The Latest on Disclosure of Adverse Costs Insurance

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Since the proliferation of adverse costs insurance through the legal industry over the last few years, there have been a handful of decisions in Ontario dealing with a plaintiff's disclosure obligations with respect to such insurance policies.

Generally speaking, adverse costs insurance, sometimes referred to as "Adverse Costs Protection" or "After-the-Event Insurance," protects a plaintiff against the risk of an adverse costs award following an unsuccessful trial.

Typically, the insurer will indemnify the plaintiff for the defendant's costs awarded against the plaintiff, and sometimes for the plaintiff's own disbursements as well, up to the limits of the policy. Adverse costs insurance may insure a specific plaintiff in respect of a specific action, or it may be issued to a law firm in respect of all actions carried by that firm.

State of the Law on Disclosure of Adverse Costs Insurance in an Action

Rules of Civil Procedure

A party to an action is generally entitled to disclosure of any insurance policies that may be required to respond to judgment on behalf of an opposing party. Rule 30.02(3) of the *Rules of Civil Procedure* requires a party to disclose the existence of, and to produce upon request, any insurance policy under which the insurer may be liable to satisfy all or part of a judgment, or to indemnify or reimburse a party for money paid in satisfaction of all or part of a judgment.

Since the costs of the action typically form part of a judgment, on its face Rule 30.02(3) seems to apply to adverse costs insurance. Nevertheless, the Ontario jurisprudence is somewhat divided as to a party's disclosure obligations regarding adverse costs insurance, with the majority of decisions holding that only the existence of such a policy must be disclosed, but not the policy documentation itself.

Abu-Hmaid v. Napar

The first decision in Ontario addressing this issue was the decision of Master Short in *Abu-Hmaid v. Napar*, 2016 ONSC 2894. In that case, Master Short held that the plaintiff must disclose to the defendant whether adverse costs insurance had been obtained, but the plaintiff was not required to disclose any further details of the insurance.

In coming to this conclusion, Master Short noted that Rule 30.02(3) seemed to apply to adverse costs insurance. However, he stated that it was his understanding (without citing any authority on the subject) that the purpose of Rule 30.02(3) was to avoid plaintiffs having to incur significant expenses to obtain judgments on which they could not recover. He felt that adverse costs insurance addressed a sufficiently different kind of liability that this policy rationale for the Rule did not apply.

Master Short felt that the existence of applicable adverse costs insurance is relevant to the resolution of a given action, but that the particulars of that insurance were not. He accordingly exercised his discretion in applying the *Rules of Civil Procedure* to order the disclosure of only the fact of the existence of adverse costs insurance, but not any of the particulars of that insurance.

Master Short's decision was followed by Justice Gunsolus in *Paulin v. Singh* (unreported, Peterborough court file no. 13-15).

Fleming v. Brown

However, in *Fleming v. Brown*, 2017 ONSC 1430, Justice Grace reached the opposite conclusion.

In *Fleming*, the plaintiff had disclosed the existence and limits of his policy of adverse costs insurance, and the defendants sought production of the policy. The plaintiff refused, relying on Master Short's decision in *Abu-Hmaid v. Napar.*

Justice Grace provided a critical review of both *Abu-Hmaid v. Napar* and *Paulin v. Singh*, finding Master Short's rationale for not applying Rule 30.02(3) to adverse costs insurance unpersuasive.

Citing the Ontario Court of Appeal's decision in *Sabatino v. Gunning*, [1985] 50 O.R. (2d) 171, Justice Grace noted that the purpose of Rule 30.02(3) was to "assist the making of informed and sensible decisions by parties involved in litigation where recourse to any available insurance monies may play a role in how the litigation is conducted and through the stages it should be pursued."

Justice Grace noted that the adverse costs insurance policy could well play a role in determining how the litigation is conducted. He felt that this was sufficient to trigger the disclosure obligation under Rule 30.02(3), and ordered the plaintiff to produce the adverse costs insurance policy.

Jamieson v. Kapashesit et al

Subsequently, in *Jamieson v. Kapashesit et al*, 2017 ONSC 5784, Justice Cornell declined to order production of the plaintiff's adverse costs insurance policy. Rather than wading into the debate as to the applicability of Rule 30.02(3), Justice Cornell distinguished the decision in *Fleming v. Brown* on the basis that the adverse costs insurance policy at issue in *Jamieson* was a blanket policy issued to plaintiff's counsel's law firm, rather than to the plaintiff specifically.

Since the policy was issued to plaintiff's counsel's firm rather than to the plaintiff, Justice Cornell concluded that the policy is not in the possession, control, or power of a party to the action, and so was not producible. He also found that as the policy contained sensitive information about the manner in which risk under the policy was to be considered, it was subject to solicitor-client privilege.

***Robichaud et al. v. Constantinidis et al*.**

In a brief ruling in *Robichaud et al. v. Constantinidis et al*., 2020 ONSC 310, Justice Schabas followed the decision in *Jamieson* and held that since the policyholder was the plaintiffs' law firm and not the plaintiffs themselves, Rule 30.02(3) does not apply, and the adverse costs insurance policy applicable to the plaintiffs' action was not producible.

James v. McGuire

Most recently, Master Robinson struggled with the issue of disclosure of an adverse costs insurance policy in *James v. McGuire*, 2020 ONSC 914. He indicated that he was bound to follow the decisions in *Jamieson* and *Robichaud*, and as the plaintiff's law firm was the policyholder for the adverse costs insurance policy at issue in that case, Master Robinson declined to order production of the policy to the defendants.

In coming to this conclusion, however, Master Robinson expressed some doubt as to the correctness of the decisions he was bound to follow. He felt there was merit to the defendants' arguments that there is a distinction to be drawn between the policyholder of an insurance policy, and named and unnamed insureds who may also be parties to the policy, which did not appear to have been considered in *Jamieson* or *Robichaud.*

Ultimately, however, Master Robinson was unable to distinguish the case before him from the binding precedent in those decisions.

Current Obligations and Future Arguments

On the current state of the jurisprudence, a plaintiff must disclose to the defendants the existence of an adverse costs insurance policy applicable to the action. If the plaintiff is the policyholder for this policy, then the policy likely needs to be produced to the defendants. However, if the policyholder is the plaintiff's lawyer's firm, then the policy does not need to be produced.

However, we can probably expect to see further challenges on this issue. To not require an adverse costs insurance policy to be produced if it is issued to plaintiff's counsel's law firm seems to be an odd result that is inconsistent with the *Rules of Civil Procedure* and caselaw regarding insurance and disclosure of policies.

As Justice Grace noted in *Fleming*, the Court of Appeal's explanation as to the policy rationale behind Rule 30.02(3) in *Sabatino v. Gunning*, [1985] 50 O.R. (2d) 171, "to assist the making of informed and sensible decisions by parties involved in litigation where recourse to any available insurance monies may play a role in how the litigation is conducted and through the stages it should be pursued," applies equally well to adverse costs insurance policies as it does to the liability insurance policies that protect defendants from the plaintiff's costs and damages. There does not seem to be any policy rationale for distinguishing between these types of insurance policies in the application of this Rule.

Further, as the defendants argued in *James*, the holding in *Jamieson* and *Robichaud* that Rule 30.02(3) does not apply to adverse costs insurance policies held by the plaintiff's lawyer's firm rather than by the plaintiff seems to ignore established jurisprudence on the rights of additional and unnamed insureds and beneficiaries under an insurance policy.

In *Jamieson*, Justice Cornell held that because the applicable adverse costs insurance policy was issued to plaintiff's counsel's firm, and not to the plaintiff directly, and because plaintiff's counsel was not a party to the action, the policy was not in the possession, control, or power of a party to the action, and for this reason could not be produced by the plaintiff. This reasoning was adopted by Justice Schabas in *Robichaud* as well.

However, the Ontario Court of Appeal has held that an additional or unnamed insured under an insurance policy is privy to the policy, even where the additional insured does

not have all the same rights under the policy as the named insured (see, e.g., *Rochon v. Rochon*, 2015 ONCA 746 at paragraphs 45-47).

To the extent that an adverse costs insurance policy insures against costs awarded against the plaintiff, the plaintiff must be an additional insured on such a policy. Costs are awarded against a party, not against the party's lawyers. The plaintiff's lawyers would have no insurable interest in an adverse costs award against the plaintiff. Only the plaintiff has that interest. It follows that the plaintiff must be a party to the adverse costs insurance policy, as it relates to a given action.

Further, in *Peter B. Cozzi Professional Corporation v. Szot*, 2019 ONSC 5071, the Ontario Court of Appeal held that the appellant lawyer, who had purchased a policy of adverse costs insurance on behalf of his client as part of the process of entering into his retainer agreement with the client, and pursuant to a business agreement with the insurer to offer such insurance to all his clients, had effectively acted as a broker and simply sold his client the insurance policy. It is not clear that in the case of a blanket firm-wide adverse costs insurance policy, the lawyers are actually acting in any different capacity than this despite the firm being the named insured.

In both *Jamieson* and *Robichaud,* the Court also expressed a concern that the adverse costs insurance policies at issue in those cases contained sensitive information and agreements between the insurer and the insureds as to how the risk of an action was to be considered, which raised concerns about solicitor-client confidentiality. However, no consideration is given in those cases to simply redacting the privileged portions of the policy, rather than refusing production of the document altogether.

Finally, recent amendments to the *Class Proceedings Act, 1992* require plaintiffs in class actions to obtain court approval of any third party funding agreements, including adverse costs insurance, and to disclose such agreements to the defendants. While this disclosure requirement is limited to the class action context, it nevertheless represents acknowledgement by the Ontario Legislature of the importance of such agreements to the conduct of litigation.

Conclusion

The existence of adverse costs insurance, and details of its applicability in an action, often inform and may even significantly impact a defendant's litigation strategy. As a case gets close to trial, defendants must calculate the risks of settlement versus proceeding to trial. Those calculations frequently include whether the defendant will be able to recover its costs if successful at trial, and whether the plaintiff is likely to shoulder the risks of a trial.

The details of applicable adverse costs insurance are integral to that calculus. As a result, and because of the issues identified above with the decisions refusing production, it can be expected that defendants will continue to argue for production of these policies.

To that end, to the extent that *Jamieson* and *Robichaud* decisions did not comply with the legislation and appellate authority discussed above, it could be argued that these decisions were reached in error and should not be followed in subsequent decisions. Ultimately, however, it will likely take an appellate court to finally determine the issue, one way or another.