

## CASE COMMENT ON *MAMACA V. COSECO*

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*Mamaca (Litigation Guardian of) v. Coseco Insurance Company* [2007] O.J. No. 1190,  
Decision of Master R. Dash

The March 30, 2007 release of Master Dash's decision for *Mamaca v. Coseco* will have a dramatic impact upon the ability for insurers to claim litigation privilege over their files, especially in the face of allegations of bad faith. *Mamaca* creates a dangerous precedent that undercuts the insurance industry's ability to conduct their business and evaluate claims. More importantly, this case has especially dire consequences for the relationships between insureds and their insurance companies once claims are made.

The facts of this case are simple: an insured was involved in a motor vehicle accident, which the insurer felt, based upon an investigator's report, was fraudulent. As a result of the insurer's refusal to pay benefits, the insured commenced a claim for damages arising out of the bad faith handling of the claim. The insured sought production of the insurer's entire claims file but the defendant refused, relying on litigation privilege to resist production of documents created after the claim for benefits were denied and mediation was requested.

Master Dash's analysis can be understood as follows:

In accident benefit claims an insurer receives applications for benefits, investigates and assesses the claim, usually with medical evidence, and often with investigative evidence, and then determines whether to pay for the claim. A court considering whether the duty has been breached will look at the conduct of the insurer throughout the claims process to determine if the insurer in all the circumstances acted fairly and promptly in responding to the claim...The only way that an insured can ascertain whether his claim was treated in good faith is by production of the insurer's internal file and other information available to it...this makes almost every document in the insurer's file critical and relevant to the issue of bad faith if properly pleaded. (para 12)

It is clear that all subsequent analysis derives from the notion that unless litigation privilege clearly applies then the insurer's file is producible...and because the insurer's file is of such great importance in cases involving bad faith, it is very likely that litigation privilege will be narrowly applied.

In *Mamaca* Master Dash concluded that litigation privilege in order to be successful required that the party claiming litigation privilege "lay an evidentiary foundation for that privilege" (para 15), which meant that the "evidence must be specific and speak to the content of each document." (15). Master Dash emphasized the criteria that litigation privilege requires that the document be produced with its dominant purpose being

preparation for litigation. In this case Master Dash concluded, due to lack of evidence to the contrary, that all documents created prior to the Statement of Claim were merely in contemplation of claims assessments.

Master Dash's decision creates a potentially catastrophic catch 22 for the insurance industry: in order for insurance companies to claim litigation privilege they must lead evidence demonstrating that the documents contained within their file were made for the dominate purpose of providing a defence in litigation. In order to lead evidence that a document's purpose is that of litigation, rather than that of a neutral assessment of claims, then consciously or not documents within the claims file will become more adversarial.

In turn, by creating documents that are shaped in order to better provide a defense, insureds will invariably be treated differently and as such the insurers are providing more fodder for allegations of bad faith.