

BETWEEN:

JOSEPHINE ABOUFARAH

Applicant

and

ALLSTATE INSURANCE COMPANY OF CANADA

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Eban Bayefsky

Heard: May 20 and June 6, 2003, at the offices of the
Financial Services Commission of Ontario in Toronto.

Appearances: David Carranza for Ms. Aboufarah
Ryan M. Naimark for Allstate Insurance Company of Canada

Issues:

The Applicant, Josephine Aboufarah, was injured in a motor vehicle accident on July 5, 2001. She applied for and received statutory accident benefits from Allstate Insurance Company of Canada (“Allstate”), payable under the *Schedule*.¹ Allstate claims that Ms. Aboufarah settled her claim on a full and final basis on either October 18 or October 19, 2001, that she did not rescind the settlement within two days and that she is, therefore, barred from proceeding with her arbitration for medical and housekeeping benefits. The parties were unable to resolve their disputes through mediation, and Ms. Aboufarah applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

¹The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended by Ontario Regulations 462/96, 505/96, 551/96, 303/98, 114/00 and 482/01.

The preliminary issue is:

1. Is Ms. Aboufarah precluded from proceeding with her arbitration because she settled her claim on a full and final basis and because she did not rescind the settlement in accordance with the Settlement Regulation?

Result:

1. Ms. Aboufarah is precluded from proceeding with her arbitration.

EVIDENCE AND ANALYSIS:

Background

Ms. Aboufarah was injured in a motor vehicle accident on July 5, 2001. She applied for statutory accident benefits and Allstate paid \$1,441.35 for housekeeping and/or medical services. At approximately the end of July 2001, Ms. Aboufarah approached MultiGroup Services (“MultiGroup”), an accident benefits firm employing lawyers, paralegals and administrative staff, to assist her in her claim for statutory accident benefits. Ms. Aboufarah testified that she sought MultiGroup’s assistance because she was in a lot of pain and because Allstate had sent her a number of forms which she did not understand. She said that on July 31, 2001, Ms. Margarita Jimenez (a paralegal at MultiGroup) and a gentleman named “Sam” came to her house to discuss her case. Ms. Jimenez testified that, on July 31, 2001, she and Mr. Joseph Nicosia (a real estate agent who occasionally assisted MultiGroup and its clients to negotiate accident benefit settlements) met with Ms. Aboufarah at her home. Mr. Nicosia testified that at some point in the summer of 2001, he and Ms. Jimenez met with Ms. Aboufarah at her home. Mr. Nicosia stated that Ms. Aboufarah retained MultiGroup to do all of the necessary paperwork for her accident claim and to work out a settlement with Allstate. He said that Ms. Aboufarah signed the July 31, 2001 retainer agreement at her home and that this authorized MultiGroup to do everything to finalize the matter, including negotiating a settlement.

Ms. Aboufarah said that, at the July 2001 meeting, Ms. Jimenez gave her various forms and that, although she did not read or understand them, she signed them because MultiGroup was going to represent her and because she trusted them. Ms. Aboufarah said that Ms. Jimenez advised her that she would be representing her.

The July 31, 2001 retainer stated, in part, as follows:

To: MultiGroup Services

I, the undersigned [Ms. Aboufarah], do hereby request retain and authorize you to act for me in connection with all my claims arising out of a motor vehicle accident...on July 5, 2001....

Without in any manner limiting the generality of these instructions, you are authorized to do all investigative work, commence settlement negotiations, all mediation and arbitration proceedings and to prosecute on my behalf a court action in any court which you in your sole unfettered discretion deem appropriate or advisable against any person, firm or corporation for the purpose of recovering any benefits loss or damages on my behalf.

I hereby authorize you to do all things necessary including but not limited to hire professionals such as lawyers, doctors and any professional for the protection of my interest and to act as my representative in connection therewith and in such ancillary matters as you in your unfettered discretion deem expedient and proper.

On August 1, 2001, Ms. Jimenez wrote Ms. Karyn Pickering, Allstate's adjuster at the time, indicating that MultiGroup had been "retained by the above noted [Ms. Aboufarah] in connection with recovering benefits for injuries sustained in the above captioned motor vehicle accident." Ms. Jimenez stated that "due to the seriousness injuries of Ms. Josephine Aboufarah you will deal directly with this firm and not with our client" [sic]. Ms. Jimenez enclosed an Authorization and a Notice of Change of Address. The Authorization stated as follows:

I, the undersigned [Ms. Aboufarah], do hereby authorize the MultiGroup Services, Personal Injury and Legal Services of 330 Oakwood Avenue, Toronto, Ontario, M6E, 2V9, all employments records, tax records, opinions, reports, abstracts; or excerpts of any records or any other information or documents requested by my representatives that you may have in your custody or under your control. [sic]

The undersigned waives any privilege with respect to the release of the information requested by MultiGROUP Services Personal Injury and Legal Services to any third parties to whom MultiGROUP Services Personal Injury and Legal Services see fit to release the information requested.

The Notice of Change of Address pertained to (and was signed by) Ms. Nicole Aboufarah, Ms. Aboufarah's daughter, who also had a claim with Allstate arising out of the July 5, 2001 accident.

Ms. Jimenez testified that she looked after Ms. Aboufarah's file, but that she eventually transferred the file to Mr. Nicosia because, in several phone calls and office visits, Ms. Aboufarah kept pressuring her to settle the case and because Mr. Nicosia was a good negotiator. Ms. Jimenez said that Ms. Aboufarah was "aware from day one" that Mr. Nicosia would be involved in handling her file and that he would handle the negotiations. Ms. Jimenez testified that Ms. Aboufarah had given MultiGroup an authorization to enter into settlement discussions on her behalf.

Ms. Aboufarah testified that while she met with Ms. Jimenez and Mr. Nicosia following the initial meeting with Ms. Jimenez and Sam, and that while she subsequently spoke with Mr. Nicosia briefly on the telephone, she did not discuss anything with Mr. Nicosia and did not authorize him to settle her claim. She stated that she did not know what Mr. Nicosia's responsibility at MultiGroup was, and that Ms. Jimenez was dealing with her case, not Mr. Nicosia. Ms. Aboufarah stated that she met with Ms. Jimenez and Mr. Nicosia at her home on September 11, 2001, the day of the World Trade Centre attacks, and that they only talked about that incident. She said that they met again a week or two later, but refused to say what the conversation was about, saying only that it had nothing to do with her claim. She then said that nothing happened between Mr. Nicosia and herself after September 11, 2001 and

that she could not recall what they discussed at the subsequent meeting. She said that she had no calls with Mr. Nicosia before the settlement allegedly occurred.

Mr. Nicosia testified that Ms. Aboufarah had given him instructions to negotiate a settlement with Allstate. He said that he had told Allstate's claims representative, Ms. Tina Kinmond (who assumed carriage of the file for Allstate from Ms. Karyn Pickering), that Ms. Aboufarah had instructed him to negotiate a settlement on her behalf. He said that he immediately conveyed to Ms. Aboufarah any discussion he had with Ms. Kinmond (either by telephone or when Ms. Aboufarah visited the office). He said that, whenever a proposal was made, Ms. Aboufarah was "aware of exactly what was on the table." Mr. Nicosia testified that he began to negotiate with Ms. Kinmond approximately two months after Ms. Aboufarah's accident and that, sometime in October 2001, he reached an agreement with Ms. Kinmond. Mr. Nicosia stated that the agreement was for the claim to be settled on a full and final basis for X dollars in addition to the money that Allstate had already paid on the file. Mr. Nicosia said that he agreed to these terms with Ms. Kinmond subject to Ms. Aboufarah's approval.

Ms. Kinmond testified that she had assumed that Mr. Nicosia had binding authority to settle Ms. Aboufarah's claim since Ms. Jimenez had sent Allstate the August 1, 2001 letter. Ms. Kinmond said that she did not think she was dealing with inexperienced representatives based on the August 1, 2001 letter. She said that Allstate was under the impression that Mr. Nicosia had the authority to settle, unless they were told otherwise. Ms. Kinmond testified that, in her view, MultiGroup and Mr. Nicosia had the authority to settle the case based on the authorizations provided and based on the fact that Mr. Nicosia had not said that he did not have such authority. Ms. Kinmond also pointed to the August 1, 2001 covering letter which indicated that Allstate should deal directly with MultiGroup. She stated that it was her understanding that MultiGroup was handling the file and that she would deal with whomever contacted her from MultiGroup.

Ms. Kinmond testified that she had had settlement discussions with Mr. Nicosia and that, late in the day on October 18, 2001, she and Mr. Nicosia agreed to settle Ms. Aboufarah's claim for X dollars, all inclusive. She said that Mr. Nicosia had not specifically said that he had gotten instructions. Ms. Kinmond said that she told Mr. Nicosia that she would send the release the following day.

Mr. Nicosia said that on either the same day or the next day that he and Allstate reached this agreement, he called Ms. Aboufarah about the settlement and she accepted it. However, he also said that he did not recall exactly what Ms. Aboufarah said regarding Allstate's offer and that he guessed that she was content with what was being offered. He said that she had given the office instructions and that it was her wanting the case settled. He said that he told Ms. Aboufarah that she needed to come into the office to sign the release documents. He then called Ms. Kinmond to say that Ms. Aboufarah had accepted the offer and that Ms. Kinmond should fax the release.

On October 19, 2001, Ms. Kinmond faxed a covering letter, the release and the notice required under the Settlement Regulation. The letter stated that "this letter will confirm that it was agreed that your above noted clients [Ms. Aboufarah and her daughter] will be settling their claim for Accident Benefits from the motor vehicle accident of July 5, 2001." The letter stated that the settlement agreement for Ms. Aboufarah was for X dollars, and enclosed "the full and final releases to be completed and return" [sic]. The letter further stated that Ms. Kinmond would be "in touch to discuss how you would like to exchange the original release for the drafts." Ms. Kinmond testified that the first part of the letter meant that Ms. Aboufarah's claim would be settled once the money was exchanged. However, Ms. Kinmond also testified that Allstate's common practice was to provide a cheque for the settlement funds once the insured provided the original release, assuming that the insured had not notified Allstate that he or she was rescinding the agreement within the two day cooling-off period.

Mr. Nicosia testified that Ms. Aboufarah came into the office about two to three weeks later, but that she was upset with the settlement. Mr. Nicosia said that there had previously been no indication of a

problem with the settlement. He said that Ms. Jimenez explained to Ms. Aboufarah the nature of a full and final release and that someone who had accompanied Ms. Jimenez translated this for her. (Ms. Aboufarah testified in English without any problems. Mr. Carranza indicated that there was no need for an interpreter since Ms. Aboufarah understood English.) Mr. Nicosia said that he called Ms. Kinmond to say that Ms. Aboufarah did not want to sign the release and that she did not want to agree to the amount originally agreed to. Mr. Nicosia stated that he had no further contact with Ms. Aboufarah.

Ms. Kinmond testified that about two weeks after she had reached an agreement with Mr. Nicosia, she called him to ask where the release was, to which Mr. Nicosia apparently said that he was having difficulty getting his clients to sign. Ms. Kinmond said that about a month after the agreement, she spoke with Mr. Nicosia and told him that, as far as she was concerned, the matter was settled, in response to which he apparently agreed that the matter was settled. Ms. Kinmond stated that she did not hear anything more on the file until receiving a letter from Mr. Carranza's office in January 2002 indicating that they now represented Ms. Aboufarah. She stated that she called Mr. Carranza and stated that the matter was settled.

On March 12, 2002, Ms. Kinmond sent a letter to Mr. Carranza confirming that it was Allstate's position that the file had been settled with MultiGroup on October 18, 2001 and that there would be no further consideration of the matter. Ms. Kinmond suggested that Mr. Carranza apply for mediation of any issues in dispute. She indicated that they were still awaiting the signed release from Ms. Aboufarah. She enclosed another draft of the release and a cheque for X dollars. Ms. Kinmond testified that, despite Allstate's normal practice of waiting to receive the original of the signed release before delivering the settlement funds, she had been instructed by her superiors (for reasons unknown to Ms. Kinmond) to send Mr. Carranza a cheque for the amount of the settlement. By letter dated March 15, 2002, Mr. Carranza returned the cheque to Ms. Kinmond, stating that Ms. Aboufarah did not wish to settle her claim.

Ms. Aboufarah denied that she instructed or gave any authority to MultiGroup, Ms. Jimenez or Mr. Nicosia to proceed with settling her claim or to settle it for the amount for which the claim was allegedly settled. She said that she never advised Allstate that MultiGroup had the authority to settle her claim. At one point during her testimony, Ms. Aboufarah acknowledged that she had hired MultiGroup to represent her in her claim for accident benefits and that they represented her in October 2001, when the settlement was allegedly entered into. At another point, she stated that she did not know whether she had hired them or what a settlement was. Ms. Aboufarah stated that MultiGroup may have tricked her into signing some of the “authorization” documents and that, sometimes, they had her sign blank forms which they might have filled in later. Ms. Jimenez testified that MultiGroup was representing Ms. Aboufarah in October 2001 and that she thought that they were still representing her until she was recently told that Ms. Aboufarah was now represented by Mr. Carranza’s office. Ms. Jimenez said that Ms. Aboufarah “just disappeared” after the problem with the settlement arose.

Ms. Aboufarah stated that the first time she learned about a settlement of her claim was in a phone call with Ms. Jimenez. Ms. Aboufarah could not remember when this call took place. Ms. Jimenez apparently told Ms. Aboufarah that her claim had been settled, but would not say what the settlement was. Ms. Jimenez told Ms. Aboufarah to come to her office to sign the settlement documents. Ms. Aboufarah did so (approximately 2-3 days after the phone call) but, once she saw the settlement, she did not agree with its terms. She said that it was at this meeting that she first learned that the settlement was for X dollars, but she could not recall when this meeting occurred, saying only that it must have been in 2001. She said she was very unhappy with the settlement, that she was still in pain at that time, that she required more treatment and that most of the settlement funds would be used to pay Dr. N. Raffi, a chiropractor, for past treatment. Ms. Aboufarah refused to sign the settlement documents. Ms. Aboufarah said that Ms. Jimenez then referred her to Mr. Nicosia. Ms. Aboufarah said that she told both of them that she was not happy with the settlement. Ms. Aboufarah testified that she would probably have been happy with the settlement if not as much money were going to Dr. Raffi, because she would then have more money for treatment.

Findings

Counsel for Allstate, Mr. Naimark, correctly set out the issues in this case as follows: Did the parties reach a settlement in this case? Did Mr. Nicosia have the authority to settle the case? When did the cooling-off period begin to run? Was the settlement rescinded within the cooling-off period?

The Settlement

I find that, on October 18, 2001, Ms. Kinmond and Mr. Nicosia agreed to settle Ms. Aboufarah's claims, on a full and final basis, for X dollars. Both Ms. Kinmond and Mr. Nicosia testified that these were the terms of the settlement. On October 19, 2001, Ms. Kinmond confirmed this settlement in a fax to Mr. Nicosia. Counsel for Ms. Aboufarah, Mr. Carranza, argued that Ms. Kinmond's use of the phrase "will be settling" in her fax suggests that the parties had not yet settled their claim. I reject this. The full sentence is: "This letter will confirm that it was agreed that your above clients will be settling their claim for Accident Benefits from the motor vehicle accident of July 5, 2001." Ms. Kinmond then stated that "[t]he settlement agreement is as follows..." and set out the terms of the settlement. I find that Ms. Kinmond's letter is intended to confirm the settlement agreement reached between herself and Mr. Nicosia the previous day, not simply to confirm a settlement that would be concluded at some point in the future.

While, at the hearing, Ms. Kinmond was unclear as to when she considered the matter settled (suggesting both that the matter had settled once she faxed the release to Mr. Nicosia and that it would be settled once the releases and settlement funds had been exchanged), I find that her October 19, 2001 letter clearly reflects that she and Mr. Nicosia had reached a settlement, after which Ms. Aboufarah was to sign the attached release. Ms. Kinmond also clarified that it was Allstate's normal practice to forward the settlement funds only once the insured had signed and returned the release. I do not find that the settlement was contingent on Ms. Aboufarah signing the release or on Allstate forwarding the settlement funds.

Mr. Nicosia's Authority to Settle

I find that Mr. Nicosia had the requisite authority to settle Ms. Aboufarah's claim for accident benefits. While Ms. Aboufarah attempted to say that she had not read or understood the retainer documents MultiGroup had given to her, she clearly testified that MultiGroup represented her and that she trusted them. Ms. Jimenez also stated that Ms. Aboufarah kept pressuring her to settle the claim and that Ms. Aboufarah was aware from the beginning that Mr. Nicosia would be negotiating a settlement on her behalf. I, therefore, do not accept Ms. Aboufarah's evidence that she had never given MultiGroup, Ms. Jimenez or Mr. Nicosia any authority to proceed with settling her claim, particularly in light of her testimony that she did not know whether she had hired MultiGroup or what a settlement was.

I accept that Ms. Jimenez and Mr. Nicosia met with Ms. Aboufarah at her home on July 31, 2001 and that she signed a retainer document at that time. I find that both the general introductory paragraph of the retainer and the subsequent enumeration of tasks that might be done on the file gave MultiGroup the authority to negotiate a settlement of Ms. Aboufarah's claims arising out of her July 5, 2001 accident. I see no basis for Ms. Aboufarah's contention that MultiGroup tricked her into signing authorizations.

I find that Ms. Jimenez's August 1, 2001 letter to Allstate clearly indicated that MultiGroup had been retained to act on Ms. Aboufarah's behalf and that Allstate was to deal directly with MultiGroup. Mr. Nicosia testified that he had advised Ms. Kinmond that Ms. Aboufarah had instructed him to negotiate a settlement on her behalf. Ms. Kinmond stated that Mr. Nicosia had not told her that he was without the authority to settle Ms. Aboufarah's case. I find that Ms. Kinmond legitimately considered Mr. Nicosia to have had that authority based on Ms. Jimenez's August 2001 letter and in the absence of any indication to the contrary.

Ms. Aboufarah denied that she had authorized Mr. Nicosia to settle her claim for the amount he agreed to with Ms. Kinmond. Mr. Nicosia's evidence was unclear as to whether Ms. Aboufarah had instructed him to settle for this amount. Mr. Nicosia and Ms. Kinmond differed as to whether he had told her that

Ms. Aboufarah had instructed him to settle for the final amount. While Mr. Nicosia may not have told Ms. Kinmond that Ms. Aboufarah had instructed him to settle for the final amount, I find it likely that Mr. Nicosia had communicated with Ms. Aboufarah about the final amount. Ms. Aboufarah offered various scenarios as to her contact with Mr. Nicosia (at one point refusing to say what they discussed, and at another point denying that she knew what his role was at all). I find it likely that Mr. Nicosia notified Ms. Aboufarah of Allstate's final offer and that she either accepted it or raised no concerns about it. In either case, I find that Mr. Nicosia had the requisite authority to settle Ms. Aboufarah's claim with Ms. Kinmond.

Even if Ms. Aboufarah had not specifically authorized Mr. Nicosia to settle her claim for the final amount, based on the authorizations she signed and Ms. Aboufarah's contact with Ms. Jimenez and Mr. Nicosia, I find that she had given Mr. Nicosia the general authority to settle her claim. I, therefore, find that Mr. Nicosia had the ostensible authority to settle Ms. Aboufarah's case and that Ms. Kinmond was entitled to rely on the agreement she reached with him.

Counsel for Allstate cited the Ontario Court of Appeal case of *Scherer v. Paletta*, [1996] 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. The Court held that "[t]he authority of a solicitor to compromise may be implied from a retainer to conduct litigation unless a limitation of authority is communicated to the opposite party" and that "[w]here a principal gives an agent general authority to conduct any business on his behalf, he is bound as regards third persons by every act done by the agent which is incidental to the ordinary course of such business or which falls within the apparent scope of the agent's authority." I agree that these principles are applicable to the present case.² They establish that, in light of the general authority Ms. Aboufarah accorded to Mr. Nicosia to settle her claim, she is bound by the settlement he entered into with Ms. Kinmond.

²See also *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), which found that settlement rules apply equally to lawyers and non-lawyer agents.

No limitation on Mr. Nicosia's authority was communicated to Ms. Kinmond and the settlement he reached was both incidental to, and fell within, his general authority to act on Ms. Aboufarah's behalf.

Mr. Nicosia testified that he agreed to the settlement with Ms. Kinmond "subject to the client's approval." He also said that he obtained this approval and communicated it to Ms. Kinmond. Ms. Kinmond did not testify as to whether Mr. Nicosia had agreed to settle the case subject to Ms. Aboufarah's consent. Ms. Kinmond said that Mr. Nicosia had not specifically stated that he had obtained Ms. Aboufarah's instructions. Ms. Kinmond simply said that she and Mr. Nicosia had agreed to settle the case for a particular amount and that she would send the releases the following day. Mr. Nicosia agreed that a settlement had been reached. While Mr. Nicosia's precise words to Ms. Kinmond are unclear, I am satisfied that, at the very least, they agreed to settle the matter on a full and final basis for a particular amount and that Ms. Kinmond confirmed this agreement the following day in writing. I do not find that Mr. Nicosia qualified his acceptance of the settlement such as to vitiate his general or ostensible authority to settle the case with Ms. Kinmond.

The Cooling-Off Period

Pursuant to section 9.1(3) of the Settlement Regulation, Ms. Aboufarah could rescind the settlement within two business days after the settlement was entered into by delivering a written notice to Allstate. There are two lines of cases on when the two day cooling-off period begins to run. The first³ suggests that an insured must, at the very least, review the settlement documents before the cooling-off period begins. The second⁴ suggests that the two days begins to run once the insurer forwards the notice

³See, for example, *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.).

⁴See, for example, *Birjasingh v. Coseco Insurance Co.*, [1999] O.J. No. 4546 (Ont. S.C.J.), *Jimenez et al. v. Markel Insurance Company 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).

required under the Settlement Regulation, provided the parties have otherwise settled the matter. The second line of cases specifically rejects the proposition that an insured must sign or otherwise acknowledge acceptance of the settlement documents before the clock begins to run.

In my view, the essence of both lines of cases is the protection of the insured. In the first line of cases, this principle is set out as follows in the decision of *McLennon*:

In my view, the *Settlement Regulation* is a form of consumer protection legislation intended to protect insureds by prescribing certain disclosure and rescission rights. Following proper disclosure by an insurer, an insured has two full days to review the settlement and consider, with sober second thought, whether the bargain struck in the heat of negotiation remains suitable. The disclosure requirement does not by itself protect the interests of insureds. To make this right valuable, there must also be time and space to adequately consider what has been disclosed. Disclosure without a period of contemplation and a real right to rescind defeats the intended purpose of the Regulation.

In the second line of cases, this principle is set out as follows in *Birjasingh*:

First, it is apparent from the wording of the settlement regulation that its principal focus was directed to situations where unrepresented insureds were agreeing to quick settlements offered by insurers without full knowledge and understanding of the effect of these settlements. This is also made clear from the comments made by Mr. Stephen Owens, the M.P.P. who introduced the regulations before the Standing Committee on Finance and Economic Affairs of the Legislative Assembly of Ontario on June 3, 1993, who said in part:

“The regulations are designed to ensure that claimants are protected against undue pressure from insurers or service providers from claiming benefits. The regulations governing settlements will protect claimants from giving up the right to claim future benefits in exchange for a quick settlement with insurers.”

The object of the Settlement Regulation is, thus, to protect insureds from hastily entering into settlements by ensuring that they have a full understanding of the effect of such agreements. In my view, in appropriate circumstances, this may require the insured to receive, review and formally acknowledge acceptance of the settlement documents before the cooling-off period begins to run. Put another way, the Regulation may require more than simply forwarding the required notice to the insured following an oral agreement in order to start the clock running. Similarly, while (as pointed out in *Birjasingh* and *Nguyen*) the Settlement Regulation does not require the written notice to be signed in order for the settlement to be effective, such may nevertheless be part of the process of protecting the insured, having regard to the circumstances under which the parties reached an agreement. In this regard, I note the comment in *Jimenez* that an “insured should not be bound by a settlement that does not clearly set out his or her entitlement” and that the “decision to accept cannot then be regarded as informed, even if the insured is represented by counsel.” In my view, therefore, 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.

In the present case, however, I see no reason to invoke any additional procedural requirements. The two representatives entered into a settlement, after which the Insurer sent written confirmation of the settlement along with the required notice. There is no suggestion of any impropriety as between the two representatives. I find that the two day cooling-off period began to run once Mr. Nicosia received the settlement documents.

Mr. Carranza submitted that the cooling-off period would only begin to run from the time Ms. Aboufarah signed the release, and that since she did not sign it, the clock had not begun to run. I do not accept this. 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. Mr. Nicosia and Ms. Kinmond had negotiated the settlement over a period of time in the fall of 2001 and Mr. Nicosia had accepted Ms. Kinmond's offer on Ms. Aboufarah's behalf. 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. She objected on the basis of the amount that Mr. Nicosia had agreed to with Ms. Kinmond, testifying at one point that she would probably have been happy with the settlement had not as much money been going to Dr. Raffi. In these circumstances, I see no basis to conclude that, for Ms. Aboufarah's protection, the settlement reached between Mr. Nicosia and Ms. Kinmond could only be considered to be final once Ms. Aboufarah had received, reviewed and formally acknowledged her acceptance of the settlement documents.

Ms. Aboufarah maintained that Mr. Nicosia had not consulted her about the amount agreed on with Ms. Kinmond and, therefore, that she had not instructed Mr. Nicosia to settle for this amount. She stated that the first time she learned about the settlement figure was at a meeting at Mr. Nicosia's office (some time after Mr. Nicosia and Ms. Kinmond had reached the agreement). Even if this were the case, I find that this does not affect the validity of the agreement reached between Mr. Nicosia and Ms. Kinmond or that, in order to protect Ms. Aboufarah in relation to Allstate, the cooling-off period ought to have run from the time she reviewed and/or signed the settlement documents. Even if Mr. Nicosia ought to have communicated more effectively with Ms. Aboufarah, this is an issue as between her and Mr. Nicosia, particularly since, as suggested in *Birjasingh*, the Settlement Regulation is designed to protect insureds from insurers or service providers, not from their own representatives. The difficulties as between Ms. Aboufarah and Mr. Nicosia do not vitiate the agreement reached between Mr. Nicosia and Ms. Kinmond or disentitle Allstate from relying on that settlement. As discussed earlier, the general principles of agency enunciated in *Scherer v. Paletta* apply as between Mr. Nicosia and Ms. Aboufarah and, therefore, Ms. Aboufarah is bound "as regards" Allstate by the settlement Mr. Nicosia negotiated with Ms. Kinmond. Despite any failings on the part of Mr. Nicosia, in the absence of any

issues regarding Ms. Aboufarah's relationship to Allstate, Ms. Aboufarah ought to have been accorded two business days from the time Ms. Kinmond sent Mr. Nicosia the settlement documents, in order to rescind the settlement.

Rescission of the Settlement

Ms. Aboufarah failed to rescind the settlement in writing within two business days of October 19, 2001, the date Ms. Kinmond faxed the settlement documents to Mr. Nicosia.

Ms. Aboufarah came to Mr. Nicosia's office approximately two weeks after the agreement with Ms. Kinmond to sign the settlement documents, but objected to the agreement reached and refused to sign the release and notice. Ms. Aboufarah had no further contact with Mr. Nicosia or MultiGroup. Neither she nor Mr. Nicosia wrote to Allstate to rescind the agreement. The most that occurred was Mr. Nicosia informing Ms. Kinmond over the phone that he was having difficulty getting Ms. Aboufarah to sign the release. Roughly two months later, Mr. Carranza's office contacted Ms. Kinmond to indicate that they now represented Ms. Aboufarah. Roughly two months after this, Mr. Carranza's office wrote Ms. Kinmond to confirm Ms. Aboufarah's position that she had not agreed to enter into a settlement of her claim. Ms. Kinmond maintained throughout that Ms. Aboufarah had settled her claim.

I find that Ms. Aboufarah had until the end of business on October 23, 2001 to notify Allstate in writing that she rescinded the settlement. 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 Mr. Carranza's office. I find that Ms. Aboufarah failed to notify Allstate within the allotted time.

I, therefore, conclude that Ms. Aboufarah and Allstate entered into a full and final settlement of Ms. Aboufarah's claim and that Ms. Aboufarah failed to rescind the settlement in accordance with the Settlement Regulation. She is, therefore, precluded from proceeding with her arbitration.

EXPENSES:

If required, the parties may now make submissions on the issue of expenses.

Eban Bayefsky
Arbitrator

September 30, 2003

Date

FSCO A02-001076

BETWEEN:

JOSEPHINE ABOUFARAH

Applicant

and

ALLSTATE INSURANCE COMPANY OF CANADA

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Ms. Aboufarah is precluded from proceeding with her arbitration.

Eban Bayefsky
Arbitrator

September 30, 2003

Date