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CASE SUMMARY: INSURER'S REPRESENTATIVE REQUIRED TO ANSWER QUESTIONS REGARDING THE REASON FOR DENIAL OF COVERAGE AT DISCOVERY, BUT NOT REQUIRED TO ANSWER QUESTIONS REGARDING THE DETAILS OF THE INVESTIGATION THAT LED TO THAT DECISION IN PERSONAL INJURY ACTION WHERE MOTOR VEHICLE LIABILITY INSURER ADDED AS STATUTORY THIRD PARTY

In Ontario, when a motor vehicle liability insurer has added itself as a statutory third party to a personal injury action because it has denied coverage to an insured defendant, the insurer's representative is required to answer questions regarding the reason for the denial of coverage at a discovery, but is not required to answer questions regarding the details of the investigation that led to that decision.

Liability insurance; Third parties; Personal injury; Practice; Discovery

Antony v. Kumarasamy, [2017] O.J. No. 4305, 2017 ONSC 4943, Ontario Superior Court of Justice, August 18, 2017, Master A. Graham

The underlying action involved a motor vehicle accident that occurred on November 20, 2009. At the time of the accident, State Farm Mutual Automobile Insurance Company and Certas Home and Auto Insurance Company insured the defendant driver under a motor vehicle liability policy. The insurers denied coverage to the driver and were added as statutory third parties to the action pursuant to the *Insurance Act*.

Plaintiff's counsel conducted an examination for discovery of a representative of the insurers and the representative refused to answer questions relating to the denial of coverage to the insured defendant. The plaintiff brought a motion to compel answers to those questions.

Rule 31.06(4) of the *Rules of Civil Procedure* states "A party may on an examination for discovery obtain disclosure of, (a) the existence and contents of any insurance policy under which an insurer may be liable to satisfy all or part of a judgment in the action or to indemnify or reimburse a party for money paid in satisfaction of all or part of the judgment; and (b) the amount of money available under the policy and any conditions affecting its availability."

The court found that although Rule 31.06(4)(b) requires an insurer to disclose the basis for its off-coverage position that limits the insurance proceeds available, it does not require disclosure of the details of the investigation leading to the position taken. The court cited *Seaway Trust v. Markle*, [1992] O.J. No. 1602 (Gen. Div.) where Lane J. held as follows:

It is not the intent of the rule to open up the whole file between insurer and insured. It is significant that the rule as to the production of insurance policies was not amended to broaden the scope of production of insurance-related documents beyond the policy itself. In my view, the examiner is entitled to disclosure in full of the terms of any agreement, understanding, notice or position taken, written or oral, that may affect the availability of the insurance proceeds but no more than that. The details of the information made available to the insurer by the insured or obtained by the insurer through its own investigation are not subject to disclosure under this rule even though such information will usually provide the factual basis for the agreement, understanding, notice or position in question. If the Rules Committee had intended a broader disclosure of the insurer's file, the Rules would have explicitly provided for it.

In the result, the court concluded the insurers were not required to answer further questions about the basis of their denial of insurance coverage and the plaintiff's motion was dismissed.

This case was digested by Aaron D. Atkinson and edited by Steven W. Abramson of Harper Grey LLP. If you would like to discuss this case further, please feel free to contact them directly at aatkinson@harpergrey.com or sabramson@harpergrey.com or review their biographies at http://www.harpergrey.com.