

DECISION
of the
GENERAL INSURANCE COUNCIL OF MANITOBA
(“Council”)
Respecting
DOUGLAS BOYD FRIESEN
(“Licensee”)

INTRODUCTION

The General Council of Manitoba (“Council”) derives its authority from *The Insurance Act* C.C.S.M. c. 140 (the “Act”) and the *Insurance Councils Regulation 227/91* (“Regulation 227/91”).

In response to a complaint against the Licensee received by Council, an investigation was conducted pursuant to sections 385(7) and 375(1.1) of the *Act* and Section 7(2)(e) of *Regulation 227/91*. The purpose of the investigation was to determine whether the Licensee had violated the *Act*, its *Regulations*, its *Licensing Rules*, and/or the Insurance Adjusters Code of Conduct (the “Code”).

During the investigation the Licensee was notified of the information submitted to Council and given an opportunity to make submissions.

On November 6, 2019, during a meeting of the Council, the evidence compiled during the investigation was presented and reviewed. Council determined that the issues and the facts and evidence were as follows:

ISSUES

1. Did the Licensee violate sections 1 (Integrity), 2 (Competence), and 3 (Quality of Service), of the *Code* when he failed to:

- (a) Follow the Insurer's instructions to write a letter to the Complainants and indicate that further payment on a tractor would require replacement of the tractor with maximum payable up to the original purchase of \$99,320.00?
- (b) Provide full disclosure to the Complainants of material information with respect to receiving full indemnification of the tractor settlement?

FACTS AND EVIDENCE

1. At all material times, the Licensee was the Designated Representative for the Firm, and the adjuster assigned to handle the Complainant's claim.
2. On November 12, 2018, the Complainants had a fire loss which destroyed their tractor (the "Tractor").
3. On November 14th and December 5th, 2018, the Insurer emailed the Licensee a copy of their Limited Waiver of Depreciation wordings so that the Licensee could familiarize himself with their coverage.
4. On December 20, 2018, the Insurer approved a payment of \$74,000.00 which represented the Actual Cash Value ("ACV") of the Tractor.
5. By email dated January 9, 2019, the Insurer indicated to the Licensee that the maximum amount payable under the Limited Waiver of Depreciation would be the [Tractor's] original purchase price of \$99,320.00.
6. By email dated January 15, 2019, the Insurer instructed the Licensee to send a letter to the Complainants, and indicated that:
 - (a) *"I would simply advise the insured that further payments on tractor would require replacement of tractor and indicate maximum payable (up to \$99,320.00 original purchase price)."*
7. On January 16, 2019, the Complainants purchased a 2010 Tractor valued at \$50,000.00, which was \$24,000.00 less than the \$74,000.00 settlement stipulated by the Insurer.
8. By email dated January 17, 2019, the Complainants provided the Licensee with a copy of the bill of sale and indicated:
 - (a) *"Confirmation that we have purchased a replacement tractor."*
 - (b) *"As well now with the replacement now on the yard, when is the tractor portion of the settlement going to be finalized?"*

9. By letter dated January 22, 2019, the Licensee provided the Complainants with a cheque in the amount of \$4,535.00, which represented the ACV value of items covered by the policy. The Licensee's letter did not address the settlement of the Tractor as instructed by the Insurer on January 15, 2019.
10. On January 24, 2019, the Complainants submitted a complaint to Council and indicated that:
 - (a) They were not made aware of the required parameters (age and value) for the replacement Tractor in order to obtain the full \$99,320.00 settlement.
 - (b) They disputed the \$74,000.00 ACV settlement they received for the Tractor.
 - (c) They purchased a replacement tractor valued at \$50,000.00 with the expectation that the balance of the \$99,320.00 settlement, \$25,320.00, could be applied to their replacement tractor loan.
 - (d) *"It was not made clear that we needed to buy brand new to receive the full value of our paid tractor policy."*
11. By email dated January 24, 2019, the Licensee indicated to the Complainants that no further allowance would be provided on the Tractor as they had replaced the Tractor with a \$50,000.00 tractor, which was less than the \$74,000.00 they had received.
12. By email dated May 15, 2019, the Licensee indicated to Council that:
 - (a) *"With respect to the Limited Waiver of Depreciation, I do not recall reviewing this with the Complainants, however I know that [the Insurer] reviewed the Limited Waiver of Depreciation directly with the [Complainants];"*
 - (b) *"With respect to communications with the [Complainants] with respect to the settlement of the tractor claim, I do not recall communicating with the [Complainants] with respect to the settlement of the tractor claim, however I know that [the Insurer] reviewed the settlement of the tractor claim directly with the [Complainants];"*
13. By letter dated May 21, 2019, the Insurer indicated to Council that:
 - (a) The Insurer's Claims Examiner spoke with the Complainant on December 7, 2018 as the Complainant had concerns about the ACV offer of \$74,000.00.
 - (b) *"The replacement of his tractor, and specifically what he needed to supply once he replaced the tractor with a new unit was discussed with the Insured."*

- (c) The Insurer *"had no conversation with our insured relating to the purchase of his replacement tractor, other than December 7, 2018 call noted above "*
- (d) *"An e-mail was sent to our insured on January 21, 2019 outlining all of the wordings relating to Limited Waiver of Depreciation and Outbuildings coverage in response to our insured's e-mail stating that they had replaced their tractor."*
- (e) *"Prior to this e-mail, an e-mail was sent to our independent adjuster on January 15, 2019 advising him to send a letter to this insured with a copy to their broker. The letter was to reiterate what is covered by policy and what is not covered by policy and to note that further payment on tractor would require replacement of tractor (with maximum payable up to original purchase price of \$99,320.00)."*

INTENDED DECISION

After considering all of the facts and evidence in light of the applicable regulatory and ethical requirements, Council determined on a provisional basis that the Licensee had failed to diligently follow the instructions of his principal, to write a letter to the Complainants that would have advised how to obtain the full proceeds with respect to the Tractor settlement and, further, that the Licensee had failed to provide full disclosure of material information with respect to receiving full indemnification on the Tractor settlement. It determined provisionally that the Licensee should be fined \$1,000.00 and assessed investigation costs of \$2,200.00 because of his violations of Sections 1 (Integrity), 2 (Competence) and 3 (Quality of Service) of the Code.

The Licensee subsequently exercised his right to dispute Council's Intended Decision and to request a hearing before Council. This occurred on January 6, 2021. The Licensee was represented by legal counsel.

ISSUE

Did the Licensee in the course of the Show-Cause Hearing provide sufficient evidence or argument why the Intended Decision should not be made final?

THE SHOW CAUSE HEARING

There was no new evidence adduced at the Hearing. The Licensee did testify, but his evidence merely highlighted certain aspects of the evidence which Council possessed and reviewed before pronouncing its Intended Decision.

Essentially, the argument of the Licensee was as follows: the Complainants primarily dealt directly with the Insurer, the Licensee's principal. The Licensee believed, with good reason, that any information which should have been provided to the Complainants was provided to them by their Insurer. It was not for the Licensee to second-guess his principal. He did not have the authority to determine the issue of coverage. That was for the Insurer. He at all times reasonably relied on this pattern of conduct by the Complainants and the Insurer. He should not be criticized – and breached no duty to the Complainants – because of his failure to communicate to the Complainants what he reasonably believed had been communicated to them otherwise. How could it be a breach of his responsibilities to fail to communicate to the Complainants information they already possessed?

DISCUSSION AND ANALYSIS

An independent adjuster is one category of learned intermediary within the insurance industry. Whereas the insurance agent mediates between the insurer and the insured at the time the insurance policy is created, the insurance adjuster is involved after the insured sustains a loss for which a claim is made under the policy.

Once assigned to a claim, the independent adjuster is expected to communicate with the insured and obtain information and documentation pertaining to the loss. Of course, one of the first steps naturally is to determine whether the loss is actually covered under the policy, and if it is, to what extent that is so.

For the adjuster and the insurer it is a commonplace notion that there are broadly speaking two potential bases for indemnification of an insured for property loss or damage. The first is coverage on an actual cash value basis. Here the amount paid to the insured is based on the value – typically fair market value – of the property at the time of the loss. What would be paid by the insurer would be the lesser of the cost of repair and the actual (depreciated) value of the item.

Nowadays, for most property, replacement cost coverage is available. Such coverage indemnifies the insured for the cost of acquiring a new item to replace the old. For this

coverage to be triggered the item must actually be replaced with a new item. If the cost of replacement is not incurred by the insured, the insurer will not pay the replacement cost.

Vehicles are an exception to the general availability of replacement cost coverage. Unless one pays an extra premium, if an insured vehicle is a constructive total loss, only the actual cash value would be paid, even if the owner purchases a new vehicle thereafter.

All of the above was exceedingly well known by the Licensee in this case.

Here, the Licensee said on more than one occasion in the course of his evidence at the Show Cause Hearing, that the "Limited Waiver of Depreciation" was a new type of coverage provided by this Insurer. The provision in question stated:

Limited Waiver of Depreciation

1. In the event of loss, destruction or damage, the Insurer agrees to make settlement without deduction for depreciation subject to the following provisions:

(a) the loss or damage must occur within 60 months of the date on which the property was delivered to the owner/lessee.

(b) the Insured must be the first owner/lessee of the property.

(c) repair or replacement must be effected within a reasonable period of time after the loss: we will not pay for increased costs due to unnecessary delay.

(d) failing compliance by the Insured with any of the foregoing provisions, settlement shall be made as if this Waiver had not been in effect.

(e) this Waiver will not apply with respect to

(i) tires, tubes, tracks or batteries;

(ii) betterment resulting from the necessary repair or replacement of parts having prior unrepaired damage; or

(iii) any claim arising out of internal damage caused by foreign object(s) being ingested into a machine.

(f) if this property, to which this Waiver is applicable is subject to a Co-Insurance Clause requiring a stated percentage of insurance to value to be maintained, the Actual Cash Value for the purpose of applying said Co-Insurance Clause to such property shall be calculated on the basis of the original purchase price or Replacement Cost of the property, whichever is lesser, without deduction for depreciation.

(g) the Insurer, at its option, may elect to keep any salvage or proceeds from salvage.2. Limited Waiver of Depreciation means the cost, at the time of loss, of repair or replacement (whichever is lesser) with new

property of similar kind and quality without deduction for depreciation.

We will pay the least of:

- (a) the original purchase price of the property.
- (b) the actual cost to repair or replace.
- (c) the Amount of Protection shown on your Cover Page.

This provision was provided to the Licensee on November 14, 2018, and on December 5, 2018. Though the Insurer indicated to Council that coverage was explained to the Complainants in a telephone conversation on December 7, 2018, the first time they received the actual wordings referred to above was in a January 21, 2019, email from the Insurer. Based on the Insurer's email of January 15, 2019, one inevitably wonders about that explanation. In directing the Licensee, the Insurer wrote: ". . . advise the insured that further payments on the Tractor would require replacement of the Tractor and indicate maximum payable . . ." "Replacement" is the term used, not "replacement with a new tractor".

In the commentary within section 1 of the *Code* (Integrity), it states: "The Adjuster Shall . . . provide full disclosure to the insured of coverage for which the policy must respond . . ."

In the comment within section 3 (Quality of Service), it is stated that the Adjuster shall not:

fail to inform. . . a policy holder of any matter of fact which may materially affect the claim or prejudice their interests.

At various points in communications with the Complainants and with the Licensee, the Insurer used the word "replace" when it meant "replace with new". The Licensee would have understood this abbreviation. The Complainants manifestly did not.

The Licensee candidly admitted in his evidence that at no point between when he was assigned the file and January 16, 2019 (when the Complainants "replaced" their Tractor) did he discuss the issue of coverage with them. It is simply no answer for the Licensee to say that he believed the Insurer had explained the issues pertaining to coverage. The Licensee had an independent direct obligation to the Complainants and he breached that obligation. The Licensee should have explained clearly and directly to the Complainants the significance of the replacement or non-replacement of their destroyed Tractor with a **new** tractor. There can be no doubt that this breach influenced the Complainants' conduct and damaged their interests.

Council agrees there was much direct contact between the Complainants and their Insurer. The Complainants were clearly trying to bypass the Licensee. The Insurer

should not have indulged the Complainants. Council is sympathetic to the predicament these circumstances presented to the Licensee. It is for this reason that Council, despite the distinct breach aforesaid by the Licensee, has reduced the fine and costs assessed from what were originally intended.

Based on the information and evidence reviewed by Council, and the arguments made on behalf of the Licensee in the course of the Show Cause Hearing, Council concluded that the Licensee violated Sections 1 (Integrity), 2 (Competence), and 3 (Quality of Service) of the *Code* and that disciplinary action is warranted.

PENALTY AND FINAL DECISION

Council's Decision dated January 27, 2021 was delivered to the Licensee by mail on January 29, 2021. The Decision outlined the foregoing background, analysis, and conclusion on a preliminary basis.

Having regard to the determination of the violations listed above, and for the reasons outlined above, pursuant to sections 385(7) and 375(1.1)(c) and (d) of the *Act* and section 7(1) of *Regulation 227/91*, Council rendered its Decision to impose the following penalty:

1. The Licensee was fined \$500.00 and assessed investigation costs of \$1,000.00.

Pursuant to section 389.0.1(1) of the *Act*, the Licensee had the right to appeal this Decision within twenty-one (21) days of receipt. The Licensee was advised of this right in the Decision and was provided with the Notice of Appeal form, in accordance with section 389.0.1(2) of the *Act*. The Licensee duly paid the levied fine and investigation costs and as an appeal was not requested in this matter, this Decision of Council is final.

In accordance with Council's determination that publication of its Decisions is in the public interest, this Decision is published, in accordance with sections 7.1(1) and 7.1(2) of *Regulation 227/91*.

Dated in Winnipeg, Manitoba on the 15th day of March, 2021.