

**IN THE MATTER OF AN ARBITRATION PURSUANT TO S. 148.2
OF THE INSURANCE (VEHICLE) REGULATION,
B.C. Reg. 447/83 and the Arbitration Act [SBC 2020] c. 2**

BETWEEN:

KG

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

***ORAL RULING RE RESPONDENT APPLICATION
SEEKING DISMISSAL OF UMP CLAIM***

Counsel for the Claimant,
KG

Nathan McQuarrie

Counsel for the Respondent,
Insurance Corporation of British Columbia

Giles Deshon
Sarah Lundy

Date of Hearing:

July 2, 2024

Date of Oral Ruling:

July 2, 2024

Arbitrator:

Dennis C. Quinlan, K.C.

INTRODUCTION

1. The Respondent Insurance Corporation of British Columbia brings an application for dismissal of an underinsured motorist protection (“UMP”) claim advanced pursuant to Division 2 of Part 10 of the **Insurance (Vehicle) Regulation**, B.C. Reg. 447/83 (the “Regulation”) by KG (the “Claimant”), arising from a motor vehicle accident that occurred September 14, 2018 in Dupont, Washington (the “September 2018 Accident”).
2. The circumstances of the September 2018 Accident may be in dispute. However for the purpose of this application, the Claimant was a passenger in a vehicle operated by KDV that had previously been involved in a minor collision and was then hit from behind by a vehicle operated by SH, a Washington State insured driver.
3. It bears importance for this application that the Claimant was also involved in an earlier motor vehicle accident on September 29, 2015 in Surrey, B.C. (the “September 2015 Accident”) when she was in collision with a vehicle operated by one YY who was insured by ICBC.
4. In summary the Respondent’s position is that the Claimant “surrendered her entitlement to advance any claim against the Respondent” arising from the September 2018 Accident, as a consequence of entering into a settlement agreement dated July 8, 2022 related to the September 2015 Accident (the “Settlement Agreement”).
5. This application involves consideration of the distinction between the concepts of first party and third party insurance, and the importance of recognizing that distinction.
6. Unless otherwise indicated, all underlining for emphasis is additional to the original document.

BACKGROUND

7. In relation to the September 2015 Accident, the Claimant on June 27, 2017 commenced an action in the Supreme Court of British Columbia against YY (the “First Action”).
8. In relation to the September 2018 Accident the Claimant on June 24, 2021 commenced an action in the Washington Superior Court against inter alia SH and Jane Doe (the Second Action”).
9. The Settlement Agreement was described as “This Settlement Agreement, Covenant Not to Sue and Indemnity...” and styled as between the Claimant and YY.
10. The evidence is that only the Claimant executed the Settlement Agreement. More will be said about this later in the Ruling.
11. The First Action and Second Action were collectively described as the “Actions”.
12. Recitals D and E described the essence of the Settlement Agreement:
 - D. The Plaintiff (for clarification the use of Plaintiff in the Settlement Agreement is referring to the Claimant herein) and Defendant YY (the “Settling Defendant”) have agreed to resolve and settle the Plaintiff’s claims against the Settling Defendant;
 - E. The Plaintiff intends to continue the Second Action against the Defendants SH and Jane Doe, husband and wife...(the “Remaining Defendants”);
13. Importantly “Settling Defendant” was defined to mean:

YY and her insurers, (including the Insurance Corporation of British Columbia) officer, directors, employees, associations, partnerships, past and present parents,

affiliates, and successors in interest, servants, agents and assigns;

14. Paragraph 2 provided that the Settling Defendant would pay the Claimant an agreed sum defined as the Settlement Amount, forthwith upon execution of the Settlement Agreement.

15. Paragraphs 3, 4, 6 and 7 described the covenant not to sue provided by the Claimant to the Settling Defendant, the Claimant's ability to continue her action against the Remaining Defendants (as earlier defined in recital E), the Claimant's covenant that she was not seeking damages resulting from the First Accident from the defendant in the Second Action, and the intent of the agreement to settle the First Action and eliminate the Settling Defendant's exposure to any further fees or expense.

3. The Plaintiff on her own behalf....in consideration of the payment of the Settlement Amount....the receipt and sufficiency of which is hereby acknowledged, hereby covenants not to sue, claim, commence or maintain any action or proceeding, including by way of counterclaim, third party proceedings, or claim for contribution and indemnity against the Settling Defendant....in respect to any and all actions....whether known or reasonably could have been known, brought or which reasonably could have been brought by the Plaintiff against the Settling Defendant arising from or in respect to the claims advanced in the Actions.....

4. The Plaintiff retains the right to continue to pursue the claims against the Remaining Defendants in the Actions. The Plaintiff in continuing the Actions against the Remaining Defendants, or other parties which may be added to the Actions, will limit her claims for recovery to the several extent of the liability of the Remaining Defendants and any such other parties which may be added to the Actions, after the deduction from the claim for recovery of any portion of such claim which the

Court may attribute or apportion to the fault of the Settling Defendant, and will not seek to recover from the Remaining Defendants or any such other parties any amount of the claim for recovery attributed or apportioned by the Court to the Settling Defendant.

6. With respect to the Actions, the Plaintiff hereby covenants that she:
 - a. is not seeking damages from the First Accident from the defendant in the Second Accident. She hereby waives any such claim, and abandons them by this settlement agreement; and
 - b. hereby acknowledges that the above is to be given all necessary effect so as to remove the basis for any claim, counterclaim, third party proceedings or contribution or indemnity claims against the Settling Defendant by the Remaining Defendants in the Actions.....
7. ...the intent of this agreement is to resolve and settle the Plaintiff's action and claim from the First Accident, and to prevent Settling Defendant, and her insurer, from incurring any further fees or costs related to the First Accident or the Second Accident....

16. Subsequent to implementation of the Settlement Agreement it was determined SH might be unable to pay the full amount of damages recoverable by the Claimant, so as to prima facie meet the definition of "underinsured motorist" in section 148.1 (1) of the Regulation.

17. Counsel for the Claimant by letter dated January 17, 2023 wrote the handling adjuster for the Respondent setting out a full background to the claim arising from the September, 2018 Accident and making the following request:

We have performed an asset search of the liable party, which shows that they are judgment proof. We enclose a copy of the asset search and signed Declaration of SH. The liable party is an “underinsured motorist” and we now approach the corporation to proceed under s. 148.

18. The handling adjuster responded by email dated January 31, 2023 stating:

Yes ICBC will consent to UMP, subject to the Supreme Court Rules. Please advise once the (sic) have resolved their claims with the other insurer.

19. It is important to recognize that Section 148.2 (4) of the Regulation provides that the corporation is not liable to an insured under section 148.1 unless written consent to a settlement is provided by the corporation.
20. The Claimant then delivered pursuant to section 148.2 (1) of the Regulation, a Notice to Arbitrate and Statement of Claim both dated March 3, 2023. Those pleadings referenced the January 31, 2023 email consent given by the Respondent.
21. An initial procedural conference involving counsel was conducted May 15, 2023 at which time the arbitration hearing was scheduled for July 2, 2024 for six days. It was agreed the Supreme Court Civil Rules would govern as applicable.
22. The Respondent delivered a Response to Claimant’s Statement of Claim dated December 18, 2023 wherein it was denied generally that the Claimant was entitled to UMP compensation.
23. However the Settlement Agreement was not mentioned in the Response and there was no plea that the Claimant had surrendered or released her entitlement to advance an UMP claim as a result of the Settlement Agreement.

24. On June 7, 2024 following an Arbitration Management Conference of the same day, the Respondent delivered a draft Amended Response to Claimant's Statement of Claim and asked for the Claimant's consent.
25. For the first time, it was plead that as a result of the Settlement Agreement "...the Claimant has no cause of action against the Respondent by explicit agreement".
26. The Claimant provided her consent to the amendment and the parties agreed the issue related to the Settlement Agreement would be dealt with on the first day of arbitration.
27. Although there was no Notice of Application, I note in passing that counsel are to be commended for keeping the arbitration proceeding on the rails so as to avoid an adjournment.

DISCUSSION

28. The statutory provisions governing UMP are contained in Division 2 of Part 10 of the Regulation which is titled First Party Coverage.
29. UMP is a statutory form of first party insurance that provides compensation to an insured person in the event an at-fault motorist has insufficient or no liability insurance or other assets with which to pay a judgment: ***S.A. (Re)***, 2020 BCSC 1323 at para. 20
30. UMP is considered a coverage of last resort in that if the injured party is eligible for damages from another party or benefits from another source (as provided for in the definition of "deductible amount" set out in section 148.1 (1)), ICBC is entitled to deduct those amounts in determining its obligation under UMP: ***S.A. (Re)***, at para. 25; ***Hossen-Najad v. ICBC***, (Arbitration award December 21, 2000, Arbitrator Yule) at para. 67.
31. Procedurally, section 148.2 (1) states that the determination as to whether a person who meets the definition of insured for the purpose of UMP under section 148.1, is entitled to compensation or the amount of

compensation, must be made by agreement between the insured and the corporation, but any dispute must be submitted to arbitration under the ***Arbitration Act***.

32. In contrast to UMP, Part 6 of the Regulation is titled Third Party Liability Insurance Coverage wherein section 64 of the Regulation provides that the corporation must indemnify an insured as defined in section 63, for liability imposed on the insured by law for injury or death of another that arises out of the use or operation by the insured of a vehicle described in an owner's certificate.
33. As recently stated in ***Carriere de Davide v Westland Insurance Group Ltd***, 2024 BCSC 686 at para. 81, first party insurance coverage provides compensation for an insured's own direct losses, and third party liability coverage provides compensation to others when the insured is liable for their damages.
34. Counsel for the Respondent Mr. Deshon provided a comprehensive argument in support of the Respondent's position that the Claimant via the wording in the Settlement Agreement agreed not to sue the Respondent in respect to any claim for UMP compensation arising from the September 2018 Accident.
35. The essence of Mr. Deshon's argument is set out in paragraph 22:
 22. In the Respondent's submission, ICBC is a Settling Defendant as a legal entity. As such it is a party to the Agreement in all of its capacities and that all claims under Parts 6, 7 and 10 for both accidents are settled by operation of the Agreement.
36. I do not agree.
37. Such argument is contrary to the definition of Settling Defendant in the Settlement Agreement and does not take into account the distinct concepts of first party and third party insurance.

38. A form of agreement such as the Settlement Agreement is commonly used in multi party litigation where it allows a party the opportunity to settle out on the plaintiff's agreement to forego recovery of any portion of the loss ultimately attributable to the settling party from the non-settling defendants.
39. Here the Settlement Agreement expressly provided that the Claimant was covenanting not to sue and would indemnify the Settling Defendant, which was defined as meaning "YY and her insurers including the Insurance Corporation of British Columbia".
40. ICBC as insurer for YY was providing third party liability insurance coverage to indemnify YY for liability imposed upon her for injury sustained by the Claimant in the September 2015 Accident. It was in that capacity and that capacity alone that ICBC was receiving the benefit of the covenant not to sue and indemnity.
41. ICBC as third party liability insurer for YY pursuant to Part 6 of the Regulation is separate and distinct from ICBC as first party UMP insurer for the Claimant pursuant to Part 10 of the Regulation.
42. As pointed out by Mr. McQuarrie, counsel for the Claimant, no action or claim is being advanced against YY or YY's third party insurer ICBC. Rather the UMP claim is made against the Claimant's first party insurer, being the Respondent, arising from the inability of the person legally liable for the injury (SH) to pay the full amount of damages. This result is entirely consistent with the terms and procedure contemplated by the Settlement Agreement.
43. The interpretation advanced by the Respondent that it was ".....a party to the agreement.....in all of its capacities....and that all claims under parts 6, 7 and 10 are settled by operation of the Agreement" is simply not supported by the words used.
44. If the form of release was to encompass the Claimant's claim for UMP compensation pursuant to Part 10 of the Regulation, precise wording was required and could easily have been employed.

45. I need go no further but I note there are several other difficulties with the Respondent's position.
46. First the evidence before me was that neither YY nor ICBC in any capacity executed the Settlement Agreement. I will say the information given by Mr. Deshon at the outset of the application was helpful in providing context to the manner of execution. While likely nothing turns on this issue given the Settlement Amount was paid to the Claimant and she herself signed the Settlement Agreement, the lack of execution by the party(ies) now seeking an expansive interpretation is somewhat unusual.
47. Second it is telling that the Respondent's claims representative provided his consent on January 31, 2023 to the Claimant proceeding to arbitration as mandated by section 148.2 (1) of the Regulation.
48. In my view, the purpose of section 148.2 (4) of the Regulation is to provide the opportunity for the Respondent to satisfy itself that an underlying settlement or prosecution to judgment is reasonable so as to minimize the amount of compensation which the Respondent might ultimately be obliged to pay as UMP compensation, and ensure that all persons who might legally be liable for the insured's damages have been identified and pursued.
49. It is difficult to understand why the interpretation now advanced on this application was not spelled out when the Claimant sought the Respondent's consent to proceed to UMP by way of arbitration.
50. One would have expected the immediate response to be that the Claimant had released her UMP claim as a consequence of the Settlement Agreement entered into some six months earlier.
51. Finally pleadings continue to carry importance. There was no mention of the Settlement Agreement or the alleged ramifications in the Respondent's Response of December 18, 2023. This only occurred recently in the amended pleading delivered June 7, 2024.

52. In summary and leaving aside the actions (or inactions) of the Respondent, the Respondent's position is simply not supported by the terms of the Settlement Agreement.

CONCLUSION

53. For the reasons set out above, I dismiss the Respondent's application to have the within claim dismissed.

54. Unless there is something I am not aware of, costs of the application are awarded to the Claimant in any event of the cause.

Dated: July 2, 2024

Arbitrator – Dennis C. Quinlan K.C.