

▶ 8 TIPS FOR MAXIMIZING
VALUE OF SMALL U.S.
SETTLEMENT DEMANDS.....1

▶ IDENTIFYING U.S. GEMS
IN YOUR PRACTICE.....2

Across *the* line

CROSS BORDER LAW CORP'S QUARTERLY NEWSLETTER
COVERING CANADIAN-AMERICAN LAW ISSUES & TRENDS.

8 Tips For Maximizing Value of Small U.S. Settlement Demands

- By Greg Samuels

Condensed from a recent TLABC seminar presentation.

1 Remember that your "audience" is a computer. Two-thirds of U.S. insurers use Colossus or other forms of adjusting software. Your demand should read less like poetry and more like a roadmap through the medical records to specific chart notes and diagnoses that can be input into the adjusting program.

2 Don't be afraid to intervene in your client's treatment. Adjusting programs favour active therapies such as physio over chiropractic or massage. If your client attends alternative therapies such as TCM or acupuncture, insist on regular visits to the G.P. to endorse these treatments. Also, encourage your clients to tell their doctors everything – if it isn't in the chart notes, it doesn't add value, so segregate all complaints (e.g. "shoulder pain" and "neck pain", not "shoulder pain radiating into neck").

3 Include all "hard specials" in your demand. Whether your client has incurred medical expenses paid for by ICBC, MSP or by way of user-fee, include the actual cost of the treatment, no matter the source. For example, upon de-

mand, MSP will provide a \$1,000+ per diem for hospital stays, yet you may never find this cost listed in your client's records. Many states' collateral source rules hold defendants directly responsible for all hard specials, no matter the source of payment.

4 Don't accept ICBC's subrogated lien interest at face value. In the typical cross border claim, ICBC will assert a subrogated interest for any Part VII benefits paid to your client that you recover from an American third-party insurer. Washington courts have held that a plaintiff has no obligation to repay such insurers unless they have been made 100% whole through settlement. Even where the matter proceeds to judgment, the PIP (Part VII) insurer must bear a pro-rata share of attorney's fees and costs.

5 Don't order a medical-legal report for a small U.S. claim. Only Alaska follows a modified version of the "costs to the victor" approach of British Columbia and other Canadian jurisdictions. In all other states, your client will bear the costs incurred to prosecute their claims. There are few instances where the doctor's report may be used in lieu of testi-

mony. The value to the computer-adjusted settlement demand does not justify the cost of the report.

6 Talk to the Adjuster. Are they bound by the software? Have all relevant "value drivers" been considered? Many adjusters are resentful of the loss of analytical control over their caseload, and may be more willing to share secrets with the rare Canadian lawyer they talk to than they would with one of their "usual suspects".

continued on other side >



7 For minimum policy limits cases, understand the state's insurance bad faith laws. Sometimes a \$25,000 policy is a gift to a small to medium-sized case, as the strong arm of bad faith law might encourage an early settlement and pursuit of an UMP claim against ICBC. In Washington State, if faced with

an insurer who asserts unreasonable defences or unreasonably undervalues the potential damage award, the plaintiff can propose a consent judgment coupled with a covenant not to execute and an assignment of bad faith rights. This can give you a decided advantage in negotiating a quick settlement for policy limits.

8 Seatbelt non-use is irrelevant in many States. In Washington, any mention of seatbelt use or non-use is inadmissible at trial. Don't concede a reduction of damages on the basis of this typical BC argument.



Identifying U.S. Gems In Your Practice

- By Greg Samuels

The above article addresses ways to maximize claim value for smaller claims, where the difference between judgment value and settlement value is less than \$20,000. Bear in mind that few adjusters will settle claims for more than fifty cents on the dollar without at least the threat of litigation, so it's important to **know when to engage U.S. counsel to avoid leaving significant value on the table.**

The following factors will significantly increase the value of a U.S. claim over a similar B.C. injury claim:

Wrongful Death - This is typically a seven or eight-figure claim in the U.S. as opposed to a five-figure claim under BC's *Estate Administration Act*. Damages include the present day value of the decedent's lifetime earnings less consumption and even fear of imminent death and pain and suffering before death.

Defective Products Claims - Unlike BC's negligence standard, products liability in most states is governed by strict liability - if the product is defective, the defendant is liable, period. The strict liability standard may even apply to US-manufactured or US-designed

products that injure a plaintiff in Canada.

Emotional Injuries - Typically very modest in BC, we once obtained a jury verdict of \$1.5M for a BC plaintiff who was involved in a catastrophic accident with her family in Washington, even though her physical injuries were very modest.

Serious physical injuries - Generally speaking, damage awards are significantly higher in the U.S. than they are in Canada, since they are not limited by caps on non-economic claims. We obtained reportedly the highest jury verdict ever against an ICBC insured, in a 2004 Washington case.

When your client has been injured in a U.S. accident or by a defective product manufactured in the U.S., and the case involves any of these factors, you owe your client a duty to engage U.S. counsel in order to maximize the value of his or her case. This might mean simply filing a lawsuit to legitimize the threat of litigation or might very well lead to trying the case rather than settling it for a fraction of its value.

Fortunately, that can be a win-win-win for you, your client and proper

U.S. counsel, as illustrated by the following true story:

Although his client was still treating for her injuries, a BC lawyer demanded settlement from a US insurer just prior to the expiration of the limitation period-- \$15,000 for what looked to us at the time as a \$50,000 case. Fortunately, the insurer rejected the demand, prompting the lawyer to engage our firm. We filed an action and are in the process of developing the damages case for trial. It would now appear that the plaintiff's injuries are permanent and will result in a reduction of lifetime earnings. Whether it ultimately resolves by way of settlement or judgment, the claim is now worth more than ten times as much as the BC lawyer would have been able to realize for the client.

Considering our generous referral and association fees, his interest in the claim has increased, rather than decreased, by engaging our services.

Full Access

To read the non-condensed version of this presentation visit:

www.crossborderlawgroup.com

When prompted, enter "crossborderlaw" and the password "clients"

Why the heck are you sending me this?

We have specifically chosen to send this newsletter to your firm, because we know you've spent money advertising your practice and you're bound to get clients who require multijurisdictional legal support. Rather than sending those clients away, we can help you service them. In fact, we get the majority of our cases on referral from or association with other BC counsel, and we provide generous referral and/or association fees that will allow you to recoup your advertising costs, plus more. Call us toll free at 800-222-6332 or in Vancouver at 604-742-4242.



GREG SAMUELS
CROSS BORDER LAW CORPORATION

204-1730 2nd Ave West
Vancouver, BC, Canada, V6J1H6
T. 604.742.4242
F. 604.742.4243
www.crossborderlaw.com

We welcome your feedback and interest in Across The Line and our services. To speak with a Cross Border Law lawyer, call 604.742.4242. We make every attempt to provide accurate information. However, nothing contained in this newsletter should be misconstrued as legal advice. The unique facts and circumstances of every case create nuances in the law and may alter the general advice given here.

© 2008 Cross Border Law Corporation. All Rights Reserved.