Focus

PERSONAL INJURY

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Plaintiff protection

Adverse cost insurance changes the game for clients, insurers

Alexander Voudouris

Adverse cost insurance comes in varying names, is offered by a handful of companies, and is relatively new to the Ontario legal landscape. It has been referred to as legal costs protection, adverse cost insurance or even after-the-event insurance.

Regardless of its moniker it is, in my opinion, the greatest advancement in access to justice in the personal injury field since the judicial acceptance in Ontario of contingency fees. The various products essentially provide insurance coverage to litigants who face paying costs to a successful opponent on motions right through to trial. To my knowledge, premiums range from $950 to $3,000 for coverage up to $100,000 and depending on the product, the client's lawyer's disbursements are covered as well. Usually, extra premiums will allow for the purchase of additional coverage.

Although I do not believe it has been tested in Ontario, in my opinion, the premium would be recoverable as a special damage, although I suspect attempts will be made at claiming it simply as an assessable disbursement.

Either way, I think our courts, in the name of access to justice, will find it difficult if not impossible to deny such a recovery, as it truly evens the playing field between individual plaintiffs and multibillion-dollar insurers. No longer will the threat of costs force plaintiffs into either over-compromising on a settlement or even abandoning a claim altogether.

In light of this, at least one of the policies I am familiar with requires plaintiff's counsel to disclose the policy's existence to opposing counsel on the theory that it will deflate defendant's counsel and facilitate settlement. On the other hand, some defence counsel have said to me that the existence of this kind of insurance will only embolden defendants from resisting a claim, knowing that should they prevail at trial they will be able to realize on any subsequent cost order. As a former defence lawyer for 18 years, I am firmly of the view that this is merely bravado if not wishful thinking on behalf of defendants.

Despite my welcoming of this product, there are of course some serious potential pitfalls, as its various incarnations change subject to market forces and increasing scrutiny of plaintiff's counsel. The first and most obvious hurdle is the minefield of different policies. Each one uses different jargon, is different in its pricing, obligations and payout, and each one frankly is confusing. It's reminiscent of the different cellphone contracts on the market, which are

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With a new year, a new Rule 48

Civil Procedure amendments to dismissal for delay mean reviewing your litigation files promptly

Nora Rock

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First, the good news: amendments to Rule 48 of the Rules of Civil Procedure allow five years from commencement of an action to set down for trial before the claim will be dismissed for delay.

The bad? Dismissals under the new regime will occur without notice and without a status hearing (unless a party wishing to preserve a matter requests one).

The current administrative dismissal regime, in effect until Jan. 1, has led to malpractice claims. Whether because a status notice went astray, was misinterpreted, or for some other reason, several hundred Ontario lawyers have found themselves faced with claims related to dismissal of actions for delay. The total cost of these claims is in excess of $7 million.

Amendments were introduced earlier this year pushing the dismissal deadline back to the five-year mark for actions commenced on or after Jan. 1, 2012. Transition provisions will govern claims commenced earlier.

With the more leisurely timeline, however, comes stricter administration: court registrars will no longer issue status notices warning of an action's pending dismissal. Once the five-year mark is reached without set-down for trial, that's it: the proceeding will be automatically dismissed. While a party can seek to have a dismissal set aside under Rule 37.14, reasonableness and lack of prejudice will likely be challenging to establish, given the longer delay under the new regime. An action struck off the trial list for delay and not reinstated within two years will be dismissed in similar fashion.

In the new regime, as of Jan. 1, the existing Rules 48.14 (Action not on trial list) and 48.15 (Action abandoned) are revoked, and a new Rule 48.14 (Dismissal of an action for delay) is substituted.

With respect to actions commenced on or after Jan. 1:

- Actions not set down for trial will be automatically dismissed, without notice to parties or their counsel, five years after the commencement date.
- The action will not be dismissed if, at least 30 days prior to the dismissal deadline, a party files with the court a

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Product: Will it turn lawyers into brokers?

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difficult to compare to each other, let alone decipher.

Another example is that some of the fine print of certain policies require routine reporting to the company offering the product, which would breach solicitor-client confidentiality rules without proper authorizations. And one would expect defence counsel will one day attempt to obtain production of the insurer's file. In my opinion, the file would be protected by litigation privilege, but this may not stop defence counsel from testing the issue.

There is also some concern that certain policies hand over ultimate control of the case to the company offering the product, and all of the implications that would have in terms of maintenance and champerty. Personally I have never seen any such policies, and if they exist, they must be renounced.

These products also create new dilemmas for plaintiff's counsel. Must they offer the product to all of their clients? Could they be found negligent in failing to offer to a client? Does offering the product to a client turn the lawyer into an insurance broker? In a case in which the product has been purchased and is triggered, can plaintiff's counsel still argue to the court that costs should be reduced due to the client's inability to pay?

Personally, I think a lawyer would be hard-pressed to explain why he or she didn't even offer the product to a client, especially if the lawyer just finished advising the client that they owe the defendant a large sum in terms of costs and has to pay out of their own pocket for their own disbursements. I think the issue of becoming a broker is more complicated. I am, however, aware of at least one legal opinion that says the lawyer is not acting as a broker and not violating the *Insurance Act*.

There are of course many more issues that must and will be addressed over the coming years by both market forces and our courts, but one thing is certain: the days of defence counsel threatening to take a plaintiff's house as payment for costs are over. The costs playing field has been equalized, and more cases will have to be resolved based on their merits.

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