

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of October 6 to 10, 2008

Unrepresented Insured's Written Request to Consult with a Lawyer Not Sufficient to Rescind SABS Settlement

Mousavi v. ING Insurance Company of Canada, FSCO A07-001889, September 11, 2008, Arbitrator Wilson

MVC May 7, 2005. The insured reached a settlement of her SABS claims with the insurer without legal representation and she signed the settlement documentation. The Settlement Regulation governing this SABS settlement provides that the insured person may “rescind the settlement within two business days” after signing the settlement documentation. In this case, prior to the expiry of this two day cooling off period, the insured emailed the insurer and requested “*an extension of the cooling off period for an additional 48 hours to consult with her lawyer.*” At issue in the arbitration was whether or not this agreement to settle the SABS claims was binding on the insured.

In this case, the insurer erroneously assumed the two day cooling off period expired the day prior to the insured's email and wrote on the day after receiving the email that the “48 hour cooling off period ... had passed prior to receiving ... [the email]”. However, Arbitrator provided as follows:

In the absence of any reply to her request, Mrs. Mousavi had no reason to believe that she would be granted any indulgence. ... I do not accept, however, that Mrs. Mousavi's March 11 letter constituted a clear repudiation of the settlement agreement.

Arbitrator stated that “[a] contract has been said to be repudiated when one party acts in a way that demonstrates an intent to no longer be bound by the contract” and cited case law from the House of Lords which included the following:

A repudiation has been defined in different terms – by Lord Selborne as an absolute refusal to perform a contract ... They all come to the same thing, and they all amount at any rate to this, that it must be shown that the party to the contract made quite plain his own intention not to perform the contract.

Arbitrator found that the agreement is voidable at the instance of the insured for the period set out in the Regulation, but, in the absence of clear repudiation, the agreement is valid and enforceable. Arbitrator felt that the insured “*in no way made it plain that she had a firm intention to cancel the agreement or to otherwise withdraw from her agreement*” and that while her email “*demonstrated*

that she had reservations about her settlement of her accident benefits claim, the pith and substance of the letter is a simple request for more time to consult with a lawyer about the settlement.”

Implications & Commentary:

Insureds should be wary of navigating through the accident benefits regime without legal advice especially when considering any full and final settlement of their benefits. In this case, even the insurer appeared to recognize the change of mind of the insured: e.g., the insurer’s letter the following day stressing, in error, that the insured’s email had been received too late.

Although the settlement regulation does refer to the term “rescind”, the Settlement Disclosure Notice refers simply to a change of mind. Further, although the Settlement Disclosure Notice requires the insured to sign the document and acknowledge that she or he has considered whether or not to obtain legal advice, it is not sufficient to rescind the settlement for the insured to simply request more time during the two day cooling off period to change his or her mind to obtain legal advice.

Accessing Arbitration Decisions

If you would like to read the arbitration decisions for yourself, they can be found at <http://www.fSCO.ca/english/insurance/auto/drs/decisions/default.asp>. Please contact FSCO at 1-800-517-2332 ext. 7202 to obtain a password to gain access to the site.