

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of November 10 to 14, 2008

Insurer's brazen discrimination not enough to warrant a Special Award

Elaiathamby v. State Farm Mutual Automobile Insurance Company, FSCO A07-000961, October 21, 2008, Arbitrator Fred Sampliner

MVC January 15, 2006. The insurer refused to pay accident benefits because it suspected the collision was fraudulent. Its reasons to doubt the veracity of the claim included that both vehicles were recently refurbished salvage vehicles and the insured took out property damage insurance on such an old vehicle. Furthermore, following the alleged collision the vehicles were towed to a local Collision Reporting Centre that was under investigation for allegedly staging accidents. Moreover, this was the insured's fourth claim in eleven years. Finally, the insurer was suspicious because the insured erred in the precise time and location of the accident and both drivers and all passengers were from the same ethnic background.

No criminal charges were laid and there was no evidence that the insured or others involved in the collision ever engaged in fraudulent activities. There was a satisfactory explanation for having property insurance on the vehicle and the insured's mistaken description of the time and place of the accident was not deceptive. There was *prima facie* evidence that the collision occurred and the insurer failed to rebut this evidence. Neither the insured's nor the insurer's competing engineering reports were reliable and therefore did not assist in a determination of the whether the collision occurred.

A special award was sought on two grounds: first, the insurer failed to consider all the evidence and second, it discriminated against the insured on the basis of race throughout the life of the claim. On the first of these issues, the insurer indicated that it had conflicting evidence about the accident from the towing companies early in the claim and yet it did not revisit the issue when the insurer provided telephone records to demonstrate consistency with other evidence. Finally, the insurer's adjuster admitted that he considered common race and ethnicity suspicious during the initial investigation. The arbitrator found that the high burden of proof placed on the insured combined with "*unsubstantiated accusations and explicit racial considerations*" indicated the claim was "*tainted by brazen discrimination since inception.*" Despite this finding, a Special Award was not granted because the insurer reasonably relied upon its expert engineering opinion. While human rights violations must be given serious consideration when deciding whether a special award is warranted, violations of the *Human Rights Code* alone are not compensable under the *Insurance Act* and any violation must be a significant contributing factor to the insurer's decision making.

Implications & Commentary:

We must conclude that the test for establishing whether discriminatory attitudes significantly contributes to an adjuster's decision making must be quite a difficult one for insured's to meet. It was not met in this case even though it was found that there was "*explicit racial consideration*" and that the adjustment of the claim was "*tainted by brazen discrimination since inception.*"

While it is true that there are other venues for addressing human rights violations, it does not detract from the insurer's duty to adjust claims in the utmost of good faith. The Insurance Act allows for the Superintendent to investigate whether an insurer is engaged in an unfair or deceptive act as set out in the Act and regulations. This would include an investigation for "any conduct resulting in unreasonable delay in, or resistance to, the fair adjustment and settlement of claims." The Act outlines investigation and remedial powers, including imposing significant fines on offending parties, but this does not provide any compensation directly to an affected insured. A Special Award provides compensation directly to the person who has been discriminated against.

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.