA does have a section on financial hardship but no mention of family violence. Once some responses are developed there should be clear information for victims of family violence.

Who is the insured?

The nature of the process of purchasing insurance means that couples who share property often obtain insurance in the name of one person only, meaning that a claim may be made (and paid to) one person, that a person who has an interest in the property may be unable to obtain information about the policy. Requiring all insured parties to consent at all stages of purchasing and maintaining a policy could be inefficient. It could also exacerbate problems experienced by some victims of family violence. This problem requires further consideration to identify a response that will improve outcomes for family violence victims - whether they are named on the policy or not.

One suggestion is that women who are victims of family violence, should have the same rights as victims of natural disasters to contact the ICA to seek information on their policies.

Privacy

Privacy policies must consider the risks of sharing forwarding, or other information, with a person who is jointly on the policy, or who has been on the policy in the past.

Investigations

We believe that there are a range of problems with the conduct of insurance investigators, which impact unfairly on many consumers, but that exacerbate problems experienced by victims of family violence.

Strict guidelines should be developed for insurance investigators, particularly in relation to personal interviews which ensure that the individual understands and can enforce their rights and is not pressured or harassed.

Family Violence Policies

The insurance industry should implement some of the more general family violence policies that are being adopted by other industries which cover issues such as staff training, identifying indicators of potential family violence and not requiring a victim to repeat her story.

Court Decisions and other relevant material

These are summaries of the main points from some relevant court decisions (not necessarily family violence related).

Advance (NSW) Insurance Agencies Pty Ltd v Matthews³

Fraudulent failure to disclose by one party, other party didn't have knowledge, whether fraud of one party = fraud of insured, Insurance Contracts Act.

In this case, the insurer rejected a claim by Mr and Mrs Matthews on the grounds that Mr Matthews fraudulently failed to disclose a material fact (which was that another insurer had rejected a prior claim of Mr Matthews relating to a fire at another business).

The initial judge found that there had been no misrepresentation in relation to a question "have you ever had any...claim rejected?" because "you" referred to the husband and wife jointly. However, the judge found there was a breach of the duty to disclose, s.21(1), which was fraudulent, but not on the part of the wife, and therefore the insurer couldn't avoid the contract altogether, so the court could determine the quantum of the claim.

On appeal by the insurer, the Court of Appeal considered the policy to be a composite policy, where "joint and several interests" were insured, and found the knowledge of both insureds was required before there is a duty of disclosure, and therefore the insureds had not failed to complete the duty to disclose.

The insurer was successful in having that decision overturned on appeal to the High Court which found that fraud on the part of one joint insured is "sufficient to characterize the joint failure to disclose as fraudulent". "On balance, it appears to me that the preferable construction of s.21(1) [Insurance Contracts Act, 1984] is to treat the words "known to the insured" as meaning, in the case of a policy of joint insurance, within the collective knowledge of the joint insured, that is to say, as known to at least one of them."

MMI General Insurance Ltd v Baktoo⁴

Composite or joint policy, fraud (setting fire) by one of the insureds, whether indemnity of co-insured.

A couple made an insurance claim when their restaurant was damaged by fire. The original trial judge found that the husband and lit the fire and could not benefit under the policy. Of interest to the EARG is the initial judge's reference to a different "socially realistic approach" developing in the US and Canada which enabled an innocent "joint assured" to recover the

³ Advance (NSW) Insurance Agencies Pty Ltd v Matthews [1989] HCA 22; (1989) 166 CLR 606 (2 May 1989)

<http://www.austlii.edu.au/au/cases/cth/HCA/1989/22.html>

⁴ MMI General Insurance Ltd v Baktoo & Anor [2000] NSWCA 70 (11 April 2000)

<http://www.austlii.edu.au/au/cases/nsw/NSWCA/2000/70.html>

appropriate proportion of a joint loss. He referred to a Tasmanian⁵ decision which followed a Canadian decision where a wife could recover her loss in circumstances similar to the current case.

The judge found that while the interests of the husband and wife were “inseparably connected”, that the wife had played no part in the fire and, as an innocent party, she was entitled to indemnity in respect of her proportion of the loss.

The insurer appealed.

The NSW Court of Appeal found that the interests in partnership property is inseparably connected and are to be treated as one, and that consequently the insurance is joint insurance, and the insurer is entitled to reject a claim made by the innocent joint insured.

Review of the Insurance Contracts Act

Excerpts from Chapter 9 “Innocent Co-Insureds” from “Final Report on second stage: provision other than section 54” (2004)⁶

9.3 In the case of spouses holding joint tenancy in a dwelling it is usual to be covered under a joint contract of insurance. There have been a number of cases involving wilful acts (for example, arson by one of the parties) which have led courts to consider whether such a policy is joint or composite. Under the ‘traditional’ approach to joint insurance of jointly owned property, the wrongdoing of one co-insured will preclude a claim by the other and no express wording in the policy to that effect is required for that to be the result. A rationale for such an approach is that all parties elected to treat the interests of the co-insureds as one under the contract, so it follows that an act or omission by one of them should affect both. To allow a claim in relation to jointly held property to succeed would allow the party in default to indirectly benefit.¹⁶⁶

9.4 Some decisions in other jurisdictions have taken a different approach to the question of joint or composite insurance in such cases. For example, in *Maulder v National Insurance Co of New Zealand Ltd*,¹⁶⁷ a case involving a husband deliberately destroying a house by fire, the court noted that the ‘traditional’ approach which focused on the nature of the property interests at the time the insurance contract was entered into failed to take into account the reality of modern spousal relationships and the fact that they can alter rapidly. The court expressed the view that insurers should be taken to know that the categorisation of property as ‘joint’ in the context of a spousal relationship is meaningless, and if the insurer wished to prevent an innocent party from recovering for loss due to breach by a co-insured, the policy would need to have clear language included to that effect. The court found that the insurance policy was a composite one and each insured had cover for their respective interests in the property. This type of approach to innocent co-insured cases has been coined a ‘socially realistic’ approach, as opposed to the traditional approach.¹⁶⁸

9.5 The issue of an innocent co-insured being disadvantaged also arises in the context of misrepresentation or non-disclosure by a co-insured.

⁵ *Holmes v GRE Insurance Limited* (1989) 5 ANZ Ins Cas 60-894 (Supreme Court of Tasmania).

⁶ http://icareview.treasury.gov.au/content/Reports/FinalReport/11_Chapter9.asp

ASIC Concerns about Insurance Investigation Practices

In a recent speech to the insurance industry, the ASIC Chairman said:

“We are also planning to review surveillance and investigation processes used by insurers to identify fraudulent claims. This is an area that has been highlighted by consumer representatives and media who have raised concerns about processes which are detrimental to consumers. Industry has been on notice of these concerns, and has had time to review them and address any shortcomings.”⁷

Joint/Composite legal decisions in New Zealand

This 1994 paper written by a New Zealand law student refers to the development of the law around joint/composite insurance policies in New Zealand.

<http://www3.austlii.edu.au/au/journals/OtaLawRw/1994/2.pdf>

⁷ Regulatory update to the general insurance industry, speech by Greg Medcraft, Chairman, Australian Securities and Investments Commission, Insurance Council of Australia Annual Forum (Sydney, Australia) 17 February 2017

