

# Insurer's Recovery Action Depends Upon the Policy Wording

The New South Wales Supreme Court recently confirmed that an insurer's right to subrogation and recovery under its policy arises from the conduct of particular parties in particular circumstances.

Whilst the court stated that subrogation is a creature of equity, they also confirmed that an insurer's right to recover may well hinge on the terms of the particular policy.

The decision in *Johnston v Endeavour Energy* in August 2015 resulted from litigation arising from the Blue Mountains bush fires in October 2013 when significant areas of the Blue Mountains were burnt out by a fire which is alleged to have started in Links View Road, Springwood.

Obviously there were a large number of people involved and a large number of varying insurance policies which covered different parties for different losses.

After paying out on the insurance policies, the representative of the insurance company wanted to be subrogated to all the rights of the insured parties.

Garling J in the Supreme Court decided consistently with previous authorities on subrogation if the insured recovers damages from a third party which include the sum insured then the insured is obliged to reimburse the insurer for that sum. Similarly, the insurer is not entitled to any monies over and above the sum necessary to be reimbursed.

Consequently, as Garling J stated:

"In the absence of any particular express or implied contractual term permitting the insurer to take recovery proceedings using the name of the insured, it is not open to the insurer to commence such action. "And further ...

"Unless there has been an assignment of an insured's right to an insurer, or an appropriate term exists, an insurer does not have a right conferred by the doctrine of subrogation to commence proceedings in the name of the insured."

So in the case of the bushfires the fact that the insurer had paid out on a property damage claim does not mean that it can start proceedings on behalf of the insured for the insured's personal injury, or indeed prevent the insured from commencing his own proceedings for his uninsured losses.

The typical strata policy will refer to the rights of recovery for a claim made under the policy but this may not necessarily extend to both insured and to uninsured losses depending upon the policy wording.

This decision should result in insurers having another check of their policy wordings to ensure that they provide the recovery rights that they believe they do.

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