Insurance

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Alberta Court Wipes Out Privilege Over Insured Statements To Adjuster

Written by **Brian A. Vail, Q.C.**

On 24 July 2013 the Alberta Provincial Court issued a decision in ***Security National v. EPS***, 2013 ABPC which held that an insured's statement to his adjuster had to be turned over to police investigating the accident.

Porter's vehicle was insured under an auto policy issued by Security National. A pedestrian (Green) was struck and killed on an Edmonton freeway. The driver did not remain at the scene. Police accused Porter of having been the driver.

Porter, with counsel retained within hours of the accident delivered a driver's statement to police in compliance with the *Traffic Safety Act*, s. 71 (which is covered by a statutory privilege). He was arrested and police began investigating him as a suspect.

Five weeks after the accident, Porter reported the accident as a possible property damage claim to Security National, without disclosing any injury or death. In August 2012, Green's sister contacted Security National and reported that Green had been killed in the accident. Security National opened a Bodily Injury file. The claims examiner retained an independent adjuster who took a detailed written statement from the insured. When Porter was charged with failing to remain at the scene involving death per s. 252(1.3)(a) of the *Criminal Code* and other offences under the *Traffic Safety Act*, the police obtained a Production Order under the *Criminal Code* in relation to the insured's adjuster statement. Security National applied for an exemption on the ground that it was covered by litigation privilege.

Judge John Henderson ruled that the statement was not privileged. While he found that one of the purposes for obtaining the statement was for reasonably contemplated litigation but that Security National had failed to prove that it was the "dominant purpose". He noted that another purpose behind the statement was *"an investigative purpose to determine whether or not there was any liability* exposure" on the part of Security National. He rejected the insurer's argument that this finding would impose chill on insurance industry with respect to taking insured statements. The Court was prepared to defer allowing the police to get the statement pending an appeal by the insurer. With respect, it is our opinion that the case was wrongly decided. A detailed brief of the case will be published in the September 2013 edition of ***Defence & Indemnity***.

This has tremendous implications for insurers. If there is a criminal or traffic charge laid against an insured arising from an accident police can access the insured's statement to his/her adjuster. In the parallel civil case, the plaintiff can gain access to it as part of the police file or the Crown disclosure package. Also, if the insured is convicted of the offence, it may impair or eliminate the insurer's ability to contest liability in the civil case. Also, this reasoning may apply to a civil case, allowing the Plaintiff to access such statements, even if police are not involved.

Judge Henderson's reasons suggest ways in which an insurer can increase the odds that litigation privilege will be found to apply to such a statement. Both the claims examiner and adjuster should give evidence that the dominant purpose behind the statement was anticipated litigation and facts to support that. In this case, no evidence of the adjuster was tendered. The examiner's evidence did not explicitly state this, it only noted that it was rare for a fatality not to involve a claim or litigation, that she needed the statement to assess liability exposure and "do her job". We recommend that insurers seek exemptions from production in such circumstances, pending the ultimate appellate outcome of this case.