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# Releasing the Unknown: Court of Appeal Re-Affirms Ability to Release Unknown Claims

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When a civil action settles, the plaintiff, as the suing party, normally provides a signed document known as a Full and Final Release to the defendant. The document serves as written confirmation that the claim has been settled in its entirety, and that the plaintiff may not sue the defendant again later for the same events. Where a defendant counterclaims against the plaintiff, or in other more unique circumstances, the parties will exchange a Mutual Full and Final Release, whereby both parties agree to give up their rights to bring other claims or continue any claim against one another.

An interesting topic that has evolved in past cases is the extent or scope of what claims may be released. Many releases identify both "known" and "unknown" claims. Consider a medical malpractice claim against a doctor who made an error during a surgery that led to pain and discomfort. The pain and discomfort is the "known claim". If that claim is settled, and several years later, the patient discovers that during the same surgery, the doctor inadvertently infected him or her with a serious disease, the latter would be an example of an "unknown claim" at the time of the settlement.

Generally the law has been that parties can release unknown claims, but the courts have required very clear language in order to conclude that the releasor intended to release claims of which it was unaware and could not have anticipated. The Court of Appeal recently reviewed these issues in its decision in *Biancaniello v DMCT LLP*, in the context of flawed accounting advice that gave rise to tax liabilities years down the road. The facts of the case are as follows.

DMCT performed accounting work for Prinova for several years and billed for services on three separate matters, one of which was a "butterfly transaction" (whereby shareholders go their

separate ways, each keeping some of the assets of the corporation without triggering a tax liability on disposition). Prinova objected to paying the fees, claiming that it received little value in exchange, and that it incurred damages as a result of some of the advice it was given. DMCT sued for its fees. The parties settled the dispute and a release was signed in 2008. In 2011 Prinova learned that instead of being tax-free, the butterfly transaction could be subject to an income tax liability of over $1 million. Prinova spent over $250,000 on professional fees to get an order of the court rescinding (undoing) the butterfly transaction. Prinova then sued DMCT seeking an order setting aside the 2008 release and damages.

DMCT brought a motion for summary judgment to dismiss Prinova's action. The motion judge dismissed DMCT's motion, finding that the release did not bar Prinova's claim, since the wording referred to claims "existing to the present time". She found that the negligence of DMCT only came to light in 2011. DMCT's appeal to the Divisional Court was dismissed. That court held that a dispute that had not yet emerged could not be absorbed by the words of a general release, and that clear and unequivocal language would have had to have been used to signal an intention to bar unknown claims. At the time of signing the release, Prinova was unaware that DMCT's advice on the butterfly transaction was negligent, and accordingly it did not know it had a claim.

Interestingly, in the *Biancaniello* case, the release actually *failed* to include for the release of unknown claims. Instead, the Court of Appeal found that it was good enough that the release was drafted in a way that it released all claims *arising from the professional services rendered* during the material time. The release was to "wipe the slate clean" in respect of the dispute. The language of the release was found to be specific and understandable. All claims arising from the services provided were included unless specifically *excluded.* Had Prinova wished to exclude claims that it might later discover arising from the work performed on the butterfly transaction, it should have bargained for that specific exclusion. Justice Feldman, writing for a unanimous Court of Appeal, even went so far as to point out: "the fact that the claim was not discovered does not mean that it did not exist, nor that it was not discoverable. In fact, it did exist, but came to light only upon being discovered by other accountants four years later". The Court of Appeal overturned the lower courts' decisions, and granted summary judgment to DMCT dismissing the claim against it.

For parties engaged in litigation, there are a couple of important take-aways from the *Biancaniello* decision. For a suing plaintiff who is settling its claim, one should assume that all claims, whether known or unknown, are being released. Ensure satisfaction with the settlement as a global resolution, on the understanding that a related claim that may come to light at a later date is likely to be barred by the release. If there is a possibility of an additional claim that may need to be brought at a later stage, include a specific carve-out or exclusion for it in the release, even if the claim appears factually distinct from the claim being settled. Alternatively, investigate that possible claim to determine whether it should be brought now, and if so, then any settlement terms can take into account the new claim.

A defendant who is settling a claim against it may wish to insist that specific language be included in the release to address unknown claims, in order to fully protect its interests (even though the *Biancaniello* decision suggests that this may not be strictly necessary).

With *Biancaniello,* the Court of Appeal has signalled some deference to litigating parties to structure the settlement as they see fit.  A release is a form of contract, which means the courts will look to the intentions of the parties when interpreting the release.  However, it will be interesting to see how the decision is applied going forward, especially in cases with very sympathetic plaintiffs, such as victims of medical malpractice or other personal injury claimants who discover a further injury years after settling their initial claim.