COMMONWEALTH OF KENTUCKY
DEPARTMENT OF INSURANCE
FRANKFORT, KENTUCKY

ADVISORY OPINION
2015-02

The following Advisory Opinion is to advise the reader of the current position of the Kentucky Department of Insurance ("the Department") on the specified issue. The Advisory Opinion is not legally binding on either the office or the reader.

TO: ALL INSURANCE COMPANIES AUTHORIZED TO TRANSACT BUSINESS IN THE COMMONWEALTH OF KENTUCKY

FROM: SHARON P. CLARK, COMMISSIONER
KENTUCKY DEPARTMENT OF INSURANCE

RE: ATTEMPT AT FORCED SETTLEMENT OF BASIC REPARATION BENEFITS

DATE: MARCH 20, 2015

It has recently come to the Commissioner's attention that some insurers are negotiating settlements of Bodily Injury ("BI") claims without referencing Basic Reparation Benefit Coverage ("BRB") and then drafting releases containing language releasing the insurer from any further obligation to satisfy BRB claims. When questioned on this issue, the insurer is withholding the BI settlement money until future BRB is waived. The insurers are apparently relying on court decisions stating that KRS 304.12, the Unfair Settlement Practices Act, does not apply to the Motor Vehicle Reparations Act (KRS 304.39), and feel safe from bad faith litigation.

However, application of KRS 304.12 aside, there are statutes, regulations and case law that do apply to this situation. KRS 304.39-010(3), the policy and purpose statement for the Motor Vehicle Reparations Act (MVRA), explains that one of the major reasons for drafting the MVRA was to "encourage prompt medical treatment and rehabilitation of the motor vehicle accident victim by providing for prompt payment of needed medical care and rehabilitation." Therefore the practice of offering a bodily injury BI settlement to a claimant only if the claimant will give up his rights to any further BRB benefits undermines the purpose of the MVRA, and is against public policy.

Furthermore, the vast majority of bodily injury ("BI") settlements involve third parties. By requiring that the injured person give up any claim to BRB, the insurer insists that the injured person forego the rights to a benefit *the injured person paid for and is provided by the injured person's own insurer.* This has the effect of forestalling subrogation by the injured person's insurance company through the Kentucky Insurance Arbitration Association. Such action has nothing to do with the injured party's case, or the compensation the at-fault party's insurer is legally obligated to pay. Subrogation rights for BRB payments belong to the BRB obligor (the injured party's insurer). Furthermore, pursuant to KRS 304.39-140(3) collection of damages from the liability of a second person, a self-insurer or an obligated government shall have priority over the rights of the subrogee for its reimbursement of BRB. Liability coverage is all that should be at issue in a settlement of a BI case. The Department discourages efforts to abrogate an individual's ability to get medical treatment by employing such a practice. This is particularly troubling in light of the fact that health insurance will not pay for treatment where other insurance is, or should be, available.

Additionally, contract case law is clear that if there exists no "meeting of the minds," a settlement document or any other contract could be declared invalid. Breach of contract law would apply in this situation, especially if the insurer inserts this clause into a release document when no such provision had been agreed upon by the parties. This could be construed as a potential violation of the Kentucky Insurance Code, especially in the case of an unrepresented party who trusts that the language in the release reflects the settlement agreement.

At the very least this behavior is against public policy and could trigger a review of the insurer's actions by the Department of Insurance in order to evaluate any potential violations of the Kentucky.

/s/ Sharon P. Clark
Sharon P. Clark, Commissioner
Kentucky Department of Insurance
On this 20th day of March, 2015