JONES DAY

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COMMENTARY

Conflict Over Proportionate Liability Laws in Australia

Under Key Australian Federal Regimes, When is Joint and Several Liability Ousted by Proportionate Liability?

- The operation of the proportionate liability regimes in the Corporations Act 2001 (Cth), the Australian Securities and Investments Commission Act 2001 (Cth) and the Competition and Consumer Act 2011 (Cth)—and the extent to which they oust joint and several liability—has been rendered uncertain by two conflicting Full Court decisions of the Federal Court of Australia.
- One Full Court decision has held that proportionate liability only applies to specific causes of action based on misleading or deceptive conduct—and that other statutory causes for the same loss or damage give rise to joint and several liability. The successful applicant is then able to elect between the two pathways in enforcing against respondents. The majority in the other Full Court decision held that the proportionate liability regime is intended to cover the field in respect of all of the claims for the same loss or damage. As a corollary, no joint and several liability enforcement option arises.
- Pending resolution of the position through further court decisions or legislative reform, the immediate practical effect is that applicants will add claims governed by joint and several liability against so—called "deep pocket" (and/or reputationally sensitive) targets, especially if other co-respondents are insolvent or are going concern risks.

The judgments in two Full Court decisions of the Federal Court, delivered one week apart, have reached quite different views on an important aspect of the operation of the proportionate liability laws for a number of important federal statutory regimes.

Significant uncertainty now exists on a key point for federal litigation—i.e., when is joint and several liability ousted by the proportionate liability regime? It's a very important point in practice for litigators and those involved in advising clients on their rights and liabilities. One case suggests a considerably narrower operation of the proportionate liability regime that leaves room for joint and several liability, the other does not. Which position is correct? It is a point that is likely to require resolution by High Court appeal or statutory reform—but in the interim will likely cause significant headaches for those advising clients in litigation matters.

In 2004, all Australian governments sought to address the "deep pocket syndrome" whereby professional

service providers and public authorities were targeted in litigation so as to gain access to their insurance. The joint and several liability that existed at the time meant that a successful plaintiff could recover its entire loss from any respondent regardless of the respondent's share of responsibility. This was particularly attractive when the main entities that were liable were insolvent or had insufficient assets to meet the judgment. An auditor or local council may have been responsible for 10 percent of the harm but could be required to pay 100 percent of the damages claim. This led to a rise in insurance premiums.

To address the targeting of "deep pockets", joint and several liability was replaced with proportionate liability for the causes of action to which the regime applied. This meant that each respondent was liable to pay damages only to the extent of its share of the responsibility for the harm.

The federal regimes under consideration in the two Full Court decisions clearly applied to claims based on a traditional misleading or deceptive conduct cause of action (s 1041H of the Corporations Act and s 12DA of the ASIC Act).

In *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65 (6 June 2014), the court was asked to determine if a claim under s 1041E (false or misleading statements), although not apportionable itself, should be apportioned where the claim arose from the same facts and gave rise to the same loss as that for a claim under s 1041H, which was apportionable.

A unanimous Full Court said no. Rather, the applicant having succeeded on both claims was required to elect the remedy that it wanted. Due to the nature of the appeal, it was clear that the applicant chose s 1041E, and as a result, the respondents were liable on a joint and several basis, i.e., the applicant could recover 100 percent of its losses from any of the respondents.

The Full Court noted that the same statutory construction applied to the *Competition and Consumer Act 2011* (Cth) but not to the state equivalents of the proportionate liability regimes.

A week earlier, in *Wealthsure Pty Ltd v Selig* [2014] FCAFC 64 (30 May 2014), a Full Court majority adopted the opposite construction. Selig included numerous claims, such as misleading or deceptive statement in a prospectus, defects in a disclosure document, false or misleading statements, breach of contract and the tort of negligence. Each of these was not apportionable standing alone. The applicants succeeded on all claims. The majority found that all of the above claims were subject to the proportionate liability regime because the regime applied when the loss or damage caused by those claims was the same as the loss or damage caused by contravention of s 1041H or s 12DA.

The approach in the *Bathurst Council* case limits the proportionate liability regime to claims under ss 1041H and 12DA—the traditional misleading or deceptive conduct cause of action. The approach in *Selig* applies the proportionate liability regime to all claims, provided there is a claim under ss 1041H and 12DA and they result in the same loss or damage.

The *Selig* approach gives the proportionate liability regime a greater reach, providing more extensive protection for "deep pocket" defendants and is in keeping with the approaches in the Australian states. If the approach in the *Bathurst Council* case prevails, then claims aimed at deep pockets are likely to resurface as an applicant can employ a number of causes of action in relation to the same alleged loss and, if successful on a number of them, elect one that is not subject to the proportionate liability regime.

While the correct legal position is now unclear, what is clear is that these decisions are likely to fuel another round of debate on the proper limits of proportionate liability.

Lawyer Contacts

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