Appeal P03-00038

OFFICE OF THE DIRECTOR OF ARBITRATIONS

JOSEPHINE ABOUFARAH

Appellant

and

ALLSTATE INSURANCE COMPANY OF CANADA

Respondent

BEFORE: David Evans

REPRESENTATIVES: David Carranza for Ms. Aboufarah
Ryan M. Naimark for Allstate

HEARING DATE: May 7, 2004, with further submissions received by August 30, 2004

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, **it is ordered that**:

1. The appeal is dismissed and the arbitration order, dated September 30, 2003, is confirmed.

2. If the parties are unable to agree on appeal expenses, the matter may be resolved in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

May 5, 2005

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David Evans
Director's Delegate

Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

This appeal involves the rules governing settlements reached before March 1, 2002. Ms. Aboufarah claimed certain statutory accident benefits under the *SABSB 1996*[1] for injuries arising out of a motor vehicle accident on July 5, 2001. She appeals from a preliminary issue decision that she is precluded from proceeding to arbitration because in October 2001 her paralegal representative entered into a binding settlement on her behalf. She claims that the arbitrator erred in finding that the settlement complied with the provisions of section 9.1 of the *Settlement Regulation*[2].

II. BACKGROUND

Under s. 9.1(1) of the *Settlement Regulation*, "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 *SABS*. In this case, the arbitrator found that Ms. Aboufarah's representative, Mr. Joseph Nicosia[3], had the power as her agent to bind her and did so when he reached a settlement with Allstate on October 18, 2001.

However, s. 9.1(2) requires that before a settlement is "entered into," the insurer "shall give the insured person a written notice." What the notice must contain is then set out in six paragraphs. For instance, paragraph 3 of s. 9.1(2) requires the notice to contain 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. This is the so-called "cooling off" period[4], which is repeated in s. 9.1(3).

Allstate sent the s. 9.1(2) written notice to Mr. Nicosia by fax shortly after agreeing on the settlement with him. The arbitrator found that the clock on the cooling off period began to run from the time Mr. Nicosia received Allstate's fax. In the alternative, he found that the cooling off period ran from the time about two weeks later when Ms. Aboufarah met with Mr. Nicosia to review the agreement, which she rejected. He wrote:

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[1] The Statutory Accident Benefits Schedule C Accidents on or after November 1, 1996, Ontario Regulation 403/96, as amended.

[2] Ontario Regulation 664, R.R.O. 1990, as amended by O. Reg. 780/93. The version of the Settlement Regulation under consideration applies to settlements reached from January 1, 1994 to February 28, 2002. It was replaced by O. Reg. 275/03 that applies to settlements made on or after March 1, 2002.

[3] Note 3: As noted in the decision, Mr. Nicosia is a real estate agent who occasionally assists MultiGroup Services and its clients in negotiating accident benefit settlements. MultiGroup was an accident benefits firm employing lawyers, paralegals and administrative staff that Ms. Aboufarah had retained to pursue her accident benefits claims.

[4] I note that the new regulation has a similar cooling off period but avoids the unfortunate "before a settlement is entered into" language.

> Even accepting that the clock did not begin to run until she reviewed the settlement documents, Ms. Aboufarah had until roughly early November to write Allstate to tell them that she was rejecting the settlement. Neither Ms. Aboufarah nor Mr. Nicosia sent Allstate the required notice within these time frames. This notice came roughly four months later from [her current representative] Mr. Carranza's office. I find that Ms. Aboufarah failed to notify Allstate within the allotted time.

Ms. Aboufarah appealed on the grounds that the arbitrator erred in finding that the agent had authority to conclude the settlement and that the arbitrator erred in his determination of the cooling off period.

In her written submissions, Ms. Aboufarah raised an additional ground on appeal by relying on s. 9.1(4) of the *Settlement Regulation.* Subsection 9.1(4) gives a further power of rescission on written notice to the insurer if it did not comply with s. 9.1(2) by failing to send or sending an incomplete notice. I note that the arbitrator wrote:

> Ms. Aboufarah did not object to the settlement because of undue pressure from Allstate, because of her need to review and digest the relevant notices or because of some defect in the settlement documents.

Ms. Aboufarah submitted that Allstate had sent an incomplete notice, relying on the *Smith* case[5]. I was not prepared to hear further submissions on the ground that Ms. Aboufarah could have raised it earlier if she felt it was relevant[6]. Further, as already noted, the arbitrator found no defects in the settlement documents that affected Ms. Aboufarah's decision to reject the settlement.

At the hearing, Ms. Aboufarah relied on another case, *Fitzgerald v. Scandrett*, [1999] O.J. No. 4157. This was a motion to settle a judgment wherein Hermiston J. made a factual finding that there had not been a meeting of minds. The opposite occurred here: the arbitrator reviewed the letter Allstate faxed to Mr. Nicosia and found that it was intended to confirm the settlement agreement reached between Allstate and the representative the previous day, "not simply to confirm a settlement that would be concluded at some point in the future." This was a finding of fact. The arbitrator had evidence upon which to make his factual determination, so I see no grounds for overturning his decision on this point.

The appeal thus turns on the questions of agency and, more importantly, the cooling off period.

III. ANALYSIS

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[5] Smith v. Co-operators General Insurance Co., [2002] 2 S.C.R. 129.

[6] On the relevance of *Smith* to the *Settlement Regulation*, see now *Navage v. Pilot Insurance Company*, [2004] O.J. No. 1098.

I will deal first with the question of agency. The arbitrator considered the matter over two and a half pages. He preferred the evidence of the representatives over that of Ms. Aboufarah with respect to the scope of authority she gave them, which was within his discretion. He found that the retainer gave MultiGroup the authority to negotiate a settlement of Ms. Aboufarah's claims. He found MultiGroup's initial letter to Allstate indicated that it had been retained to act on Ms. Aboufarah's behalf and that Allstate was to deal directly with it. He found that Mr. Nicosia had the ostensible authority to settle Ms. Aboufarah's case and that Allstate was entitled to rely on the agreement reached. He considered the Ontario Court of Appeal case of *Scherer v. Paletta*, [1966] 2 O.R. 524, in support of the proposition that an agent's actions towards a third party bind the agent's principal where the agent has the ostensible authority to act on the principal's behalf. He found that these principles applied[7]. He found that no limitation on Mr. Nicosia's authority was communicated to Allstate and that the settlement he reached was both incidental to, and fell within, his general authority to act on Ms. Aboufarah's behalf. He was satisfied that, at the very least, they agreed to settle the matter on a full and final basis for a particular amount and that Allstate confirmed this agreement the following day in writing. He did not find that Mr. Nicosia qualified his acceptance of the settlement such as to vitiate his general or ostensible authority to settle the case.

In short, the arbitrator considered the evidence before him and reached a conclusion while following well-accepted principles of law. As has often been said, it is not the role of an appeal adjudicator to second-guess the factual findings of the arbitrator, who had the opportunity to observe the witnesses and consider the detailed evidence in its entirety. His conclusions were well-supported on the evidence.

I will now turn to the cooling off period. As Glass J. stated: "Under the previous regulations, there appears to have been continuous confusion and debate about when the cooling off period began and expired."[8]

The arbitrator considered the two lines of cases that have dealt with the cooling off period. These turn upon the finding of when a settlement is " entered into."[9]

The conflict is between the "two-step" and the "three-step" approach. Step one is the settlement agreement. Step two is the delivery of the disclosure notice. The cases then split on whether or not a third step is required C confirmation of the settlement C before

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[7] As noted by the arbitrator, in *Dhawan and State Farm Mutual Automobile Insurance Company*, (FSCO A00-000031, April 20, 2001) and *Rose and CGU Insurance Company of Canada*, (FSCO A01-000988, June 26, 2002), it was found that settlement rules apply equally to lawyers and non-lawyer agents. Although *Dhawan* was appealed, the appeal was dismissed without consideration of the merits due to the actions of the applicant's representative: see *Dhawan and State Farm Mutual Automobile Insurance Company*, (FSCO P01-00025, February 1, 2002), and (FSCO P01-00025, May 16, 2002).

[8] *Gladstone v. Aviva Canada Inc.*, [2004] O.J. No. 4929 [S.C.J.]

[9] The current *Settlement Regulation* simply describes discrete steps for an insurer to take leading to the insured person's signing of the notice and, if there is one, the release. Pursuant to s. 9.1(4), the insured person can rescind the agreement two days after the latest of signing the notice or the release.

the two-day cooling off period starts to run. That is, is the settlement "entered into" upon delivery of the notice to the representative, where an applicant is represented, or at some later point?

The arbitrator set out the two lines of cases.[10]

The high-water mark of the three-step approach is in *Soordhar*. Arbitrator McMahon stated:

> It is my view that the drafters contemplated that the parties would negotiate the basis for a settlement, following which the insurer would prepare the settlement documents including the notice provided for in subsection (2). If after receipt and review of the disclosure statement the insured person is still content to dispose of his or her claim on the basis of the settlement proposal, *and confirms that intention by notifying the insurer that the settlement proposal is accepted*, then and only then does the "cooling off" period commence.[11] [Emphasis added.]

The leading two-step case is *Birjasingh*. Nordheimer J. made the following comment about *Soordhar*:

> With respect, that interpretation is, in my view, difficult to draw out of the wording of the settlement regulation. First, there is nothing in the settlement regulation which requires notification of the acceptance of the settlement. To the contrary, the settlement regulation is expressly worded to give effect to the settlement unless rescinded by the insured party. Secondly, one is left wondering why a cooling off period would be necessary in the process suggested by Arbitrator McMahon since the insured party has already received, and presumably reviewed, the disclosure statement and taken whatever time he or she might wish before confirming acceptance of the settlement to the insurer. Why then allow another two day period to rescind the settlement?

I agree with the comments of Nordheimer J. regarding the third step of confirmation to the insurer. However, the approaches I have just set out are not the only ones to consider. We are not merely restricted to two options at opposite ends of the spectrum. Thus, the

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[10] For the three-step approach, the arbitrator referred to *Soordhar and Citadel General Assurance Company*, (OIC A-006428, December 5, 1995), *McLennon and Pilot Insurance Company*, (OIC A96-001499, May 8, 1997), *Turner and Economical Mutual Insurance Company*, (OIC A-012411, June 30, 1997), *Von Steun and Canadian General Insurance Group*, (OIC A96-001516, March 18, 1998), *Craparotta and Canadian General Insurance Group*, (OIC A97-000618, March 20, 1998), *Cordova v. Allstate Insurance Company of Canada* (1998), 41 O.R. (3d) 795 (Ont. Ct. Gen. Div.) and *Igbokwe et al. and HB Group Insurance Management Ltd. et al.* (2001), 55 O.R. (3d) 313 (Ont. C.A.).
For the two-step approach, he referred to *Birjasingh v. Coseco Insurance Co.*, [1999] O.J. No. 4546 (Ont. S.C.J.), *Jimenez et al. v. Markel Insurance Co. of Canada* (2000), 49 O.R. (3d) 402 (Ont. S.C.J.), *Rose and CGU Insurance Company of Canada*, (FSCO A01-000988, June 26, 2002) and *Nguyen and Wawanesa Mutual Insurance Company*, (FSCO A01-001593, February 19, 2003). *Nguyen* was subsequently upheld at (FSCO P03-00009, January 26, 2004).

[11] Page 9.

settlement may be considered " entered into" short of a confirmation to the insurer. That is, once the insured person has reviewed the notice, the remaining factual determination of when the settlement is "entered into" will be the arbitrator's. The arbitrator may find the settlement was "entered into" without further notice to the insurer or without the necessity of the insured person signing the release.

However, in my opinion, at a minimum the insured has to have an occasion to review the notice before the cooling off period can start. To that extent, the normal laws of agency are suspended until that occurs. The agent may have the power to agree on a settlement, but under the terms of the *Settlement Regulation* the agreement is not "entered into" until the insured person is given the notice.

I find that the internal logic of the notice itself requires this process. The notice provides considerable information about the restrictions a settlement imposes on taking further legal steps (paragraphs 2 and 5) and on possible tax implications (paragraph 4). This is information that should already be known to the representative. If the notice need only be delivered to the representative to start the cooling off period, the notice becomes redundant. More particularly, paragraph 6 requires a statement advising the insured person to consider seeking independent legal, financial and medical advice before entering into the settlement. This paragraph more than any other suggests to me that it has to be reviewed by the insured person himself or herself; otherwise, it merely tells a lawyer to consider seeing another lawyer.

I base this finding also on the contextual logic of the notice as part of the important consumer protection aspect of insurance law, as set out in *Smith:* "There is no dispute that one of the main objectives of insurance law is consumer protection, particularly in the field of automobile and home insurance."[12]

With respect to consumer protection, Arbitrator McMahon found that if the delivery of the notice to the insured's counsel is effectively giving it to the insured, then the period of contemplation becomes "purely illusory." Nordheimer J. rejected this on the grounds of the "practical fact" that a solicitor would normally have had extensive discussions with his or her client before obtaining instruction to agree to any settlement and that there would have been "more than enough time for 'contemplation' by the client in such circumstances." In my experience, that is not necessarily the case. The settlement process may generate more heat than light, which is why the cooling off period was instituted. If the insured person does not have the chance to review the settlement before it is considered entered into, that process is denied, whether the insured person is represented by experienced counsel or, as in this case, by a real estate agent.

I find the lack of words such as shall 'personally' give or shall give 'directly' to the insured person do not detract from the interpretation I propose. I note that the new *Settlement Regulation* does not use the words "personally give" or "give directly"; either, yet the intention for the insured person to see (and now sign) the notice is clear.

[12] Paragraph 11.

Paragraph 9.1(3)6 of the revised regulation requires a statement "for signature by the insured person acknowledging that he or she has read the disclosure notice...."[13] As Glass J. put it in *Gladstone*:

> There is no confusion about the wording of the current regulations. They state that the insured person may, within two business days after the later of the day the person signs the disclosure notice and the day the insured person signs the release, rescind the settlement by delivering written notice to the office of the insurer or its representative and returning any money received for the settlement.[14]

The laws of agency can still apply in terms of service of the notice to or service of the rescission by an agent. In my interpretation, it is still not necessary for the insurer to give the notice to the insured person directly. It is sufficient if, as was done in this case, the insurer delivers the notice to the representative, and the representative then reviews it with the insured person. There does not have to be direct communication or contact between the insurer and the insured in a situation where both parties are represented by counsel, nor does it mean that any notice of rescission could only come from the insured party directly. After all, Arbitrator McMahon in *Soordhar* did not object to service of the notice to and rejection of it by the solicitors.

The process I envisage would be consistent with the result in *Soordhar*. Arbitrator McMahon wrote that Mrs. Soordhar met with her counsel and advised him that she was no longer prepared to settle in accordance with the terms of the offer. He immediately faxed a letter to the insurer's counsel stating that Mrs. Soordhar instructed him to refuse and rescind the settlement. Thus, the insurer was advised well within two days of Mrs. Soordhar's reviewing the settlement that she refused it.

The process is also consistent with other case law at the Commission. Thus, in *Von Steun and Canadian General Insurance Group*, (OIC A96-001516, March 18, 1998), the parties, both represented by counsel, reached a settlement on December 12, 1997. Ten days later, the insurer's counsel forwarded a release for the applicant's signature and the disclosure notice to his counsel, but the office was on Christmas vacation. The applicant made an appointment to review the documentation on January 7, 1998. By letter faxed the same day, counsel advised the insurer that the settlement was rescinded. Arbitrator Makepeace held:

> Accordingly, I find that the two-day cooling off period did not begin until January 7, 1998, when the Applicant first received and reviewed the disclosure notice with [his counsel]. He gave written notice through counsel that day, effectively rescinding the tentative agreement reached on December 12, 1997.[15]

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[13] This appears to be a response to *Birjasingh* where Nordheimer J. in note 4 wrote:"I note that there is nothing in the settlement regulation which requires the written notice to be signed or otherwise acknowledged by the insured."

[14] *Supra*, footnote 8, at par. 25.

[15] Page 7.

In this case, Ms. Aboufarah saw her agent about two weeks after the notice was sent, and then she should have advised Allstate of her rejection of the settlement. If she had done so, then Allstate would not have had to wait four months to find out that the settlement was rejected.

The process I suggest also appears to be consistent with the result in *Nguyen and Wawanesa*.[16] In that case as well, the applicant had the opportunity to review the settlement documentation including the notice and decided to reject it. Although the time line is not exactly clear, it appears that at least a month then passed before the insurer received notice of that rejection. In the result, the *ratio* of the decision turned more on whether or not the settlement had to be signed for it to be "entered into":

> Mr. Nguyen had the option of delivering written notice to Wawanesa of his intention to rescind the settlement within two business days after receipt of the settlement documents. He did not do so. I do not accept Mr. Nguyen's argument that it was not necessary to forward notice of an intention to rescind the agreement as there was no agreement because no release was signed. An agreement between the parties had been concluded to which a signed release was not a prerequisite.[17]

On appeal, Director Draper wrote that he rejected the three-step approach:

> The parties can still negotiate a settlement, as defined in s. 9.1(1), but it will not be "entered into" until the insurer provides the written notice required by s. 9.1(2). Until this notice is provided, and for two business days thereafter, the insured person can rescind the settlement. This is the protection provided by the regulation. I am not persuaded that it necessarily requires a fresh confirmation of the settlement after the notice is provided.[18]

I agree that, to the extent that the "third step" is the fresh confirmation to the insurer of the settlement, it is not required. However, in my opinion, to be consistent with the internal logic of the notice itself and the requirements of consumer protection, I find that the second step involves the review by the insured person of the notice. At that point, the notice has been given to the insured person and the necessary protection by the regulation has been provided.

The remaining issue is for the arbitrator to decide when the settlement is entered into: at the point where the insured person reviews the documentation, or at some later point. As the arbitrator noted, the mere conclusion of an agreement followed by the sending of the required notice may not trigger the cooling-off period if other steps are required to protect the insured. He found no additional steps were required in this case. In particular, he

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[16] *Supra*, footnote 10.

[17] Arbitration decision, page 8.

[18] Appeal decision, page 8.

found it was not necessary for Ms. Aboufarah to sign the release for the settlement to be entered into:

> In my view, waiting for an insured to sign a release would, generally, only be required if necessary to protect the insured from entering into a quick settlement without fully understanding the effect of such an agreement. In the present case, however, Allstate had not pressured Ms. Aboufarah at all to reach a settlement. If anything, Ms. Aboufarah had pressured her own representatives to settle her case.... In these circumstances, I see no basis to conclude that, for Ms. Aboufarah's protection, the settlement reached between Mr. Nicosia and [insurer's counsel] Ms. Kinmond could only be considered to be final once Ms. Aboufarah had received, reviewed and formally acknowledged her acceptance of the settlement documents.[19]

I find the arbitrator acted within his discretion in concluding that the release did not have to be signed for the settlement to be entered into. Therefore, on the basis that Ms. Aboufarah had the occasion to review the settlement but did not advise Allstate in a timely fashion of her rejection of it, I find the arbitrator committed no error in law in reaching his decision.

The appeal is upheld.

IV. EXPENSES

I asked the parties for submissions on expenses. However, Ms. Aboufarah advised that she preferred to make her submissions on expenses after receiving the appeal decision. Accordingly, if the parties are unable to agree on appeal expenses, the matter may be resolved in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

May 5, 2005

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David Evans
Director's Delegate

Date

[19] Arbitration decision, pages 14 B 15.