

# **DIGGING FOR GOLD IN THE ACCIDENT BENEFITS FILE**

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Thanks to the Supreme Court of Canada's decision in *Whiten v Pilot Insurance Co.*, 2002 S.C.C. 18, both bad faith and punitive damages have now been brought to the forefront in first party claims. First party insurers have received a direction from the highest court which condemns claims procedures which indicate high-handed malicious conduct and punishes them with a severe monetary penalty. First party insurers have now been forced to recognize the serious repercussions which follow in handling their claims in a "bad faith" manner. With first party plaintiffs eager to find bad faith in every case, insurers are aware that their file is now subject to intense scrutiny.

This paper does not propose to go into the historical or current state of the law with respect to bad faith claims. Rather, this article hopefully will provide a brief summary of the types of records to request and insist on being produced from an insurance company which once produced may be able to be used in a damaging way against the insurer. As there are over 250 arbitration and appeal decisions from the Financial Services Commission of Ontario ("FSCO") each year, it has become virtually impossible to review each and every decision. However, with a network of lawyers put together by the Ontario Trial Lawyers Association, it has made the job easier to stay on top of the latest buzz from FSCO.

Although the *Whiten* decision provides a blueprint in establishing a bad faith claim in first party disputes, counsel must keep in mind that they do not have a "license to go on a fishing expedition". In *Santos v Santec Investments Inc.*, [1999] O.J. No. 548 (Gen. Div.), the Court held that:

"Punitive damages which is an extraordinary discretionary remedy should not be used as a boiler plate issue for invasive discovery which is not truly relevant to the factual disputes in issue."

All documents relating to any matter in issue in an action that are or have been in the possession, control, or power of a party to the action must be disclosed in an affidavit of documents. Under the *Dispute Resolution Practice Code*, in proceedings before FSCO, there is no examination for discovery process. Neither is there a process that requires the exchange of affidavits of documents. The only formalized

process for the exchange of documentary information is the pre-arbitration conference, which must take place pursuant to the *Dispute Resolution Practice Code*. Rule 32 of the *Dispute Resolution Practice Code* requires an exchange of appropriate documents before the pre-hearing. Additionally, under section 5 of the *Statutory Powers and Procedures Act*, an arbitrator is empowered to order production of documents, unless the documents are privileged.

### **Finding the Gold**

Insurers quite often have a collection of reference manuals, books and articles which are kept for the administration and handling of claims. Further, adjusters will keep a detailed log of all their involvement in a particular file including their opinion of medical evidence, opinion of the claimant's credibility and suggestions for reserve and interpretation of surveillance, etc. In order to mine for these documents, be prepared for the assertion from an insurer that the documents are protected by privilege.

Before a checklist of documents is considered, a brief review of the law of privilege is worthwhile.

### ***Privilege Primer***

The question of privilege is a complicated one. This paper is not intended as a detailed explanation of the subject of privilege, however, it is intended that counsel will be armed with enough information on privilege and the decisions in this area that they can combat the assertion and obtain adequate disclosure.

The current leading authority on the establishment of a privilege to documents is the decision of the Ontario Court of Appeal in *General Accident Insurance Company v Chrusz* (2000), 45 O.R. (3d) 321. There are two main kinds of privilege, namely litigation privilege and solicitor-client privilege. These two privileges are very different. Litigation privilege can only arise in the context of pending litigation. Solicitor-client privilege can arise absent of litigation, so long as there has been an established solicitor-client relationship.

### *Litigation Privilege*

The *Chrusz* case confirmed that the "dominant purpose test" is the law in Ontario. To attract the protection of litigation privilege, the dominant purpose for the creation of the document must have been litigation, actual or contemplated, at the time the document was created. This interpretation changes the previous notion where the "substantial purpose" test was followed. In the *Chrusz* case, Justice Carthy held:

"In my view, an insurance company investigating a policy holder's fire is not, or should not be considered to be, in a state of anticipation of litigation. It may be that negotiations and even litigation will follow as to the extent of the loss, but until something arises to give reality to litigation, the company should be seen as conducting itself in good faith in the service of the insured."

Oftentimes, insurers claim privilege early in investigation on the basis of the anticipation of litigation. However, if the insurance company is anticipating litigation prior to completing their investigation or before determining entitlement, then it is difficult for the insurer to suggest that they are acting in good faith in the service of their own insured.

In proceedings at FSCO, there is a question as to whether privilege can be attached to documents following an Application for Mediation.

In *McCullough v AXA Insurance Company* (unreported), July 21, 2000, Toronto File No.: 99-CV-64703 (Gen. Div.), Justice Stinson ordered the adjuster notes to be produced despite the assertion by the defendant's insurer for privilege on the basis that the dominant purpose of the notes was to obtain information for their solicitors in anticipation of litigation. Justice Stinson followed Lord Denning in *Waugh v British Railways Board* [1980] A.C. 521 (HofL) as follows:

"If material comes into being for a dual purpose, one to find out the cause of the accident, the other to furnish information to the solicitor, it should be disclosed, because it is not then wholly or mainly for litigation."

In *Samolia v Prudential of America General Insurance Company (Canada) and Truman Leacher* (unreported), July 14, 2000, Windsor File No.: 97-GD-34065 (Gen. Div.), Justice Brockenshire ordered the insurer's entire claims file produced for the period of time after the action had been commenced until the company withdrew its claim of misrepresentation and fraud against the insured.

Similarly, in *Perigny v Royal Insurance Company of Canada* (Court File No.: 98-CV-158130, July 19, 2000), Justice Brennan ordered production of adjusters' notes and held:

"[The] insurer's file relating to the handling of the claim and benefits payable, I hold that that it is not established that such file documentation was produced for the sole or dominant purpose of litigation until the statement of claim herein was delivered, and therefore privilege does not attach to shield such documents from production. Even after commencement of the action, activities of the defendant insurer may be relevant to the claim of bad faith and must be the subject of discovery and production, updated to the time of trial in supplementary affidavits of documents where reasonably requested."

Counsel should no longer accept privilege simply on the grounds of an issued claim or an application for mediation.

### ***Solicitor-Client Privilege***

Solicitor-client privilege may also apply to a document whether or not it was prepared in contemplation of litigation. The Supreme Court of Canada set out the description of the privilege in *Descfeaux v Mierzwinski* [1982] 1 S.C.R. 860:

"Where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relating to that purpose, made in confidence by the client are at his insistence permanently protected from disclosure by himself or by the legal advisor, except if the protection is waived."

It was noted in the *Chrusz* case that:

"Solicitor-client privilege will extend to third party when the third party employs "an expertise in assembling information provided by the client and in explaining that information to the solicitor."

Thus, the work product of the expert may be covered by this rule of privilege, provided there is a direct relationship with the expert and the party at the direction of the solicitor. Privilege will be lost of any document when it is intentionally disclosed to a third party with whom there is no common interest.

### **The Gold Within an Insurance Claims File**

#### ***Complete Claims File***

You should ask for a complete copy of the Accident Benefits file and all documentation within it. The file will likely contain adjusters' log notes, handwritten or electronic, medical records, draft medical reports and DAC reports amongst other material. Insurers are likely to state that material in the claims file is irrelevant, protected by litigation or solicitor-client privilege.

Keep in mind the following decisions to enable that this material is disclosed:

1. Master Polika held in *McLoughlin v Royal Insurance Canada*, [1997] O.J. No. 4707 (Gen. Div.) at 2:

"The plaintiff's position is that as their claim includes one for punitive and exemplary damages based on the defendant's alleged high-handed and arbitrary conduct and complete disregard of its obligations to the plaintiffs pursuant to the requirements of the Statutory Accident Benefits Schedule, Ont. Reg. 776/93, as amended by Ont. Reg. 635/94, they are entitled to production of the whole of the claims file. Their core argument is that as all the information is in the defendant's possession in its claims file they have no other way of proving this portion of their claim and thus the whole file ought to be produced."

2. *Samolia v Prudential of America General Insurance Company (Canada) and Truman Leacher* (July 14, 2000), Windsor File #97-GD-34065 (Gen. Div.), at p.3 para.7, Justice Brockenshire opined:

"In my view the plaintiff herein should be entitled to the entire claims file, including anything and everything in the file during the period that the company maintained its refusal to pay."

3. *Bergeson et al. v National Surety Corporation* (1986), 112 F.R.D. 692 (D. Mont.) at p. 697:

"The claims file is a unique, contemporaneously prepared history of the company's conduct."

### ***Adjuster Log Notes and Correspondence***

With respect to the relevance of log notes, Justice Dilks stated in *Sheikh v The Personal* (November 13, 1997), Toronto File # 97-CU-125357:

"Here, policies of general application, whether contained in Minutes, memoranda, manuals or directives, are relevant as far as they deal with the manner in which the claimants and their claims are to be treated. For these reasons, I conclude that the Master was clearly wrong. The appeal should be allowed and the Respondents should be ordered to produce all material in their possession listed in the Notice of Appeal."

In *Belair Insurance Company and Candido* (FSCO P99-00055, November 9, 1999), the Director's Delegate upheld the pre-hearing arbitrator's order that the insurer produce its notes, memoranda or other documents concerning its decision to deny the occupational therapy benefits in dispute, subject to litigation privilege, and that the insurer describe all documents for which privilege was claimed, including the basis of the privilege claimed.

Also, see the following cases:

1. *Samolia v Prudential of America General Insurance Company (Canada) and Truman Leacher*, (unreported), July 14, 2000, Windsor File # 97-GD-34065 (Gen. Div.)
2. *Bergeson et al. v National Surety Corporation* (1986), 112 F.R.D. 692 (D. Mont.) at p. 697
3. *McLoughlin v Royal Insurance Canada*, [1997] O.J. No. 4707 (Gen. Div.) per Master Polika, at p. 2
4. *Cappadocia v Canadian General Insurance*, [1998] O.J. No. 5681, (Gen. Div.) per Master Polika.

### ***Reserve Amounts***

The regulations of the Superintendent of FSCO require that an insurance company appropriate part of its retained earnings for outstanding claims. These reserves are monitored by the Superintendent of Insurance and in the event that reserves are inadequate, insurers can be penalized and may lose their license. If you are able to ascertain the reserve amount set for a claim, you can usually determine how far the insurer will go to settle. In first party claims, reserve amounts can be used to mount a bad faith argument in that should the reserve be set high, settlement offers at much lower amounts offered by insurers would be evidence of how the insurer has disregarded its policies to treat the insurer fairly.

See *Samolia v. Prudential of America General Insurance Company (Canada) and Truman Leacher*, *supra*. Also see *Sheikh v The Personal* (July 3, 1998), Toronto File # 97-CU-125357 and *K. Cooper-Stephenson*, *Personal Injury Damages in Canada*, 2<sup>nd</sup> Ed. (Toronto: Carswell, 1996 at p. 99).

### ***Adjusters' Notes Disclosing Reserve Numbers***

Reserve amounts were forced to be disclosed in *Sheikh v The Personal* where Master Clark stated:

"In view of the plaintiff's claim that the defendant stopped paying the benefits out of bad faith, I am persuaded that the reserve numbers should not have been blacked out in the adjuster's notes. The numbers could not be said to have been generated in contemplation of litigation."

Reserves were also ordered to be produced in *Campeau v Liberty Mutual* [2001] FSCO A00-000522 and in *Hall v Co-op* (1992) 14 C.P.C. (3d) 355.

Reserves were not produceable in *Mizzi v York Fire & Casualty Ins. Co.* [2001] FSCO A01B000176.

### ***Computer Notes***

As to disclosing the computer version of adjuster notes, in *Perigny v Royal Insurance*, it was held:

"As to the computer notes - the insurer's file relating to the handling of the claim and benefits payable, I hold that it is not established that such file documentation was produced for the sole or dominant purpose of litigation until the Statement of Claim herein was delivered, and therefore privilege does not attach to shield such documents from production."

### ***Legal Opinions Relied Upon in Making Decisions***

Insurers usually rely on a number of sources of information in denying a client's claim. Oftentimes, the reason is based on legal advice. However, where there is sufficient evidence to show that an insurer failed to obtain a legal opinion, then that evidence could be used against the insurer as one of the facts to demonstrate a bad faith claim.

When an insurer accuses an insured of fraud, courts are more likely to require the entire file to be opened up. After relying on the defendant's discovery admission that the minimum standard expected at the defendant insurance company prior to accusing an insured of fraud was to obtain and rely on the advice of legal counsel, in *Samolia v Prudential of America General Insurance Company (Canada) and Truman Leacher, supra* where Justice Brockenshire ordered that legal opinions for denying coverage produced.

See also *Hartford Accident and Indemnity Co. v Maritime Life Assurance Co.* (1997), 9 C.P.C. (4<sup>th</sup>) 102 (N.S.S.C.).

### *Extending Surveillance and Investigation*

Among the information that you should request with respect to any investigation is the names of all persons who carried out any surveillance, their qualifications and a copy of their curriculum vitae. Along with your request for this information, it is important also to obtain investigation information including searches and other background checks with respect to your client that the insurance company has undertaken to obtain. Further, copies of videotapes, still photographs, negatives, notes of investigator, letters to investigators and to insurers should also be demanded as the information may ultimately show that the investigator edited out information which may have been damaging to the insurer's position. With respect to production of surveillance tapes and investigation tapes produced to experts under the *Dispute Resolution Practice Code*, formerly Rule 37 and the current Rule 40, information relating to surveillance and investigation must be disclosed.

In *Cappadocia v Canadian General Insurance*, [1998] O.J. No. 5681 (Gen. Div.), Master Polika stated:

"In respect of the surveillance reports and videotapes once they were given to Dr. Ozersky, used in the D.A.C. assessment which assessment was both relied upon and disclosed by the defendant, it is clear to me any privilege attaching thereto was waived and I so find."

Further, the production of surveillance reports was ordered by Justice Brennan in *Perigny v Royal Insurance, supra*:

"I hold also that if some surveillance evidence is disclosed to the claimant, privilege is waived for all such evidence."

In addition, letters of instruction to investigators was also ordered by Justice Brennan *Perigny v Royal Insurance, supra*.

See also *Campeau v Liberty Mutual, supra*, where arbitrator Blackman ordered the entire videotape surveillance, still photographs and notes of the investigator along with his C.V. The videotape, which was

originally 35 minutes long, had been edited down to 13 minutes. Liberty Insurance was only prepared to deliver the edited videotape. Finally, in *Puljic and Zurich Insurance Company* (FSCO P00-00022, June 1, 2000), the Director's Delegate questioned the appropriateness of limiting the insurer's production obligations to those occasions when it decided to rely on any portion of the surveillance or investigative evidence. He commented that:

"Courts and tribunals have generally been moving toward early and full disclosure, minimizing the ability of a party to "bury" relevant information that might assist the other side. The Commission certainly encourages the early exchange of documents as an important part of the mediation process and to ensure a fair hearing."

### *Claims Adjusting Manuals*

Insurance companies use different types of manuals and resources in order to train their employees in the adjustment of claims. The claims manual is relevant to show how the company instructs its adjusters and to compare it to the actual handling of your client's claim. Obviously, there are vast differences between the manner in which the company manual required the claim to be adjusted and the way the adjuster actually adjusted your client's claim, then the insurer may be faced with a special award or bad faith claim. See *Samolia v Prudential of America General Insurance Company (Canada) and Truman Leacher, supra*.

Also see *Sharpe v Co-operators* (May 18, 1998), Court File 841-95, (Gen. Div), where Justice Boland stated:

"The plaintiff claims aggravated, punitive and exemplary damages arising out of the defendant's conduct towards the plaintiff with respect to accident benefit payments. I ordered that the defendant produce copies of its manuals and claims policies relating to the adjustment and consideration of statutory accident benefits."

Finally, in *McCullough v AXA Insurance Company* (July 21, 2000), Toronto File #99-CV 16703 (Gen. Div.), Justice Stinson stated:

"In relation to the plaintiff's request for production of the manuals, the Learned Master stated that he was not satisfied by any evidence that the manuals were relevant. With all due respect, I believe that the Master's decision on this point was clearly wrong. In the passage of the Statement of Claim quoted above, the plaintiff alleged that the defendant had created policies, guidelines and directives that breached its duty of good faith to the plaintiff. As such, the contents of the plaintiff's manuals (as I have defined them) would be directly relevant to proving or disproving the existence of those policies.

It should not be a cat and mouse exercise, especially where a party so peculiarly situated to know about the existence or non-existence of an internal document, such as a procedural manual. In light of the defendant's failure to tender evidence on this document, I infer that the manual likely exists. I direct the defendant to produce it."

With respect to the training materials, in *Sandhu v Allstate*, Toronto Court File #98-CU-161320 C.M.:

"Defendants are to produce any written documentation such as, but not limited to, policy directives or training materials in effect from May, 1996 through December, 1996 re processing and terminating on claims in the nature of this plaintiff's claim."

### **Conclusion**

The decision in *Whiten* by the Supreme Court of Canada has changed the landscape in which the insurers are used to operating. It is now commonplace for a first party insurer's file to be opened up to scrutiny to ensure the duty of good faith and the handling of their adjusters in claims adjudication. Litigation in this context requires a clear understanding of what the insurer's file contains and how to ensure that it is produced. A thorough knowledge of the insurance industry, the law of the duty of good and faith and law surrounding production of documents will ensure that insurers produce the entire claims file.

Insurers are now extremely apprehensive about the possibility of one of their insureds putting forth a bad faith claim. Not only will it be costly if bad faith can be shown, but as Pilot has found out the public relation damages can be far more extreme.

Good mining!