

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of May 5 to May10, 2008

BEWARE: SABS Settlements based on 'Law of Contract'

Edna Klimitz and Allstate Insurance Company of Canada, FSCO A07-001142, April 18, 2008, Arbitrator Susan Sapin

November 7, 2003 collision. Insured applied for non-earner benefit. Insurer denied and matter proceeded to mediation. During a mediation held on multiple dates including January 29, 2007 and March 5, 2007, the insured indicated that the insurer offered to settle all non-earner and future medical benefit claims on a Full and Final basis. In May 2007, and following the Report of Mediator, the insured accepted the offer. The insurer responded by indicating the offer was withdrawn and offered to settle the insured's claims for an amount approximately 1/3 of the offer made during the mediation. The Arbitrator's Decision on a Preliminary Issue was to deal with whether there was a valid 'offer and acceptance' by the insurer and insured, respectively.

The Arbitrator noted that there were significant differences on key points between the insured and insurer's account of the events. The insured's representative alleged an offer on January 29, 2007. The insurer's representative alleged little more happened at the January 29, 2007 mediation other than rescheduling the mediation to March 5, 2007. The insured's representative advised the insurer of the acceptance of the January 29, 2007 offer in May 2007. Shortly afterwards, the insured was informed that the insurer's offer was withdrawn.

Arbitrator Sapin noted that principles of contract law indicate that offers not specified to a time limit, remain open for a reasonable period of time. And while a 'reasonable time' can vary with the circumstances, the time frame in this matter was still within that 'reasonable' range. She noted that there was no communication by the insurer to revoke, rescind or withdraw the offer. She also concluded that the Report of Mediator indicating that the last offer was "0" was not determinative. She reasoned that the function of the Report of Mediator was not to summarize the parties' position on settlement, but to document steps taken in the SABS process. She felt there was a valid and enforceable contract law type of agreement on settlement.

Implications:

The essential facts in this case were not agreed upon by the insured and insurer, leaving the Arbitrator to make a 'judgment call' based on contract law principles. While the use of this decision may be restricted to mediation-related disputes at FSCO, it is one which initially catches the insurance industry and legal profession

a little *off guard*. The insurance/lawyer tendency is to restrict mediation discussions solely to the mediation itself. This decision raises the possibility that the role and limits of mediation (and discussions within mediation) may extend beyond that boundary. For insurers, insureds, and their representatives this will likely mean that, to protect expectations, insurers and insureds will have to expressly limit settlement discussions at a mediation to a specified timeline – such as the receipt of the Report of Mediator.

Accessing Arbitration Decisions

If you would like to read the arbitration decisions for yourself, they can be found at <http://www.fSCO.ca/english/insurance/auto/drs/decisions/default.asp>. Please contact FSCO at 1-800-517-2332 ext. 7202 to obtain a password to gain access to the site.

