

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of October 20-24, 2008

Insurance company must ensure that settlement documentation is detailed and signed by insurer and not its lawyer

***ING Insurance Company of Canada v. Jetty*, FSCO P08-00012, October 10, 2008 – Director’s Delegate Blackman**

MVC July 31, 2003. The Report of Mediator confirmed settlement of the insured’s eligibility to income replacement benefits. The insurer’s lawyer provided the insured’s lawyer with a release and a Settlement Disclosure Notice. The insured signed and returned those documents. Almost one month later the insured rescinded the settlement on the basis that the insurer had not informed him of his entitlement to 80% of his net losses from self-employment on the Settlement Disclosure Notice.

The insured was permitted to rescind the settlement for two reasons. First, the Settlement Disclosure Notice did not provide a description of benefits that were available to this particular insured. The document did not provide additional information about amounts available to him as a self-employed person beyond the \$400 per week maximum for income replacement benefits.

The use of a prescribed form does not detract from the insurer’s obligations to disclose the full extent of benefits available. An insurer can add to the form in order to comply with its legal requirements under the Settlement Regulations to provide its insured persons information about the benefits available. To that end, there is a space on the form to “provide any other details.” In *Opuku v. Pal*, [1999] O.J. No. 1777 the Court stated that the Settlement Regulation “is clearly remedial in nature. Its object is to provide information to insured persons considering a settlement proposal, which will assist them in making a considered, and well-informed settlement decision. I am required to give such legislation a fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the legislation.” The Ontario Court of Appeal in the same case held that “a description of the benefits available requires a statement of any monetary limits which apply to any particular benefit.” The arbitrator found support from the Supreme Court of Canada in *Smith v. Co-operators General Insurance Co.*, [2002] 2 S.C.R. 129 in stating that it was immaterial whether the insured was actually misled in this case. The Court stated in *Smith* that insurance law is geared towards consumer protection and so the courts must impose clear boundaries between what is and is not permissible without too much concern for the particular circumstances of each case. Allowing for case specific considerations would make it difficult to ensure minimal compliance with

the regulation. Finally, compliance is completely within the hands of insurance companies to ensure.

The second basis for rescission of the settlement was that the Notice was signed by the insurer's legal representative rather than by the insurer. The Notice must be signed by a "representative of the insurer" and not by a "legal representative of the insurer."

The principal that insurance law is geared toward consumer protection is not furthered when the insurer is not required to certify that the information in the Notice is complete and correct. It is the insurer that has binding authority to enter into settlement. A legal representative, on the other hand, must seek instructions from the insurer. The legislative intent is that both the insurer and the insured are personally involved in any settlement. Finally, there is potentially a multitude of issues which could arise if a lawyer is permitted to sign Settlement Disclosure Notices including whether she had the authority to do so and whether privileged documentation in her file would trump disclosure that the insurer is required to make to the insured about the content of the insured's claim file. Finally, the *Rules of Professional Conduct* prohibit "a lawyer from asserting as fact anything that is properly subject to legal proof, cross-examination, or challenge. The lawyer should not in effect appear as an unsworn witness or put the lawyer's own credibility in issue..."

Implication:

It is in both parties best interest to ensure that settlement documentation is thorough, accurate and signed by the claimant and a representative of the insurer and not their respective lawyers. It is assumed that a claimant is unable to make an informed decision to sign a release where the Settlement Disclosure Notice lacks detail about the full extent benefits potentially available to that claimant. Insurance companies cannot avoid their obligations to make this full disclosure on the basis that a claimant has legal representation. Defence counsel in a tort lawsuit will also be interested in reviewing the details of a Settlement Disclosure Notice where it takes the position that the Accident Benefits settlement amounts were lower than they ought to have been. Insufficient detail of benefits or signature by the insurer's legal representative keeps the door open to revisiting AB settlement agreements.

Accessing Arbitration Decisions

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Please contact FSCO at 1-800-517-2332 ext. 7202 to obtain a password to gain access to the site.