**IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, SECTION 268 and REGULATION 283/95**

**AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c. 17;**

**AND IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**ERIE INSURANCE COMPANY**

Applicant

- and -

**PROGRESSIVE CASUALTY INURANCE COMPANY**

Respondent

# DECISION ON A PRELIMINARY ISSUE

**COUNSEL:**

Chris T. Blom for the Applicant

Pamela A. Brownlee for the Respondent

**ISSUE:**

**1.** Is Erie entitled to pursue Progressive for repayment of the amounts it has paid out to Mr. Farley, or will continue to be liable to pay him under the *Statutory Accident Benefits Schedule*, pursuant to *Regulation 283/95* of the *Insurance Act* ?

**RESULT:**

**1.** The parties' dispute was previously settled, and consequently, Erie is not entitled to pursue Progressive for payments made to Mr. Farley under the the *Schedule.*

**BACKGROUND:**

Ronald Farley was injured when the vehicle in which he was a passenger was involved in a motor vehicle accident near Parry Sound, Ontario on September 1, 2003. The insurer of that vehicle was Progressive Casualty Insurance Company ("Progressive"). Mr. Farley lives in Ohio, and owned a motor vehicle at that time. It was insured by Erie Insurance Company ("Erie"), an insurance company carrying on business in the United States with its head office in Erie, Pennsylvania.

Mr. Farley initially sent an application for accident benefits to Progressive. It appears that a few months later, Progressive advised him that Erie was in higher priority under the regulation, and directed him to forward his application to them. He subsequently did so. Erie retained Ontario counsel in late 2004, and initiated an arbitration under *Regulation 283/95* against Progressive on December 6, 2004. Arbitrator Samis was appointed to arbitrate the parties' dispute, and a pre-hearing was convened with counsel in late 2005.

A resolution of that dispute was reached in 2006. Counsel for Progressive forwarded a Full and Final release to counsel for Erie setting out what she understood to be the terms of the parties' agreement, for his client's execution. This release was never signed.

In July 2008, Erie's current counsel (not the one who had been retained to conduct the earlier arbitration) wrote to counsel for Progressive to advise that his client did not consider the matter to have been finally settled. He stated that a new arbitration would be commenced under the regulation, and the parties consented to my appointment as arbitrator.

A pre-hearing was convened in May 2009. Mr. Blom set out Erie's position that Progressive had "deflected" Mr. Farley's application, and claimed that as it had not provided notice to any insurer as required by section 3 of the regulation, Progressive was liable to repay Erie for any benefits paid out to Mr. Farley. Ms. Brownlee took the position that the priority dispute between the parties had been settled in 2006, and could not be resurrected. Mr. Blom disagreed.

Counsel agreed that the question of whether or not the settlement reached finally determined the parties' rights and obligations should be determined as a preliminary issue, at a separate hearing.

## HEARING:

The preliminary issue hearing was held on September 15, 2009, in Toronto, Ontario, pursuant to the provisions of *Regulation 283/95* of the *Insurance Act* and the *Arbitration Act,* S.O. 1991.

**EVIDENCE:**

Neither party called any *viva voce* evidence at the hearing. A joint document brief was filed, containing the Claimant's application for benefits and the relevant correspondence between the parties relating to the preliminary issue. Counsel for Erie also filed an affidavit sworn by Keri Wilson, the Claims Adjuster handling this matter for Erie, dated August 27, 2009.

The facts surrounding the issue of whether or not a full and final settlement was reached in 2006 are not in dispute: the parties simply disagree about the legal effect of the communication that passed between Ms. Brownlee and Erie's previous counsel in 2006, and whether or not the settlement reached should be enforced.

The document brief filed at the hearing reveals that counsel exchanged written correspondence through February, March and April 2006, subsequent to the initial pre-hearing teleconference with Arbitrator Samis. On May 8, 2006, counsel for Erie forwarded the following letter to Ms. Brownlee:

> *Please be advised that on a without prejudice basis, my client is willing to accept that it is the priority carrier in exchange for a dismissal of the Arbitration on a without costs basis. In the regard, I assume my client would be responsible for any fees to be submitted by Arbitrator Samis.*
>
> *I trust that you find this to be satisfactory and look forward to hearing from you in this regard at your earliest convenience.*

The letter contains the notation "Without Prejudice" on the top right corner.

Ms. Brownlee responded on May 30, 2006 as follows:

> *Further to my telephone message of May 26, 2006, I confirm that Progressive Casualty will agree to a dismissal of these Arbitration proceedings on a without costs basis on the condition that Eire Insurance*

> *execute the enclosed Full and Final Release and bear responsibility for any outstanding invoices of Arbitrator Samis.*
>
> *If this is satisfactory, please have your client execute the enclosed Full and Final Release or authorize you to execute same on their behalf and return an original executed copy of the Release to our offices.*
>
> *I look forward to hearing from you shortly.*

A one-page release was enclosed with this letter. It provided that Erie would forever discharge Progressive from any claims relating to the priority dispute arising out of Mr. Farley's application for benefits, in exchange for Progressive waiving its costs.

On July 13, 2006, counsel for Erie wrote to Arbitrator Samis and Ms. Brownlee as follows:

> *Further to Mr. Samis' correspondence dated July 12, 2006, I wish to confirm that this matter has in fact settled. As a result, Mr. Samis' services are no longer required, and any fee expense should be forwarded to my office.*
>
> *I trust that you find this to be satisfactory and thank everyone for their co-operation throughout.*

Ms. Brownlee subsequently sent letters to counsel for Erie on July 17, October 30, November 24, 2006 as well as on January 3, 2007 requesting that the release forwarded earlier be executed and sent back to her. Counsel for Erie finally responded on January 11, 2007 advising that he continues "to await to hear back from my client." The release sent by Ms. Brownlee was never signed.

Ms. Wilson's affidavit sets out some further background information. She states that Erie made the decision to pay benefits to Mr. Farley in April 2006, after being advised that he was experiencing financial hardship. This decision was made after the arbitration with Arbitrator Samis had been commenced. Ms. Wilson attested that she advised Erie's counsel of the decision to pay benefits in April, but stated that she never told him that

Erie was prepared to accept priority, or that it intended to waive its rights to recover the amounts paid out from Progressive. The affidavit goes on to state that Ms. Wilson received a copy of counsel for Erie's letter of May 8, 2006, set out above, and that she considered it to be consistent with her instructions to him that Erie would pay benefits to Mr. Farley but would not give up the right to pursue Progressive for the amounts paid out.

Ms. Wilson further claims in the affidavit that she did not understand that the letter sent by counsel would finally determine the priority issue. She states that she was accordingly surprised when she reviewed the release that was forwarded to her by counsel that provided for a full release of Erie's right to pursue Progressive. She stated that she had not instructed her counsel to release Progressive from its obligation to pay benefits to Mr. Farley. She provided that she had not been sent a copy of counsel for Erie's letter to Arbitrator Samis advising that the matter had been settled, and that she believes that counsel's communication to both Ms. Brownlee and the arbitrator in this regard was "based on a misunderstanding of Erie's instructions."

**PARTIES' ARGUMENTS:**

Mr. Blom essentially contended that the impugned settlement resulted from a miscommunication between Ms. Wilson, the Erie adjuster, and her counsel in the prior arbitration proceeding, and should not be upheld. He argued that it was clear from Ms. Wilson's affidavit that she believed that Erie's right to pursue Progressive would be preserved, despite the letter sent by her counsel on May 8, 2006, whereas that did not appear to be counsel's understanding of his instructions. Mr. Blom submitted that the terms of the agreement to settle the parties' dispute had never been formally concluded, and that there was therefore no true "meeting of the minds".

Counsel for Progressive took the opposite view, and contended that the parties had reached an agreement through their solicitors, in the earlier proceeding before Arbitrator Samis. She argued that that settlement should be enforced, as all of the essential terms

had been agreed to. She added that the fact that the release she forwarded was never signed by the Erie claims adjuster was of no real consequence.

Ms. Brownlee argued that the counsel retained by Erie was clearly the company's agent, and that the law of agency provides that a principal is responsible for the acts of its agent, and is bound by them. She submitted that the evidence indicates that Erie's prior counsel's authority was apparently limited by his client, but that she was not made aware of this limitation.

The Ontario Court of Appeal has considered the question of the impact of a miscommunication between a client in litigation and his or her solicitor on an alleged settlement, in two different cases. Mr. Blom relied principally on the Court's decision in the case of *Milios v. Zagas* [1998] 38 O.R. (3d) 218 to support his argument, while Ms. Brownlee relied on the Court's earlier decision in *Scherer v. Paletta* [1966] 2 O.R. 524. I will set out the facts and findings in both cases, as they were central to the parties' submissions in this matter.

In *Scherer v. Paletta*, *supra,* a plaintiff repudiated a settlement that had been reached in a personal injury action between his solicitor and opposing counsel, claiming that he had not instructed his solicitor to accept the defendant's settlement offer. The defendant had made an initial offer to settle the action by way of payment to the plaintiff of $15,000. The plaintiff rejected this offer, against his solicitor's recommendation. The plaintiff then advised his lawyer to press for an increased amount, but if unsuccessful, to accept the amount offered. The lawyer subsequently proposed that the defendant pay the amount of $17,500 to settle the matter, which the defendant accepted. When the plaintiff was advised of this he repudiated the settlement, stating that when he had told his solicitor to reject the $15,000 offer, he had instructed him to submit any further offers received to him for approval. The solicitor denied that any such qualification had been communicated to him by the plaintiff.

The Court of Appeal considered the question of whether or not the defendant was entitled to enforce the settlement that had been agreed to, in view of the dispute regarding the limitation on the solicitor's retainer. Justice Evans noted that the defendant had been unaware of any such limitation. He went on to state that a solicitor's authority to compromise his or her client's claim "may be implied from a retainer to conduct litigation, unless a limitation of authority is communicated to the opposite party." Justice Evans also stated that as between principal and agent, the authority may be limited by agreement or special instructions, "but as regards third parties the authority which the agent has is that which he is reasonably believed to have, having regard to all the circumstances.."

Finally, Justice Evans determined that the court retains the discretionary power to make any order required in these circumstances, but that if the parties are of full age and capacity, it should not embark on any inquiry as to the limitation of authority imposed by the client upon the solicitor where there is no dispute that a retainer exists, or regarding the settlement terms agreed upon by the solicitors. In the result, the court approved the settlement that had been reached, and granted judgment in accordance with the terms agreed to.

In the subsequent case of *Milios v. Zagas*, *supra,* the plaintiff obtained a default judgment against the defendant for rental arrears, which the defendant attempted to have set aside. The defendant's motion was dismissed, and he was ordered to pay the plaintiff's costs in the amount of $7,000. The defendant appealed this order. Prior to the appeal being perfected, the plaintiff's solicitor advised the defendant's solicitor that his client was prepared to settle the matter by having the action dismissed and the judgments vacated, in exchange for the defendant agreeing to pay his solicitor client costs, in the amount of $21,000. The defendant rejected that offer, and proposed as a counteroffer that each side bear their own costs of the matter.

The plaintiff was travelling in Greece at the time the defendant's counteroffer was made. His solicitor faxed the offer to him at his home. Later that day, the plaintiff's wife called

the solicitor to advise him that the plaintiff was in Greece, that she had spoken to him about the offer, and that he had told her to "go ahead with the settlement". Based upon those instructions, counsel for the plaintiff accepted the defendant's offer that each side bear their own costs. When the plaintiff returned from Greece three weeks later and found out about the terms of the settlement, he advised his solicitor that his wife had misunderstood what he had said, and that he had directed her to advise that they should proceed with his offer, requiring the defendant to reimburse him the $21,000 that he had incurred for legal costs. He insisted that he had never intended to abandon his claim for costs against the defendant.

The defendant moved for judgment in accordance with the alleged settlement, and judgment was granted. The Court of Appeal subsequently allowed the plaintiff's appeal, and overturned the motion judge's order. Justice Osborne cited the court's comments in the *Scherer v. Paletta* case that once an agent's retainer is established, any limitations on it will not affect a settlement if those limitations have not been communicated to the other side. Justice Osborne found, however, that the *Milios* case did not fall within those parameters, as the plaintiff's wife had misunderstood his instructions and had mistakenly passed them on to the solicitor, resulting in the settlement having been entered into by mistake. He drew a distinction between that situation, and one in which a solicitor has limited authority that is not communicated to the other side.

Justice Osborne also found that the motions judge had erred by not taking into account the following four factors – as no order giving effect to the settlement had yet been taken out the parties' pre-settlement positions remained intact; aside from losing the benefit of the impugned settlement, the defendant would not be prejudiced if the settlement was not enforced; the degree to which the plaintiff would be prejudiced if judgment is granted in relation to the prejudice that the defendant would suffer if the settlement were not to be enforced; and the fact that no third parties would be affected by the settlement not being enforced. He considered the above factors, and determined that the mistaken acceptance of the defendant's settlement offer should not be enforced by the court.

Mr. Blom contended that when the *Milios* factors are applied to the analysis in this case, the same conclusion should be reached. He noted that no order has been taken out to formalise the 2006 agreement, and that aside from losing the benefit of the impugned settlement, there would be no prejudice suffered by either Progressive or Mr. Farley. He emphasized, however, that Erie would lose the right to argue that Progressive had deflected the claim in violation of the regulation, and that that would result in significant prejudice to his client.

Mr. Blom also referred to two other cases in which a judge has effectively overturned a settlement arrived at as a result of mistakes or misunderstanding. In *Weinberg v. Datacom Marketing Inc.* [2006] O.J. No. 289, the judge applied the *Milios* factors outlined above in a situation where a solicitor who took over settlement discussions from a colleague on vacation misunderstood the earlier agreement that had been reached between counsel regarding the scope of a release to be signed by their client. The judge determined that it was a proper circumstance in which to exercise the court's discretion to permit the proceeding to continue.

In *Auciello v. Paul Revere Insurance Co.* [2001] O.J. No. 1940, Justice Nordheimer dismissed the defendant insurer's motion to enforce a settlement providing for a dismissal of the action brought by the plaintiff under a long-term disability policy. The judge referred to both the *Scherer* and the *Milios* decisions, and concluded that "with some reluctance…this is one of those rare cases where the court should exercise its discretion not to enforce the settlement". He stated that there was too much uncertainty surrounding the events leading up to the settlement to permit him to comfortably decide that the plaintiff's claim under the policy should be terminated.

Ms. Brownlee claimed that the facts in this case are on 'all fours' with the circumstances described in *Scherer v. Paletta*, and that the same conclusion should be reached. She contended that Erie's prior counsel was acting as its agent in the earlier arbitration, that the company was therefore responsible for the acts of its agent, and that a third party, namely Progressive, was entitled to rely upon the actions of the agent. She submitted that

Erie counsel's authority was clearly limited, but that this limitation was never communicated to either her or her client.

Ms. Brownlee contended that the circumstances leading up to the decision in the *Milios* case were different than those in this case. She stated that in *Milios*, the plaintiff's wife had mistakenly communicated incorrect settlement instructions to the solicitor, whereas in this case, Erie's prior counsel misunderstood the extent of his retainer and agreed to settlement terms that were not in accord with his client's instructions. She argued that whereas the court was prepared to excuse the mistake made by Mrs. Milios and not enforce the settlement reached by the solicitors, the events in this case more closely resembled the limitation of solicitor's authority situation in *Scherer v. Paletta*, as she had never been advised of the limitation on the solicitor's authority.

Ms. Brownlee added that when it became apparent that there was no meeting of the minds with respect to the settlement, she should have been advised immediately. Instead, neither she nor anyone at Progressive heard anything further from Erie's counsel until receiving a letter from Erie's current counsel in July of 2008, advising that a new arbitration was being initiated.

Finally, counsel for Progressive contended that the *Auciello* decision was distinguishable from the instant case, as it was clear that Justice Nordheimer was reluctant to set the settlement aside and only did so because of the unusual facts, and his concern about the competence of Mr. Auciello. She claimed that unlike Mr. Auciello, the insurers in this dispute were sophisticated parties and should be held to account for their actions and instructions. Mr. Blom's commented in reply that Erie should not be considered to be a sophisticated litigant in this context, as it is not an Ontario insurer and is not familiar with Regulation 283/95 and the private arbitration system.

**ANALYSIS & FINDINGS:**

The parties do not dispute the facts underlying the issue before me, nor do they rely on technical arguments such as the effect of the release not being signed, or the wording of the letter sent. Counsel essentially disagree as to how the miscommunication that occurred between the claims adjuster at Erie and its counsel should be characterised – Mr. Blom submitting that it was a mistake, and Ms. Brownlee contending that it was a limitation on counsel's authority that she was not made aware of.

Having considered the matter carefully, I find that what transpired in this case is more akin to the alleged limitation on the solicitor's authority described in *Scherer v. Paletta*, *supra,* rather than the type of mistake that underscored the miscommunication in *Milios v. Zagas, supra,*. In the result, the settlement reached in the 2006 arbitration should be upheld, and Erie is consequently precluded from pursuing Progressive for the payment of accident benefits to Mr. Farley.

The evidence before me indicates that Ms. Wilson, the Erie claims adjuster, believed that the arbitration proceeding that was commenced before Arbitrator Samis could be settled, without Erie giving up the right to pursue Progressive for repayment of the benefits it paid out to Mr. Farley at some later point. She attested in her affidavit that if her counsel had properly understood her instructions, he would have offered to withdraw the application for arbitration initiated by Erie in exchange for Progressive agreeing to "go out" without costs, but without limiting Erie's right to bring the application back on whenever it decided that the time was right to pursue repayment from Progressive. While this approach might make sense in certain cases, it is unlikely that counsel for Progressive would have recommended this approach to her client.

The arbitration scheme under *Regulation 283/95* is based on the idea of "pay now, dispute later" so that an injured claimant does not have to wait to receive benefits until the insurers involved resolve the question of who is in priority to pay the claim. The first

insurer to receive a completed application – assuming some nexus exists – must respond to the application and pay benefits, after which it may pursue another insurer who it feels is in higher priority. The timelines for providing notice to another insurer in section 3 are intentionally short, so that the insurer that is being targeted by the first insurer is advised of the issue early, and if appropriate, can decide to take over the file before there has been much activity on it, and adjust the claim as it sees fit.

Unfortunately, that did not happen in this case. The accident took place in September 2003, the initial arbitration was commenced by Erie in late 2004, and the alleged settlement not concluded until mid 2006. By that point, it was already "late in the game" to be addressing the question of who the priority insurer was, and it would not have served anyone's interest to have the determination of that question delayed any longer.

It is unclear whether the miscommunication between client and counsel stemmed from Ms. Wilson's lack of familiarity with the arbitration process under the regulation, or whether her counsel simply misunderstood her instructions. As mentioned above, Ms. Wilson's evidence was provided by way of affidavit. As she did not testify at the hearing, I did not have the benefit of hearing her provide answers to questions that may have been posed in cross-examination such as when she might have instructed her counsel, if ever, to pursue Progressive for the repayment of benefits paid to Mr. Farley. I also did not have the opportunity to hear her explanation of why, after reading her counsel's letter of May 8, 2006, reproduced above, she did not think that Erie had agreed to accept priority and release its rights to pursue Progressive. As outlined above, the letter does not propose that the arbitration simply be adjourned or withdrawn, but actually states that Erie "is willing to accept that it is the priority carrier in exchange for the dismissal of the Arbitration on a without costs basis", albeit qualified by the words "without prejudice". In light of this clear wording, Ms. Wilson's statement in her affidavit that she interpreted her counsel's letter to be consistent with her instructions that Erie would pay benefits to Mr. Farley without prejudice to its rights to pursue Progressive to recover the amounts paid is difficult to accept.

In any event, it is clear that the relationship of a solicitor to his or her client is one of agent to principal (Bowstead on Agency, 12th ed., pp.65-66, as cited in *Scherer v. Paletta*). And, when an agent negotiates with a third party on a principal's behalf, the acts of the agent will bind the principal. As determined in the *Scherer* case, the only exception to this rule is when a limitation imposed by a client on his or her solicitor's authority is communicated to the other side. When a solicitor with limited authority acts beyond the limitation imposed there will undoubtedly be issues that the solicitor and client will need to address, but that will not impact the third party if the limitation has not been communicated to them.

In *Scherer v. Paletta* the problem arose when the solicitor accepted a settlement offer on the plaintiff's behalf, in the face of the plaintiff's claim that he had instructed the solicitor to bring any offers to him for approval. The real question was how much, if at all, the solicitor was entitled to compromise the plaintiff's claim, or put a different way, whether there was a gap between the expectations of the client and that of counsel with regard to counsel's constraints in settling the claim with the opposing party. In my view, the same type of gap existed in this case; namely, whether the settlement of the arbitration that was then ongoing was only to be a temporary step (believed by the Erie adjuster), or whether it would finally resolve the issues between the insurers (as counsel believed).

I find this to be distinct from what occurred in the *Milios* case. Rather than having a gap between the relative expectations of the client and counsel, the miscommunication there resulted from what is colloquially know as a case of "broken telephone". The evidence indicated that the plaintiff's wife had mistakenly advised the solicitor that the plaintiff had agreed to accept the defendant's counteroffer, whereas he had merely repeated that he was prepared to settle on the basis of the offer he had previously made. These instructions were provided by a third party who was not involved in the lawsuit, and as soon as the mistake was discovered, counsel for the plaintiff promptly called the opposing solicitor to advise of the misunderstanding.

Neither of these things occurred here. Not only was there no intermediary or third party adding another layer of communication to the mix, but Progressive was only notified of the apparent miscommunication more than two years after Ms. Brownlee had forwarded the releases to Erie counsel for his client to sign. In my view, these factors distinguish the *Milios* decision from the instant case, and merit a different conclusion.

As a final matter, I would emphasize that my analysis in this case does not take into account the relative degree of prejudice that each party may suffer as a result of the settlement being confirmed. I acknowledge that if Progressive was in fact the first insurer to receive an application from Mr. Farley and "deflected" it, as alleged by Mr. Blom, my findings will result in a harsh outcome for Erie. None of the facts beyond the ones immediately relevant to the impugned settlement were explored at the hearing, so it is not clear whether Erie's allegations would withstand scrutiny. However, as I read the *Milios* decision, the balancing of the relative degrees of prejudice called for by the court toward the end of its decision flows from the discretion provided to the court on a motion to enforce a settlement under Rule 49.09 of the Rules of Civil Procedure.

In contrast, an arbitrator in my position is neither explicitly nor implicitly provided with this discretion. My sole task at this preliminary stage is to determine whether or not the settlement in question is binding on the parties, as opposed to whether the prejudice analysis favours one side or another. Given my finding that the *Milios* "exception" does not apply here, and given the legal axiom that an agent's acts bind his principal unless the limitation on his authority is known to the other side, I must conclude that the settlement reached by the parties during the course of the arbitration before Arbitrator Samis should be upheld.

Accordingly, Erie is not permitted to pursue Progressive under *Regulation 283/95*.

**DATED at TORONTO, ONTARIO this _____ DAY OF NOVEMBER, 2009.**

_____

**Shari L. Novick**

**Arbitrator**