Risk Management Considerations for Process of Litigation

Our claims department is often asked by our clients about the status of a claim during litigation.

We thought it might be of interest to describe the various stages in the litigation process. In Ontario, civil actions consist of five basic stages: commencement, pleadings, discovery, mediation, pre-trial conference and trial. Appeals may also follow a trial decision.

An action begins with the issuance of a Statement of Claim or a Notice of Action followed by the Statement of Claim. The Statement of Claim identifies the parties to the action, the damages being sought and the nature of the claim.

Once the Statement of Claim has been served, the defendant(s) must deliver a Statement of Defence or Notice of Intent to Defend. This must be delivered by defence counsel within 20 days of service of the Statement of Claim. Failure to do so may result in the defendant being noted in default and a judgement being made. In jurisdictions where case management does not apply, the plaintiff's solicitor will usually waive the time limit for a defence until such time as the investigation of the incident is complete.

The Statement of Claim, Statement of Defence, Cross Claims, Counter Claims, Third Party Claims, etc. are the written statements, filed in the Court and exchanged between the parties. These constitute the pleadings. Once the pleadings are complete, both parties should know the basic allegations and issues in dispute.

At the Examination for Discovery the opposing parties are examined under oath by the lawyers about the facts and circumstances of the incident and the amount of damages. This also includes production and discovery of the documents each party will be using to support their case. This procedure allows the lawyers an opportunity to assess the merits of each other's case and the quality of each witness.

Once discoveries are held a mediation or mediations usually follow. This allows the parties to meet, informally, in order to attempt resolution. A mediator is used to guide the process. Anything said or put in writing at a mediation is not producible in Court.

Once an action has been set down for trial, a pre-trial conference is held before a judge. Each solicitor prepares a memorandum describing the theory of his case including documentation to support his position. It is reviewed by the judge who assesses the case and usually makes recommendations for settlement. The purpose is to encourage settlement and reduce the length of the trial. This may be achieved by having some of

the issues settled such as an agreement on the amount of damages. The trial then takes place on the liability issue only.

At trial, the plaintiff's lawyer presents his case, followed by the defendant's case. Each party makes a closing address. In a jury trial, the judge instructs the jury which then awards the verdict. The judge then incorporates the verdict into an order for judgement or a dismissal. In a trial without jury, the judge may hand down an oral decision following closing arguments or hand down a written decision at a later date.

Of course, not all civil actions actually reach judgement. Litigation is a hazardous and expensive process for both sides and an action may be settled out of court or dropped prior to or during trial based on the lawyers' assessment of all of the facts and evidence established. Approximately 95% of these matters are resolved prior to trial.

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