

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of July 26 to 30, 2010

Insurer not justified in requiring lawyer certification or lawyer as a witness to insured's signature as a term of release

***Dominion of Canada General Insurance Company v. Singh*; FSCO P09-00033; June 30, 2010; Director's Delegate L. Blackman**

May 23, 2006 collision. This was an appeal of an arbitrator's award made after settlement had been reached between the parties. After the amount of settlement was agreed upon, the parties were unable to agree as to the form of release. The insurer insisted that the insured's lawyer certify in writing that the terms of the settlement and their implications had been explained to the insured. Alternatively, the insurer required that either the insured's counsel or the insurer's counsel witness the insured's signature on the release. Neither party suggested that a witness other than counsel would be sufficient. Given the impasse, arbitration proceeded to determine whether a settlement had been reached. The arbitrator found that settlement had been reached and awarded both interest and a special award.

On appeal, the Director's Delegate noted that the *Settlement Regulation* did not mandate the form of release. He stated that, because the Settlement Regulation allows only the insured to rescind a settlement, within two days of signing the Disclosure Notice or the release, an insurer cannot use overzealous terms or inflexibility on a release as a back door to resile from a settlement.

There was no statutory requirement of lawyer certification, and the insurer conceded that the requirement of a lawyer's certification breaches solicitor-client privilege. Nevertheless, the witnessing of a signature did not breach solicitor-client privilege as it has been deemed by the courts to be an act, not a communication. The requirement of a release with a witnessed signature was usual business practice; however, a release limiting the acceptable witness to counsel was unduly restrictive.

The Director's Delegate upheld the arbitrator's finding that a settlement had been reached and the award of interest. The special award was rescinded. The arbitrator had acted on a wrong principle in exercising her discretion to grant a special award.

Implications:

While many counsel may have little concern about providing lawyer certification or witnessing the release signed by the insured, this case addresses the broader



issue identified by the Director's Delegate. Once a settlement has been reached, an insurer will not be permitted to require onerous terms in the release in order to resile from the agreement. Also, delay in payment while the terms of the release are negotiated will attract interest. In this case, the special award was rescinded, in part, because it was open to both the insurer and the insured to suggest an alternative witness to the signature in accordance with common practice. The possibility of a special award would not be precluded, however, in an appropriate case.

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. If you have questions or comments about this edition of the newsletter, contact Joni Dobson at Legate & Associates: jdobson@legate.ca.