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Financial Lines Alert

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Federal Court rules that "*Dispute splitting*" at FOS is not "*claim splitting*"

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Introduction

The Financial Ombudsman Service (**FOS**) Terms of Reference specify the maximum financial remedies which may be awarded by FOS "*per claim*". For disputes involving financial advice lodged between 1 January 2010 and 31 December 2011 the maximum remedy is $150,000 per claim. For Disputes lodged after 1 January 2012 the maximum remedy is $280,000 per claim. Individuals whose losses exceed the financial caps often argue that their dispute involves multiple "*claims*" and is therefore subject to multiple limits. Unsurprisingly that position is disputed by Financial Services Providers (**FSPs**) and their insurers.

While FOS has issued guidelines about "*claim splitting*", until recently FOS' approach had not been the subject of judicial consideration. In ***Wealthsure Pty Ltd v Financial Ombudsman Service Pty Ltd*** [2013] FCA 292 the Federal Court of Australia considered the issue.

Facts

The circumstances of the case are relatively common for financial advice disputes in the post GFC environment. Between November 2005 and March 2007 Wealthsure's authorised representatives provided investment advice to Mr and Mrs Box. The advice was provided in 3 separate Statements of Advice (**SOA**). The investments recommended in each SOA were based on an assessment of the Boxes' risk profile that was undertaken prior to the issue of the first SOA. That assessment was revisited and confirmed prior to issuing each subsequent SOA. The investments lost substantial value and the Boxes lodged a dispute with FOS alleging that their losses were the caused by Wealthsure's deficient advice.

The Boxes argued that, since their losses arose from investments recommended in 3 separate SOAs, their Dispute comprised 3 separate "*claims*" and therefore a separate compensation cap of $150,000 applied to each claim. The combined value of the losses claimed exceeded $150,000 but was less than $450,000.

Wealthsure argued that because the losses arose from the initial assessment of the Boxes' circumstances in 2005 and any subsequent advice was merely a continuation of any breach of duty which arose from that assessment, the dispute comprised a single indivisible claim to which a single cap of $150,000 applied.

FOS determined that the Dispute comprised 3 "*claims*" which were each subject to a separate compensation cap. Wealthsure sought a declaration from the Federal Court that the Dispute was a single claim and therefore the maximum amount that could be awarded by FOS was $150,000.

The Decision

In reaching his decision, Justice Gilmour of the Federal Court noted that:

+ the FOS Terms of Reference make clear that a "*Dispute*" can comprise more than one "*claim*" with each "*claim*" subject to a separate monetary cap; and

+ the FOS Operational Guidelines provide that:

"... the expression "Claim" refers to the set of facts that, put together, give an Applicant a right to ask for a remedy. This means a set of separate events or separate facts that lead to the alleged losses. FOS does not aggregate a number of claims into one claim just because the claims all arose from an ongoing relationship between an FSP and an Applicant..."

After considering the various common law rules in relation to claim splitting (and determining that those rules were not infringed), His Honour held that:

+ Wealthsure had a duty under section 945A of the **Corporations Act** to have a reasonable basis for its advice;

+ the duty under s945A arose when each SOA was issued; and

+ the duty required Wealthsure to revisit the Boxes' risk profile before each SOA was issued.

His Honour concluded:

> *"...If there was negligence in the attribution of an inappropriate risk profile at the outset then the generic error was repeated on two further occasions. That it was an error in each case requires to be adjudged upon the personal circumstances of the Boxes at those different occasions. There would then have been not one but three errors, albeit from the same generic error.*
>
> *That the duty of care or statutory duty might be similar in each instance does not alter the position that the giving of each SoA ... constituted a discrete set of facts that gave the Boxes the right to ask for a remedy which is in the language of a 'claim' as expressed in the Operational Guidelines..."*

It followed that there was no splitting of claims and that the Dispute before FOS comprised 3 separate "*claims*" each subject to a separate monetary cap.

Implications

FSPs often argue at FOS that where there is an on-going advice relationship with their client, a single error which is perpetuated through a series of subsequent SOAs is a single breach of duty and therefore a single claim subject to a single limit. Unless overturned on appeal the Federal Court's decision in ***Wealthsure*** means that argument is now unlikely to be successful at FOS (at least in disputes where the claimant's circumstances do not change over time). With the increasing of the monetary cap to $280,000 "*per claim*" for financial advice disputes lodged with FOS after 1 January 2012, that is a concerning development for FSPs and their insurers.

Many FSPs have separate endorsements to their professional indemnity policies that provide discrete terms of cover for FOS matters. In many instances those endorsements, while written with FOS jurisdictional limits in mind, are drafted to limit insurance cover and/or apply deductibles based on a single dispute being a single claim for the purpose of the policy. Insurers and FSPs should carefully review the terms of their professional indemnity policies to determine if the cover for FOS Disputes remains appropriate.

Any appeal from Justice Gilmour's decision must be filed before the end of April 2013. We will monitor any further developments and issue a further alert, should the effect of the decision be altered or confirmed by Appeal. ■

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