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Priority Disputes and the Ninety Day Notice Period: No Margin For Error

Courts and Arbitrators are very generous and liberal with respect to the interpretation of limitation periods when it comes to breaches perpetrated by claimants. Triers of Fact are reluctant to dismiss a claimant's action due to a technical breach (i.e. missed limitation period) as opposed to the substance of the claim. Having one's day in Court is often considered to be an indelible right of a claimant, regardless of the how many procedural failings have been perpetrated. However, when it comes to insurance companies disputing between one another as to who has priority to pay to a claimant benefits, an Adjuster must beware of the strict interpretation of the ninety day notice period. The Court has very little sympathy for insurance companies and negligible empathy for busy adjusters.

The Law

Under Section 2 of the *Disputes Between Insurers* the first insurer that receives a completed application for benefits is obliged to pay benefits pending the resolution of any dispute as to which insurer is required to pay the benefits. Section 3 states:

> 3(1) No insurer may dispute its obligation to pay benefits under section 268 of the Act unless it gives written notice within 90 days of receipt of a completed application for benefits to every insurer who it claims is required to pay under that section.
>
> (2) An insurer may give notice after the 90 day period if,
>
> (a) 90 days was not a sufficient period of time to make a determination that another insurer or insurers is liable under section 268 of the Act; and
>
> (b) the insurer made the reasonable investigations necessary to determine if another insurer was liable within the 90 day period.

The key questions are: (1) whether the insurer made reasonable investigations within the ninety day period and (2) whether the ninety days was not a sufficient period of time for it to determine that another insurer was liable. If the insurer is not able to prove both parts of this test, then the Court will refuse to extend the ninety day period. The recent appeal decisions of *Liberty Mutual Insurance Co. v. Zurich Insurance Co.* (2007) and *Echelon General Insurance Co. v. CGU Insurance Company of Canada* (2008) show how difficult it is for an insurer to extend the ninety day notice period.

From a starting point, the law recognizes that insurers are sophisticated parties who deal with priority disputes of this nature on a regular basis. The Court of Appeal has found that the saving provisions to extend the limitation period should only be used sparingly. Despite the fact that an individual adjuster may be

Cary Schneider is a partner at Beard Winter LLP specializing in insurance and civil litigation matters including the growing area of cyber and privacy law. He is a member of the International Association of Privacy Professionals (IAPP), is in the process of being certified as a Certified Information Privacy Professional/Canada (CIPP/C), and studies cyber security at Harvard University. Cary advises insurers on breach and coverage situations, as well as assists businesses in preparing pre-breach data plans and post breach responses.

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adjusting over 100 files at any given time, the insurer is held to a higher standard of care compared to an average litigant.

The following two recent appeal decisions from private arbitrations cases are prime examples which show how difficult it is to extend the ninety day period:

In *Liberty Mutual Insurance Co. v. Zurich Insurance Co.* (2007) the claimant (13 years old) was riding a bicycle when he was struck by a vehicle insured with Liberty. At the time of the accident the claimant was living with his father who was on a trip to China. Liberty received that application for accident benefits completed by the office of a senior counsel, Rocco Lofranco, on July 4, 2001. The ninety day notice period would therefore expire on October 2, 2001. The application for accident benefits incorrectly listed the claimant as residing with his mother and that he was not covered under any policy of insurance. Liberty undertook 19 different methods to attempt to determine whether there was another policy that would respond which focused on attempted communications with the mother, with Mr. Lofranco's office, and surveillance of vehicles that were parked at the mother's home. The claimant's mother and counsel were non-cooperative. On July 14, 2001 the claimant's father returned from China and the Court accepted that his vehicle would likely have been parked in the driveway. On August 22, 2001 Liberty received a copy of the motor vehicle accident report which indicated that the claimant in fact resided with his father at which point Liberty contacted counsel for the claimant for an explanation as to the discrepancy. No answer was forthcoming.

On November 1, 2001, (after the expiry of the notice period), an investigator attended at the father's home where they discovered that the father had a vehicle and that the claimant was a dependent on his father. On December 12, 2001 Liberty sent its notice to Zurich with respect to this priority dispute; which was just a little over two months post the limitation period.

The Court found as a matter of fact that the mother had intentionally misled Liberty, that there was documentation that indicated that the claimant resided with his mother, and that counsel for the claimant had been non-cooperative. Indeed, the Court found that the lengths that Liberty had undertaken to locate another insurer were extraordinary. Despite these findings of fact, the Court found that Liberty had notice by August 22, 2001, (on account of the motor vehicle accident report), that the claimant may be residing with this father. Armed with this information, the Court found that Liberty ought to have sent a representative to the father's home where they might have seen the father's vehicle in the driveway and determined the insurer of the vehicle (Zurich). The Court found that Liberty ought to have been able to make these determinations within 90 days and that since they did not; that they were prohibited from proceeding with the priority dispute.

In *Echelon General Insurance Co. v. CGU Insurance Company of Canada* (2008) the claimant was involved in a cycling incident in which he was struck by a vehicle insured with Echelon. The application for accident benefits was received on July 19, 2002 and accordingly the ninety day notice period expired on October 17, 2002. The accident occurred on May 11, 2002 and an Autoplus search run on May 27, 2002 revealed that the claimant may have been insured with three different insurers (none of which being CGU). Echelon contacted these insurers and each reported that there was no policy in place at the time of the collision. The prominent plaintiff counsel James Vigmond was retained to represent the claimant and in the Application for Accident Benefits the claimant (via counsel) indicated that he was not a dependant. Counsel for the claimant subsequently wrote a letter on October 7, 2002 (10 days prior to the expiry of the notice period) stating that the father had been insured with CGU, the identity of the insurance agent, the identity of the policy number, and a representation that the father had no insurance at the time of the accident as his payment had lapsed.

On December 17, 2002 (two months after the expiry of the notice period) the claimant's father attended at the office of Echelon to pick-up a benefits cheque. The astute adjuster noticed that the father had driven to the office and conducted a follow-up Autoplus search that very day. The results revealed that the father did in fact have a valid policy of insurance with CGU at the time of the loss; but that the policy of insurance was different from that represented in the prior letter from counsel. On December 18, 2002 Echelon put CGU on notice of the intention to pursue a priority dispute. It is unknown why the Autoplus search conducted in May, 2002 did not reveal a valid policy of insurance for the date of loss while as the December, 2002 search did.

The key issue was whether Echelon should have followed-up with the insurance agent/CGU once it received the October 7, 2002 letter from counsel; which was just 10 days prior to the expiry of the notice period. This is despite the fact that Mr. Vigmond's office stated in the letter of October 7, 2002 that there was no insurance on the vehicle. The Court found that even if Echelon had contacted CGU/agent that there was no guarantee that they would have been able to determine whether there was insurance on the vehicle. Despite this, the Court concluded that Echelon ought to have made such inquiries of CGU/agent in any event and their failure to do so

was fatal. The notice period was not extended which thereby left Echelon as the priority insurer.

Recommendations

Firstly, it is imperative to know when the ninety day period commences and ends. In some decisions, the adjusters did not know this information and this was heavily frowned upon by the trier of fact. The ninety day notice period commences once a completed application for accident benefits is received.

As made evident in the two aforementioned decisions, an insurer cannot rely on the representations of counsel. Despite the fact that counsel may be senior and highly respected, an insurer must conduct its own investigations and not accept the submissions of counsel as to the availability of insurance. Similarly, an insurer will be hard-pressed to justify its inability to locate the applicable insurer within the limitation period on the basis of an intentional or unintentional misrepresentation by a claimant (or her family) and any non-response from counsel. An insurer is obligated to conduct its own investigation from all possible sources.

An insurer must review all the available documentation in a vigilant and priority basis to compare any inconsistencies. If an application for accident benefits refers to one address as the residence and the motor vehicle accident report refers to another, then the insurer ought to send out a representative to both homes and track down the particulars of all vehicles parked at the homes. An innocent/intentional error by the claimant as to where and with whom she resides could result in a very costly mistake. These investigations ought to be conducted as soon as possible and on an immediate basis the closer you get the expiry of the notice period.

Furthermore, there should be a sense of urgency in the investigations as the 90 day period is drawing to a close. Waiting for a response from claimant's counsel as the limitation period approaches is not considered to be a justified excuse by the Courts. Adjusters should use the telephone as opposed to writing letters (this should be documented afterwards), use email/faxes as opposed to regular letter mail, and communications should relay the urgency of the matter. Courts do consider the proactive actions taken by adjusters and the sense of urgency conveyed.

If an initial Autoplus report does not reveal that there was any insurance on the vehicle, I recommend that another Autoplus search be conducted between 5-15 days before the expiry of the notice period. It is not clear when and how Autoplus posts their insurance information, and accordingly, it is better to be safe than sorry.

Be cognizant of the fact that a trier of fact is unlikely to extend the ninety day notice period and that she will not take into consideration the lack of prejudice if your notice is served just one day late. Regardless of the volume of your pending, these files ought to be considered a priority and any investigators/independents be advised accordingly in very explicit terms. All leads ought to be tracked down if only for the sole purpose to prove to a Trier of Fact that you did everything possible to locate the responsible insurers.

Courts are not sympathetic to insurers and expect them to be both proactive and sleuth-like. Good adjusters will make these files priority number one within the ninety-day period, track down all possible leads, and double check their information. If there is a reasonable possibility that a specific insurer may have priority but you are not sure, put them on notice within the limitation period. Remember, even if you name an incorrect insurer within the first ninety days, it is much better to withdraw a dispute then to ask a trier of fact to allow you to commence one. As the famous quote dictates: "it's easier to ask for forgiveness than it is to get permission".

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