

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of August 25-29, 2008

Tort medical reports not necessarily producible in arbitration proceedings

***Pellerine v. Dominion of Canada General Insurance Company.*, FSCO A07-002404, July 24, 2008 – Arbitrator Blackman**

MVC July 7, 2002. The insurer brought a motion to obtain copies of certain documents. Included in the request for documents was a “copy of the report by Dr. Rajka Soric discussed in the report of Dr. Neville Doxey.” The insured objected to the production of Dr. Soric’s report since it was obtained in the context of mandatory productions in a related tort claim.

The report could not be produced in the arbitration proceedings as a result of the deemed undertaking rule in the *Rules of Civil Procedure* governing the tort action. Rule 30.1.01(3) states:

All parties and their counsel are deemed to undertake not to use the evidence or information to which the rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

The deemed undertaking rule does not prevent the production of arbitration materials in a tort claim, however, the *Rules of Civil Procedure* do not apply to arbitration proceedings. Since the *Dispute Resolution Practice Code* does not address the issue, reference was made to common law.

The insured did not waive privilege over the report by providing it to Dr. Doxey. The deemed undertaking rule is an obligation “owed to the court for the benefit of the parties, not one which is owed simply to the parties.” Without the court’s consent or release of Dr. Soric’s report an arbitrator does not have the jurisdiction to order production.

Implications:

It would be prudent to ensure that documents produced in a tort action are not inadvertently, or otherwise, provided to assessors in an accident benefits claim. It arguably provides an unfair advantage to an insured because the insurer would not have access to the same report. This may impact the weight given to the AB report at arbitration.

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