

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of September 15 to 19, 2008

Limitation period continues to run despite insurer's invitation to provide further information for self-employed insured's IRB calculation

Markvoski v Pilot Insurance Company, FSCO A07-002340, August 28, 2008, Arbitrator Robert Kominar

July 18, 2002 collision. Insured was a self-employed denturist. Insurer retained an accounting firm to calculate IRB. Accountants requested financial documentation from insured. In May 2003, accountants provided a report calculating IRB on the basis of documentation received, and invited insured to provide further information that might change the opinion. Insured did not provide further information. In September 2003, insurer sent explanation of benefits (OCF-9) denying IRB and outlining right to access the dispute resolution process. Application for mediation was made October 2005; mediation was conducted in February 2005. Application for arbitration was filed October 2006 – more than 3 years post-denial.

Insured argued that the OCF-9 of September 2003 did not constitute a firm and clear refusal to pay benefits, and thus the limitation period did not begin to run from that date. Insured pointed to correspondence between the adjuster and insured noting insured was attempting to obtain updated financial information to support claim for IRB. Adjuster's correspondence stated that if information was provided accountants would review it, but also imposed a timeline on provision of the information. Insured argued the continuing discussion of IRB entitlement made the prior denial unclear and ambiguous, and insurer was estopped from relying on the limitation period.

Arbitrator rejected insured's argument which required an inference that, if insurer intends to clearly refuse to pay, it must also stop communicating with insured about the issue. The inference was inconsistent with the spirit and intention of the dispute resolution process.

Implications:

Once a clear denial has been provided, it is dangerous to rely upon representations by the insurer suggesting otherwise. The insurer is obliged to fairly adjust the claim, and ongoing discussions can be expected. While an estoppel situation could be created if an insurer specifically waives a limitation period or encourages insured not to be concerned about time limits, this would have to be very clear in the face of a expressed denial and invitation to invoke



the dispute resolution process. The safest assumption is that the limitation period continues to run.

Accessing Arbitration Decisions

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Please contact FSCO at 1-800-517-2332 ext. 7202 to obtain a password to gain access to the site.