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November 15, 2023

Adverse Costs Policy is Not Privileged or Confidential; Full Policy Ordered to be Produced *(Spencer v. Martin and Hillyer)*

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Advertisements for personal injury firms often use the phrase "you don't pay unless we win". This usually means that a law firm will bear the full cost of the file and, if successful in obtaining some monetary award for its client, will take a percentage of that award to pay for its work. This is known as a contingency fee arrangement. In Ontario, contingency fee arrangements are permitted by the Law Society of Ontario. Contingency fee percentages can range from 20 to 35 percent of the amount recovered.

One issue that may arise with contingency fee arrangements is what happens if the firm does *not* win and there is no money from which the firm can take a percentage to pay for its work. In addition to losing its case, the client may be ordered to pay for part of the successful party's legal costs and disbursements.

As a way to address this risk, plaintiffs may obtain adverse costs insurance. This type of insurance provides coverage for these costs. It is also known as "trial insurance" or "after the event insurance". Coverage is usually around $100,000 but can be upwards of $250,000, depending on the size and cost of the file. The premium for the policy will depend on the likelihood of success of the file. The policy can be held by the plaintiff or by the law firm. If the plaintiff is unsuccessful, the coverage can apply to pay for the successful party's legal fees, as well as the firm's disbursements.

It is important to distinguish between costs and disbursements in this discussion. In personal injury matters, the firm will incur disbursements throughout the course of the file. These are not legal fees (cost for lawyer's work or time), but rather out-of-pocket expenses incurred by the firm for the file. These may include photocopies, expert reports, medical records, and court filing fees. When a plaintiff is unsuccessful and has to rely on adverse costs insurance to pay for all of the costs, the insurance will pay for disbursements, but not cover the firm's legal fees. This reflects the fact that a firm taking on work on a contingency fee arrangement is taking a risk that if they are not successful, they will not be paid for their time/work.

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Against this background, this post will discuss a recent decision of the Superior Court on adverse cost insurance and the production of the full policy for such insurance (*Spencer v. Martin and Hillyer*, 2023 ONSC 6353).

The underlying action involved a personal injury matter, with the respondent bringing an action for injuries sustained while walking the applicant's horse. The respondent was represented by the firm throughout the action and the trial. Following the trial, the respondent's action was dismissed in its entirety and he was ordered to pay $350,000 in legal fees plus HST, and $74,472.52 in disbursements.

The firm had an adverse costs insurance policy with the insurer, Omega General Insurance Company. The policy covered a number of its clients, including the respondent. The policy would pay for the firm's disbursements and the costs owed by the respondent, up to the policy limit of $100,000. The firm had the respondent sign a direction stating that the policy would give first priority to the law firm, such that his lawyers would be paid first from the policy to the full extent of their disbursements before the applicant or her lawyers are paid anything.

The firm refused to acknowledge whether the respondent or the applicant were beneficiaries or had priority under the policy. The applicant (and defendant in the underlying matter) brought an application to determine whether the policy limits of $100,000 should be divided on a pro rata basis between the firm's disbursements (valued at $65,965.47) or the trial costs owed by the respondent to the applicant (valued at $469,972.52). For the application, the firm had only provided a redacted copy of the policy, on the grounds that certain portions were confidential or privileged.

The applicant sought an order for the law firm to produce the policy in its entirety without any redactions. The firm resisted on the grounds that to do so would breach client confidentiality, on the basis that producing an unredacted copy of the policy would inform the applicant, her lawyers, and other parties and lawyers on other files, of the advice the firm gives to its clients. The firm argued that concerns over privilege and client confidentiality transcended this particular case and impacted all of the firm's clients and potential clients. For its arguments, the firm relied on the Law Society of Ontario's *Rules of Professional Conduct*, arguing that lawyers have a duty to hold in strict confidence all information concerning the business and affairs of their clients.

The issue for the court to determine was whether the redactions of the policy were privileged and/or confidential.

The policy did not list any client names or file names and clause 4.2 of the policy stated that it shall not "interfere with lawyer-client privilege". The court found that there was no actual legal advice or information in furtherance of litigation contained in the policy. Rather, the policy included a description of when and how the policy gets triggered, and the roles of the parties to the agreement. The court also found that most of the redacted information was common knowledge and often used in adverse costs coverage contracts. The court referred to the fact that an identical copy of the Omega policy was filed, in its entirety, in another matter with the Brantford Superior Court.

In contractual interpretation, a court must review the entirety of a contract to ensure proper interpretation. A court must consider the words of a contract, read as a whole. In this matter, a court will be unable to interpret the adverse costs insurance policy, and read it as a whole, if the policy remains redacted. When the matter proceeds to a full hearing to determine whether the policy should be divided on a pro rata basis,

the judge will be unable to make a proper determination without the full policy.

In the result, the court ordered for the production of the full policy, without redactions. There was no indication that current or future clients of the firm would be prejudiced if the policy was unredacted. There was nothing in the policy wording that disclosed litigation strategy to opposing parties, and the disclosure of the full policy did not engage the concerns over client confidentiality set out in the Law Society *Rules of Professional Conduct*.

Adverse cost insurance is a relatively new concept in Ontario. This decision provides further clarification on how the courts will interpret these policies, in the context of concerns over solicitor-client privilege.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact Isabel Yoo, at 416.865.6655 or iyoo@grllp.com.

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