THE SETTLEMENT REGULATION IN THE ONTARIO COURTS

FAR FROM SETTLED

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The "Settlement Regulation" (§9.1 Ontario Regulation 664 as amended by Ontario Regulation 780/93) has governed the settlement of accident benefit claims for seven years. Until relatively recently, all of the jurisprudence under §9.1 came from arbitrators at the Financial Services Commission of Ontario ("FSCO"). The arbitrators generally gave §9.1 a broad and liberal interpretation, often permitting insured persons to rescind settlements that they had entered into with their insurance companies.

As far as we can tell, it took four years for a consideration of §9.1 to come before the Ontario Courts. However, since November of 1998, the Courts have been called upon to interpret the Settlement Regulation on 10 occasions (and counting), with conflicting and somewhat unsatisfying results. This paper will attempt to bring the reader up to date on the state of the law on the Settlement Regulation in the Ontario Courts.

The actual text of §9.1 has been appended to this paper. To summarize, when a settlement of statutory accident benefits is proposed, the insurer must provide a description of the benefits available, a description of the impact of the settlement (i.e. a restriction on the right to litigate, arbitrate, etc.), a statement that the insured can rescind the settlement within 2 business days (the "cooling-off period") and a statement advising the person to consider seeking independent legal, financial and medical advice. Finally, where the settlement provides for a lump sum payment for a benefit that is not a lump

sum benefit, the insurer must provide an estimate of the commuted value of the benefit and an explanation of how the insurer determined the commuted value. If the insurer fails to give the insured a settlement document containing all of this information, the insured can rescind the settlement at any time.

Generally speaking, our Courts like settlements. The idea that a person can rescind an informed settlement that has been voluntarily entered into does not sit well within a system that encourages settlements at every possible turn. Contract law is founded on the principles of "offer and acceptance". Rule 49 is founded on the same principles. Counsel in this field presumed that the Courts might have a hard time with the idea of "offer, acceptance and rescission". They were right.

When this issue first came before the Court, warning bells sounded. The facts of *Cordova* v. *Allstate Insurance Co. of Canada* (1998), 41 O.R. (3d) 795, are straightforward. A claim for accident benefits was settled. The insurer provided the settlement documents, which did not include a "statement of the restrictions contained in the settlement on the insured person's right to mediate, litigate, arbitrate, appeal or apply to vary an order" (§ 9.1(2) paragraph 2). The insured person later attempted to rescind the settlement, based in part on the failure of the insurer to provide this statement in the settlement documents. Justice Somers concluded that he was, "unable to give effect to the settlement apparently arrived at. I may say I do so with some reluctance, but I have concluded that a statutory procedure must be followed in order for the settlement to be binding" (at p. 799). You might surmise that Justice Somers was reluctant to enforce the clear terms of the statutory procedure due to our judicial preference to encourage final settlements. This general preference shows through in several of the following cases.

The main exception to this judicial preference was found in *Opoku* v. *Pal* (1999) 49 O.R. (3d) 97, aff'd 49 O.R. (3d) 97 (C.A.). This case involved a quadriplegic young man, whose lawyer attempted to settle both his tort claim and his claim for accident benefits for a lump sum (approximately $1.75 million). The settlement documents included what purported to be a "commuted value" statement, but was in fact only a description of the various maximum insurance limits available under each heading. After we were retained, we rescinded the "settlement" and argued that the description provided by the insurer did not comply with the Settlement Regulation. Justice Spiegel found that, in order to comply with the commuted value requirement of §9.1(2) paragraph 5, the insurer should have provided:

a) Mr. Opoku's life expectancy;
b) the appropriate discount rate in respect of each of the periodic benefits;
c) the insurer's assumptions concerning the rate at which the med/rehab benefits would be paid over the course of Mr. Opoku's life; and
d) the insurer's assumptions concerning the rate at which the attendant care benefits would be paid over the course of Mr. Opoku's life (at p. 114).

Justice Spiegel held that, since the insurer did not comply with the Settlement Regulation, Mr. Opoku was entitled to rescind the settlement. Since the same insurer purported to settle the tort claim and accident benefits claim in the one lump sum (the same insurer had responsibility for both claims), the tort settlement was set aside as well.

On appeal, the Court of Appeal affirmed Justice Spiegel's decision. The Court did comment that an insurer is not required to resist settlement until all possible information is available to assist them in the commuted value calculations. So long as the insurer

makes an assessment in good faith (emphasis added) based on the information available to it, and provides the factual assumptions relied on to calculate the commuted value, the insurer will have complied with the Settlement Regulation.

Following *Opoku*, there was a real fear in the insurance industry that most of the approximately 50,000 settlements (the number suggested in the affidavit material in *Opoku*) that had been entered into were now voidable. It is common knowledge that insurers routinely provided the same type of insufficient commuted value calculations in their settlement documents that were at issue in *Opoku*. At a minimum, the decision made for a lot of uneasy actuaries and insurance company executives.

Their concern was somewhat eased following the case of *Catania* v. *Scottish & York Insurance Co.*, [1999] O.J. No. 3678. In this case, the settlement involved a lump sum payment of $8,399.00. Ms. Catania attempted to rescind the settlement, based on the *Opoku* decision and the fact that there was no commuted value calculation provided in the settlement documents. The settlement was not really a lump sum payment intended to cover a lifetime of benefits. Instead, it was a payment of past income replacement benefits for a period of six months ($6,000.00), plus payment for some limited psychological treatment ($2,000.00) and some medical reports ($399.00). Justice Dambrot did not take any issue with the approach in *Opoku*, but found that it had no meaningful application to this particular case. It was found that Ms. Catania's life expectancy, the appropriate discount rate, etc. were totally irrelevant to the settlement at issue. As a result, the settlement was upheld.

Opoku and *Catania* are the only two cases currently available dealing with the right of an insured to rescind a settlement based on the commuted value calculations. Where the

courts will draw the line between a $1.75 million settlement that can be rescinded and a $8,399.00 settlement that cannot be rescinded is anyone's guess. It may help to have some sympathetic facts.

Sympathy was certainly not on our side in *Birjasingh* v. *Coseco Insurance Co.*, [1999] O.J. No. 4546. In this case, the settlement was agreed to between counsel, with instructions from their clients. The settlement documents (which were not alleged to be defective in any way) were sent to Plaintiff's counsel. Ms. Birjasingh never actually saw the documents, and when she discovered (some months later) that she would require further surgery, her lawyer attempted to rescind the settlement. This rescission was based on a line of FSCO decisions holding that, until the insured is physically "given" the settlement documents, as required by §9.1(2), the 2 day cooling-off period does not begin to run. Justice Nordheimer refused to follow the line of cases from FSCO and as a result refused to set aside the settlement. The FSCO cases were based on the reasoning that, to give meaning to the 2 day cooling-off period, the insured must actually get the settlement documents and then consider his or her options for two days. Justice Nordheimer instead relied upon the law of agency, holding that "communication of a matter to the solicitor is, in effect, communication of that matter to the client" (at par. 11). Underlying this decision is Justice Nordheimer's conclusion that the Settlement Regulation was enacted to address, "situations where unrepresented insureds were agreeing to quick settlements offered by insurers"(at par. 12). It should be noted that §9.1 is silent on the issues of legal representation and the speed of the settlement. In fact, this same argument was raised by the Defendants in *Opoku*, before the Court of Appeal, without success. In any event, as the law now stands, the 2 day cooling-off period begins to run when the

insured's lawyer receives the settlement documents. A suggestion to Plaintiff's counsel; either see your client very quickly, or if you choose to rescind, use FSCO arbitration rather than the courts as a method of dispute resolution.

What happens to the settlement funds when an insured attempts to rescind a settlement? The Court of Appeal has concluded that the funds are immediately owing to the insurer in the case of *Stephan* v. *Insurance Corporation of British Columbia* (2000), 48 O.R. (3d) 41. However, the Court did not make the rescission dependent upon the return of the settlement funds, as had been suggested by the insurer. Presumably the issue would be dealt with by a claim for set-off, or an action for repayment, after the settlement is rescinded.

The issue that seems to be the most controversial in the Courts is the interplay between §9.1 and Rule 49. Both *Kibalian* v. *Wellington Insurance Co.*, [2000] O.J. No. 1689, and *Jimenez* v. *Markel Insurance Co. of Canada* (2000), 49 O.R. (3d) 402, conclude that, "s. 9.1 and Rule 49 cannot work in tandem" (*Kibalian*, at par. 7). In *Kibalian*, an offer was made and accepted pursuant to Rule 49. Before the insurer's lawyer sent any of the settlement documents required by §9.1, the insured's counsel rescinded the settlement. Justice Jennings, in refusing to permit the Plaintiff to rescind the settlement, found that, "the plaintiff by choosing to proceed under Rule 49 had waived the provisions of the Insurance Act" (at par. 21). His Honour further found that, to permit a 2 day cooling-off period after the acceptance of a settlement, "is to make a mockery of the Rule 49 procedure" (at par. 17).

This line of reasoning was quoted with approval in *Jimenez*, in obiter. That case involved a claim for accident benefits that was settled at a FSCO mediation. The next day (during

the 2 day cooling-off period) the clients informed their lawyer that they wanted to rescind the settlement. Their lawyer did not properly advise the insurance company of this fact until more than one month later. Justice Campbell framed the issue as follows, "should the remedial aspect of the regulation be construed to protect and benefit an insured when a settlement is accepted and not objected to by an errant solicitor" (at p. 410). Put that way, it is not difficult to predict that Justice Campbell did not have a lot of sympathy for the Plaintiff's position, and therefore refused to permit them to rescind the settlement.

Justice Matlow came to the opposite conclusion regarding Rule 49 in *Igbokwe* v. *HB Group Insurance Management Ltd.*, [2000] O.J. No. 4637. In this case, Mr. Igbokwe (incidentally himself a very experienced accident benefits insurance adjuster) and his lawyer made an offer to settle all of his claims for accident benefits directly to his insurance company, including a term that costs were to be agreed upon. Shortly thereafter, they received a reply from counsel for the insurer (who, of interest, is the same insurer from both the *Opoku* and *Birjasingh* cases) in a related bad faith action purporting to accept the offer of settlement, and telling Plaintiff's counsel that he would have to assess his costs. Plaintiff's counsel rescinded the settlement. No settlement documents had been delivered by the insurer. Justice Matlow explicitly rejected the previous cases and held that, even if the case was settled under Rule 49, the Settlement Regulation still applied. Mr. Igbokwe therefore had the benefit of the 2 day cooling-off period, which never actually began to run since the insurer had never delivered the settlement documents.

Igbokwe is currently under appeal. This area clearly requires some clarification. Keep in mind that while our courts may favour cases being settled, if the rules can be bent to force

settlement where it seems none was clearly intended, this may bring about the opposite effect. If discussions or proposals are interpreted to force settlements, then real settlement discussions and negotiations may be avoided, thereby inhibiting settlements from occurring! One would hope that the Court will consider the often overlooked Rule 1 (specifically Rule 1.02(1) paragraph 3), which states that, "These rules apply to all civil proceedings…subject to the following exceptions: …They do not apply if a statute provides for a different procedure." In this case, a statute clearly provides for a different procedure. Section 279(2) of the *Insurance Act* and the Settlement Regulation trump Rule 49, and therefore insureds should be able to maintain their right to the 2 day cooling-off period.

Until we get the final word from the Court of Appeal, the Settlement Regulation will provoke more litigation and uncertainty, instead of well thought out and informed settlements.

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Settlements – Statutory Accident Benefits

(Ontario Regulation 664 as amended by Ontario Regulation 780/93)

9.1 (1) In this section, **"settlement"** means an agreement between an insurer and an insured person that finally disposes of a claim or dispute in respect of the insured person's entitlement to one or more benefits under the *Statutory Accident Benefits Schedule*.

(2) Before a settlement is entered into between an insurer and an insured person, the insurer shall give the insured person a written notice that contains the following:

1. A description of the benefits that may be available to the insured person under the *Statutory Accident Benefits Schedule* and any other benefits that may be available to the insured person under a contract of automobile insurance.

2. A description of the impact of the settlement on the benefits described under paragraph 1, including a statement of the restrictions contained in the settlement on the insured person's right to mediate, litigate, arbitrate, appeal or apply to vary an order as provided in sections 280 to 284 of the Act.

3. A statement that the insured person may rescind the settlement within two business days after the settlement is entered into by delivering a written notice to the insurer.

4. A statement that the tax implications of the settlement may be different from the tax implications of the benefits described under paragraph 1.

5. If the settlement provides for the payment of a lump sum in an amount offered by the insurer and, with respect to a benefit under the *Statutory Accident Benefits Schedule* that is not a lump sum benefit, the settlement contains a restriction on the insured person's right to mediate, litigate, arbitrate, appeal or apply to vary an order as provided in sections 280 to 284 of the Act, a statement of the insurer's estimate of the commuted value of the benefit and an explanation of how the insurer determined the commuted value.

6. A statement advising the insured person to consider seeking independent legal, financial and medical advice before entering into the settlement.

(3) A settlement may be rescinded by the insured person, within two business days after the settlement is entered into, by delivering a written notice to the insurer.

(4) If the insurer did not comply with subsection (2), the insured person may rescind the settlement after the period mentioned in subsection (3) by delivering a written notice to the insurer.

(5) A restriction on an insured person’s right to mediate, litigate, arbitrate, appeal or apply to vary an order as provided in sections 280 to 284 of the Act is not void under subsection 279(2) of the Act if,

(a) the restriction is contained in a settlement; and

(b) the insurer complied with subsection (2).