

SETTLING MODEST U.S. PERSONAL INJURY CLAIMS WITHOUT A U.S. LAWYER—FOUR THINGS TO CONSIDER

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At Cross Border Law, our practice focuses on complex multijurisdictional civil litigation that implicates interests on both sides of the U.S.-Canadian border. Yet we're often confronted with questions – either directly from potential clients, or from referring Canadian counsel -- regarding cases that present more modest challenges. For example, non-catastrophic personal injury claims arising out of auto accidents in the United States between a Canadian plaintiff and a U.S. defendant often pose straightforward litigation problems which don't require specialized expertise in choice-of-law or *forum non conveniens* to resolve. The temptation to settle such cases on your own, without the assistance of U.S. counsel, can be compelling – and in certain cases, may be appropriate. But if you're going to try to resolve your client's U.S. based personal injury matter short of filing a lawsuit, keep these four key points in mind:

Costs are not generally recoverable in U.S. jurisdictions – Of the 50 state jurisdictions in the U.S., only Alaska follows a modified version of the “costs to the victor” approach followed by the British Columbia Rules of Court. In all other states, the plaintiff will generally be fronting his own costs for record production, expert witness fees, court reporters and the like.

Thus, if you're going to attempt to prepare your client's case for settlement, the key is to find ways to obtain essential evidence and expert reports in the most cost-effective manner possible. If presented with a settlement offer, you must likewise consider the cost of bringing your BC-based medical experts and fact witnesses to the U.S. forum in the event that your client rejects settlement and proceeds with a lawsuit. While there are occasional exceptions to the “no costs” regime, the simple fact is that many small to moderately sized cases may have legal merit, but are simply not financially feasible for a BC plaintiff to pursue. In some such cases, settlement may be your only realistic option. In others, your jurisdiction may offer alternatives such as mandatory arbitration or “small claims” courts, where relaxed rules of evidence (such as limits on defence discovery, or easy introduction of testimony by telephone or written report) might be sufficient to make a claim feasible to litigate.

Many modest personal injury claims in the U.S. are “adjusted” by computer: About two-thirds of U.S. liability insurers use some form of computer-based adjusting program (CSC Corporation's *Colossus* being the best-known example) to assess value on small to moderate sized personal injury

claims. At some insurers, the bodily injury adjusters are reduced to mere data input clerks, and have little or no authority to deviate from the range of settlement values generated by their “Silicon Supervisor”. The upshot of this trend towards computerized adjusting means that damages will only be recognized for injuries which are noted in a medical report that contains a diagnosis which the adjusting software is programmed to accept. Our impression is that “adjusting-by-computer” places excessive emphasis on the notes and diagnoses of the plaintiff’s primary physician, is heavily biased towards physiotherapy over chiropractic care for soft tissue complaints, and is poorly equipped to give proper credit to alternative treatments, some of which are more commonly employed in Canada than in the U.S. (such as acupuncture and traditional Chinese medicine). When preparing your demand letter, it’s important to do a little online snooping to determine if the defendant’s insurer uses *Colossus* or other computerized adjusting tools. If they do, craft your demand letter less as a persuasive pitch and more as a roadmap through the medical records to specific chart notes and diagnoses which can be input into the adjusting program. Doing so will ensure that you maximize the range of settlement values that the software allows your adjuster to offer.

The evidence supporting your client’s claim must be adapted to satisfy the expectations of an American insurance

adjuster: Preparing your demand to conform with the realities of computerized claims assessment is only the first step in

packaging Canadian evidence to maximize settlement value before an American insurer. Suppose you determine that the insurer you are dealing with does *not* use adjusting software as a major component in payout decisions. Under the “traditional” human-oriented claims analysis approach, U.S. adjusters are typically used to evaluating quantum for non-pecuniary damages as a multiple of the “hard specials”, i.e. the cost of medical treatment and other economic loss occasioned by the injury. Canadian plaintiffs, whose medical treatment is provided by provincial health care and does not come with a bill for services rendered, force the adjuster to guess as to the true value of those “hard specials” – and the estimates they make rarely err in your client’s favour. Comparative research in a U.S. jury verdicts reporter may be needed to equate your client’s treatment with like examples in the U.S., to ensure your plaintiff doesn’t receive a reduced non-pecuniary damages offer. Further, diagnostic support for a client’s claim is often far more extensive in a typical U.S. personal injury claim. An adjuster may look askance at a claim of moderate neck or back injury which does not include an MRI report from a treating physician or expert – even though a similar claim in Canada could be sustained with merely the GP’s diagnosis coupled with a CT scan. Certain types of claims may benefit from obtaining an MRI from a private clinic, purely for litigation purposes, to ensure that the American insurer does not use Canada’s more conservative diagnostic culture as justification for denying compensation for otherwise legitimate injuries.

U.S. law of insurance bad faith can be a powerful tool in settlement negotiations:

The standards of conduct insurers are required to operate under in the U.S. differ from state to state – but nearly every U.S. jurisdiction has more robust consumer protections available than those presently offered by Canadian law. For example, insurers who refuse to engage in reasonable settlement discussions in cases where liability or the risk of excess judgment to the defendant is reasonably clear are often risking a violation of state consumer protection legislation. In Washington State, such conduct may expose the insurer to additional damages, as well as liability for costs and attorney’s fees (contrary to the typical U.S. approach, outlined above). The insurer’s “bad faith” in exposing its insured defendant to additional risk is assignable to third parties – meaning that in extreme cases, a plaintiff may negotiate a covenant judgment with the defendant coupled with an assignment of the defendant’s bad faith claim, and seek extracontractual damages directly from the insurer. And remember, these situations where the defendant may have assets at risk beyond her policy limits

arise much more often in the U.S., where required minimum policy limits tend to be far lower than they are in Canada. It pays to do some limited research into your jurisdiction’s bad faith law *before* preparing your demand – and perhaps to include reference to a statute or two in your letter, if only to put the insurer on notice that you’re aware of their responsibilities, and intend to hold them to the same standards a “home state” lawyer would expect them to follow.

Obviously, these are just some of the considerations that come into play. Many small to moderately sized U.S. personal injury claims can be competently settled for full value by Canadian counsel, provided that the differences between claims evaluation and development in the two jurisdictions are acknowledged and addressed.

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