

## **WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE**

For the week of November 3-8, 2008

### **The “Special Award”: Not So Special For Insurers**

***James Johnson and AXA Insurance (Canada) , FSCO A04-002670, October 23, 2008 – Arbitrator Robert Bujold***

MVC December 12, 2000. Arbitrator Bujold had determined at arbitration in 2006 and early 2007 that the insured, who was involved in one or more businesses, was eligible to receive a benefit amount under the SABS that the insurer had not paid. He also felt that the insurer had acted unreasonably in failing to pay appropriate IRB amounts to the insured. At issue in this hearing were the calculation of the maximum “Special Award” and the level of Special Award to pay to the insured.

The Arbitrator noted that section 282(10) of the Insurance Act (“Act”) provides a potentially generous “Special Award” payable by an insurer where it has acted unreasonably in withholding or delaying payments. The Act makes provision for a second payment in addition to statutory benefits: the payment of an additional lump sum, plus interest at 2% per month, compounded monthly, calculated from the time the benefit first became payable. In the case of the insured, Mr. Johnson, the potential Special Award appears to have a likely start date of October 21, 2003. The maximum permissible award payable by the insurer to an insured was **\$754,139.36**.

But, the maximum award is not payable in all cases of unreasonable conduct. Factors to be considered include the failure of an insurer to advise an insured that eligible business losses could increase an IRB, unexplained delays in payment, and insurer conduct in relationship to its own accountants, amongst other factors. In this case, Arbitrator Bujold ordered the insured pay a Special Award of **\$40,000.00** to the insured.

#### **Implication:**

Self-employed (“key-person”) individuals and the businesses they operate are particularly vulnerable to insurers that often make excessive demands before contemplating payments of IRBs and other benefits. These excessive demands place unfair burdens on the key-person. The time (and effort) expended to attempt to fulfill these unfair burdens are used by insurers to retain benefit monies.

However, this insurer delay places the very financial viability of some key-person businesses at risk forcing insureds, among other things, to seek financial counseling benefits under section 15(5) (d) of the SABS. Unfortunately, by the time that benefit is realized, the damage has been done. The Special Award is one method of punishing insurers that choose to act unreasonably. It would appear that at this time only modest Special Awards are contemplated and the full force of the Act is not being applied to protect insureds.

### **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.

