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CASE SUMMARY: INSURER’S STATUTORY RIGHT TO AN EXAMINATION UNDER OATH AUTHORIZES AN INSURER TO OBTAIN INFORMATION RELEVANT TO ASSESSING ITS CONTRACTUAL OBLIGATIONS; IT IS NOT INTENDED TO PERMIT INSURERS TO EMBARK ON FISHING EXPEDITIONS OR “TAKE BLIND SHOTS IN THE DARK.”

Court refused the insurer’s documentary request in advance of an examination under oath as being abusive and unnecessarily invasive in the context of the claim. An examination under oath is not a fishing expedition.

Insurance law – Automobile insurance – Statutory provisions – Documentary production – Rights and duties of insured – Rights and duties of insurer

Aviva Insurance Co. of Canada v. Ebhodaghe, [2021] O.J. No. 6231, 2021 ONSC 7343, Ontario Superior Court of Justice, November 4, 2021, J. Di Luca J.

The insured made a claim against the insurer for the loss of her vehicle after it was stolen. An employee of the insurer interviewed the insured by phone and believed the insured had lied on her policy documents by falsely stating the city she resided in at the time of the application for insurance. Following the interview, the insurer sent the insured directions that would permit the insured’s banking institutions to release to the insurer copies of the insured’s account profile listing and copies of all statements for the named accounts for a 6-month period beginning in the month prior to the purchase of the policy. The insured provided the insurer with some banking information, but advised that she would not provide further information as she viewed the requests as invasions of her privacy.

The insurer brought an application for an order compelling its insured to attend at an examination under oath and for the production of “all documents relating to the matters in question” pursuant to the insured’s statutory obligations under the automobile policy. Specifically, the insurer sought the insured’s bank records, including the retailer location data, which data the insurer submitted would demonstrate where the insured “habitually resides”.

The Statutory Conditions required that the “insured shall submit to an examination under oath, and shall produce for examination at such reasonable place and time as is designated by the insurer or its representative all documents in the insured’s possession or control that relate to the matters in question, and the insured shall permit extracts and copies thereof to be made.”

The Court stated that the purpose of the condition is to provide an insurer with an opportunity to obtain knowledge of facts necessary to enable it to decide its obligations and to protect it from false claims. The Court further stated that, in making an order compelling a person to attend for examination under oath, a court can also assess the relevance of the proposed areas of questioning and has the jurisdiction to compel a person to attend and answer only relevant questions and produce only relevant documents.

The Court found that it was not possible on the record before it, to conclude that the insurer had an “objective and reasonable” basis for suspecting fraud. Further, there was no evidence before the Court explaining why it was an issue for the insurer if, in fact the insured had lied about her home address when she applied for insurance and why it might result in the insurer declining coverage and/or cancelling the policy. The Court found that, on the record, there was no basis to assess why such a misrepresentation was material to the decisions that the insurer must make in assessing the claim. The Court reiterated that a statutory examination was not a “fishing expedition”. As the insured had since agreed to attend the examination under oath, the Court declined to make an order requiring her to do so.

With respect to the insurer’s request for an order compelling documentary production, the Court held that it was not remotely satisfied that the scope of permissible examination would include banking data that includes specific locations where the insured spent her money over many months. The Court held that the requests were abusive and unnecessarily invasive to the insured’s privacy rights, and that the Statutory Condition “authorizes an insurer to obtain information relevant to assessing its contractual obligations. It does not authorize a broad, unfettered sweep through the intimate details of a person’s movement and spending habits over many months.”

The Court found that the insurer’s conduct in requesting entirely disproportionate and invasive documentary production ultimately prompted the insured to disengage from the process and thus awarded fixed costs payable to the insured.

This case was digested by [Tricia M. Milne](#), and first published in the LexisNexis® Harper Grey Insurance Law Netletter and the Harper Grey Insurance Law Newsletter. If you would like to discuss this case further, please contact Tricia M. Milne at tmilne@harpergrey.com.