[INSIGHT] By Peter H. Bickford

When is a Release Not a Release?

Once again the NY Insurance Department* is attempting to narrow the ability of insurance companies to settle claims.

Current Regulation 64 provides a straightforward requirement that insurers cannot require a claimant to sign a release as a condition of settlement that is "broader than the scope of the settlement." This limitation means that settlements cannot include claims, including unknown or future claims, unrelated to the underlying facts or basis for liability of the claim being settled. But in the view of insurers this limitation does not and should not prevent a release from including any and all possible damages relating to a claim being settled whether or not known at the time of settlement.

Peter H. Bickford

Since 2007, when it first issued an Office of General Counsel Opinion on the matter, the Department has been trying to narrow the definition of the scope of settlement as used in Regulation 64 by restricting releases to known current claims and not allowing release of "unexpected, unknown, and/or unanticipated" claims regardless of their relationship to the underlying facts or cause of liability. The Department also sought to change Regulation 64 in 2009 and 2010 but backed off because of the opposition of insurance companies and their trade groups. Now the Department is once again seeking to codify limitations on the use of releases through a proposed amendment to Regulation 64 (the proposed regulation, which was published in the State Register on August 29, would be effective 90 days after adoption).

In addition to narrowing the definition of "scope of the settlement" the proposed regulation limits release provisions on confidentiality, disclosure of terms, or derogatory statements about the insurer; requires separate releases for property and casualty claims; requires releases of claims (other than claims under liability policies) to specify with certainty the actual damages (how often does agreement on actual damages ever happen in real life?); and dictates the specific language of any release form to be used in motor vehicle property damage liability claims. Also, although the proposal adds a carve-out for certain defined large commercial claimants, it fails to include a carve-out for releases by parties represented by counsel.

I fully expect that insurers and their trade associations, who have strongly objected to the past attempts to restrict the use of releases under Regulation 64, will continue to argue their concerns with the current proposal. However, *the proposed regulation's restriction on the ability of insurers to obtain full release by third party claimants should be of concern to all policyholders and not just their insurers.*

In the Regulatory Impact Statement accompanying the proposed regulation in the State Register, the stated purpose of the regulation is "to provide clarity regarding the scope of releases to: provide a level playing field for all authorized insurers; allow the [Department] to more easily enforce this section; and ensure that releases are narrowly tailored to the claim being settled and are easy for all parties to understand." It would have been helpful if the Impact Statement had presented some evidence of abuse of releases to support the need for the proposal, but unfortunately there is none and, as far as I know, none was presented as part of the earlier attempts to restrict the use of releases. It would also have been helpful if the Impact Statement had discussed the impact on claimants and policyholders rather than just on the Department and insurers.

Policyholders who are the subject of third-party claims against them for alleged property or physical damage, want two things from their insurance company: they want the insurance company to handle and pay for it; and they want to make sure there is finality. Finality can only be achieved through a judgment, dismissal with prejudice, payment or settlement accompanied by a full and complete release. But if the release is limited to known, established damage at the time of release, there is no finality. Without a broad release there is no protection of policyholders from claimants seeking to reopen claims for any number of potential future developments, real or imagined, that were not raised at the time of settlement. Insurers have a duty to their policyholders as well as to claimants, but if they cannot provide certainty to policyholders in settling claims then they are not adequately protecting them.

It is not contested that the scope of a settlement and release should be limited to damages arising out of a specific event or circumstance and should not include claims or damages arising from unrelated incidents. However, there is a difference between releasing unknown or unascertainable damages and releasing unrelated claims. Preventing settlement and release of any and all damage that may arise from the underlying circumstances, whether unknown now or that may arise in the future, defeats the meaning and purpose of settlement and prevents insurers from fully protecting their policyholders. That cannot be what the Department intends, and *it is hoped that The Department will come to understand that in its zeal to protect claimants from abusive companies, it is not appropriate to protect third party claimants to the exclusion of policyholders.*

A number of other states have laws or regulations similar to current Regulation 64, limiting releases to the subject matter of the claim. Most of these laws and regulations, however, are limited to first party claims, and none go so far as to prevent the release of "unexpected, unknown, and/or unanticipated" claims arising from the subject matter of the settled claim.

Releases play a legitimate and important role in the claim settlement process, and while protecting claimants from unfair settlement practices is appropriate, the scope of that protection should not be so broad as to restrict the legitimate and time-tested use of releases for the protection of policyholders. [IA]

**Yes, I know it's the Insurance Division of the Department of Financial Services, but for me (and I am sure for others) it will continue to be the Insurance Department – like the Met Life Building in Midtown Manhattan will always be the Pan Am Building even though the name was changed in 1981.*