



canada's insurance
defence network

Identifying, Investigating & Resolving **Fraudulent Insurance Claims**



About RMC

canada's insurance
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vos avocats en assurance
partout au canada



National Coverage



TOPICS

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 2. Investigating a potential fraud
1. Protecting the insurer
 2. Remedies

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PART 1

What to watch for.



POLL #1

Have you experienced an increase in suspected fraudulent insurance claims since the start of the pandemic?



WHAT IS INSURANCE FRAUD

Definition

- “Fraud committed against an insurer, as when an insured lies on a policy application or fabricates a claim” (Black’s Law Dictionary)
- “Any act committed with the intent to fraudulently obtain payment from an insurer” (Government of Canada)

WHAT IS INSURANCE FRAUD

Overview

- Fraud affects all types of insurance including: automobile, property, disability, healthcare
- Estimated that insurance fraud costs Canadian taxpayers between \$1.6-2 Billion annually
- Fraud tends to rise during economic downtimes.
- Insurance Fraud is on the rise due to COVID-19.

WHAT IS INSURANCE FRAUD



COMMON SCHEMES

Premeditated schemes: devising a plan to claim for some sort of loss

Opportunistic schemes: Opportunistic schemes: when a legitimate claim is inflated to obtain an unwarranted insurance payment.

RED FLAGS

- Individuals that are in a rush to place insurance (especially if a loss happens right after coverage is placed) or individuals in a rush to accept a quick settlement
- Claims made quickly after a vehicle was purchased or registered
- Claimants who have a history of accidents within a short period of time
- Individuals who ask hypotheticals about coverage
- Individuals who are extraordinarily familiar with insurance terms and procedures

RED FLAGS

Specific to COVID-19, the Insurance Bureau of Canada has warned insurance adjusters to be aware of:

- cyber issues
- telemedicine fraud
- food spoilage claims (restaurant industry).
- owner vehicle give-ups
- claims that may be disguised as another claim

LEGISLATION

Section 554(1) of the Alberta Insurance Act states:

If:

- a) An applicant for a contract
 - I. Gives false particulars of the described automobile to be insured to the prejudice of the insurer, or
 - II. Knowingly misrepresents or fails to disclose in the application any fact required to be stated in the application,
- b) The insured contravenes a term of the contract or commits a fraud, or
- c) The insured wilfully makes a false statement in respect of a claim under the contract,

A claim by the insured is invalid and the right of the insured to recover indemnity is forfeited

LEGISLATION

Statutory Conditions:

FRAUD 7

Any fraud or willfully false statement in a statutory declaration in relation to the particulars required under Statutory Condition 6 invalidates the claim of the person who made the declaration.

LEGISLATION

Section 233 of the *Insurance Act* of Ontario states:

Misrepresentation or violation of conditions renders claim invalid²³³

(1) Where,

(a) an applicant for a contract,

(i) gives false particulars of the described automobile to be insured to the prejudice of the insurer, or

(ii) knowingly misrepresents or fails to disclose in the application any fact required to be stated therein;

(b) the insured contravenes a term of the contract or commits a fraud; or

(c) the insured wilfully makes a false statement in respect of a claim under the contract,

a claim by the insured is invalid and the right of the insured to recover indemnity is forfeited.

POLL #2

What types of suspected fraudulent claims have you seen during the pandemic?

(select all that apply)



PART 2

Investigating a Potential Fraud



INVESTIGATION

Questions to answer during initial investigation:

- Does the named insured have an insurable interest in the property?
- Does the supporting documentation support the dollar amount claimed by the Insured?
- Is there a financial motive for the insured to stage or cause the subject loss?
- Where did the insured live at the time of loss?
- At the time of loss, where was the insured? Is there proof of alibi?
- What were the debts, assets and income of the insured at that time?
- Details of the insured's prior insurance claims

EXAMINATIONS UNDER OATH

Authority

An Insurer's ability to question an insured under oath is based on legislation or the policy wording.

- For automobile insurance policies, the right is statutory.
- For example, Section 556 of Alberta's *Insurance Act* states:
 - (4) The insured must submit to examination under oath and must produce for examination at any reasonable place and time designated by the insurer or its representative all documents in the insured's possession or control that relate to the matters in question, and the insured must permit extracts and copies of the documents to be made

EXAMINATIONS UNDER OATH

- Section 33(2) of the Statutory Accident Benefits Schedule in Ontario gives the insurer a right to examine the insured on one occasion.
- For other types of policies (e.g. property policies) the insurer will have to look to the policy wording to see if it has a right to examine the insured.
- If the insured refuses, the insurer is entitled to discontinue payment of benefits.

EXAMINATIONS UNDER OATH

Purpose

- Reduce insurance costs, address fraud and increase accountability within the system (Aviva v McKeown, 2017 ONCA 563 at para 34)
- Examinations under oath should NOT be used as a substitute for a full investigation which should be completed beforehand (i.e., collecting relevant documents, witness statements, surveillance, etc.)

NOTICE OF EXAMINATIONS UNDER OATH

In Ontario, the Insurer shall make reasonable efforts to schedule the examination under oath for a time and location that are convenient for the applicant and shall give the applicant reasonable advance notice of the following:

1. The date and location of the examination.
2. That the applicant is entitled to be represented by counsel or another representative, at their own cost.
3. The reason or reasons for the examination.
4. That the scope of the examination will be limited to matters that are relevant to the applicant's entitlement to benefits.

TIMING OF EXAMINATIONS UNDER OATH

Do your homework first:

- The examiner should have as much information as it can gather before the cross-examination (e.g. interview other parties involved, such as the detective or witnesses before conducting the examination under oath).
- Ensure you have a sworn statement from the insured.
- Each case is fact specific and can affect the timing of the Examination.
- Examinations should be undertaken within 60 days generally after the insured submits the sworn statement of proof of loss. Policies may provide for shorter deadlines.
- If interviewing multiple insureds, schedule the examinations separately, but on the same day if possible, to avoid collu

KEY QUESTIONS DURING EXAMINATIONS UNDER OATH

- The person asking the questions should be experienced in cross examinations (i.e. a lawyer or claims examiner).
- The questions should start open ended in order to gather as much information as possible (in particular, consider the fraud triangle: motive, opportunity, rationalization).
- Questions should then become closed to obtain admissions.

KEY QUESTIONS DURING EXAMINATIONS UNDER OATH

Topics include:

- General identification information
- Background information (family history, residence history, criminal record, job history, etc.)
- Identification and verification of all records produced
- Inquire as to any changes/limit increases on the policy
- Inquire into financial information to learn about insured's assets and debts prior to the date of loss
- Verify the loss/damages (obtain all receipts, photos, etc.)
- Information pertaining to the circumstances surrounding the loss
- Any additional areas of inquiry from investigation

RETAINING EXPERTS

- Retain experts early on in the process.
- Experts can help determine what information needs to be gathered before it is lost (e.g. a Black Box from a car, or CCTV footage from a nearby building).
- Expert evidence may be required to prove the fraud (for example, that the fire was of an incendiary origin or that the car accident did not occur as alleged).

HOW TO PRESERVE AND GATHER EVIDENCE

From Insured (Duty to Cooperate)

1. Obtain recorded statements as soon as possible of details of events and items lost.
2. When interacting with Insured, take good notes of words spoken:
 - take notes contemporaneously and detailed
3. Confirm statements by email or letter with Insured.

HOW TO PRESERVE AND GATHER EVIDENCE

From Insured (Duty to Cooperate)

4. Take note of when the insured property was acquired by the Insured and determine if the acquisition date coincides with the purchase date of the insurance policy, as well as the renewal date of the policy:
 - obtain authorizations for disclosure of previous Insurer's file and reason for termination
 - obtain our Insured's application forms to determine what was disclosed
5. Examination under Oath:
 - only one opportunity (usually wait for the completed Schedule of Loss)
 - must refer to the terms of the policy when requested

HOW TO PRESERVE AND GATHER EVIDENCE

From Third Parties

Obtain statements of Third Parties or potential witnesses (i.e. family members) to:

- corroborate or disprove information
- establish a time-line of the events
- if the Third Party refuses to give a statement, send an email to confirm discussions and facts stated and ask them to confirm/reply.

HOW TO PRESERVE AND GATHER EVIDENCE

As to Property Damages

Inspect the Property and Take Multiple Pictures:

- it may be your only opportunity
- right of access by accredited agent, Statutory Condition 10

Entry, Control, Abandonment

After any loss of damage to insured property, the Insurer shall have an immediate right of access and entry by accredited agents sufficient to enable them to survey and examine the property, and to make an estimate of the loss or damage, and, after the insured has secured the property, a further right of access and entry sufficient to enable them to make appraisal or particular estimate of the loss or damage, but the Insurer shall not be entitled to the control or possession of the insured property, and without the consent of the Insurer there can be no abandonment to it of insured property.

PART 3

Protecting the Insurer

PROTECTING THE INSURER

What to Confirm at the Examination Under Oath

Obligation to Provide Proof of Loss Within 60 Days of the Loss or on Request

Every Insurer, immediately upon receipt of a request, and in any event not later than sixty (60) days after receipt of Notice of Loss, shall furnish to the Insured or person to whom the insurance money is payable forms upon which to make Proof of Loss required under the contract.

An Insurer who neglects or refuses to comply with subsection (1), in addition to being liable to prosecution, cannot rely on the provisions of section 111 as a defence to an action brought, after the neglect or refusal, for the recovery of money payable under the contract of insurance.

PROTECTING THE INSURER

Obligation to Advise When Loss Payable

The loss shall be payable within sixty (60) days after completion of the Proof of Loss, unless the contract provides for a shorter period.

Advise Insured of Limitation Period of One Year or Pursuant the Terms and Conditions of the Policy

Every action or proceeding against the Insurer for the recovery of any claim under or by virtue of this contract shall be absolutely barred unless commenced within one (1) year next after the loss or damage occurs.

PROTECTING THE INSURER

Advise Insured of Any Special Conditions such as the Terms for Replacement and Explain the Need for Receipts for Items of Value of \$300.00 or Under

i.e. replacement costs (receipts), Schedule of Loss

PROTECTING THE INSURER

Use of the Reservation of Rights Letter and Non-Waiver Agreement

Must be careful with the wording to reflect the situation, case specific.

PART 4

Remedies

INTRODUCTION

Preventative measures:

- The age-old trick of example making: criminal recourse to dissuade future fraudsters.

Curative measures:

- At the investigative stage (before the insurer pays the indemnity):
 - Civil recourse in the event of fraud due to false declarations or exaggeration of damages;
 - Civil recourse in the event of an entirely fabricated claim.
- After the indemnity is awarded:
 - Civil recourse in recovery of the amounts paid.

CRIMINAL RECOURSE; A PREVENTATIVE MEASURE

WHY IT WORKS

- By their very nature, criminal proceedings have a strong dissuasive purpose.
- In this regard, Section 718 of the Criminal Code (R.S.C., 1985, c. C-46) states:
 - The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
 - a. to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
 - b. to deter the offender and other persons from committing offences;

[...]

PROSECUTION

- Insurance fraud is an indictable offence under s. 380 of the Criminal Code:
 - in cases where the matter exceeds 5000 \$ or is considered a testamentary instrument, punishable to a maximum of 14 years of imprisonment;
 - in cases where the matter does not exceed 5000 \$, punishable to a maximum of 2 years of imprisonment or on summary conviction.
- The prosecution bears the burden of proof and must establish the mens rea and actus reus of fraud beyond a reasonable doubt, a much heavier onus than the balance of probabilities applicable in civil matters.

PROSECUTION (CONTINUED)

- The actus reus of fraud is composed of two elements:
 - a dishonest act, which is established by proof of deceit, falsehood or other fraudulent means; and
 - deprivation, which is established by proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim, caused by the dishonest act.
 - [R. v. Théroux, 1993 CanLII 134 (S.C.C.), para. 16]
- The mens rea of fraud is a subjective test. As explained in R. v. Tran, 2020 ONSC 2742:
 - The mens rea of fraud is based on the subjective test of whether the accused subjectively appreciated the consequences of the prohibited act as at least a possibility and not on the objective test of whether a reasonable person would have foreseen those consequences.
 - [R. v. Tran, 2020 ONSC 2742, para. 65]

THE DIRECT IMPACT OF FRAUD

According to Leanne Collins, the leader of Fraud Analytics at RSA Canada

“Insurance fraud impacts everybody. Whether claims are legitimate or not, it all comes out of the policyholders’ premiums. If we take \$1 of premium from everybody, but we pay out \$1.25 in claims – we’re going to run into a deficit. This is one of many factors that lead to higher insurance rates for everyone. We are all victims of insurance fraud”.

In the United-States, the FBI estimates that the total cost of insurance fraud is more than \$40 billion dollars a year. This represents an average cost, per family between \$400 and \$700 every year.



BENEFITS OF CRIMINAL RECOURSE

- Criminal proceedings, unlike their civil counterparts, do not offer immediate or tangible relief to the Insurer in fraud cases.
- As previously mentioned, demonstrating the seriousness with which insurance fraud is dealt is likely to reduce fraud cases in the future.

CIVIL RECOURSE;

MOVING FORWARD AFTER FRAUD

APPLICABLE MEASURES AT THE INVESTIGATIVE STAGE (QUEBEC)

Fraud due to false declarations or exaggeration of damages:

- Section 2472, paragraph 1 of the Civil Code of Quebec provides that:
 - Any deceitful representation entails the loss of the right of the person making it to any indemnity for the risk to which the representation relates.
- The aforementioned deceitful representations made by the insured must be intentional, in the hopes that they gain an advantage to which they have no right.
- In pursuing this remedy, the burden of proof falls upon the insurer. The intentional deceit must be proven by a balance of probabilities. In the absence of concrete proof of fraud, the Court may establish presumptions of fact when they are serious, precise and concordant.

APPLICABLE MEASURES AT THE INVESTIGATIVE STAGE (QUEBEC, CONTINUED)

Fraud due to false declarations or exaggeration of damages (continued):

- Although the insurer must prove intentional deceit, the insured is not discharged of proving that their claim is reasonably credible.
 - [Ahmad-Surrya c. Assurances générales des Caisses Desjardins, 2007 QCCS 2204, para. 106]
- If the insurer successfully proves intentional deceit, no indemnity shall be paid to the insured.
- Despite the loss of the right to indemnity, 2472 C.C.Q alone does not cancel the policy. ** Sans doute complements à ajouter.

APPLICABLE MEASURES AT THE INVESTIGATIVE STAGE (QUEBEC, CONTINUED)

Fraud due to **an entirely fabricated claim**:

- Section 2472 C.C.Q does not apply in such cases, because the right to indemnity does not exist without the existence of a reason to indemnify. Therefore, without a real loss, no claim can be made, and no claim can be refused.
- In reality, this manifests as a refusal on the part of the insurer to indemnify the insured. If the refusal is contested, the courts will be called to evaluate the legitimacy of the claim.
- The legitimacy must be proved by the insured, by the balance of probabilities.

APPLICABLE MEASURES AFTER THE INDEMNITY HAS BEEN PAID (QUEBEC)

Discovery of a fraudulent claim after the insured has collected the indemnity:

- In this scenario, the insurer will seek to recover the amounts paid to the insured.
- As was the case for other recourses, the burden of proof lies in the insurer to establish that the insured acted fraudulently. Once the fraud is established, the original right to be indemnified ceases to exist and the insured must then reimburse the amounts received.

BENEFITS OF CIVIL RECOURSE

- Unlike criminal proceedings, civil recourse offers direct financial relief for the damage caused by fraud.
- Although the burden of proof belongs to the insurer, establishing fraudulent intention is easier in civil matters, due to the balance of probabilities.

QUESTIONS?



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