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Insurance

Class action lawsuit raises questions for Ford, insurance regulator | Jasmine Daya

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Jasmine Daya

Eleven auto insurance companies that have allegedly withheld hundreds of millions of dollars in HST payments from Ontario car accident victims since 2010 have been named in 11 class action lawsuits that now total \$1.1 billion in damages. None of the 11 class actions has been certified or tested in court.

Each of the 11 auto insurance companies were named in 11 separate class action lawsuits in early to mid-November 2018. The insurers include: Intact, Aviva, Unifund Assurance, Belairdirect, Certas Direct, Allstate, Co-operators, Wawanesa, Economical, Commonwell Mutual and Echelon.

Toronto Star investigative reporter Robert Cribb broke this story in two articles about these alleged unfair practices, one on Nov. 1, 2018, and a second article on Nov. 11, 2018. This story was also picked up by Global News, CBC, CTV, the *Windsor Star* and *Canadian Underwriter*.

The class actions allege that the auto insurance companies failed to pay or reimburse HST to accident victims on their medical benefit claims. In other cases, they included HST in calculating a claimant's benefit limits. Both practices are wrong.

Importantly, the auto insurance companies allegedly did this in violation of repeated direction from the regulator, the Financial Services Commission of Ontario (FSCO) which regulates and licenses Ontario's

insurance companies. The FSCO issued a dozen bulletins and guidelines to the industry, which included direction on the HST issue, between June 2010 and June 2016.

A July 2010 bulletin on medical benefit payouts stated: "If the HST is considered by the [Canada Revenue Agency] to be applicable to any of the services or fees listed in this Guideline, then the HST is payable by an insurer."

Further, a 2015 guideline made it clear that HST should not be considered part of the benefit limits for statutory accident benefits (SABS): "The HST is a tax and is not part of the benefit limits set out in the SABS."

Given that HST is at 13 per cent, the amount is not insignificant to auto accident victims who rely on these payments to pay rent or a mortgage, their utilities and feed themselves and their families.

If a car accident victim, for example, is awarded by a court, or settles with his auto insurance company for an amount of, say, \$5,000 per month, HST should be added to that amount, not deducted from it. The correct amount of the monthly payment should therefore be \$5,000 plus the HST of \$650. If the \$5,000 payment includes the HST, the actual payment is \$4,425 and the HST portion is \$575 — giving them 13 per cent less money for the month.

In addition, the FSCO was named as a defendant in the lawsuits for failing to ensure the "government-designed, mandatory insurance was operated fairly."

Of the 11 auto insurance companies, only Intact has changed its system so that the HST no longer comes out of the limits and this only happened in late September 2018.

As a personal injury lawyer practising in the Greater Toronto Area, I have personal experience with this practice where insurance companies incorrectly charge HST on benefits payments. I recently filed an application to the Licence Appeal Tribunal to dispute non-payment of an accountant's report. This was an accountant that I hired on behalf of my client to calculate income replacement benefit.

During the negotiation process, the insurance company finally agreed to remit payment to the accountant for his report amounting to \$2,500 but refused to pay HST of \$325. The accountant that I had hired agreed to the payment because he felt he had no choice. To go through a tribunal hearing for \$325 did not make sense and the accountant had already been waiting several months.

Following the news story, the accountant wrote to the insurance company representative 2018 requesting reconsideration of payment of \$325 for HST. Shortly afterwards, the insurer advised via e-mail that the matter was resolved which translates to, the company would not be paying the HST.

Here are four important questions for the regulator, the government of Ontario and Premier Doug Ford:

1. Why has FSCO allowed auto insurance companies to ignore 12 bulletins (since 2010) that clearly stated that HST was additional to medical benefit payments?
2. Why did FSCO promise change to the Ontario Trial Lawyers Association in August 2016 “concerning an alarming practice of some Ontario insurance companies who wrongfully deduct HST from the available medical and rehabilitation limits for injured accident victims?” Two years have passed and no change has happened.
3. Why has the government of Ontario not demanded more accountability from the regulator, FSCO, to ensure fair dealings with Ontario car accident victims?
4. Why does the government of Ontario continue to “drink the Kool-Aid,” as poured by the auto insurance companies?

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