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Posted on: June 14, 2013

THE COST OF GETTING COZY:

Court Finds Insurer Owes Duty of Care to Third Party Claimant

Richards Buell Sutton Insurance Law Newsletter

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Traditionally, an insurer is the natural adversary of a party advancing a claim against its insured. The insurer may engage in hard-nosed tactics against the claimant, well aware that that it owes the claimant only a fair fight. This battlefield is no place for a duty of care to arise, and it will not arise provided that the relationship remains adversarial. Ironically, bad things can happen when an insurer strays from the adversarial nature of the relationship in an endeavour to save claims administration and handling costs.

The Background

The Nova Scotia Supreme Court recently addressed such circumstances in *All-Up Consulting Enterprises Inc. v. Dalrymple*, 2013 NSSC 46 . The third party claimant (the plaintiff in the action) operated a helicopter company. The defendants were a truck driver who struck and damaged one of the plaintiff's helicopters and his insurer (the "Insurer"). Liability was all but at admitted – at least at the adjustment stage – which no doubt contributed to the cooperative dealings early on between the plaintiff and the Insurer. The plaintiff suffered significant business losses after the prospects for early settlement evaporated, and brought an action against the driver and the Insurer framed in negligence, breach of contract and negligent misstatement.

Findings of Fact

As expected, the dealings between the plaintiff and the Insurer during the weeks following the loss are complicated. The parties exchanged letters, spoke on the phone and held meetings. Various representatives were involved, and the personnel involved changed. The salient facts might be distilled as follows:

- The plaintiff made the Insurer aware of its precarious financial circumstances and that time was of the essence in getting the helicopter back in the air and/or a rental aircraft in its place;
- The Insurer, at an early stage, advised the plaintiff the claim should be easily resolved, that it would fund the rental of a replacement helicopter and that the claim was close to settling. At no point

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following these representations did the Insurer advise the plaintiff to pursue the matter with its own property insurer;

- The Insurer asked the plaintiff for a comprehensive settlement proposal and received such a proposal but thereafter turned the file over to an outside adjuster and refused to respond to the offer until the new adjuster reported; and
- The plaintiff provided the information the Insurer required to settle the claim and was not responsible for the delays in achieving early settlement.

The Ruling

The trial judge was quick to dismiss the claim in contract, but found the Insurer liable in both negligence and negligent misstatement and awarded damages of over $900,000 for business loss and $200,000 for property damage.

Given the dearth of authority supporting the plaintiff's claim against the Insurer the trial judge necessarily returned to first principles of tort law in finding a duty of care. In finding for the Plaintiff, the trial judge was careful to limit the application of the judgment:

> "In the narrow circumstances where a tortfeasor's insurer volunteers to negotiate a settlement directly, in an expedited manner, with knowledge of the plaintiff's financial emergency, and with knowledge that the plaintiff was setting aside a claim with its own insurer, I am satisfied that a duty of care can be found."

With regard to standard of care, the court determined that no expert evidence was required and stated

> "…the standard is simply that of an ordinary, reasonable, and prudent insurer dealing with a third party who, to the insurer's actual knowledge, is in urgent need of settlement and proceeds and has been led by the insurer to expect a non-adversarial and non-negligent negotiation of the claim. By that standard, the evidence satisfies me that [the Insurer] was negligent in dealing with the plaintiffs."

Practical Considerations for Insurers

Cooperation in the early settlement of claims is valuable and satisfying, and ought to be considered in the handling of every claim, even large complex losses. This case offers a number of important take-away

thoughts to consider when working cooperatively with a third party claimant:

1. A duty of care can arise when an insurer volunteers to negotiate a settlement with a third party in an expedited manner and with knowledge of that party's financial urgency and its setting aside advancement of a claim on its own insurance policy;
2. An insurer can breach a standard of care owed to a third party claimant by, amongst other things, leading the claimant to believe that a non-adversarial process would take place, failing to properly and thoroughly investigate in a timely fashion, the failure of its staff to handle the matter in a consistent and unified fashion, failing to clearly advise the claimant of a change in decision and failing to provide written confirmation that the claimant should still be advancing the matter with its own insurer;
3. Where there is a prospect for business loss in particular, an insurer should think twice before making bald assertions that settlement is imminent or that the insurer will fund a mitigation effort. If such assertions are made, there must be good and well communicated reasons for not proceeding as planned; and
4. Claims by unrepresented litigants could prove particularly fertile ground for negligence actions such as this. Special care, including written correspondence, should be taken to ensure that unrepresented claimants understand the nature of the relationship and do not become reliant on the insurer to handle their claims or pay their losses.