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PUBLICATION

It's Privileged: Should Litigation Privilege attach to pre-litigation Adjusters' Files?

Date: December 19, 2016
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Original Newsletter(s) this article was published in: Blaneys' Coffee House: December 2016

Litigation privilege serves to protect from disclosure, documents that come into existence (a) after litigation has been commenced, or (b) when litigation was reasonably contemplated if it was for the dominant purpose of using the information to obtain legal advice, or to assist in the conduct of the contemplated litigation. The purpose of the privilege is "to create a 'zone of privacy' in relation to pending or apprehended litigation", so that litigants can prepare their respective cases in private, without adversarial interference and the risk of premature disclosure.[1]

In the context of an insurance claim, claimants will often seek production of adjusters' reports and other material that were created during the course of a pre-litigation investigation. Conversely, insurers will often challenge such production, claiming litigation privilege.

As demonstrated in the recent decision of *Plenert v. Melnik Estate*[2], litigation privilege will usually attach to adjusters' pre-litigation material, in the context of a third-party liability claim.

Facts

The *Plenert* action was one of several before the Supreme Court of British Columbia, which arose out of a serious, fatal motor vehicle accident.

The defendants commenced third party proceedings against Emil Anderson Maintenance Co. Ltd., a road maintenance contractor, alleging that Emil Anderson had negligently maintained the highway in the vicinity of the accident, which had resulted in the slippery road conditions that caused the loss.

B.C.'s Ministry of Transportation and Infrastructure had notified Continental Casualty Company (Emil Anderson's liability insurer) of the incident, out of "an over-abundance of caution", and

advised that SCM (an independent adjusting firm) had requested a copy of Emil Anderson's sanding schedule.

Several defendants brought an application for the production of preliminary reports and witness statements, which had been prepared and obtained by several adjusters on behalf of Emil Anderson.

The sole issue for the court to resolve was whether the documents ought to be produced, or whether they were privileged.

Test for Litigation Privilege

In Canada, in order for a party to establish litigation privilege over pre-litigation documents,

1. there must have been a reasonable prospect of litigation at the time the documents were prepared. There must be evidence that litigation was more than speculative, although it does not have to be a certainty; and

2. the dominant purpose for which the documents were created must be to obtain legal advice, or to assist in the conduct of anticipated litigation.[3]

Position of the Parties

Continental argued that the documents were privileged: they arose at a time when litigation had been reasonably anticipated, and for the dominant purpose of litigation. In support of its position, affidavit evidence was advanced to demonstrate that the only reason Continental requires its claims handlers to undertake an investigation - open a file, retain independent insurance adjusters, and obtain witness statements - is to prepare for anticipated litigation against an insured. Additionally, Continental requires its claims handlers to prepare a special report whenever an incident is sufficiently serious.

Conversely, the defendants argued that there is a continuum to an investigation, and that it is not until the underlying facts of a case have been determined that litigation can be said to be reasonably contemplated. In this case, the documents had been prepared simply for the dominant purpose of investigating the accident, not for the purpose of anticipated litigation.

Decision of the Court

With respect to "dominant purpose", the court, in reliance on a decision of the Ontario Superior Court of Justice[4], emphasized the material distinction between first-party claims (e.g. property damage claims)[5] and third-party (tort) claims[6]. In the context of a first-party claim, an initial investigation would be undertaken to determine whether a claim is covered under the policy, and the available limits. It would not be until the insurer concludes there is coverage for all or part of the claim that litigation could be contemplated, and privilege would thus attach. Otherwise, the insurer would notionally be denying coverage immediately upon receiving notice of the claim (potentially exposing itself to a claim for bad faith).

On the other hand, with respect to third-party claims, there is usually no preliminary investigative stage (irrespective of whether the investigation may be utilized to broker a pre-litigation settlement). The only purpose of creating such documents would be (a) for anticipated litigation, (b) to set reserves, and (c) to seek legal advice.

The court reasoned that, in this case, the type and severity of the accident, together with the fact that an adjuster had requested Emil Anderson's road maintenance schedule, was sufficient to demonstrate that the belief of imminent litigation, at the time the documents were created, was reasonable. While the initial notification was made out of an "abundance of caution", the overall evidence was highly suggestive of a very serious claim, and that litigation was likely. The court relied on the affidavit evidence of Continental and the independent adjusters to conclude that the "dominant purpose" of creating the documents was for potential litigation; there was no evidence to contradict that evidence.

Furthermore, the court noted that the "limited role" of the liability insurer (solely to defend and potentially indemnify) reinforced its finding of litigation privilege.

Accordingly, the court held that the documents were protected by litigation privilege. It was mindfully pointed out, however, that liability insurers' preliminary investigations may not attract privilege in all cases - it will depend entirely on the particular circumstances.

What does this mean for Insurers?

This is good news. Previously, the law governing litigation privilege, in the context of adjusters' pre-litigation material, had been murky and inconsistent. The *Plenert* case has provided some clarification, and has served to strengthen the position of third-party liability insurers who find themselves facing an application for production of adjusters' investigative material. However, insurers ought to have internal policies and procedures in place to ensure that the purpose of, and role in, early investigation is sufficiently documented, so that, if necessary, the "dominant purpose" of an investigation can be verified and established.

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[1] *Blank v. Canada*, [2006] 2 S.C.R. 319.

[2] 2016 BCSC 403 (CanLII).

[3] This test was subsequently affirmed by the Supreme Court of Canada: *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 (CanLII).

[4] *Panetta v. Retrocom Mid-Market Real Estate Investment Trust*, 2013 ONSC 2386 (CanLII).

[5] A claim by an insured against his or her own insurer.

[6] A claim by a third party against an insured.

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