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Insurance Law Update

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SCC STRENGTHENS TEST FOR CONFIRMATION OF A CAUSE OF ACTION

The Supreme Court of Canada's recent decision in *Ryan v. Moore* provides some much-needed clarification to the manner in which settlement discussions with an insurer can serve to confirm a cause of action that would otherwise be barred by operation of statute.

FACTS

Ryan was involved in a car accident. His counsel engaged in ongoing discussions with Moore's insurer. The discussions did not result in a settlement and Ryan's counsel brought an action within the two-year period set out in the relevant *Limitations Act*. Unbeknownst to Ryan, his counsel or Moore's insurer, Moore had died a year prior to the filing of the Writ. The Newfoundland *Survival of Actions Act* provided that an action could not be brought against a deceased more than one year after death or more than six months after granting of letters of probate or administration (note: such legislation varies between provinces; British Columbia and Ontario do not have statutory provisions reducing the limitation period for personal injury claims against a deceased).

Ryan's counsel argued in part that the action was not barred by operation of the *Survival of Actions Act* as the cause of action was confirmed by the insurer. The acts said to constitute confirmation included the insurer's reimbursement of Ryan's counsel's costs in obtaining medical records and a specialist's report, and various written requests by the insurer for information regarding Ryan's injuries.

RULING

The Court concluded that confirmation of a cause of action requires an "admission" of liability. A mere acknowledgement that a claim has been asserted or that a cause of action may exist is not an admission of liability.

The payments for medical records and reports in this case were not sufficient to constitute confirmation of the cause of action. As the payments did not indemnify Ryan for the damages he suffered in the accident the Court held that they could not be considered payments in respect of

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the "cause of action". This finding was contrary to (and overrules) appellate decisions in various provinces.

Similarly, the letters exchanged between Ryan's counsel and the insurer did not restart the limitation clock. Rather, they were "*obviously only requests for information and part of the normal investigation process*", which investigations must be encouraged in order to achieve early settlements.

The Court's finding stressed that the purpose behind payments and correspondence is critical in determining whether there has been a confirmation; if the insurer is intending by words or conduct to admit liability then there will be a confirmation of the cause of action. However, the Court recognized that most dealings between a claimant and an insurer prior to the commencement of litigation are for investigative purposes and to promote early resolution and are not dependent on an acknowledgement of liability.

PRACTICAL IMPACT FOR THE INSURANCE INDUSTRY

Past judicial pronouncements on the particular statements or actions necessary to constitute "confirmation" of a cause of action have been inconsistent. Statements as vague as "I would appreciate hearing from you so that we can arrange an appointment to discuss settlement of this claim" have been considered sufficient to constitute confirmation. This judgment should significantly raise the "confirmation" threshold.

However, to be safe and avoid disputes we continue to recommend that pre-litigation communications:

- are specified as being on a "without prejudice" basis;
- include a statement that "nothing herein shall be construed as either an admission of liability on the part of the insured or a waiver or extension of any applicable limitation period"; and
- never include the word "settlement" or any variation thereof; rather use phrases such as "without admitting liability, we offer $__ in compromise of your client's claim for damages".

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