

What is dual insurance?

Natalie Elphinstone, Social Media Officer
June 2020

What is dual insurance?

- ▶ In essence:

Dual insurance (also known as double insurance) arises when two separate insurance policies cover the same risk

- ▶ There can be two or even more policies that cover the same risk

- ▶ Simple starting point when considering dual insurance is asking the question:

Could the insured make a successful claim for indemnity under more than one policy, regardless of who took out the policy?

What is dual insurance? (cont.)

- ▶ The principles that arise from judgments are that dual insurance will arise if:
 - Two (or more) insurers are “under co-ordinate liabilities to make good the one loss”¹
 - The insurers have “a common interest, and a common burden”²
 - The insurers have a “common obligation”³
 - The insurers have an obligation “of the same nature and to the same extent”⁴
 - The insured has “equal or substantially equal recourse” to both policies of insurance⁵

What is dual insurance? (cont.)

- ▶ The Courts have stated further:
 - “The element essential for contribution is that, whatever else may be covered by either of the policies, each must cover the risk which has given rise to the claim. There is no double insurance unless each insurer is liable under his policy to indemnify the insured in whole or in part against the happening which has given rise to the insured's loss or liability.”¹
 - “The nature or quality of the obligations is critical although the quantum of liability between co-obligors may vary”⁶
 - The notion of coordinate liability is one that depends on common interest and common burden, and that liability must be of the same nature and to the same extent. Justice McHugh of the High Court stated that “difficulty in defining which liabilities meet that description [of co-ordinate liability] is noted almost as often as the term is used.”⁷

Scenario I

- ▶ Two different policies taken out by different people that both cover the same insured:
 - **Policy A:** Business Insurance Policy purchased by the subcontractor which provides cover for property damage arising out of or in connection with the subcontractor's business
 - **Policy B:** Contract Works Policy purchased by a principal contractor which provides cover to the principal contractor for property damage arising out of or in connection with the contract works whilst at a contract site

Assume that the subcontractor was working on the contract site and caused damage to the contract works.

Scenario I (cont.)

- ▶ Factors to be considered when determining whether dual insurance applies in this scenario:
 - Does the definition of “Insured” in Policy B extend to subcontractors not named on the policy schedule?
 - Did Insurer A pay out the claim?
 - Would Insurer B have also paid out the claim had it been made against Insurer B instead of Insurer A?
 - Do both policies contain a common obligation, have a common interest and common burden, and are they of the same nature and the same extent, that is, do they have co-ordinate liabilities?

Scenario 2

- ▶ An insured purchases two different policies which have overlapping cover.
 - **Policy A:** Broadform Liability Policy
 - **Policy B:** Professional Indemnity Policy, which has a personal injury extension
- ▶ Policy A is designed to cover the insured's general liability risks, such as incidents which occur as a result of their business activities or at their place of business
- ▶ Policy B is designed to cover insureds that act in a professional capacity, who “provides advice or services of a skilful character according to an established discipline“ (e.g. medical practitioners, accountants, architects, real estate agents etc)

Scenario 2 (cont.)

- ▶ Additional factors to be considered when determining whether dual insurance applies in this scenario:
 - What allegations of negligence has the third party made against the insured?
 - In what capacity was the insured acting in at the time of the loss (e.g. were they providing a professional service, or acting in their capacity as an occupier of a property)?
 - Does Policy A contain a breach of professional duty exclusion?
 - Does Policy B limit claims made against the insured to only claims where the insured owed a professional duty to its client (and not third parties generally)? If so, was the insured acting in a professional capacity?

Scenario 3

- ▶ Two different policies taken out that both cover the same insured
 - **Policy A:** Public Liability Policy purchased by a warehouse owner which covers its liability to people including people who store goods in the warehouse
 - **Policy B:** ISR policy purchased by the warehouse owner which covers property damage to property which the warehouse owner was legally responsible for
- ▶ A fire occurs and all of the goods stored in the warehouse are destroyed
- ▶ Insurer A pays out the loss, and then seeks dual insurance from Insurer B

Scenario 3 (cont.)

- ▶ Insurer A was insuring the risk that the warehouse owner had as a bailee of goods
- ▶ Insurer B was insuring the risk that warehouse owner had as a third party for causing damage to goods belonging to another person
- ▶ Therefore, dual insurance probably does not apply in this case because the two policies were insuring different **types** of risk

Remember!

- ▶ This is an overview only
- ▶ Dual insurance can be very complicated
- ▶ There are **other** exceptions to dual insurance

Example: the application of “other insurance” or “excess policy” clauses

Cases

1. Albion Insurance Co Ltd v Government Insurance Office (NSW) (1969) 121 CLR 342; [1969] HCA 55.
2. Cited by the majority in HIH Claims Support Ltd v Insurance Australia Ltd [2011] HCA 31;(2011) 244 CLR 7 (citing Eyre LCB in Dering v Earl of Winchelsea (1787) 1 Cox 318 at 322-323 [29 ER 1184 at 1186]).
3. HIH Claims Support Ltd v Insurance Australia Ltd [2011] HCA 31;(2011) 244 CLR 7
4. HIH Claims Support Ltd v Insurance Australia Ltd [2011] HCA 31;(2011) 244 CLR 7(citing 1987 SLT 345 at 348 per Lord Ross, employing the expression of Lord Chelmsford in Caledonian Railway Company v Colt (1860) 3 Macq 833 at 844)
5. HIH Claims Support Ltd v Insurance Australia Ltd HIH Claims Support Ltd v Insurance Australia Ltd (2010) 16 ANZ Insurance Cases 61-863 at 78,501-78,502 [23]
6. HIH Claims Support Ltd v Insurance Australia Ltd (citing Albion (1969) 121 CLR 342 at 345-346; Government Insurance Office of New South Wales v Crowley [1975] 2 NSWLR 78 at 83).
7. Burke v Lfot Pty Ltd [2002] HCA 17

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Natalie Elphinstone
Social Media Officer, WII (Vic)

Thank you