

INSURANCE ISSUES: *Risk Management*

A publication of the Law Society of British Columbia



Lawyers
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Fund

Smooth Sailing to Settlement: Avoiding Common Mistakes

Each year, the Lawyers Insurance Fund receives numerous calls and reports from lawyers concerned about problems arising out of their settlement efforts on a particular file. Our bird's eye view of these settlement issues, which can occur across a broad spectrum of files, lets us see how the problems arise, and how they might be avoided.

In this newsletter, we start with examples from our claim files that illustrate eight settlement risk areas for lawyers. We then share insights from our unique perspective to give you the risk management tips you need for smooth sailing in those settlement waters.



Eight trouble areas

Reasons	Claim file examples
1. Ambiguity in terms of offer	<p>» ICBC offered policy limits to settle an MVA claim. Counsel accepted the offer, intending that the Part 7 benefits would remain open. ICBC sought to enforce the settlement on the basis that the Part 7 (no-fault) benefits were released.</p> <p>» A lawyer offered to accept a recreational property in settlement of a claim, but failed to state that it had to be free of encumbrances. The other side accepted, and then took the position that the settlement required the lawyer's client to take the property subject to encumbrances.</p> <p>» A lawyer was defending claims arising out of two MVAs involving the same plaintiff, and intended to settle both claims at once. The formal offer was unclear as to whether it applied to one or both accidents, and the plaintiff accepted on the basis that it pertained to one accident only.</p>
2. Missteps in accepting an offer	<p>» A lawyer who acted for a client in a dispute with a neighbour was instructed to accept a formal offer. However, the lawyer's enquiries before acceptance resulted in the other lawyer revoking the offer. As no settlement was reached, the litigation continued.</p> <p>» In the context of settlement discussions, a lawyer inadvertently made a counter-offer that caused the Canada Revenue Agency to take its best offer off the table. As a result, the client was obligated to make a payment to the CRA, rather than receive a credit.</p>
3. Inadequate attention to details	<p>» In making an offer to settle a shareholder dispute, a lawyer mistakenly referenced the incorrect non-compete provision. The client may now be forced to comply with a much broader non-compete provision.</p> <p>» A lawyer inadvertently referred to the wrong defendant in a settlement offer. Despite acknowledging that it was a misnomer, the Court denied an award of double costs.</p>
4. Failing to address pre-conditions or subjects	<p>» In a family law proceeding, the wife's lawyer made a settlement offer that entailed payment by the wife to her husband for the family home. Although the wife was not able to obtain financing, the husband enforced the settlement because the offer was not made subject to financing.</p>

Our top six risk management tips

1. Know what you want and then use clear and unambiguous language when drafting offers

- Clearly identify the issues and claims your offer is intended to settle. Have you included everything that needs to be addressed? Is your offer intended to apply to only one action or part of an action? If you are acting on an MVA claim, consider what you intend regarding Part 7 (no-fault) benefits. Is the offer meant to address Part 7 benefits or do you want to explicitly leave Part 7 benefits open?
- If there are multiple causes of action and/or proceedings relating to one MVA, or a bundle of issues, consider attaching your draft release to your settlement offer so there can be no mistake as to what you are trying to settle. If your form of release is a condition of settlement, make that clear in your offer and consider attaching the release to avoid any potential ambiguity.
- Review your offer as a whole. A settlement dispute in a family matter recently went to the BC Court of Appeal. Counsel for the wife had made a settlement offer that was internally inconsistent. Counsel for the husband purported to accept the offer on terms unintended by the wife. The acceptance was enforced by the Supreme Court. On appeal, the court held on the whole of the evidence, including the way in which the husband's counsel had purported to accept the offer by clarifying terms, there was no settlement. The litigation may have been avoided had the original offer been clear.
- When using precedents, take extra care.
- Review and think through each provision carefully to ensure that it is applicable to your matter.
- Consider the mechanics of the offer and whether it should address how and when the money is to be paid out.
- Determine if your offer is conditional. If it is subject to your client obtaining financing, passage of a special resolution of a strata, or any other conditions, ensure that they are clearly stated and properly express your client's requirements. If the subject or condition is time sensitive, consider whether it is in your client's interests to include an expiration date by which the subject or condition must be fulfilled.
- Know the law related to your offer to settle. With respect to claims involving the

Ministry of Health’s right of subrogation, consider clearly excluding the *Health Care Costs Recovery Act* from your offer. If you are settling an out-of-province claim, bear in mind that the rules in other provinces have particular requirements – do not assume that they are identical to ours.

- Before the offer goes out, review the pleadings, documents and your instructions. Go over the terms of settlement with your client and make sure they reflect what the client is seeking. Double check that you have addressed all of your client’s wishes and instructions, all the applicable legal issues, and referenced

all appropriate rules. Double-check all your references to ensure that you have incorporated the correct documents and named the parties accurately.

2. Be clear and unambiguous when accepting an offer

- When your client instructs you to accept a formal offer, do so clearly, unequivocally, promptly and – whenever possible – in writing. Be careful not to introduce any new terms into the deal that could be interpreted as a counter-offer, giving the other side an escape hatch.

- If you need to make your acceptance subject to any events or actions, be sure to advise your client that a conditional acceptance may give the other side the opportunity to resile.
- Be mindful that, depending on the circumstances, your attempts to clarify the terms of the deal may be taken as evidence that the parties are not *ad idem*. In the appeal matter discussed in the first tip, the husband’s counsel tried to clarify some of the settlement terms when he purported to accept the wife’s offer. Considering this evidence with the terms of the ambiguous offer, the Court of Appeal decided that a reasonable person would

<p>5. Failing to appreciate requirements and implications of formal offers to settle</p>	<p>» A lawyer for the defendant omitted to include in a formal offer to settle certain wording specifically prescribed by the Supreme Court Civil Rules. The judge decided that the omission precluded an award of double costs.</p> <p>» In the context of an alleged malicious prosecution of an MVA matter, the defence lawyer made a formal offer for a monetary amount. The lawyer then received instructions to make a further offer for a waiver of costs. The plaintiff accepted the first, formal offer, and argued that the second did not have the effect of revoking the first.</p>
<p>6. Failing to document revocation of offer</p>	<p>» A lawyer verbally revoked his client’s formal offer to settle but did not document the revocation. The other party subsequently purported to accept the formal offer. In the intervening period, the claim had substantially increased in value.</p> <p>» A lawyer made a formal offer to settle. The lawyer subsequently made a significantly higher informal offer, but failed to revoke the formal offer. Opposing counsel purported to accept the formal offer.</p>
<p>7. Communication breakdowns</p>	<p>» A lawyer acted as co-counsel for a plaintiff who alleged nervous shock from witnessing his co-worker’s accident. The defendant made a formal offer to waive costs for a dismissal of the claim. At trial, the court found that the claimant’s injuries were not foreseeable, and dismissed the action. The plaintiff, now exposed to significant costs, alleged that the lawyer failed to advise of the potential cost implications of not accepting a formal offer to settle.</p> <p>» On the eve of a defendant’s summary trial application, the defendant offered to settle the claim. The offer was not accepted. The matter proceeded and the defendant was successful. The plaintiff alleged that the lawyer failed to advise her of the offer and claimed that she would have accepted the offer had she known about it.</p> <p>» A defendant made a very favourable formal offer to settle, but the plaintiff’s lawyer delayed in seeking instructions. As a result, the plaintiff was required to pay defence costs and disbursements for the period between the date of offer and acceptance.</p>
<p>8. Forgetting about an outstanding offer</p>	<p>» A creditor’s lawyer made a formal offer to settle that she later forgot about. When the claim subsequently increased in value, the debtor purported to accept the formal offer as it had not been withdrawn.</p> <p>» Plaintiff’s counsel overlooked revoking an offer to settle two related MVA claims when it became apparent that the plaintiff’s injuries were more severe than initially assessed. Defence counsel purported to accept the outstanding offer.</p> <p>» Counsel for the husband in a family dispute accepted an offer that had been outstanding for months. The wife alleged that she had advised her lawyer that she did not want to settle on those terms and had thought that the offer was no longer on the table.</p>

not have concluded that the parties had reached a binding settlement.

- Bear in mind that your client cannot, by law, take advantage of a mistake made by the other side. You cannot accept an offer that you know, or your client knows, has been made in error: *Vickaryous v. Vickaryous*, 2001 BCSC 930 and 256593 B.C. Ltd. v. 456795 B.C. Ltd. 1999 BCCA 137. See also rule 2.1-4(c) of the *Code of Professional Conduct for BC*. If you find yourself in this situation, as either the lawyer who made the mistake or the lawyer who wishes to accept an offer that you know or suspect was made in error, call us right away.

3. Use extra care when drafting formal offers to settle

- We all know it is hard to predict with any certainty whether the costs consequences of a formal offer will be enforced after trial. To improve your chances of success, adhere to the technical requirements of the Supreme Court Civil Rules and the Supreme Court Family Rules when making an offer. Ensure you have included the required wording and have fulfilled the service requirements set out in the Rules.
- Consider your offer in the context of the court's process and the factors it will take into account in making an award of costs, as set out in Rule 9-1 of the Supreme Court Civil Rules. You can better your chances of success by investing time and thought when formulating an offer to settle.
- Turn your mind to whether you want to negotiate informally while maintaining a formal offer to settle. Consider including in the offer an explicit statement that subsequent informal offers are not intended to replace any formal offers to settle.

- Remember that clear and unambiguous language is required to withdraw a formal offer. It may be appropriate to stipulate in the offer how it can be withdrawn, and whether it can only be withdrawn in writing.

4. Revoking the offer? Make it clear

- When you are instructed to revoke an offer, make it your practice to do so in writing. By making your intentions clear, you will avoid the uncertainty and stress caused by disputes between counsel as to whether revocation was effected or merely threatened.

5. Give your clients the advice they need, and confirm it in writing

- Paper your file. When clients are disappointed with a judgment, it is easy for them to honestly believe that they would have settled had they only understood the potential consequences of proceeding to trial. You may have thoroughly advised your client about costs consequences, but often there is nothing or very little in the file to challenge the client's evidence to the contrary. We can defend you much more effectively if you can point to correspondence in your file that supports your evidence.
- Explain clearly to your client the potential cost consequences of a formal offer to settle or a loss at trial. Prepare a standard handout detailing those consequences that you can give to clients. Ensure your client understands the length of time available to accept an offer. The client may assume that an offer has expired simply because of the passage of time.
- Keep notes of your advice and your client's instructions. Even a brief note is

Reminder to lawyers

If a mistake is made in spite of the efforts of you and your assistants to practise safely, remember that you must report it to us immediately. That's because you are obliged to give us immediate written notice if you become aware of a mistake or someone suggests you made one, or you face any circumstance that could reasonably be expected to lead to a claim, however unmeritorious.
Report a claim or potential claim

better than none at all. Confirm the advice you have given and your client's instructions in writing whenever possible.

- Handle difficult clients carefully. Be cautious with emotionally fragile clients and very angry clients. These are clients for whom you should be particularly clear in giving legal advice, and particularly careful in documenting their instructions.

6. Don't forget about outstanding offers

- Consider including a built-in expiry date to any offer that you make. Allow a reasonable time for the other side to review the offer, and diarize the matter before the expiry date so that you can consider renewal.
- If your offer is open-ended, ensure that you diarize a date to reassess its appropriateness as the litigation proceeds.
- Set up reminders so that you don't forget about outstanding offers available to your client. Sometimes, for reasons known only to you and your client, your client's position changes and it becomes appropriate to accept the outstanding offer without delay.

