JONES DAY

MAY 2015

COMMENTARY

High Court of Australia Limits Proportionate Liability Laws to Misleading and Deceptive Conduct

Key Points

- The High Court in *Selig v Wealthsure Pty Ltd* [2015] HCA 18 has determined that the proportionate liability regime in Div 2A of Pt 7.10 of the *Corporations Act 2001* (Cth) and Pt 2, Div 2, subdiv GA of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) only apply to s 1041H and s 12DA respectively—prohibitions on misleading or deceptive conduct.
- The proportionate liability regimes do not apply to other causes of action for the same loss or damage.
- The reasoning will extend to the proportionate liability regime in Part VIA of the *Competition and Consumer Act 2011* (Cth).
- While the High Court has now provided certainty as to the operation of the proportionate liability regimes in key federal legislation, it is also likely to fuel another round of debate on the proper limits of proportionate liability.

Background

The judgments in two Full Court decisions of the Federal Court, delivered one week apart, reached different views on an important aspect of the operation of the proportionate liability laws for two important federal statutory regimes—the Corporations Act and the ASIC Act.[1] In one of those cases, *Selig v Wealthsure Pty Ltd*, special leave was sought and granted by the High Court of Australia.

The *Selig* case was based on investment advice from the authorised representative of Wealthsure Pty Ltd that saw Mr and Mrs Selig invest in Neovest Limited, which was effectively a Ponzi scheme, with the result that they lost their entire investment. The *Selig* case included numerous claims, including s 1041H of the Corporations Act and s 12DA of the ASIC Act, misleading or deceptive statement in a prospectus, defects in a disclosure document, false or misleading statements, breach of contract and the tort of negligence. The applicants succeeded on all claims.

The respondents sought to have the proportionate liability regime in Div 2A of Pt 7.10 of the Corporations Act and Pt 2, Div 2, subdiv GA of the ASIC Act applied to their liability under all of the causes of action. This would have meant apportioning responsibility amongst the operators of the investment scheme and the providers of the investment advice. The operators of the investment scheme were either in liquidation or bankruptcy.

The primary judge held that Div 2A applies only where there has been a contravention of s 1041H and has no application where a plaintiff succeeds on other statutory and common law causes of action, in respect of which a defendant is liable for the whole of the damage. The Full Federal Court by a majority overturned the primary judge and applied the proportionate liability regime to all of the claims.

Div 2A of Pt 7.10 of the Corporations Act

Central to the determination of the application of Div 2A was the concept of an "apportionable claim". Was it limited to only the claim based on breach of s1041H or did it apply to the other claims that gave rise to the same loss and damage?

Section 1041L states:

> (1) This Division applies to a claim (an apportionable claim) if the claim is a claim for damages made under section 1041I for:
>
> (a) economic loss; or
>
> (b) amage to property; caused by conduct that was done in a contravention of section 1041H.
>
> (2) For the purposes of this Division, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).
>
> (3) In this Division, a concurrent wrongdoer, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.
>
> (4) For the purposes of this Division, apportionable claims are limited to those claims specified in subsection (1).
>
> (5) For the purposes of this Division, it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died."

Section 1041H(1) contains the prohibition on misleading or deceptive conduct in relation to a financial product or service. Section 1041I provides the cause of action for loss or damages for contravention of s 1041H(1), as well as a number of other sections.

The High Court focussed on s 1041L(1) which limits an apportionable claim to a contravention of s1041H that gives rise to a claim for economic loss or damage to property under s1041I.

The Full Federal Court majority below had extended the meaning of apportionable claim through s 1041L(2) which refers to the loss or damage being based on more than one cause of action.

The High Court rejected the above interpretation on the basis that:

- The word "claim" must be given the same meaning in both ss (1) and (2) of 1041L. The Full Court's approach results in claim having two different meanings.
- Viewing s 1041L(2) as extending the meaning of s 1041L(1) is inconsistent with s 1041L(4) which expressly states "apportionable claims are limited to those claims specified in subsection (1)".
- The function of s 1041L(2) is not to complete the definition of an apportionable claim. Its purpose is to explain that, regardless of the number of ways in which a plaintiff seeks to substantiate a claim for damages based upon a contravention of s 1041H, so long as the loss or damage claimed is the same, apportionment is to be made on the basis that there is a single claim.

The respondents also sought to argue that it was unlikely that different assessments of claims for the same loss or damage could have been intended—some being apportionable and some not. The High Court rejected this argument as s 1041N(2), which forms parts of Div 2A, states:

> If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:
>
> (a) liability for the apportionable claim is to be determined in accordance with the provisions of this Division; and
>
> (b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Division) are relevant.

The High Court also examined s 1041N(3)(a) which instructs the court that "[i]n apportioning responsibility between defendants in the proceedings … the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law".

The High Court stated that in the context of Div 2A, the "relevant law" is s1041I(1B) which provides for contributory negligence in respect of conduct in contravention of s 1041H. The High Court takes the view that s 1041N(3)(a) provides another indication that Div 2A is only concerned with s 1041H.

Ramifications

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 his/her 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 his/her share of the responsibility for the harm.

In *Selig v Wealthsure*, the High Court raised the counter-argument:[2]

> There is an obvious benefit to wrongdoers from this kind of proportionate liability regime. … proportionate liability applies regardless of whether a concurrent wrongdoer is insolvent or is being wound up. The risk of a failure to recover from a particular wrongdoer shifts entirely to the plaintiff.

The High Court's finding means that plaintiffs will endeavour to structure their claims so that they are not subject to proportionate liability and the prospect of being out-of-pocket if a defendant is insolvent.

Consequently, it can be expected that plaintiffs will seek to bring multiple claims. The prohibitions on misleading or deceptive conduct will still be used because they have advantages over other statutory and common law claims, such as: there is no fault or intention required, there is no need to show a duty of care or breach of that duty or foreseeability.[3] However, to avoid proportionate liability, other claims based on tort, contract, equity or statute where joint and several liability applies will be included.

This means that litigation is likely to be longer and more costly as multiple claims are pleaded and brought to trial.

While the High Court has now provided certainty as to the operation of the proportionate liability regimes in key federal legislation, it is also likely to fuel another round of debate on the proper limits of proportionate liability.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

John Emmerig
Sydney
+61.2.8272.0506
jemmerig@jonesday.com

Michael Legg
Sydney
+61.2.8272.0720
mlegg@jonesday.com

Endnotes

1 *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65 (6 June 2014) and *Wealthsure Pty Ltd v Selig* [2014] FCAFC 64 (30 May 2014). *See Jones Day Commentary*, "Conflict Over Proportionate Liability Laws in Australia" (June 2014).

2 *Selig v Wealthsure Pty Ltd* [2015] HCA 18 at [21].

3 *Selig v Wealthsure Pty Ltd* [2015] HCA 18 at [20], [36].