

Personal Injury**Off-coverage positions: Requirement for reasons**By **Dale Orlando and William Harding**

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(February 10, 2020, 3:28 PM EST) -- In personal injury trials, defence lawyers invariably do their best to give jury members the impression that the defendant will be personally responsible to pay whatever judgment is awarded. This, of course, is almost never the case. Auto insurance is mandatory in Ontario. It therefore makes no sense to pursue a significant personal injury case against an individual without insurance coverage because, even if successful, an individual will rarely have the assets to pay a judgment personally.

Unfortunately, plaintiff lawyers are prohibited from telling jurors that the individual before them will not have to pay the judgment personally as they have access to an auto insurance policy that will pay the award.



William Harding

In some circumstances, auto insurers will take the position that they are not required to defend and indemnify the defendant, despite the negligent party having a contract of insurance in place. This is called "taking an off-coverage position." Instead, they seek to add themselves as a statutory third party to the action, pursuant to s. 258(14) of the *Insurance Act*.

Insurers may deny coverage to their insured based on multiple reasons, such as when a material misrepresentation is made or when there is a lack of co-operation from the insured. Ordinarily, little if any information is given to the plaintiff and his or her lawyer as to the reason behind the insurance company's position.

An insurance company denying coverage and adding itself as a statutory third party can have major implications on an injured plaintiff's ability to recover adequate compensation for their injuries. The effect of being named a statutory third party means that the insurer is now only required to contribute a maximum of the statutory minimum insurance of \$200,000 towards any award made by the court. With the standard liability insurance policy being \$1 million, this is a significant reduction in available funds.

When the defendant's insurer takes an off-coverage position, the injured party can seek to add their own auto insurance company to the claim (if they have an auto policy available to them) pursuant to the uninsured/underinsured coverage offered by their insurer in an endorsement to the auto policy called the OPCF-44R.

The OPCF-44R allows the plaintiff to claim from their own insurance company the difference between insurance money available from the defendant's auto insurance and the maximum of their own auto policy. However, the onus is on the plaintiff to satisfy their auto insurer that there are insufficient funds available under the defendant's auto policy to satisfy the claims of the plaintiff.

We are currently dealing with this very issue in a tragic case involving the death of a mother and her two young passengers. Here, the insurance company for the defendant has advised that they will be taking an off-coverage position and naming itself as a statutory third party. This will result in the defendant's insurer only being required to pay a maximum of \$200,000 to the surviving family suffering this tragic loss.

Thankfully, some case law has emerged that is helpful to plaintiffs when this issue arises. In *Lica v.*

Dhaliwal 2015 ONSC 3888, the court held that in some instances, an insurer must provide reasons for the off-coverage position. In *Lica*, the plaintiff was claiming through the OPCF-44R endorsement of his own insurance policy as a result of the defendant's insurer taking an off-coverage position and limiting its exposure to \$200,000, which was insufficient to satisfy the plaintiff's claim for damages.

The plaintiff's OPCF-44R insurer then took the position that it would not respond to the claim as it was unclear if the plaintiff was indeed underinsured without knowing more about the off-coverage position being taken by the defendant.

The court ruled that reasons for the off-coverage position were required in order to satisfy the requirements of the OPCF-44R that the plaintiff was indeed underinsured.

Lica is a crucial case for plaintiff counsel to consider when dealing with an insurer taking an off-coverage position and adding itself as a statutory third party. If an insurer is added to a claim pursuant to an OPCF-44R endorsement, it may allow the plaintiff to assess the merits of an off-coverage position at an earlier stage in the proceeding.

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