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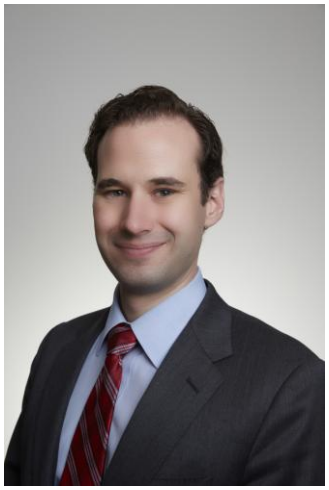

By Matthew Miller

Relevant, but producible? Adjuster's files in the litigation process

Upon being notified of a claim or an incident that could give rise to a claim, many insurers appoint field adjusters to conduct investigations. These can result in the generation of reports, the taking of witness statements and photographs and the collection of documents. Once litigation commences, most defence counsel will disclose the existence of the adjuster's file but claim privilege over it. In the cases discussed below, Ontario courts have dismissed motions for production and recognized that litigation privilege attaches to investigations by adjusters and most documents collected as a result.

Adjuster's file and litigation privilege

Often defence counsel will claim litigation privilege over the entire adjuster's file and refuse to produce any of it. But is an adjuster's file privileged when it is generated months or even years before litigation is commenced? In the recent decision of *Panetta v. Retrocom* ((2013) ONSC 2386 (Ont. S.C.J.)) Justice Quinn addressed this issue and agreed with the defence that it is.

According to Justice Quinn, statements made by opposing parties such as the plaintiffs and co-defendants are producible, but any notes and observations tangential to the statement itself are not. The names and contact particulars of independent witnesses are producible, but the statements themselves are privileged. Surveillance of a plaintiff is "*not normal procedure*" by an insurer and is not producible.

Justice Quinn decided that the moment the incident giving rise to the action took place, the plaintiff was in an

adversarial role with "*all those who would ultimately become defendants and their insurers*". He went on to note that, "*In third party insurance claims the sole reason for* any *investigation by or on behalf of an insurer is because of the prospect of litigation. It is naive to think otherwise….*" Justice Quinn refused to order the defendant to produce any details of the adjuster's file.

Statement made by a defendant to his insurer

Is a statement made by a defendant to his own insurer's adjuster producible? The courts have been consistent in deciding that it is not. What about the contents of the statement, rather than the statement itself?

In *Sangaralingam v. Sinnathurai* [2009] O.J. No. 5211 (Master); [2010] O.J. No. 309 (Ont. S.C.J.); [2011] O.J. No. 1205 (Div. Ct.) plaintiff counsel examined the defendant for discovery and requested the contents of a statement given by the defendant to his adjuster after the Statement of Claim had been issued. Defence counsel refused to answer any questions regarding the statement, claiming privilege. At the first hearing of the plaintiff's motion for production, Master Short dismissed the motion for the statement or its contents, finding that these questions were directed solely at the defendant's credibility and were properly refused.

On appeal, Justice Allen agreed with the plaintiff and ordered the contents of the statement were producible. Justice Allen's reasoning was that the statement was taken by the adjuster almost two years before examinations for discovery and ordering the defendant to answer questions about it could: "*clarify evidence or jog the deponent's memory as to relevant information he might have overlooked or forgotten*." Justice Allen ordered production of all material information contained in the statement.

On a second appeal the Divisional Court agreed with Master Short and found the

statement was not producible. The plaintiff had examined the defendant thoroughly enough to generate a 75-page transcript. The plaintiff therefore had alternate means to elicit the answers he needed, and there was no requirement that the defendant provide the transcript. The Divisional Court decided the plaintiff's request was aimed at finding what was said to the insurer, not clarifying facts. The plaintiff's motion was finally dismissed.

Reviewing privileged statements prior to examination for discovery

What if a defendant reviews a privileged statement made in the past to jog their memory prior to examination for discovery? Is privilege over the statement then waived? In *Knox v. Applebaum Holdings Ltd. et al.* ((2012) ONSC 4181 (Ont. S.C.J.)) Justice Hockin decided it was not.

Justice Hockin agreed with the 1997 decision of *Wronick v. Allstate* (1997), 7 C.P.C. (4th) 285 (Ont. S.C.J.) and found that a party reviewing a past statement to refresh their memory prior to discovery was different from a party reviewing notes as they testified at trial.

In the latter case opposing counsel did have the right to obtain those notes to properly cross-examine the witness. This requirement was not present at discovery. Justice Hockin agreed with the reasoning in *Sangaralingam* and found that the plaintiff had the opportunity to fulsomely examine the defendant, and there was an alternate method to obtain the information contained in the statement. The plaintiff's motion for production was dismissed.

Conclusion

Ontario courts have been consistent in recognizing the role of insurance adjusters in investigating claims from an early stage. Most aspects of an adjuster's investigation are privileged and not producible. Based on the current state of the law, insurers are free to conduct a

thorough investigation of every loss in order to prepare for the eventual claim, without fear of their entire file contents being held producible.

However, legal counsel should approach this issue on a case by case basis and not just assume that the entire report is privileged. Often an adjuster's report will contain collateral documents or appendices, and while the adjuster's report itself may not have to be disclosed, some of the collateral documents are likely producible under the various civil procedure disclosure obligations. Further, there may be some tactical reasons as to why counsel would want to disclose information early on. For example, if you have a strong liability position then it may be worthwhile to disclose witness statements or contact information earlier on in the litigation to permit the opposition the opportunity to investigate the facts and take a hard look at their case.

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