

Rights and interests under contracts of insurance

Until now, litigation arising from motor vehicle collisions also known as 'Crash 'n' Bash' litigation instigated more often than not, by the Insurer of one of the motor vehicle, as a debt recovery action, has not legally been able to be named in the proceedings. Most Insurance Policies list as a term that should legal proceedings be instigated as a result of a motor vehicle collision, it is the owner and/or driver of the insured vehicle that will be named, and not the insurance company (**Insurer**) on the legal documents.

Assignment within Insurance

What we are seeing now are cases where the Insurer is being named and sued directly. Litigation of this nature arising when, without the knowledge or authorization of the Insurer, the Insured enters into a Deed of Assignment purporting to assign to a Third Party Repairer (**Repairer**) all "rights and interest under the Contract of Insurance to claim against the Insurer in respect to (the) claim".

Consider this scenario:

- Policy of comprehensive motor vehicle insurance with the Insurer of choice, covered by an Insurance Certificate;
- Motor vehicle was damaged whilst covered by the Insurer;
- The Insured lodges a claim under the insurance policy;
- The Insurer undertakes an assessment of the damaged vehicle, and compiles a quotation of the repairs;
- Without the Insurer's knowledge, the Insured obtains an alternative quote from an alternative repairer;
- A disparity exists between the two quotes; the quote obtained by the Insured is significantly higher than that obtained by the Insurer; and
- Without the Insurer's authorisation, the Insured enters into a Deed of Assignment purporting to assign to the repairer all "rights and interest under the Contract of Insurance to claim against the Insurer in respect to (the) claim".

The Insurer has never authorised the repairs to the Insured's vehicle, nor implied any intention to pay the repairer for works allegedly conducted under the Deed of Assignment. If the Insurer did not authorize the repairer, do the terms of the insurance policy protect the Insurer, or is the repairer entitled to recover directly from the Insurer?

Surely without the Insurer's authorisation for the repairs, the Insurer's responsibility, if any, is limited to the amount of the Insurer's own assessment of damages – the lesser of the two in this scenario. If paid by the Insurer to the Insured, who is responsible for the difference between that and the actual amount of repairs conducted under the alleged Deed?

The two issues to be considered:

- the validity of the assignment; and
- if the Insurer did not authorise the repairer, do the terms of the insurance policy protect the Insurer, or is the repairer entitled to recover directly from the Insurer?

In order to comment on these matters, it is necessary first to consider the Insured's position under their policy before moving to the question of any assignment of rights. The Product Disclosure Statement contained within most Insurance Policies outlines the Insured's entitlements.

In this scenario the basis of cover states that:

- only with the authorisation of the Insurer can the Insured nominate a repairer of choice; and
- the quotation provided by Insured's nominated repairer must be competitive; else the Insurer can decide to instruct another repairer.

Failure to obtain prior authorisation

However, just because the Insured may have failed to obtain authorization before conducting the repairs does not necessarily mean that the Insured has breached any policy terms. These terms do not prohibit the repairs being undertaken without the authorization of the Insurer, but rather identify exactly when the repairs shall be paid for, hence the introduction of [s.54\(1\) of the Insurance Contracts Act, 1984](#).

If the policy is questioned, [s.54\(1\)](#) requires an examination of the prejudice caused to the Insurer by the Insured failing to obtain the Insurer's authorisation and reduces the amount of the claim to a sum that fairly represents the extent to which the Insurer's interests were (so) prejudiced. Here, the prejudice would be represented by the differential between the Insured's repairer's cost of repairs and the lower sum as provided for by the Insurer's assessment.

Alternatively, the Insurer could offer a 'cash settlement' to the Insured for their assessed cost of repairs, not only because this is the authorised sum, but because the Insurer believes the nominated repairer's quotation is not competitive. If the disparity between the two amounts is of such a magnitude, there exists a suggestion that the higher figure could be outside the parameters of the competitive market place.

Such a test of competitiveness is objective rather than subjective following from an ordinary and natural interpretation of the provisions, and the pure belief of the Insurer. Hence, the onus of proving that the repairer's figure is not competitive solely rests with the Insurer. Especially given that it is the Insurer, itself, that is seeking the benefit of a clause within its own policy limiting its own liability. In order to be able to satisfy a court that it was entitled to settle the Insured at the lower figure, the Insurer would also carry the onus of establishing that the lower sum represented the reasonable cost of a competent and guaranteed repair. Evidence such as this would lead to a competition between the expert motor vehicle assessors called by both sides.

Has the Insured lawfully assigned their rights to the Repairer?

If so, can the repairer stand in the Insured's shoes as assignee and prosecute a cause of action for the higher amount against the Insurer?

The Deed of Assignment seeks to assign to the repairer all of the Insured's rights and interest under the Contract of Insurance to claim against the insurer. Accordingly, it does not purport to assign the policy, but merely the Insured's right to recover under the policy. This right to recover is a legal chose in action, and may be assigned. A legal assignment of a chose in action requires express notice in writing (to be) given to the debtor, refer [s.134 of the Property Law Act, 1958](#).

Whilst the failure to provide written notice does imply that a legal assignment has not been perfected, it does not necessarily mean that a valid equitable assignment of the right to recover has not occurred see [Alma Hill Constructions Pty. Ltd. v Onal \(unreported\) \[2007\] VSC 86](#). In that decision, his Honour Kaye J deals with some conflicting authorities to conclude that, otherwise valid assignments of choses in action without notice pursuant to [s.34](#) are enforceable in equity.

So, it would appear in this scenario that the Insured's assignment was valid in both law and equity as having bestowed a right upon the repairer to pursue the Insurer for the recovery of the Insured's entitlements under the policy with respect to this claim. Of course, Product Disclosure Statements differ between Insurers, and may in alternate circumstances purport to prohibit or limit any right of assignment on the part of the policy-holder.

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