Punishing an Insurance Company: Treat Your Insureds Fairly When They Suffer a Loss… $100,000 Punitive Damage Award Granted Against Insurer

The Issue

Insurance companies must treat their insureds fairly and reasonable when investigating their loss. In other words, insurers must adjust these claims in "good faith".

Having a disagreement with your insured over the amount of loss arising from a significant garage fire is understandable and even anticipated.

But when that disagreement turns to litigation, the insurer has to refrain from engaging in a "high handed litigation strategy" to pressure the insured into settling their claim. The insurance company cannot put a "gun to the head" of their insured by raising the stakes in litigation when that same strategy did not factor into the initial assessment and adjustment of the claim.

In the case of **Brandiferri v. Wawanesa Mutual Insurance, et al., 2012 ONSC 2206 (CanLII)**, the Court awarded a $100,000 punitive damage award against Wawanesa Mutual Insurance for taking an aggressive litigation strategy which appeared to be designed to raise the stakes against the homeowner and pressure them to settle.

Why This Matters

If your house is significantly damaged by smoke, you will probably be reliant on your insurance company to help you out.

If the insurance company does not dispute that the fire was an innocent accident, then the only issue remaining is the scope and amount of your loss.

For example, these are examples of typical questions that you will face:

- How much will it cost to repair or clean your house?
- How much will it cost to clean or replace your furniture? Your clothes?
- How much will you receive to find alternative living arrangements?
- If there are big differences in the cleaning or repair estimates between your contractors and the insurance contractors, then whose estimate will prevail?
- What exactly are you entitled to receive under the policy
    - money to buy new clothes stained / smelling from smoke or just to have those clothes dry cleaned?
    - The quality of materials to repair or re-build your house?

The Details

In the case of **Brandiferri v. Wawanesa Mutual Insurance, et al., 2012 ONSC 2206 (CanLII)**, the homeowner waited 11 years to get to Trial.

Their house fire happened in 2000 and their Trial in 2011.

There was never any concern by the insurance company that this was an accidental fire. The extent of the smoke damage, from the garage fire into the rest of the house, was underestimated by everyone at first.

There were many areas of dispute between the homeowner's claim and what the insurance company though reasonable, including the extent of repairs / re-build of these areas of the house:

- basement ceramic tile
- driveway interlock
- heat recovery ventilator system

- window replacement
- whether the entire roof should be re-shingled or only the part that was burnt
- whether cabinets needed to be replaced
- brickwork for the exterior of the house
- subsequent water leakage into the basement
- refinishing floors
- remediating fire damage behind drywall
- bathroom repairs

The plaintiff here was successful on some of their claims at Trial, winning partial recovery of the amounts sought.

The problem for the insurance company in this case is how the Court perceived that they "raised the stakes" of the litigation by way of their defence of the lawsuit:

1. During the adjustment of the claim, they did not allege fraud on the part of the homeowner. Yet when the lawsuit started, the insurance company then alleged that the homeowner's committed fraud on their various Proofs of Loss;

2. During the lawsuit, the insurer claimed that the plaintiff's claim failed for having not performed an appraisal of their loss, as required by the Insurance Act. Yet during the adjustment of the loss, the insurer took a contrary position and appears to have refused their consent to an appraisal; and

3. The insurer launched a $600,000 counterclaim against the homeowner, but dropped it just prior to the start of the Trial.

Important to Note: "Repeat Offender" Designation

Practitioners in the area will note the last part of this decision, **in which Judge Lauwers finds that Wawanesa Mutual Insurance is a "repeat offender and ought to be punished significantly"** (emphasis ours)

With respect, this surprising designation appears to have been given in part as a result of a reference, during closing submissions, to a 2006 appeal case involving Wawanesa in which punitive and aggravated damages were upheld: **Plester v. Wawanesa Mutual Insurance Company, 2006 CanLII 17918 (ON CA).**

Practitioners will note paragraphs 208 to 218 in particular:

> **Issue 5: Punitive Damages**
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> [204] It is trite law that an insurer owes an insured a duty of utmost good faith in investigating, assessing and attempting to resolve claims: *702535 Ontario Inc. v. Non-Marine Underwriters, Lloyd's of London*, **2000 CanLII 5684 (ON CA)**, [2000] O.J. No. 866, 184 D.L.R. (4th) 687 (C.A.). The court recognized at para. 28 that the insurer must proceed with reasonable promptness because the insured "having suffered a loss, will frequently be under financial pressure to settle the claim as soon as possible in order to redress the situation that underlies the claim." At paragraph 29, O'Connor J.A. noted:
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> > The duty of good faith also requires an insurer to deal with its insured's claim fairly. The duty to act fairly applies both to the manner in which the insurer investigates and assesses the claim and to the decision whether or not to pay the claim. In making a decision whether to refuse payment of a claim from its insured, an insurer must assess the merits of the claim in a balanced and reasonable manner. It must not deny coverage or delay payment in order to take advantage of the insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement. A decision by an insurer to refuse payment should be based on a reasonable interpretation of its obligations under the policy.
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> The court went on to hold that a breach of the duty to act in good faith gives rise to a separate cause of action distinct from the obligation to pay proceeds under the policy (paras. 32-33).
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> [205] In this case the plaintiffs submit that Wawanesa's misconduct was egregious. It first made the fraud allegation in the Statement of Defence and Counterclaim. Further, the counterclaim in the amount of $600,000.00 "put a gun to the head" of the Brandiferris by threatening them with "financial ruin." The abandonment of the counterclaim just before trial underlines the abuse. Mr. Kwinter argues that if Wawanesa, as "a repeat offender," is allowed to get away with what it did here, then it undermines "the heart of insurance coverage." There was not a reasonable possibility of proving fraud in this case. It was, he asserts, a concocted defence.
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> [206] Mr. Kwinter buttresses this claim by submitting that Wawanesa breached its duty of good faith by making the final payment to Strone despite the Brandiferris'

instruction. He asserts that this exemplifies the cosiness between Strone and Wawanesa, which is further illustrated by the fact that there is no ligation between Strone and Wawanesa. He also points to Wawanesa's failure to advise the Brandiferris of the Crest Cleaners fire until three years after it occurred,

[207] The plaintiffs rely on the decision of the Supreme Court of Canada in *Whiten v. Pilot Insurance Co*., **2002 SCC 18 (CanLII)**, [2002] 1 S.C.R. 595. In that case the insurer alleged arson although there was no air of reality to it. The Court upheld a jury award in the amount of $1 million, although it noted that the amount was higher than the court would have awarded. Binnie J. laid out the basic principles behind an award of punitive damages at paragraph 94 of the decision. Picking up some expressions in that decision, Mr. Kwinter argues that Wawanesa has engaged in "high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour." He highlights the "relative vulnerability of the plaintiff." Mr. Kwinter submits that the "objectives of retribution, deterrence and denunciation" apply to serious insurer misconduct.

[208] Mr. Kwinter notes that in *Plester v. Wawanesa*, [2006] O.J. No. 2139 (C.A.), another case in which the insurer alleged arson, the Court of Appeal upheld the jury award in the amount of $350,000.00 against insurance liability of about $400,000.00 and but reduce aggravated damages from $175,000.00 to $50,000.00. The Court of Appeal nonetheless found the amount of punitive damages to be higher than it would have awarded. Based on the outcome of *Plester*, Mr. Kwinter describes Wawanesa is a "repeat offender".

[209] Mr. Kwinter submits that an award of punitive damages in the amount of $350,000.00 plus aggravated damages in the amount of $50,000.00 would be appropriate and are necessary to get Wawanesa's attention and secure its reform.

[210] Mr. Forget argues that this is not a case for punitive damages: "It has been conceded by several parties to the action, including Salvatore Brandiferri, Vince Naccarato, Pina Naccarato and Tony Diceglie, that Mr. Benzie acted fairly and promptly in the circumstances. Tony Diceglie went even further stating Wawanesa was too generous in circumstances providing additional scopes of damages and agreeing to replace items which were clearly not damaged by any smoke." Mr. Forget submits that Wawanesa's conduct must be seen as a whole and that it does not meet the standard required by the cases: "It is submitted that in the face of the Brandiferris breaching

their duty of good faith, Wawanesa acted fairly and promptly in responding to the claim and the Brandiferris have failed to show otherwise."

Discussion

[211] Mr. Forget's argument does not address the gravamen of Mr. Kwinter's complaint about Wawanesa's high-handed litigation strategy, which Mr. Forget did not attempt to justify.

[212] Part of an insurer's duty of utmost good faith in investigating, assessing and attempting to resolve claims must attach to the insurer's litigation strategy against the insured when the claim is disputed. This does not mean, as O'Connor J.A. noted in *702535 Ontario Inc*., that the duty of good faith forces an insurer to be correct in making a decision to dispute a claim (at para. 30), and see *Fidler v. Sunlife Assurance Co. of Canada*, **2006 SCC 30 (CanLII)**, [2006] 2 S.C.R. 3 at paras 63, 71. But the insurer may not abuse its financial power, knowing that the insured, "having suffered a loss, will frequently be under financial pressure to settle a claim as soon as possible" (*702535 Ontario Inc*., at para. 28).

[213] The fraud allegation was late breaking and was only made after the action was started in the Statement of Defence and Counterclaim. I find this to have been a high-stakes litigation strategy designed to intimidate the Brandiferris. I do not accept Mr. Phin's evidence that he concluded early that the claim was fraudulent. Nothing in Wawanesa's written record or the conduct of its personnel corroborates that assertion. His self-serving evidence on that issue, in the context of all of the information available to all of the participants and their pattern of conduct in adjusting the claims including the garage claim, simply does not bear scrutiny.

[214] I accept that Wawanesa is a repeat offender and ought to be punished significantly. That said, punitive damages ought to be proportional. I fix punitive damages in the amount of $100,000.00 to be paid by Wawanesa to the Brandiferris.

[215] I now consider the plaintiffs' claim for aggravated damages. In *Fidler* the Supreme Court refers to a category of contracts in which damages for mental distress or breach might be awarded as a foreseeable consequence of a breach. That case concerned a disability policy, but it seems to me that a homeowner's insurance policy

falls into the category of the "peace of mind" class of contract to which the Court adverts.

[216] At paragraphs 51-53 the Court speaks of damages for mental distress in a contractual setting as an instance of "aggravated damages." The Court notes, however, that evidence is required:

> **47** This does not obviate the requirement that a plaintiff prove his or her loss. The court must be satisfied: (1) that an object of the contract was to secure a psychological benefit that brings mental distress upon breach within the reasonable contemplation of the parties; and (2) that the degree of mental suffering caused by the breach was of a degree sufficient to warrant compensation. These questions require sensitivity to the particular facts of each case.

[217] The plaintiffs led no evidence of mental distress on which to base such compensation. I decline to grant such "aggravated damages" on nothing more than an inference of mental distress. In this instance only I accept Mr. Forget's submission that an adverse inference should be drawn from the fact that the Brandiferris did not testify.

[218] In *Fidler* the Court also criticizes the use of the label "aggravated damages" in relation to "peace of mind" contracts as "unnecessary and, indeed, a source of possible confusion" (para. 53). The conceptual basis for aggravated damages outside of the "peace of mind" contract cases is unclear, but it seems to me that such damages are best addressed within the conceptual framework of punitive damages, which I have already assessed. I therefore decline to award aggravated damages of a punitive nature.

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