Can insurers recover from your employees after paying out on a corporate policy?

It is a standard term in insurance policies that an insurer which has paid out under the policy can take over any claims the insured had against third parties to recoup those losses. These rights of 'subrogation' also arise at law generally and are regularly used by insurers to minimise the impacts of an insured loss.

Often businesses will regard an insurance policy as an alternative to having to seek recovery from a third party that caused the loss and, of course, claiming under the policy is typically much less onerous than pursuing a third party. However, in claiming on the policy and once the insurer has paid, the insured is transferring the right to bring the third party claim to the insurer. From that point on the insurer will call the shots on whether and how to proceed to recoup the loss.

Having insurance does not enable businesses to cease involvement in available recovery actions. Subrogated claims are brought in the name of the insured and are likely to require the assistance of the insured's business and employees. This can affect the insured's business relationships and also act as a drain on its employees' time.

One recent approach by an insurer has highlighted a further example of issues that can arise with subrogation. The case *Rathbone Brothers Plc & Anor v Novae Corporate Underwriting Ltd (2014)* concerned a consultant (PEV) engaged by a Rathbone group company. PEV had also previously been an employee of that company. As is common, Rathbones took out an insurance policy to cover, among other areas, claims made against Rathbones group companies arising out of negligence of employees.

As part of his role with Rathbones, the consultant was subject of a negligence claim brought by the beneficiaries of a trust he acted as trustee for. However, as is common in service contracts, the consultant also had the benefit of an indemnity from Rathbones to cover any claims made against him as a result of work undertaken in his capacity as a consultant for Rathbones. Such an indemnity is often provided alongside insurance and provides an extra layer of protection for the consultant or employee; it can also act as an incentive for the employee or consultant to take on particular roles.

Rathbones and its insurers did not agree on coverage for the claim. The insurers took a number of points, including that even if the consultant was indemnified under the policy insurers could look to recoup amounts paid out under the policy from Rathbones itself. This was on the basis that it was entitled to exercise its rights of subrogation in the insurance policy and 'step into the shoes' of the consultant to claim against Rathbones under the indemnity and recover any losses it paid out.

In effect this made the losses circular. Rathbones had bought the policy to protect its business in respect of a particular risk, that risk eventuated; however if the insurer paid the third party claim it would seek to recover the payment from Rathbones. The policy was of no value to Rathbones in these circumstances.

Controversially the lower court considered this would be a valid use of the insurer's subrogation rights. The Court of Appeal however rejected this approach and made it clear that subrogation could not be used in this situation. The majority view of the Court was that a term should be implied into the insurance policy which would prevent insurers from seeking to use an employee's indemnity rights against the employer when the indemnity covered the same risks as the insurance policy taken out by the employer on its behalf and on behalf of employees/consultants. Many employers no doubt breathed a sigh of relief when the Court of Appeal overturned the High Court decision.

Is a Consultant an 'insured person'?

In reaching this decision, the Court of Appeal also considered whether a 'consultant' acting as a personal trustee would fall within the definition of 'insured persons' within the insurance policy. The insurance policy defined 'insured persons' as being among other categories of people:

"…a paid employee…working under the direct control or supervision of any insured company"

The Court of Appeal considered that it would be an extraordinary limitation of cover if when exercising their role as

trustees paid employees were not covered as the provision of trustee services was a major part of Rathbone's business and one of the principal reasons why it would seek professional indemnity insurance.

The Court also rejected the argument that a consultant was not a "paid employee" on the wording of this particular policy.

This case highlights a few issues with insurance policies/indemnities:

- An insurer is unlikely to be able to enforce rights under an indemnity provided by an employer who is co-insured with employees under a policy which the employer has taken out to cover the same risk as that covered by the indemnity.
- However to avoid arguments about subrogation in policies covering more than one insured, any intended waiver of subrogation should be clearly expressed in the policy.
- Employers providing indemnities should make it clear (if intended) that the indemnity is secondary to the relevant insurance cover.

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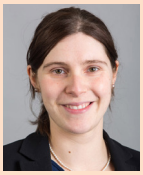

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