Insurance Law FOCUS

The benefits of advance payments

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While the notion of giving money to a plaintiff without a final settlement may seem counter-intuitive, an advance payment can provide significant benefits to both sides. In motor vehicle cases, advance payments to an injured plaintiff by a tort defendant are a statutory right in eight provinces and all three territories. This well-established device can be extended to non-auto cases with the use of appropriately worded agreements between the parties, and in some instances, interim funding orders can be made by the courts.

It is not hard to understand why a plaintiff would welcome an advance payment in an automobile accident case. Often a serious injury deprives the victim and his or her family of employment income, which is only partly compensated by no-fault income replacement benefits. Injury and disability often also impose extra expenses for families that may already be living from pay cheque to pay cheque. A lump sum advance payment made pursuant to s. 256 of the *Insurance Act* (Ont.) or similar legislation in other provinces can relieve this financial burden and permit accident victims and their families to focus on maximizing the benefit of available rehabilitation resources.

Benefits of an advance payment may be less obvious from the defendant's point of view, but they are tangible and immediate. The enabling legislation provides a statutory release for the amount paid, and of course, prejudgment interest will stop running on the amount of the advance payment.

Of equal importance is the effect such a payment can have on the relationship between the parties in the litigation. A generous and timely payment can engender significant goodwill from the plaintiff in favour of the defendant, which can result in a more co-operative relationship between the parties.

An advance payment based on a realistic appraisal of the value of the plaintiff's case will, at the very least, reduce the amount at stake in the litigation and lower the incentives acting on the plaintiff and his counsel to pursue the litigation. A well-timed advance payment becomes a stepping stone to settlement discussion and resolution.

The defendant does not need the plaintiff's consent or agreement to make an advance payment in a motor vehicle case. Section 256 of the Ontario *Insurance Act* (and its equivalent in the insurance legislation of all provinces and territories, save for Saskatchewan and Quebec) provides that, where an insurer makes a payment pursuant to its obligations to its insured under a motor vehicle liability policy, the payment constitutes, to the extent of the payment, a release by the person to whom the payment is made. The statute also provides that any payment is without prejudice to the defendant or his insurer, and cannot be taken as an admission of liability or disclosed to the judge or jury during the trial.

In general liability cases, the defendant does not have the benefit of the statutory release and other protections found in motor vehicle claims. However, effective advance payments can be made by agreement between the parties, or even unilaterally with an appropriately worded covering letter. Any agreement for an advance payment should include a provision that the payment is made on a completely without prejudice basis and without admission of liability; the amount of the payment will be deducted from the plaintiff's award at the end of trial and before a judgment is entered; and prejudgment interest will not run on the amount of the payment from the date of delivery to the date of settlement or judgment. These conditions can be agreed to in writing by the parties and a partial release delivered for the amount of the advance payment.

Where agreement on the terms cannot be achieved, it is still possible for a defendant to make a unilateral payment, with terms of acceptance spelled out in an escrow letter requiring that the payment be returned if the conditions are not accepted by the plaintiff.

Where plaintiff's counsel requests an advance payment that is not forthcoming, it may be worth applying to the court for an order for an advance payment by way of partial summary judgment. The court will only make such an order where the plaintiff's prospects of recovery are real and beyond reasonable doubt (see *Moore v. Vandenbosch*, [1989] O.J. No. 1987 (Ont. S.C.); and *Johnson v. Bates*, [1994] O.J. No. 2517).

In Ontario, the recent reduction in the amount of medical, rehabilitation and attendant care benefits available to non-catastrophic automobile accident victims provides another opportunity for tort insurers to step up to the plate. With only $50,000 of medical/rehabilitation benefits available to him, a plaintiff may be reluctant to ask the no-fault insurer for a significant capital expenditure — for example, accessibility modifications to his home and vehicle — for fear of running out of treatment funding. A tort insurer (where liability is undisputed) can then step in with an advance payment to fund that expense, and enhance the plaintiff's rehabilitation efforts and ultimately reduce its insured's exposure in the litigation.

When an advance payment is proposed to an insurer, there may be valid concerns that the money will be used to fund the litigation and will serve to encourage the plaintiff to continue with his claim. That concern can often be resolved by agreement with plaintiff's counsel that the advance payment will be given in its entirety to the plaintiff, without deduction for fees and disbursements.

Defence counsel interested in developing a constructive relationship with plaintiffs and their lawyers will find an advance payment an effective tool for doing so, while concurrently helping to manage their client's litigation risk. ■

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Auto insurance policies are regulatory documents — like statutes

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393, has created a convoluted, extra-contractual doctrinal test for giving that coverage clause meaning in an accident context.

Courts must first ensure that the motor vehicle is indeed being used as a motor vehicle (the "purpose" test). Next, courts must conclude that the motor vehicle's use caused the loss (the "causation" test). In determining causation, courts interpret third party liability coverage more narrowly than coverage for first-party accident benefits.

This approach breeds unpredictability in court decisions, because it forces coverage questions into a complex causal narrative to sort out insurance coverage. Courts have produced conflicting coverage decisions in a variety of common accident situations, such as when drivers drop off passengers from the vehicle, when projectiles are thrown and injure car occupants, and in some assault situations involving vehicles.

The second problem with the text-centric contractual approach is that it ignores the effect of a coverage decision on the broader insurance compensation network. The "use or operation of an automobile" coverage clause in automobile liability insurance policies exists as a mirror-image exclusion clause in other types of liability insurance, such as homeowners or commercial liability policies. What automobile insurance covers, other liability insurance products exclude in an attempt to segment the insurance coverage market.

Yet a narrow interpretation of the automobile coverage clause may lead to a corresponding offloading of risk to a different liability insurance policy that relies on the same language in its exclusion. Other insurers may be forced to absorb a risk they did not expect to absorb. Worse still, not being attuned to the overall effect of a decision about automobile insurance coverage could lead to an insured's complete inability to trigger any coverage under either an auto or non-auto policy, simply because coverage and exclusion clauses cancel each other out, despite an insured having the maximum possible coverage available on the market.

The solution to Canada's interpretive dilemma for automobile insurance coverage disputes is to centre a new interpretive framework built around the fact that automobile insurance policies are regulatory documents with a public purpose, like statutes. Any disputes centred on construing meaning in policy language would be more responsibly resolved by paying heed to the following:

- the purpose of the policy;
- the intent behind the particular coverage clause — including drafting history, regulatory opinions and submissions to governmental bodies;
- the consequences of coverage — the broader, systemic risk offload effect of a coverage decision on other insurers, other insureds, other lines of insurance products, the social welfare system and the efficacy of the public system;
- consumer protection — if necessary to solve a coverage dispute, courts should acknowledge the inherent imbalance of consumer power in the insurance market, by construing ambiguous language in favour of the insured (*contra proferentem*) and by adopting a more robust reasonable expectations doctrine with some teeth — the reasonable expectations of the insured (not the insurer or both parties, as such is inappropriate in the government-controlled automobile insurance context).

Any attempts at determining when automobile insurance coverage applies in an accident situation needs to account for the unique role of automobile insurance in the fabric of Canadian society. It is not just any contract, subject to private, contractual principles of interpretation. It is a social contract, closer to statute than private commercial agreement. ■

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