

**Attacking Claims of Privilege
in a Bad Faith Action**

Particularly with the advent of no-fault insurance schemes, more and more people are finding themselves embroiled in litigation with their insurance companies. Whether an insured is bringing an action against their insurer for failing to pay accident benefits, disability benefits, life insurance benefits or property damage claims, a common allegation in any Statement of Claim is that the insurer breached its duty to act in good faith.

A breach of duty to act in good faith gives rise to a separate cause of action distinct from an action for failure of an insurer to compensate for a loss insured under the policy (*Samoila v. Prudential of America General Insurance* (2000), 50 O.R. (3d), 65 (S.C.O.); *702535 Ontario Inc. v. Lloyd's London, Non-marine Underwriters* (2000), 184 D.L.R. (4th), 687 (Ont. C.A.). Most recently, see *Clarfield v. Crown Life Insurance Co.*, (2000), 50 O.R. (3d), 696 where the court ordered the defendant disability insurer to pay \$75,000 in aggravated damages for breaching its duty to deal with the plaintiff's claim in good faith). This duty to act fairly relates both to the manner in which the insurer investigates and assesses a claim as well as to the decision as to whether or not to pay the claim. In making the decision as to whether to refuse or pay the claim, the insurer has a duty to assess the merits of the claim in a balanced and reasonable manner. Indeed, the courts have held that the insurer must give the same consideration to the interests of the insured as it gives to its own interests.

If an insurer denies payment of a claim, or discontinues payments under a claim, an insured may commence an action for failure to pay the claim and, additionally, for damages for breach of the duty to act in good faith. To prove a bad faith action against an insurer, the insured need prove how the insurer assessed, processed and decided the claim. The insurer's claim file is a critical source of discovery because it represents a chronology of the insurer's state of mind in its processing of the claim.

The discovery provisions of the Rules of Procedure speak to the general policy favoring early and complete disclosure of all relevant documents. That policy can come into conflict with an insurer's claim that the documents are privileged, either by solicitor and client privilege or litigation privilege. In the context of a bad faith claim, when can an insurer refuse to disclose documents on the grounds of privilege?

SOLICITOR AND CLIENT PRIVILEGE

In *Descoteaux v. Mierzwinski* (1982) 70 C.C.C. (2d) 385 and in *R. v. Shirose*, 133 C.C.C. (3d) 257, the Supreme Court of Canada adopted Wigmore's description of solicitor and client privilege as follows:

“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 instance permanently protected from disclosure by himself or by the legal advisor, except the protection be waived.” (Emphasis added).

As can be seen from the above criteria, not every communication between a solicitor and client is subject to privilege. Communication must be advanced for the purpose of seeking legal advice from the solicitor and the privilege is limited only to those communications which the client either expressly made confidential or which he could reasonably assume under the circumstances would be understood by the solicitor to be intended to be confidential. Privilege would not extend to facts provided by the client to the solicitor if those facts are otherwise discoverable and relevant (see *General Accident Assurance Company v. Chrusz* (1999), 45 O.R. (3d), 321 (Ont. C.A.)).

Additionally, even if a communication is otherwise protected by solicitor and client privilege, that privilege may be waived in certain circumstances. This is particularly relevant in considering bad faith claims. In *Samoila v. Prudential of America General Insurance* (supra), an insured brought a bad faith claim against his insurer relative to the insurer's refusal to pay accident benefits. At Examinations for Discovery, the insured sought production of the insurer's claim file including letters received from the solicitors for the insurer relating to the denial of coverage. At Examinations for Discovery, the representative of the insurer testified that to assist it in determining whether to deny the claim, it first relied on the advice of its legal counsel. In a motion to compel production of the claims file, including the letters received from the solicitors for the insurer, Justice Brockenshire held that although the communication between the solicitor and client was privileged, that privilege was waived by the insurer because it relied on the legal opinion to defend an allegation of bad faith. In coming to his decision, Justice Brockenshire referred to *Bank Leu Ag v. Gaming Lottery Corp.* [1999] O.J. 3949 (S.C.J.) wherein Mr. Justice Ground stated:

“When a party places its state of mind in issue and has received legal advice to help form that state of mind, privilege will be deemed to be waived with respect to such legal advice.”

In a bad faith claim, the insured plaintiff alleges that the insurer breached its duty to act in good faith. Typically, as part of its defence, the insurer will maintain that it assessed the claim completely and fairly and that, prior to denial, to assist in making its decision, it sought and obtained legal advice. In doing so, the insurer puts its state of mind in issue and waives any solicitor and client privilege to the advice it obtained prior to denying coverage. That is to say, in relying on the fact that it sought and followed legal advice prior to denial of coverage to prove that it acted fairly, an insurer will then waive privilege to that legal advice.

At times, an insurer will claim solicitor and client privilege over communications between its solicitor and a third party. The most typical example is where the insurer retains an independent adjuster or other agent to deal directly with its solicitor. It is well settled that solicitor and client privilege can extend to communications between a solicitor and a third party appointed by the client (see *General Accident Assurance v. Chrusz* (supra), at page 351). However, not every communication between a third party and a solicitor is protected by privilege. Privilege will attach to communications between a third party and a solicitor in circumstances where:

1. the third party is a channel of communication between the solicitor and the client, or
2. the third party was translating or interpreting information provided by the client to the solicitor, or
3. the third party was passing information from the client to the solicitor for the purpose of the former seeking legal advice (see *General Accident Assurance Company v. Chrusz* per Doherty J.A.).

If the third party is simply gathering information from sources extraneous to the client and passing that information on to the solicitor, that information is not protected by solicitor and client privilege. The inquiry is not whether the third party is an agent of the client but what the function of the third party is relative to the relationship between the client and the solicitor.

LITIGATION PRIVILEGE

The Ontario Court of Appeal has now settled that litigation privilege will attach to those documents that were created for the dominant purpose of litigation, whether actual or contemplated (see *General Accident Assurance Company v. Chrusz*). Often an insurer will take the position that all of its claims file, from the moment the file was opened, is protected by litigation privilege. This position has not found favour with the Courts. As Justice

Carthy stated in *General Accident v. Chrusz*:

“In my view, an insurance company investigating a policy holder’s file 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.” (at pg. 338)

In the same case, Justice Doherty stated:

“Unlike some courts...I do not accept that the mere possibility of a claim under an insurance policy entitles an insurer to treat its client as a potential adversary from whom it intends to keep confidential information concerning its investigation of the claim. I prefer the view which assumes that the insurer ‘fairly and open mindedly’ investigates potential claims...if an insurer asserts a privilege over the product of its investigation, it must demonstrate that it intended to keep that information confidential from its client. The mere possibility of a claim will not establish that intention.” (at pg. 350)

CONCLUSION

It would be very difficult, if not impossible, for a plaintiff to prove a case of bad faith against an insurer unless the plaintiff is given liberal access to the manner in which the insurer investigated and assessed the claim. Insurers will typically defend a bad faith claim by asserting that it acted fairly and reasonably throughout yet it will then claim privilege over most or all of its claim file. Plaintiff’s counsel must carefully scrutinize any claim for privilege, whether it be solicitor and client privilege or litigation privilege. It must always be remembered that in a motion to determine whether a communication is properly privileged, the onus is on the party asserting the privilege to establish an evidentiary basis for the claim (*General Accident v. Chrusz* at page 348). Each document over which privilege is claimed in an Affidavit of Documents must be carefully scrutinized at Examination for Discovery to determine:

1. whether the communication fully meets the criteria for the privilege claimed; and
2. whether, in the circumstances, the privilege was waived.