

## Note to Insurers: Choose your Position, and Tell your Insured: *Demetriou v AIG Insurance Co of Canada* and the missing ring

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The recently released case of *Demetriou v AIG Insurance Co of Canada*, provides further insight on insurer conduct that can attract punitive damages. Following an insurers denial of a claim for a stolen ring, Justice Gray granted the insured plaintiff summary judgement and awarded \$50,000 in punitive damages against the insurer.<sup>1</sup>

### Underlying Facts

The plaintiff had an heirloom ring appraised and added to an insurance policy with AIG Insurance Company of Canada (“AIG”). While vacationing, the plaintiff was robbed at knifepoint, and the ring was stolen.

The plaintiff reported the theft to police and his insurance broker. He later met with AIG’s adjuster and investigator, provided particulars about the claim, and was subjected to a number of examinations under oath. AIG formally denied the claim six months later, alleging it had insufficient information to substantiate the claim. AIG then told the plaintiff that it would not renew his insurance policies. Litigation ensued.

The plaintiff sought particulars on whether the insurer was relying on exclusions concerning deliberate acts or fraud. AIG confirmed it was not specifically relying on these exclusions. Additionally, up until the date of the summary judgment hearing, at no time did AIG seek to rely on these exclusions or plead fraud.

### Claiming Fraud

During the summary judgement motion, the insurer submitted that the plaintiff had not proven that the ring was stolen, and that the plaintiff had to establish the facts necessary to support his claim. AIG relied on the cases *Hajgato*<sup>2</sup> and *Shakur*<sup>3</sup> for its position. *Hajgato* and *Shakur* involved claims of theft that insurers denied on the basis that a theft did not occur. Both cases emphasized the onus on an insured to prove a theft occurred, with the court in *Shakur* stating that in denying theft, fraud is impliedly alleged.

In *Demetriou*, Justice Gray distinguished the two cases, since AIG had expressly disclaimed any reliance on fraud or deliberate acts. Justice Gray ruled the only question was whether the plaintiff had failed to sufficiently cooperate or provide sufficient information. His Honour was satisfied that the plaintiff, and family, had complied with an insured’s obligations and provided extensive information as requested. Certain suspicious circumstances were adequately explained, although if not, they were irrelevant anyway since fraud was not being relied upon by AIG.

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<sup>1</sup> *Demetriou v AIG Insurance Co of Canada*, 2019 ONSC 627.

<sup>2</sup> *Hajgato v Gibraltar General Insurance Co*, 1984 CarswellOnt 1431 (“*Hajgato*”).

<sup>3</sup> *Shakur v Pilot Insurance Co*, 1990 CanLii 6671 ONCA (“*Shakur*”).

In the subject case, the court denied AIG's request to amend its statement of defence to plead fraud, if necessary, since the plaintiff had "conducted the litigation based on the position that no fraud was being alleged".<sup>4</sup>

Although it is not necessary to expressly state fraud, disclaiming reliance on it entirely puts the insurer in a compromised position. When an insurer takes the position that a theft (an insured incident) did not occur, there is at the least an implied allegation of fraud. A claimant must still prove the loss occurred on a balance of probabilities. If fraud is disclaimed expressly then the claimant will only have to prove that they cooperated and provided sufficient information to the insurer to substantiate the claim.

### **Punitive Damages**

Justice Gray cited *Whiten v. Pilot Insurance Co.*, for the test for awarding punitive damages, noting punitive damages are only awarded in cases for "malicious, oppressive and high-handed conduct" that "offends the court's sense of decency".<sup>5</sup>

Punitive damages were appropriate here because: 1) Within two weeks of the claim being filed, AIG had contemplated that litigation would be required to resolve the claim. 2) AIG did not inform the plaintiff on its position regarding the claim but thereafter subjected the insured to scrutiny by its adjuster and examinations under oath. 3) AIG informed CGI Insurance Services that the claim file was closed within three months of the claim being filed, and 4) The plaintiff was not made aware of this report. Following the "closure" of the claims file, AIG continued to conduct examinations under oath of the plaintiff and his family.

The Court found AIG made an early determination that the claim would be litigated and "attempted to surreptitiously put forward a case of fraud, even though it had disclaimed any reliance on fraud".<sup>6</sup> AIG had no intention to pay the claim but did not disclose this fact to the plaintiff. Despite its position, AIG still had the plaintiff and his family comply with requests for particulars and advanced its own discovery through conducting examinations under oath. The court stated the "conduct of the defendant can only be construed as being designed to put the plaintiff through his paces even after it had decided to deny the claim, and was with a view to setting up its case for litigation".<sup>7</sup>

### **Conclusion**

The court ordered \$50,000 in punitive damages against the insured. This case highlights an insurer's obligations to, promptly process a claim and act fairly and reasonably in investigating and assessing the claim.<sup>8</sup> A decision to deny a claim should be transparent and disclosed to the affected parties, rather than insisting on opaque investigations surreptitiously advanced to support an undisclosed allegation.

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<sup>4</sup> *Supra* note 1.

<sup>5</sup> *Whiten v Pilot Insurance Co*, 2002 SCC 18 ("*Whiten*").

<sup>6</sup> *Supra* note 1.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Bullock v Trafalgar*, [1996] OJ No 2566.