

BRIEFING NOTE

Insurers face \$4,950,000 in Punitive & Aggravated Damages *(Branco v. American Home Assurance, et al. 2013 SKQB 98)*

A Saskatchewan trial court's harsh rebuke of two insurers' handling of a long-term disability claim has given rise to an historically high award of punitive damages in the insurance context. The Court's conclusion suggests that this may be indicative of things to come for the industry:

[215] Although Canadian court[s] may have believed that the \$1 million award in the *Whiten* case would catch the attention of the insurance industry and [expressed] the court's disapproval of such actions, it is apparent that the \$1 million was not sufficient....

[216] ... It is hoped that this award will gain the attention of the insurance industry. The industry must recognize the destruction and devastation that their actions cause in failing to honour their contractual policy commitments to the individuals insured.

So what conduct led to this serious penalty? The plaintiff, Branco, was a welder who worked for a subsidiary of a Saskatchewan company in Kyrgyzstan. He injured his foot while at work, first in December 1999 and again in March 2000.

AIG provided benefits to Branco for work-related injuries based on "WCB" benefits payable in Saskatchewan. Zurich was responsible for Branco's Long-term disability.

AIG failed to pay benefit payments when due, and discontinued benefit payments on a number of occasions; on one occasion for a period of 18 months. The payments were ultimately discontinued on December 2, 2004.

AIG was found in breach of the terms of the policy requiring it to continue paying benefits, as well as its duty to deal in good faith with Branco as evidenced by numerous lengthy and unexplained delays in making payments to Branco. These delays were described as "malicious and designed to leverage a reduced settlement."

The court was especially critical of AIG in light of a previous case (*Sarchuk v. Alto Construction Ltd.*, [2003 SKQB 237](#)), with nearly identical facts, and involving the same insurance adjuster, which had resulted in an award for punitive damages against AIG in 2003. The court noted that "in spite of this award, [the insurance adjuster] and AIG continued to act in a similar manner with [Branco] in the same time period immediately after the *Sarchuk* decision was rendered."

The court awarded aggravated damages of \$150,000 for Branco's mental distress due to AIG's failure to honour the terms of this "peace of mind" contract.

Guild Yule LLP

BARRISTERS AND SOLICITORS

2100 – 1075 Georgia Street

Vancouver, BC V6E 3C9

P 604 688 1221

F 604 688 1315

E feedback@guildyule.com

In awarding punitive damages against AIG, the Court emphasized that AIG's actions had continued for eight years, AIG was very aware of the hardship it was inflicting upon Branco, and that the discontinuance of benefits was "a clear and blatant attempt" to force Branco into accepting an unreasonably low cash settlement.

Further, AIG had attempted to cover up its misconduct when it used the doctor's failure to provide a prompt medical report as justification for discontinuing monthly benefits. The Court also emphasized that the financial vulnerability of the plaintiff was an important consideration.

The Court assessed punitive damages at \$1,500,000 on the following basis:

[197] The goal of punitive damages is deterrence. Insurers must discontinue exploiting the vulnerability of insureds in times of disaster. The court must also consider the fact that previous awards such as \$60,000 in *Sarshuk* and \$1,000,000 in *Whiten* appear to have done little or nothing to deter insurance companies from their actions.

With respect to Zurich, the Court noted that B's claim for LTD benefits had been approved early on in the process, but nevertheless they refused to pay until just before trial (nearly 10 years later). The court held that this delay of 10 years in making payments was "reprehensible" and a "gross breach of a peace of mind contract". The court awarded \$300,000 in aggravated damages against Zurich for the mental distress that this caused.

With respect to punitive damages, the Court emphasized that even after receiving numerous medical reports establishing Branco's disability as early as 2002 and even after approving the claim, "the only actions by Zurich for years were either unjustifiably low offers or expensive and unwarranted court applications". These actions were described as "attempts to make significant profits". Further, in light of the medical reports, it was "impossible" for Zurich not to have known the significant impact its misconduct was having on Branco's well-being.

The Court assessed punitive damages against Zurich in the amount of \$3,000,000, on the basis that "for every individual who could not withstand these types of actions by Zurich in similar situations as [Branco], Zurich or other insurance companies would profit by approximately one-half of a million dollars in each case they could settle on an unjustifiably low offer after two or three years of financial and psychological pressure ... it would only take six individuals worldwide who accept low offers like the ones made to [Branco] to save Zurich \$500,000 each and recoup the amount of this award."

These writers anticipate that the matter will be appealed so it may be some time before we can determine whether this represents a quantum shift in terms of punitive damage exposure for insurers. For now it will be a notable arrow in the quiver of insurance plaintiff counsel.

Alexander D.C. Kask is a partner with Guild Yule LLP and practices in the areas of insurance law, professional liability, health law, municipal law, administrative law, product liability, safety standards regulation, and personal injury litigation.

Shauna Skinner is an associate with Guild Yule LLP and practices in the areas of general insurance litigation, human rights law, medical and dental malpractice defence, education law, employment law, municipal law, and claims arising from personal injury and property damage.

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