

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

For the week of November 17 to 21, 2008

### Insurer must disclose Reserve Information

#### ***Uka v. Aviva Canada Inc.*, FSCO A06-0001692, Oct. 31, 2008, Arb. Ashby**

MVC October 27, 2005. Insured commenced arbitration regarding various benefits terminated or denied by the insurer. On a preliminary issue, the insured requested disclosure of insurer's reserve amounts and the process by which they were set. Insured argued that the reserve information was necessary to assist in both determining whether the insurer adjusted the claim in bad faith and to evaluate the amount of a special award. Insurer argued that the insured failed to establish the relevance of such disclosure and that the prejudice caused to the insurer would outweigh the need for disclosure. The insurer suggested that the reserves by their nature are misleading because they also reflect, *inter alia*, potential legal costs, the likelihood of success and reinsurance considerations.

Arbitrator explained that if an applicant demonstrates a reasonable possibility that a document in an insurer's file is relevant to the issues at arbitration, that is sufficient to allow an arbitrator to order production of the document, subject to any claim for privilege. In comparing the disclosure of reserve amounts with the required disclosure of the insured's pre-accident medical records, Arbitrator noted:

*... The ambit of production at the pre-hearing stage is necessarily broader than what is required for admission as evidence at the hearing. Thus an applicant's medical records are disclosed routinely up to one year pre-accident. Notwithstanding those records may contain highly sensitive and irrelevant medical information. Reserves in my view are far more relevant to an insured's claim to benefits than the insured's visits to his or her physician for treatment or bronchitis, pneumonia, or far more sensitive and potentially embarrassing maladies. ...*

*Similarly, the disclosure of reserves and the process by which they were set may give insight into how the adjuster viewed the merits of the insured's claim and the supporting documentary and medical information. If such information is inconsistent with the adjuster's denial, termination or withholding of benefits then it would be relevant to the reasonableness with which those decisions were made. As well, the reserve amounts could assist a hearing arbitrator in quantifying the amount of the award to be assessed.*

Arbitrator found that the insured had established a reasonable possibility of the relevance of the reserve information and noted the additional submissions of the

insured regarding medical findings which if accepted might have provided a basis for paying certain benefits although these benefits were terminated or denied. Arbitrator noted that if the adjuster chose to increase reserve amounts at a time proximate to the receipt of those reports then such information would support an inference that the file had been unreasonably adjusted and the insured can only find this out by being provided with the reserve information.

After considering the relevance of the reserve information, Arbitrator considered whether the disclosure should be disallowed on grounds such as privilege, the sensitivity of the information or practicality. Arbitrator reviewed prior jurisprudence and found that although there is a legitimate protected zone of privacy regarding communications with counsel and in litigation, there is no protected zone of privacy for adjusting a first-party insurance file. Arbitrator concluded that Aviva did not provide a rationale pursuant to litigation privilege or solicitor and client privilege for withholding the reserve information and concluded that the reserve information must be disclosed.

### **Implications:**

Where an insured alleges bad faith and claims a special award, reserve amounts and the process by which they were set should be requested from the insurer. They are relevant in considering the reasonableness of the insurer's decision to terminate or deny benefits and can assist the arbitrator in quantifying the amount of the award to be assessed. If the period during which the reserve information is sought relates to the adjustment of the insured's benefits rather than litigation, then there would be no basis for withholding the information.

### **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.