

Insurance

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Advanced Payments by Automobile Insurers



By **Michael Doerksen**

Automobile liability insurers in Alberta have long been permitted to offer advanced payments to injured claimants in part settlement of claims without admitting that the insurer or its insured has any liability. This bulletin looks at two issues surrounding advanced payments: the disclosure of advanced payments to the trial judge and the recent amendment allowing non-voluntary court-ordered advanced payments.

The current advanced payment provision is section 581 of the Alberta *Insurance Act*, which provides:

581(1) When an insurer makes a payment on behalf of an insured under a contract evidenced by a motor vehicle liability policy to a person who is or alleges to be entitled to recover from the insured covered by the policy, the payment constitutes, to the extent of the payment, a release by the person or the person's personal representative of any claim that the person or the person's personal representative or any person claiming through or under the person or by virtue of the Fatal Accidents Act may have against the insured and the insurer.

Advanced payments under section 581 act as a release of the claim to the extent of the payment. Insurers typically consider making such a payment when its insured is plainly liable for the claimant's injury and the insurer is confident that damages will exceed the amount of the advanced payment.

Disclosing an Advanced Payment to the Court

Ordinarily the fact and amount of an advanced payment is kept confidential. The *Insurance Act* prohibits disclosing advanced payments to the court during trial. Section 581(4) provides:

(4) The intention of this section is to permit payments to a claimant without prejudice to the defendant or the defendant's insurer, either as an admission of liability or otherwise, and the fact of any payment must not be disclosed to the judge or jury until after judgment but may be disclosed before formal entry of the judgment.

There have been occasions, however, where the insurer wished to argue at trial that the plaintiff failed to mitigate by using the advanced payment to pay for treatment.

In *Guthmiller v Krahn*, 2001 ABCA 266, the insurer made advanced payments totaling \$85,000. The insurer also took the position that the plaintiff should attend at the Canmore Pain Management Clinic. Before a trial on quantum counsel agreed that the fact and amount of the advanced payment must not be disclosed in the trial. Defence counsel, in cross-examining the plaintiff at trial, asked pointed questions suggesting that, by not attending the Canmore Clinic, the plaintiff had failed to mitigate when he had the financial means to do so. This reference to financial means was a thinly veiled reference to the insurer's advanced payments. The trial judge reprimanded the lawyer for essentially disclosing at trial the fact of the advanced payment, contrary to the statute and the agreement of counsel. The Court of Appeal upheld the trial judge's decision that defence counsel's line of questioning was improper in light of the provision in subsection (4) that the fact of any advanced payment must not be disclosed to the judge until after judgment.

The Court of Appeal in *Guthmiller* proposed two possible solutions to the insurer's predicament: First, the amount of the advanced payment could have been disclosed "in the financial statement without identifying the source of the payment." This would permit the defendant to pursue its line of questioning concerning mitigation and financial means without disclosing the advanced payment. Second, the statute allows disclosure of the advanced payment to the trial court after judgment is granted but before it is formally entered. In this time window the defendant could apply to the trial judge to adduce new evidence, disclosing the advanced payment and making its argument about mitigation.

This second approach was taken in *Pfob v Bakalik*, 2004 ABCA 278. The trial and appellate courts both approved of the procedure that was adopted, of disclosing the advanced payment and making arguments on mitigation after the trial judge had rendered her judgment but before judgment was formally entered.

Court-Ordered Advanced Payments

Until recently, all advanced payments were voluntary on the part of the insurer. In 2004 the *Insurance Act* was amended to pave the way for the government to make regulations “authorizing the Court to make an order requiring an insurer to make a payment under this section to a claimant in advance of any judgment” and prescribing the circumstances under which an advanced payment order may be made.

Section 5.6 of the *Fair Practices Regulation* governing court-ordered advanced payments came into effect in July, 2012 along with the *Insurance Act* amendments arising from the *Insurance Amendment Act, 2008*. The test for a court-ordered advanced payment requires the court to be satisfied that:

- (a) as a result of the injuries of the claimant, the claimant is unable to pay for the necessities of life, or
- (b) the payment is otherwise appropriate.

This provision grants a great deal of judicial discretion, particularly in light of the “otherwise appropriate” wording.

The Regulation also gives the court broad scope to impose “any conditions it considers appropriate” as part of its order. Conceivably, the court could order the plaintiff to use the payment for a particular treatment or other purpose as a condition of payment.

No other province has a legislative provision quite like Alberta’s section 5.6. Newfoundland’s courts have discretion under their Rules of Court to order an advanced payment. In certain other provinces a court may order an advanced payment of special damages (New Brunswick) or as a condition of granting a defendant a trial adjournment (B.C.). Cases from other provinces can shed some light on how Alberta’s courts will apply section 5.6.

The cases from these provinces suggest that advanced payments will likely only be ordered in exceptional cases, where the applicant is able to prove (i) that there is no reasonable possibility that the final award will be less than the advanced payment; (ii) that the applicant faces serious financial difficulty without the payment; (iii) that there is no serious issue concerning liability or the causal connection between the injury and the accident. Insurers should expect these criteria to be the focus of the court’s attention on an application under the new Alberta provision.

At present there are no reported Alberta cases on advanced payments under section 5.6. However, Field Law’s insurance defence lawyers report that they are seeing applications for advanced payments come across their desks on several files. We may not have to wait long before the Alberta court issues its first written decision on the criteria for awarding a plaintiff an advanced payment.

About the Author

Michael clerked with the Supreme Court of British Columbia in Vancouver before articling with Field LLP’s Calgary office. Following completion of his articles he became an associate with the firm in May 2000 and has worked in general civil litigation, insurance litigation and collections. He currently maintains a practice in legal research and writing with an emphasis on insurance coverage issues.

During his time with Field LLP Michael has prepared written submissions in cases before the Alberta Court of Queen’s Bench, Alberta Court of Appeal, the British Columbia Supreme Court and various administrative tribunals in Alberta. He has extensive knowledge in civil procedure, insurance law, construction law and commercial litigation. He has written on construction surety and insurance, procedure and evidence and electronic discovery issues.

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