



Advance loans: A risk to the plaintiffs bar

The Lawyers Insurance Fund has seen a dramatic increase in claims reported by the plaintiffs bar relating to ‘advance loans’. These are loans given to your plaintiff clients in anticipation of a settlement or judgment relating to a personal injury or other tort claim. Although the typical loan is small, the amount owing by the time the litigation resolves may be much more because of high interest rates and fees.

This lending practice may provide some financial relief to your plaintiff clients. However, it puts you at significant risk if the loan is outstanding. The lender will likely require your client to give it an irrevocable assignment of the litigation proceeds, and then give you notice of the assignment. Just as with a direction to pay, if you do not pay the lender the amount outstanding, you are personally liable. Even receiving notice of your client’s promise to pay the lender and failing to comply may leave you exposed.

If you are actually involved in your client’s loan application, you face additional risks. The lender may ask you to give undertakings - including undertaking to pay the outstanding amount from the litigation proceeds, advise of a change in counsel and disclose privileged information about the litigation - and get you to agree that you hold the litigation proceeds in trust. Failing to comply with an undertaking given or trust condition accepted puts you at risk both legally and ethically. If the lender asks you for an opinion on the merits of a claim or other information that turns out to be wrong, you may face a claim that you breached a duty of care. A client, unhappy with the loan or your disclosure of privileged information, or facing a claim for repayment - despite a loss at trial - because of non-compliance with certain terms, may allege that you failed to give proper advice.

If liable, expect to pay your insurance deductible (\$5,000 or \$10,000), surcharge (\$1,000 for 5 years) and lose eligibility for the part-time discount. So, appreciate the risks and take steps to avoid them.

Create and use systems

- Use a system to record, track and ensure compliance with any notice of assignment you receive, undertaking you give or anything else that requires you to take steps in relation to your client's loan. As part of your system, consider:
 - adding a note in a prescribed area of the file cover to record receipt of an assignment;
 - adding a check-box to your trust withdrawal form that requires you to check, then confirm, that you have complied with any obligations in relation to those proceeds before your client is paid; and
 - adding a flag before a file is transferred that requires you to check if you have undertaken to notify the lender or take any other steps before the file is transferred.
- Make sure that any systems you use are incorporated into your practice or case management software.
- Ensure that multiple requirements on one file are effectively managed as you may, for instance, receive notice of several assignments from several lenders in relation to the same client.
- Consider designating a specific person in your office responsible for ensuring records are created, maintained and provide the appropriate flags.
- Educate your staff about assignments, directions to pay and undertakings, and why recording and tracking them are so important.

Pay particular attention if you transfer or inherit a file

- If you are leaving a firm or transferring a file, alert your successor to the existence of any assignment or other commitments.
- If you inherit a file, read the transferred file from the bottom up. Once your review is complete, you should have seen – and considered – every single document in the file. This will ensure that a notice of assignment, for instance, is seen and added to your own firm's systems.

Be cautious about undertakings

- Ask yourself why you are giving undertakings to or accepting trust conditions from the lender, when the lender can protect its position simply by giving you notice of the assignment. A refusal may well be appropriate.
- If you are prepared to take these steps, make sure that you are able to comply with any promises you make and obtain informed consent from your client. And then make sure that your systems will protect you from overlooking or forgetting compliance.

Do your own review and follow-up

- Read any assignment, direction to pay, undertaking you give or any other document you sign in relation to the loan carefully and thoroughly. Then comply.
- Do not rely on your client to give you the amount outstanding or to pay the lender. Obtain a pay-out statement directly from the lender and pay the lender directly.
- Ask the lender to acknowledge payment in full and final satisfaction of the debt, when payment is sent. Do not pay your client until you receive that confirmation.

Don't give an unqualified opinion

- Confirm in writing that your opinion or anything you provide is prepared for and only to be relied on by your client, not the lender.

Advise your client, or confirm you are not

- If you are involved in your client's loan application, either advise on the loan or confirm that you are not giving advice. If you are not, confirm your client is agreeing to terms and conditions that will affect their interests and recommend they read the agreement carefully and consult with the lender, as needed, so that their interests are not prejudiced.
- If you are asked to take any steps, confirm the client's instructions. For instance, before you agree to disclose privileged information to the lender, obtain informed consent from your client.
- Keep notes of your advice and your client's instructions.