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Toronto

ONTARIO
SUPERIOR COURT OF JUSTICE

B E I W E E N :

FERNANDA SAMPAIO

Plaintiff

- and -

**CERTAS HOME AND AUTOMOBILE INSURANCE COMPANY, HER MAJESTY
THE QUEEN IN RIGHT OF ONTARIO, PHILIP HOWELL AND BRIAN MILLS**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the Plaintiff's lawyer and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: October 31, 2018

Issued by: _____
Local Registrar

Address of court office: 393 University Avenue
10th Floor
Toronto, Ontario
M5G 1E6

TO:

Certas Home and Auto Insurance Company
333 First Commerce Drive
Aurora, Ontario
L4G 8A4

Her Majesty the Queen in right of Ontario
Crown Law Office (Civil Law)
Ministry of the Attorney General
720 Bay Street, Eighth Floor
Toronto, Ontario M7A 2S9

Philip Howell
1000 King St. W., PH5,
Toronto, ON M6K 3N1

Brian Mills
Financial Services Commission of Ontario (FSCO)
5160 Yonge Street
16th Floor
Toronto, Ontario M2N 6L9

CLAIM

NATURE OF THE ACTION

1. Automobile Insurance in Ontario is mandatory. Every Motor Vehicle Owner in Ontario must purchase Mandatory Insurance if they wish to operate a Motor Vehicle on a public road.
2. The Mandatory Insurance is offered by Insurers but the terms and conditions of the Mandatory Insurance are established by the Government of Ontario through statute and regulation. The operation of Mandatory Insurance is overseen and regulated by the Financial Services Commission of Ontario (FSCO), an agency of the Ministry of Finance.
3. The Mandatory Insurance provides *inter alia* for the provision of certain goods and services to individuals harmed in automobile accidents. These defined benefits are set out in the Statutory Accident Benefits Schedule (SABS). Insurers are legally obligated to provide or pay the costs of providing the defined benefits set out in the SABS.
4. In July 2010, the harmonized sales tax (HST) was implemented in Ontario. HST is applicable to many of the benefits set out in the SABS. Prior to the implementation of the HST, and regularly thereafter, FSCO directed Insurers to,
 - (1) **pay Applicable HST** in addition to the cost of the goods and/or services provided under the SABS; and
 - (2) **not include Applicable HST** within the calculation of any cap on benefits under the SABS.
5. In defiance of the repeated direction of the regulator, the Defendant Insurer (1) did not consistently pay or reimburse its Insureds for Applicable HST; and/or

(2) included Applicable HST in the calculation of the benefit entitlement under the SABS (the “Wrongful Conduct”).

6. FSCO was aware of the Wrongful Conduct. FSCO received complaints about the Wrongful Conduct. However, FSCO took no or insufficient steps to stop the Wrongful Conduct. Ultimately, FSCO failed to ensure that the government-designed, Mandatory Insurance was operated fairly.

DEFINED TERMS

7. The capitalized terms used in this Statement of Claim have the meanings indicated below:
- (a) “Applicable HST” means HST applicable to benefits set out in the SABS;
 - (b) “Automobile Insurance” means insurance against liability arising out of bodily injury to or the death of a person or loss of or damage to property caused by a motor vehicle or the use or operation thereof, and which provides for benefits under the SABS;
 - (c) “CJA” means the *Courts of Justice Act*, R.S.O., c. C. 43, as amended
 - (d) “Class” and “Class Members” means all persons,
 - (i) who applied for benefits under the SABS that were approved by the Defendant Insurer pursuant to a policy of Automobile Insurance issued by the Defendant Insurer,
 - (ii) where the Defendant Insurer during the Class Period either
 1. did not pay or reimburse the Class Member for Applicable HST, or
 2. included the amount of Applicable HST in the calculation of any cap within the benefit entitlement under the SABS;and

- (iii) who reside in Canada as of the date of the certification order;
- (e) “Class Period” means the period from July 1, 2010 until the date of any judgment given in the Class Proceeding or the date of any Order enjoining the Defendant Insurer from the Wrongful Conduct;
- (f) “Class Proceeding” means this putative class action;
- (g) “Compulsory Automobile Insurance Act” means the *Compulsory Automobile Insurance Act*, RSO 1990, c. C.25;
- (h) “CPA” means the *Class Proceedings Act*, 1992, S.O. 1192 c. 6;
- (i) “Defendant Insurer” means the defendant, Certas Home and Automobile Insurance Company;
- (j) “FSCOA” means the *Financial Services Commission of Ontario Act*, 1997, S.O. 1997, c. 28;
- (k) “FSCO” means the Financial Services Commission of Ontario;
- (l) “Government Defendants” means collectively the defendant Her Majesty the Queen in right of Ontario, Philip Howell and Brian Mills;
- (m) “Guidelines” means guidelines issued by the Superintendent pursuant to section 268.3 of the Insurance Act on (1) the interpretation and operation of the SABS or any provision of the SABS and/or (2) guidelines setting out the treatment, services, measures or goods applicable in respect of types of impairments for the purposes of payment of a medical or rehabilitation benefit provided under the SABS;
- (n) “HST” means the harmonized sales tax amount payable under Part IX of the *Excise Tax Act*, R.S.C., 1985, c. E-15;
- (o) “Insurance Act” means the *Insurance Act*, 1990 c. I.8;
- (p) “Insurance Contract(s)” means a contract(s) of automobile insurance undertaken by an Insurer, or evidenced by a policy issued in another province or territory of Canada, the United States of America or a

jurisdiction designated in the SABS by an Insurer that has filed an undertaking under section 226.1 of the Insurance Act;

- (q) “Insured” means a person who is entitled to benefits set out in the SABS under an Insurance Contract, whether or not described therein as an insured person;
- (r) “Insurer(s)” means an insurer(s) licensed under the Insurance Act and carrying on the business of providing automobile insurance;
- (s) “Mandatory Insurance” means the insurance mandated by the *Compulsory Automotive Insurance Act* R.S.O. 1990, c.C.25, as amended;
- (t) “Motor Vehicle” has the same meaning as in the *Highway Traffic Act*, R.S.O. 1990, C. H.8 and includes trailers and accessories and equipment of a motor vehicle;
- (u) “Motor Vehicle Owner(s)” means owner(s) or lessee(s) of a Motor Vehicle;
- (v) “New SABS” means Ontario Regulation 34/10 made under the Insurance Act, as amended;
- (w) “Old SABS” means Ontario Regulation 403/96 made under the Insurance Act, as amended;
- (x) “PATCA” means the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P27, as amended;
- (y) “PSOA” means the *Public Service of Ontario Act*, 2006, c. 35, as amended;
- (z) “Published” means published in *The Ontario Gazette*;
- (aa) “SABS” means the New SABS or the Old SABS as the context requires; and

- (bb) “Superintendent” or “FSCO Superintendent” means the individual appointed as Superintendent of Financial Services of FSCO under Part III of the PSOA, pursuant to section 5 of the FSCOA.

RELIEF CLAIMED

8. The Plaintiff claims against the Defendants for:
- (a) an order certifying this proceeding as a class proceeding pursuant to the CPA;
 - (b) an order appointing her as the representative plaintiff for the Class;
 - (c) An interlocutory and permanent injunction prohibiting the Defendant Insurer from engaging in the Wrongful Conduct;
 - (d) a declaration that the Defendant Insurer owed a duty of care to the Class to act in the utmost good faith when handling the Class Members’ claims for benefits under the SABS;
 - (e) a declaration that during the Class Period, the Defendant Insurer breached its duty to act in the utmost good faith by *inter alia* engaging in the Wrongful Conduct;
 - (f) A declaration that during the Class Period, the Defendant Insurer was in breach of contract in respect of Insurance Contracts with the Class by engaging in the Wrongful Conduct;
 - (g) A declaration that the Defendant Insurer breached the Insurance Act by engaging in the Wrongful Conduct;
 - (h) a declaration that the Defendant Insurer has been unjustly enriched as a result of the Wrongful Conduct during the Class Period, together with an order for restitution;
 - (i) a declaration that the Defendant Insurer has gained through the Wrongful Conduct, together with an order for the disgorgement of any

monetary benefit that the Defendant Insurer has obtained as a result of the Wrongful Conduct in relation to the Class, or in the alternative, a declaration that the Defendant Insurer is liable under the doctrine of waiver of tort to account and disgorge the monetary benefits the Defendant Insurer obtained as a result of the Wrongful Conduct;

- (j) a declaration that the conduct of the Government Defendants described herein amounts to a misfeasance of public office;
- (k) a declaration that the Defendants caused the Class Members to suffer loss and damage by their conduct described herein;
- (l) general, special and aggravated damages in the sum of \$100 million for personal injury costs and economic loss, or such other sum as found appropriate at the trial of the common issues;
- (m) punitive damages from the Defendant Insurer in the amount of \$10 million or such other sum as found appropriate at the trial of the common issues;
- (n) pre-judgment interest, compounded, in an amount equal to the internal rate of return that the Defendant Insurer earned on capital, or alternatively, pursuant to section 128 of the CJA;
- (o) post-judgment interest pursuant to section 129 of the CJA;
- (p) an order for the aggregate assessment of monetary relief and distribution thereof to the Class Members;
- (q) the costs of this action on a substantial indemnity basis plus applicable taxes and the costs of distribution of an award under section 24 or 25 of the CPA, including the costs of notice associated with distribution and the fees payable to a person administering any distribution pursuant to section 26 of the CPA; and
- (r) such further and other relief deemed just.

PARTIES

9. The plaintiff is an individual who resides in the City of Barrie.
10. The Defendant Insurer is a corporation incorporated pursuant to the laws of Canada that *inter alia* engages in the business of selling Insurance Contracts to Motor Vehicle Owners in Ontario in consideration for the payment of a premium.
11. The defendant, Her Majesty the Queen in Right of Ontario, is named as a defendant in this action pursuant to the provisions of the PATCA on behalf of the Crown, the Minister of Finance, FSCO and on behalf of their agents, servants, officers, employees.
12. FSCO is a regulatory commission established by the Government of Ontario under the provisions of the FSCOA with the legislative mandate to regulate the auto insurance industry in Ontario pursuant to the provisions of the FSCOA. FSCO has an office in the City of Toronto. The Defendant Her Majesty the Queen in Right of Ontario is liable for the actions of FSCO pursuant to the provisions of the PATCA.
13. The defendant, Philip Howell (“Howell”), is an individual who resides in the City of Toronto. On August 9, 2009, Howell was appointed as FSCO Superintendent and remained in that appointment until October 22, 2014.
14. The defendant, Brian Mills (“Mills”), is an individual who resides in the City of Toronto. On October 22, 2014, Mills was appointed as FSCO Superintendent and remains in that position.
15. Her Majesty the Queen in Right of Ontario is vicariously liable for the damages arising from the actions/inactions of Philip Howell and Brian Mills.

FACTS

16. The Plaintiff brings this action on her own behalf and on behalf of the Class.

Mandatory Motor Vehicle Insurance

17. The Compulsory Automobile Insurance Act requires every owner or lessee of a Motor Vehicle in Ontario to maintain Mandatory Insurance for that vehicle if it is being operated on a public road.
18. Fines for Motor Vehicle Owners and drivers who do not carry the Mandatory Insurance can range from \$5,000 to \$50,000. Drivers found driving without Mandatory Insurance can have their driver's licence suspended and their vehicle impounded. Drivers convicted of driving without Mandatory Insurance can face higher insurance premiums or may be unable to obtain insurance and effectively lose the right to drive.

Terms Set by Government

19. The terms of the Mandatory Insurance are government-defined but the Mandatory Insurance itself is delivered by for-profit insurance companies including the Defendant Insurer.

The SABS

20. An integral part of the Mandatory Insurance is the provision of certain benefits, including statutory accident benefits, which are set out and defined by the Statutory Accident Benefits Schedule (SABS).
21. Under section 268 of the Insurance Act, every Insurance Contract is deemed to provide the benefits set out in the SABS, subject to the terms, conditions, provisions, exclusions and restrictions set out in the SABS.
22. There are two SABS relevant to the Class Period: the Old SABS and the New SABS. The Old SABS are applicable to accidents on or after November 1, 1996 but before July 1, 2010. The New SABS are applicable to accidents on or after July 1, 2010.

Benefits to Assist Accident Victims

23. The benefits set out in the SABS are intended to provide necessary medical and care benefits to accident victims expeditiously and with a minimum of fuss. The government-designed scheme was created with the intention that accident victims should not require a lawyer to obtain the benefits set out in the SABS.
24. Inherent in the government-designed scheme is the requirement that Insurers act fairly, consistently and expeditiously in providing the benefits set out in the SABS.

FSCO

25. FSCO is responsible for regulating the insurance sector in Ontario, including the auto sector. FSCO was established under the Financial Services Commission of Ontario Act (FSCOA). It is an arm's-length agency of the Ministry of Finance.
26. FSCO is the body responsible for administering the Insurance Act and its regulations including the SABS. All insurance companies wishing to sell Automobile Insurance in Ontario must be licensed by FSCO.
27. The statutory purpose of FSCO includes the provision of regulatory services that protect the public interest and enhance public confidence in Insurers. FSCO represents to the public that it “monitors, investigates and when there is non-compliance with legislation and regulations, takes appropriate enforcement action ...”¹
28. The FSCO Superintendent has certain statutory duties, including the administration and enforcement of the Insurance Act and the SABS, and to supervise Insurers, including the Defendant Insurer.

¹ https://www.fSCO.gov.on.ca/en/about/monitoring/Pages/monitoring_process.aspx, last accessed October 9, 2018

Regulatory Approved Rates

29. Insurers must submit proposed rate changes to FSCO for approval. Motor Vehicle Owners have no choice but to purchase Mandatory Insurance at rates approved or authorized by FSCO.
30. The Superintendent is required by law to review rate changes proposed by Insurers to ensure that they are just, reasonable, not excessive, and do not impair the financial solvency of the Insurer.

HST and the SABS

31. HST came into effect on July 1, 2010. The payment of HST is required by law. HST is a consumption tax applicable to certain goods and services for sale in Ontario.
32. HST is applicable to many of the goods and services underlying the benefits set out in the SABS. HST is a tax. It is of no benefit to the Insured. Insurers must pay Applicable HST which is an inherent cost of providing the benefits set out in the SABS.
33. For example, section 25 of the New SABS requires Insurers to pay *inter alia* for the costs of certain assessments. Section 25(5)(a) provides for a benefit of \$2,000 in respect of fees and expenses for conducting any one assessment. Under the Regulatory Framework, Insurers must also pay the applicable HST. Thus, where the fees and expenses for conducting any one assessment amount to \$2,000 plus \$260 of Applicable HST, the Insurer must pay \$2,260 for the assessment. The Applicable HST cannot be used in the calculation of any benefit restriction or cap.

Underwriting

34. Prior to the implementation of HST Insurers and the insurance industry as a whole were fully aware that HST would increase claims costs. In particular, Insurers, including the Defendant Insurer, knew that with the implementation

of the HST the cost of providing SABS benefits would increase by the amount of Applicable HST.

35. The Defendant Insurer was required to and did adjust its reserves for the anticipated increase in the cost of providing benefits under the SABS arising from the implementation of HST.
36. FSCO specifically directed the Defendant Insurer to include in regulatory submissions the impact of the HST on unpaid claims and the run-off of the unearned premium.
37. The Defendant Insurer specifically considered the impact of Applicable HST on SABS benefits when setting rates. At or around the time of HST implementation, the Defendant Insurer priced into its rates for Insurance Contracts the expected increase in cost which would result from Applicable HST. The Defendant Insurer's rate submissions to FSCO included the projected additional cost that would likely result from Applicable HST.

Guidelines and Bulletins

38. Section 268.3 of the Insurance Act provides that the FSCO Superintendent may issue Guidelines on the interpretation and operation of the SABS.
39. Guidelines set out the rights and responsibilities of Insurers and Insureds when dealing with claims under the SABS, and set out the rules for such matters as the payment of the costs of benefits set out in the SABS.
40. Pursuant to section 268.3 of the Insurance Act, Guidelines come into effect on the day Published and *must* be considered in any determination involving the interpretation or operation of the SABS.
41. The Insurance Act, including regulations thereunder, together with the Superintendents' Guidelines and Bulletins comprise the regulatory framework under which SABS were to be implemented (the "Regulatory Framework").

Bulletin No. A-04/10

42. On June 18, 2010, just prior to the implementation of HST in Ontario, the Superintendent issued Bulletin No. A-04/10 which attached Guideline 04/10. The bulletin and accompanying Guideline provided specific direction to Insurers with respect to the handling of Applicable HST. It made clear that Applicable HST was a tax and was payable by the Insurer.
43. Bulletin No. A-14/10 included the following information under the heading "CHANGES":

With the implementation of the HST, this Guideline provides direction on how the tax is to be applied. **When applicable, the HST is payable by an insurer in addition to the rates and fees that are outlined in this Guideline.** [emphasis added]

44. Bulletin No. A-14/10 was intended to provide Insurers with a clear understanding that the payment of Applicable HST was the responsibility of the Insurer and was not to be deducted from any caps or benefits payable under the SABS.

Guideline No. 14/10

45. Guideline No. 14/10 (Professional Services Guideline) was issued with Bulletin No. A-14/10. The Guideline was issued for the purposes of the Old SABS applicable to accidents on or after November 1, 1996 applying to expenses related to certain SABS benefits rendered on or after July 1, 2010.
46. Guideline 14/10 provides that:

The applicability of the HST on the services of any health care professionals, health care providers, or form fees listed in this Guideline falls under the jurisdiction of the Canada Revenue Agency (CRA). If the HST is considered by the CRA to be applicable to any of the services or fees listed in this Guideline, then the **HST is payable by an insurer in addition to the fees payable as set out in this Guideline.** [emphasis added]

Guideline No. 06/10

47. In July, 2010, the Superintendent issued Guideline No. 06/10 (the “Professional Services Guideline”) effective September 1, 2010, for service benefits rendered on or after September 1, 2010.
48. The purpose of Guideline No. 06/10 was to establish the expenses payable by Insurers related to the services of health care professions or health care providers under the SABS. Guideline 06/10 reiterated the Superintendent’s direction to Insurers that “HST is payable by an insurer in addition to the fees payable as set out in this Guideline”.

Guideline No. 08/10

49. In November, 2010, the Superintendent issued Guideline No. 08/10 (the “Costs of Assessments and Examinations Guideline”), effective September 1, 2010 for service benefits rendered on or after September 1, 2010.
50. Guideline No. 08/10 establishes the expenses Insurers are required to pay in relation to the services of health care professions or health care providers under the SABS. Guideline No. 08/10 reiterated the Superintendent’s direction to Insurers that “HST is payable by an insurer in addition to the fees payable as set out in this Guideline”.

Guideline No. 01/11

51. In July, 2011, the Superintendent issued Guideline No. 01/11 (the “Professional Services Guideline”) effective September 1, 2010 for service benefits provided on or after July 1, 2011.
52. Guideline No. 01/11 establishes the expenses Insurers are required to pay for the services of health care professions or health care providers under the SABS. Guideline No. 01/11 reminds Insurers that “HST is payable by an insurer in addition to the fees payable as set out in this Guideline”.

Guideline No. 01/12

53. In January 2012, the Superintendent issued Guideline No. 01/12 (“Cost of Goods Guideline”) effective September 1, 2010. This Guideline requires Insurers to pay for reasonable and necessary expenses incurred by or on behalf of Insureds in providing goods as part of the benefits under the SABS.
54. Guideline No. 01/12 directs Insurers to pay Applicable HST. The Guideline notes that such direction is consistent with Superintendent’s Guideline No. 01/11 and Superintendent’s Guideline No. 08/10.

Guideline No. 03/12

55. In July, 2012, the Superintendent issued Guideline No. 03/12 – an update to the Professional Services Guideline. It applies to expenses related to service benefits provided on or after July 14, 2012. Consistent with previous Guidelines, Guideline No. 03/12 reiterated the Superintendent’s direction that “HST is payable by an insurer in addition to the fees payable as set out in this Guideline”.

Guideline No. 01/13

56. In June, 2013, the Superintendent issued Guideline No. 01/13 – an update to the Cost of Goods Guideline applying to expenses related to goods provided as part of the benefits under the SABS on or after June 1, 2013. The Superintendent indicated that the Guideline was incorporated by reference in sections 15 and 16 of the SABS. Guideline No. 01/13 again directed that “the HST is payable by the insurer as part of the “reasonable” expense for that item”.

Guideline No. 02/13

57. In June, 2013, The Superintendent issued Guideline No. 02/13 – an update to the Professional Services Guideline applying to expenses related to services provided on or after August 3, 2013. The Superintendent again directed that

“the HST is payable by an insurer in addition to the fees as set out in this Guideline”

Guideline No. 03/14

58. In September, 2013, the Superintendent issued Guideline No. 03/14 – an update to the Professional Services Guideline applying to expenses related to service benefits provided on or after September 6, 2014. The Superintendent repeated his direction that, “the HST is payable by an insurer in addition to the fees as set out in this Guideline”

Bulletin No. A-04/15

59. On June 17, 2015, the Superintendent issued Bulletin No. A-04/15. It reminded Insurers of their obligation to pay Applicable HST and to not include Applicable HST in the calculation of any benefit cap set out in the SABS:

... HST is addressed in three Guidelines issued by the Superintendent of Financial Services – the Cost of Assessments and Examinations Guideline, the Professional Services Guideline, and the Cost of Goods Guideline. The Professional Services Guideline states that “If the HST is considered by the CRA to be applicable to any of the services or fees listed in this Guideline, then the HST is payable by an insurer in addition to the fees as set out in this Guideline”. The Cost of Assessments and Examinations and Cost of Goods Guidelines include similar statements.

Insurers are reminded that in the absence of such wording in the SABS or other such Guidelines (e.g., Minor Injury Guideline), the direction remains the same.

FSCO expects that insurers will apply the HST legislation correctly in accordance with any direction from CRA. The HST is a tax and is not part of the benefit limits set out in the SABS.
[Emphasis added]

Guideline No. 02/16

60. In June 2016, the Superintendent issued Guideline No. 02/16 – an update to the Cost of Goods Guideline applying to expenses related to goods provided

on or after June 1, 2016. Consistent with all previous Guidelines, the Superintendent directed that “the HST is payable by the insurer as part of the “reasonable” expense for that item”.

Insurance Bureau of Canada

61. The Insurance Bureau of Canada (IBC) is the national trade association for the private general insurance industry. Its members represent approximately 90% of the property and casualty insurance industry in Canada. The Defendant Insurer is a member of the IBC.

Industry Standards

62. The IBC developed policies and practices governing their members. On March 6, 2006, it released its Standards of Sound Marketplace Practice (the “Industry Standards”), which describes practices that insurers should follow when adjusting a claim.

63. In particular, the Industry Standards direct that insurers should have internal policies and procedures that are well understood, fully in place and utilized to ensure that claims are handled as expeditiously as possible and in accordance with any legal requirements with fairness and transparency to the claimant.

64. In addition, the Industry Standards require that claims must be dealt with in a timely manner and evaluated *consistently* in a spirit of balance and fairness.

65. In 2010 the Industry Standards were incorporated by reference into FSCO Guideline A-23/10.

66. The Defendant Insurer did not follow the Industry Standards in dealing with its Insureds in respect of handling Applicable HST payable under the SABS.

Defendant Insurer’s Misconduct

67. From time to time, the Defendant Insurer sold Insurance Contracts to Motor Vehicle Owners. The Insurance Contracts were contracts of adhesion. The

terms were designed and fixed by the Government of Ontario and FSCO and were not negotiable.

68. Class Members subsequently submitted applications for benefits under the SABS that were approved by the Defendant Insurer pursuant to the Insurance Contracts it sold.
69. At all times during the Class Period the Defendant Insurer knew that it was required to pay Applicable HST in addition to the benefits set out in the SABS.
70. At all times during the Class Period the Defendant Insurer knew that it was not permitted to include Applicable HST in the calculation of any benefit cap under the SABS for any Class Member.
71. During the Class Period, after approving the SABS claims of Class Members, the Defendant Insurer (1) did not consistently pay or reimburse the Class Members for Applicable HST; and/or (2) included Applicable HST in the calculation of one or more cap on benefit entitlement set out in the SABS in relation to the Class Members.
72. At the same time, the Defendant Insurer did, on occasion, pay Applicable HST to some Insureds, failing to treat similarly situated Insureds in a similar and consistent manner.

Complaints to FSCO

73. During the Class Period FSCO received complaints about Insurers engaging in Wrongful Conduct.
74. On June 4, 2015, Moez Rajwani and Dorianne Sauvé wrote to Superintendent Mills on behalf of the Coalition Representing Health Professionals in Automobile Insurance Reform (the "Coalition"). The Coalition represents over 10,000 front line health professionals from over ten health professions involved in the treatment of accident victims.
75. The Coalition brought to Mills attention that its members "continue to note a lack of fair and appropriate payment of HST on those goods and services that

[sic] are required to collect and remit HST according to the Canada Revenue Agency.” The Coalition requested The Superintendent take appropriate regulatory action.

76. The Superintendent did not take appropriate action.
77. On June 23, 2016, Adam Wagman wrote to Superintendent Mills on behalf of the Ontario Trial Lawyers Association (“OTLA”). OTLA represents approximately 1,000 lawyers in Ontario involved in the representation of Ontarians involved in auto accidents.
78. Mr. Wagman wrote “concerning an alarming practice of some Ontario insurance companies who wrongfully deduct HST from the available medical and rehabilitation limits for injured accident victims.” He wrote:

We also respectfully request that FSCO take every reasonable additional action, and seek every available remedy, as required to compel compliance with, and to prevent insurers from so callously ignoring, the [Bulletin A-14/10].

79. The Superintendent did not take appropriate action.
80. On July 13, 2016, Izabel Scovino of FSCO replied to Mr. Wagman acknowledging the Wrongful Conduct indicating that “FSCO will continue to monitor the extent of this insurer practice across the industry and the degree of consumer harm it causes in order to determine the appropriate level of regulatory response required.”
81. On August 25, 2016, Mills wrote to Mr. Wagman, acknowledging the Wrongful Conduct indicating that:

FSCO continues to monitor insurer practices across the industry. Those insurers who, to FSCO’s knowledge, have failed to pay HST in addition to the cost of a benefit, have indicated that they will follow the direction set out in FSCO Bulletin A-04/15 in the future. FSCO will continue to convey this message regarding the HST should any further issue arise.

82. Mills' correspondence confirmed that FSCO was aware of the Wrongful Conduct but was only prepared to repeat prior direction.
83. FSCO did not thereafter monitor the Insurers they found engaging in Wrongful Conduct. FSCO took no action to stop the Wrongful Conduct or require the Insurers who they knew were engaging in the Wrongful Conduct to fairly compensate Insureds who were impacted by the Wrongful Conduct.

Damage to the Class

84. As a result of the Wrongful Conduct of the Defendant Insurer and the failure of FSCO to appropriately regulate the Defendant Insurer and stop the Wrongful Conduct, the Plaintiff and the Class Members received fewer benefits under the SABS than they ought to have received.

FERNANDA SAMPAIO

85. The Defendant Insurer issued to the plaintiff an Insurance Contract identified as policy number 288903960J (the "Sampaio Insurance Contract"). Ms Sampaio paid all premiums due under the Sampaio Insurance Contract. Ms Sampaio was an Insured under the Sampaio Insurance Contract.
86. The Sampaio Insurance Contract provided that Ms Sampaio would be entitled to receive benefits under the SABS in the event she was injured as a result of the use or operation of a Motor Vehicle.
87. On December 28, 2012 Ms Sampaio was involved in an automobile accident which resulted in her suffering injuries to her back, including a fractured vertebrae, sprain to her cervical spine, fractured sternum and injury to her shoulder and upper arm.
88. On January 11, 2013 Ms Sampaio applied to the Defendant Insurer for benefits under the SABS. The Defendant Insurer approved the claim(s) for benefits under the SABS which resulted in Ms Sampaio receiving treatment.

89. On or about December the Defendant Insurer corresponded with Ms Sampaio and advised that her request for treatment funding in the amount of \$131.50 was approved including \$15.12 HST. On or about January 31, 2015 the Defendant Insurer reduced Ms Sampaio's SABS in the amount of \$131.50 which wrongfully included \$15.12 in HST.

BASIS OF LIABILITY

Duty of Good Faith

90. The Defendant Insurer owed the Plaintiff and other Class Members a duty of good faith and fair dealing. This duty applied to the Defendant Insurer's dealings with both Motor Vehicle Owners and Insureds.
91. The duty of good faith and fair dealing applies at all stages of the relationship between Insurers and Insureds. The duty of good faith and fair dealing exists independently of and in addition to the terms of any Insurance Contract.
92. The Defendant Insurer had a duty to the Plaintiff and other Class Members to act promptly and fairly at every step of the claims process, including in the provision of benefits under the SABS.
93. The Defendant Insurer breached its duty of utmost good faith to the Class Members by:
- (a) engaging in the Wrongful Conduct;
 - (b) failing to interpret its obligations under the Insurance Contracts in a fair and reasonable manner;
 - (c) failing to advise the Plaintiff or the Class Member of the availability of coverage for Applicable HST in relation to approved benefits under the SABS;
 - (d) failing to abide by the provisions of the Regulatory Framework;
 - (e) failing to follow the directions and instructions of the Superintendent and FSCO;

- (f) failing to evaluate and pay the SABS claims of the Insureds in a consistent manner in a spirit of balance and fairness;
- (g) failing to have appropriate, well understood, internal policies and procedures to be utilized in ensuring that claims are handled as expeditiously as possible and in accordance with the legal requirements of the Regulatory Framework with fairness and transparency to the Insured;
- (h) taking advantage of the Plaintiff's and Class Members' relative lack of sophistication with the complex Regulatory Framework;
- (i) wrongfully taking advantage of the Plaintiff's and Class Members' statutorily limited options for redress with respect to the Wrongful Conduct;
- (j) preferring its own profits ahead of and at the expense of the well-being of Insureds who suffered loss or injuries as the result of the use or operation of an automobile;
- (k) after having received notice by the FSCO and others that it was engaging in Wrongful Conduct, failing to immediately notify those Insureds that been subjected to Wrongful Conduct; and
- (l) failing to provide any means for the Plaintiff or Class Members to objectively determine if it was complying with the Regulatory Framework.

94. As a result of the Defendant Insurer's breach of good faith and fair dealing the Plaintiff and Class Members have suffered loss or damage.

Violation of the Insurance Act

95. The Defendant Insurer's Wrongful Conduct amounts to a breach of the statutory duty that Insurers not engage in unfair or deceptive acts or practices as set out in section 439 of the Insurance Act. Specifically, the Defendant Insurer acted in the manner set out in subsections 5 and/or 6 of O. Reg 7/00,

in relation to claims made under the SABS, by failing to or refusing without reasonable cause to pay a claim for goods or services within the time prescribed for payment set out in the SABS.

Breach of Contract

96. The relationship between the Defendant Insurer and the Plaintiff/Class Members was contractual in nature.
97. The Plaintiff and Class Members were forced to enter into contracts with one of a limited number of FSCO licensed Insurers under the terms set by the Government of Ontario.
98. It was an express or implied term of the Insurance Contracts that the Defendant Insurer:
 - (a) would pay or reimburse any Applicable HST, and not include Applicable HST in the calculation of any cap on benefit entitlement under the SABS;
 - (b) would not engage in the Wrongful Conduct;
 - (c) would abide by the directions of the Superintendent, including adhering to Guidelines;
 - (d) would provide benefits under the SABS in accordance with the terms, conditions and requirements of the Regulatory Framework;
 - (e) would abide by the Industry Standards;
 - (f) would provide benefits under the SABS in a timely manner; and
 - (g) would treat Insureds in a consistent manner in accordance with the Regulatory Framework, in a spirit of balance and fairness.
99. In breach of its Insurance Contracts with the Plaintiff and the Class, the Defendant Insurer;
 - (a) engaged in the Wrongful Conduct;

- (b) failed to abide by the provisions of the Regulatory Framework;
- (c) failed to review and follow the directions and instructions of the Superintendent;
- (d) failed to adhere to the Guidelines;
- (e) failed to evaluate and pay the claims under the SABS in a consistent manner in a spirit of balance and fairness;
- (f) failed to provide transparency in its practices relating to the payment of or provision of benefits under the SABS to which the Insureds were legally entitled;
- (g) hired incompetent employees, failed to properly supervise its employees, and failed to provide proper training to its employees; and
- (h) failed to follow the Industry Standards.

100. The Plaintiff and Class Members suffered damages as a result of Defendant Insurer's contractual breaches.

Waiver of Tort

101. In the alternative, the Plaintiff and the Class waives the contractual claims and plead that she and the Class Members are entitled to an accounting and to recover from the Defendant Insurer an amount equal to the economic benefit to the Defendant Insurer of engaging in the Wrongful Conduct.

Unjust Enrichment

102. The Defendant Insurer has been enriched by the Wrongful Conduct. The Plaintiff and Class Members have suffered a corresponding deprivation. There is and can be no juristic reason to justify the Defendant Insurer's retention of the Class Members deprivation.

103. The Defendant Insurer engaged in wrongdoing, namely the Wrongful Conduct. It would be inequitable to permit the Defendant Insurer to profit from its own

wrongdoing by allowing it to obtain a benefit from its deliberate choice to engage in Wrongful Conduct. The Plaintiff and the Class seek gain-based relief for the wrongdoing, including a disgorgement of any economic benefit to the Defendant Insurer as a result of the Wrongful Conduct.

The Government Defendants

Negligence

104. The Government Defendants owed a duty of care to the Plaintiff and the Class to (1) administer and enforce the Insurance Act and associated regulations, including the provision of benefits under the SABS; and (2) supervise the Defendant Insurer. The Government Defendants had a duty to prevent Wrongful Conduct and require remediation for any Wrongful Conduct.
105. Repeated complaints were made to the Government Defendants in relation to the Wrongful Conduct of Insurers, including the Defendant Insurer. Notwithstanding this clear evidence of wrongdoing, the Government Defendants failed to act in response to the complaints and in compliance with their statutory obligations.
106. The Plaintiff pleads that the Government Defendants' actions amount to a breach of the provisions of the Insurance Act.
107. The Government Defendants breached their duty to the Plaintiff and the Class Members in the following manner:
 - (a) by failing to investigate complaints about Wrongful Conduct;
 - (b) By failing to have qualified staff to investigate complaints made concerning automotive insurance; and
 - (c) By failing to take sufficient or any action to ensure that Insurers, including the Defendant Insurer, complied with the Regulatory Framework and did not engage in the Wrongful Conduct.

108. The actions of the Government Defendants have caused the Plaintiff and Class Members material damage.
109. The Plaintiff further pleads it was foreseeable that damage would be caused to the Plaintiff and the Class Members if the Government Defendants failed to stop Insurers from engaging in Wrongful Conduct.

Misfeasance in Public Office

110. At all material times, the Government Defendants and/or their employees or agents acted other than in good faith.
111. At all material times, the Government Defendants were acting as public officers and exercising their powers in that capacity.
112. The Government Defendants made a deliberate decision in bad faith not to act to stop the Defendant Insurer from engaging in Wrongful Conduct. They knew that their failure to prevent the Wrongful Conduct and require the Insurers to appropriately compensate Insureds was unlawful and likely to injure the Plaintiffs and the Class.
113. The Government Defendants preferred their own interests to the interests of the Insureds, including the Plaintiff and Class Members, deliberately turning a blind eye to the Wrongful Conduct. They did so in fear that Insurers would in retaliation
 - (a) increase rates for the Mandatory Insurance at a time when the Government of Ontario had promised a reduction in rates which had not yet been achieved; and
 - (b) stop providing hundreds of thousands of dollars in political donations to the then-governing party.
114. The Government Defendants knew or ought to have known that their failure to act against the Insurers and the Defendant Insurer in particular, would cause

the Plaintiff and the Class Members harm. As such their actions constitute misfeasance.

DAMAGES

115. As a result of the Defendants breach of their duty of good faith and fair dealings, statutory breaches, breach of contract, negligence and/or misfeasance, the Plaintiff and the Class have suffered damages including, but not limited to,

- (a) personal injury;
- (b) out of pocket expenses;
- (c) costs incurred in paying Applicable HST; and
- (d) inconvenience, frustration and anxiety.

116. The conduct of the Defendant Insurer caused Class Members to suffer intangible injuries including mental distress, which were a reasonably foreseeable consequence of the Wrongful Conduct. The Plaintiff and Class therefore make a claim for aggravated damages.

PUNITIVE DAMAGES

117. There was a significant knowledge and sophistication imbalance between the Defendant Insurer and the Plaintiff and Class Members, making the Class particularly vulnerable to Wrongful Conduct. The Defendant Insurer's conduct in engaging in Wrongful Conduct was willful, deliberate, wanton, entirely without care, high-handed, and in intentional disregard of the rights of the Plaintiff and the Class. The Defendant Insurer's Wrongful Conduct was adopted as a matter of corporate policy. A punitive damage award is necessary to deter the Defendant Insurer from acting similarly in the future, as evidenced by the Defendant Insurer's past disregard of the law and repeated directions and warning of the regulator.

RELEVANT STATUTES

118. The Plaintiff plead and rely upon the CJA, Compulsory Automobile Insurance Act, COA, FSCOA, PATCHA, the New SABS, the Old SABS, and PSOA.

The Plaintiff proposes that this action be tried at the City of Toronto.

Date: October 31, 2018

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v.

CERTAS HOME AND AUTOMOBILE INSURANCE COMPANY et al.

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at
TORONTO

Proceeding under the Class Proceedings Act, 1992

STATEMENT OF CLAIM

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