



*The Beard Winter LLP insurance litigation group acts for numerous insurers, ensuring that their claims are resolved promptly and economically, or proceed to trial quickly when necessary.*

## JUNE 2007 IN THIS ISSUE...

Welcome to the inaugural issue of the Beard Winter Defender, where we'll report on legal issues related to the insurance industry. In this issue we have articles on:

- ✦ Document Disclosure in Bad Faith Claims
- ✦ Mediation and Settlement Conferences: Strategies for the Insurance Industry

## DOCUMENTARY DISCLOSURE AND ACCIDENT BENEFITS CLAIMS WHERE AN INSURED HAS CLAIMED BAD FAITH

James V. Leone

The issue of disclosure of Adjuster's Notes and complete Accident Benefits file when requested by counsel in an Arbitration or Superior Court proceeding has always been the subject of much discussion. Generally speaking, and in the absence of special circumstances, the Courts and the Financial Services Commission of Ontario have generally allowed the Insured complete access to the Insurer's file inclusive of Adjuster's Notes up to the date of the first Application for Mediation. Following this time period, litigation privilege is generally seen as occurring and the Insurer is generally not under any duty to provide the Insured with the Adjuster's Notes and/or any other documentation which were prepared in contemplation of litigation.

The issue of bad faith as raised by an Insured always complicates the issue. It seems as though a Special Awards and bad faith claims are now routinely claimed as a matter of course in boilerplate pleadings by many plaintiff's counsel in Ontario. Often, the issue is not pursued and merely raised as a "bargaining chip". However, in a recent Decision of the Superior Court of Justice of Master Ronald Dash, the issue of litigation privilege came before the Courts to decide.

In the *Mamaca v. COSECO Insurance Company* Decision, 2007 CanLII9890 (ON S.C.), the matter arises out of a motor vehicle accident which occurred on August 21, 1998. The Insurer appeared to deny Accident Benefits primarily based on a failure to receive a Statutory Declaration and allegations of material misrepresentation on the part of the Insured. Specifically, the Insurer had consulted with the Insurance Crime Prevention Bureau for the purpose of further investigating the accident and, specifically as to whether or not the accident had been staged.

On November 19, 1998, the defendant abandoned its assertion that the accident had been staged. From April through November 2000, the Insured had made repeated inquiries of the Insurer as to whether or not they had made a determination as to payment of Income Replacement Benefits with no response. Finally, on December 1, 2000, the Insurer wrote to their Insured advising that they would be compiling the file "so that a decision with respect to the Income Replacement Benefits be made".

On May 28, 2001, the plaintiff applied for Mediation at the Financial

Services Commission of Ontario. The plaintiff plead 26 separate particulars of bad faith some specific as to certain acts and some more general.

In his analysis of the relevant case law, Master Dash discusses the Supreme Court of Canada Decision of *Blank v. Canada* (Minister of Justice), [2006] S.C.J. No. 39, in its capacity of piercing litigation privilege if prima facie evidence of bad faith is evident. Master Dash indicates a party cannot hide "similar blameworthy conduct" behind a cloak of litigation privilege. At paragraph 33 of this Decision, Master Dash states:

"... it is often difficult for a Plaintiff alleging bad faith by his Insurer in the processing of his claim to know exactly how the Insurer internally handled the claim and arrived at its decision to deny benefits or to provide prima facie evidence of bad faith in that process without seeing the very documents protected by litigation privilege."

Ultimately, Master Dash ordered the Insurer to provide documents which had been previously claimed as being prepared in contemplation of litigation.

Obviously, these cases are largely fact driven. However, this is an example of where the Courts will step in and lift litigation privilege where they deem appropriate.

Read more at:

<http://www.canlii.org/en/on/onsc/doc/2007/2007canlii9890/2007canlii9890.html>

and

<http://www.canlii.org/en/ca/scc/doc/2006/2006scc39/2006scc39.html>



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## MEDIATION AND SETTLEMENT CONFERENCES: STRATEGIES FOR THE INSURANCE INDUSTRY

Paul M. Iacono, Q.C.

In preparing for the ADR session, I think it is important for the insurance representative and their counsel to meet to discuss potential scenarios that may come up at the mediation. I think it is also important for the insurance representative to take an active role. When I am attending a mediation as counsel, I will always encourage the insurance representative to take over certain parts of the oral presentation. I have found that certain statements coming from the mouth of the insurance representative have much more meaning to a plaintiff. Having the client make a brief opening statement is useful. This can be prepared in advance and can be kept very brief. Sometimes it is much easier for the insurance representative to establish rapport with the plaintiff than it is for defense counsel.

The Rules for mandatory mediation require that counsel attend with their client. This is essential. A mediation without the client will not result in success. If counsel cannot attend with their client, they should advise the mediator and opposing counsel, so that other alternatives can be considered. The Rule goes on to say that a party who does not have full authority to settle may attend, as long as he or she has telephone access at all times to someone who does have authority, even if the mediation takes place outside of business hours. The reasons for this are obvious. It is the client's law suit; only the client can settle it. Without the plaintiff in attendance the "catharsis" cannot take place, resolution is more difficult to achieve. While the Rule refers to "attendance by the parties", that is the plaintiff and defendant, there is no doubt that the "authority to settle" requirement means that it is the insurance representative, not the insured, whose presence is required.

The final ingredient in successful mediation is patience. You cannot rush a "catharsis." The late C.F. McMillan,

Q.C. once said that "a law suit is like baking a cake. It has to stay in the oven for a precise amount of time". While the accuracy of that statement to a law suit could be disputed, there is no question that it applies precisely to a mediation. Any party to a mediation can choose to end the process at any time. If that happens, it is much better to have an agreement that the mediation end. In that way it will be easier to obtain a consensus to reconvene.

To attend a mediation with a preconceived or pre-established time deadline is fatal. Flexibility is the key to success. Particularly under the new Practice Direction where the mediation is timed at a point where the parties want to meet to discuss settlement, it is of singular importance to leave all doors open.

Although we have all become familiar with the term "mandatory mediation", it is important that you remember at all times that settlement is not something that can be imposed upon you. Settlement is not mandatory. No one is under the mistaken belief that every case will resolve at mediation. Do not waste the opportunity of being able to speak directly with the plaintiff. Use the time period to persuade the plaintiff that your view of the situation is more logical. You must do this in a way, however, that keeps the doors to settlement open. Do not burn bridges. If the mediation session cannot be used for resolution, use it to narrow the issues. Agree to those issues in writing. If the session cannot be used to close down the litigation, use the session to build rapport with the plaintiff. If you develop rapport directly with the litigant, it will become "an oasis of good will" to which you can return time and time again to replenish the discussions.



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