

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of February 16-20, 2009

Avoid Delay in Payment of AB's by Avoiding Priority Disputes with the Fund

Valaukas and Wawanesa Mutual Insurance Company v. Motor Vehicle Accident Claims Fund, FSCO P07–00023 and P07–00021, **February 3, 2009**, **Director's Delegate David Evans**

MVC September 14, 2004. Valaukas was a passenger in an insured vehicle, but he had none of his own. The police report identified Wawanesa as the insurer for the vehicle. Valaukas applied to the Motor Vehicle Accident Claims Fund (“the Fund”) for accident benefits. The application did not identify other available insurance. Valaukas did not attach a copy of the police report. The Fund denied payment on the basis that the application form was incomplete. Valaukas then applied to Wawanesa for accident benefits.

At issue was whether the Fund or Wawanesa was obliged to respond to the application for benefits.

One of the purposes of the priority rule in section 268(2)1 of the *Insurance Act* is to ensure that a person injured in a collision can access accident benefits while insurance companies dispute which is obliged to respond to the application for benefits. Where it is uncertain or unknown which insurer should pay benefits, the insurer that receives the application must pay pending resolution of priority dispute *provided* that there is some basis for an applicant to believe that insurer is obliged to respond. While the threshold for establishing a sufficient nexus between an insured and an insurer's obligation to pay benefits is low, the choice of insurer cannot be completely arbitrary. Where an application is made to the Fund there must be some basis for believing that no other insurance is available to respond.

In this case, there was no evidence that Valaukas tried to obtain the police report or made any inquiry with either driver in the accident about available insurance. Valaukas made no attempt to determine the availability of insurance when he applied to the Fund. For this reason, and because Wawanesa was the only insurer to receive a completed application for accident benefits, Wawanesa was obliged to pay accident benefits.



Implications

The protection afforded to an insured by the priority rules is not absolute. Some effort should be undertaken to determine which insurer ought to respond. In Legate & Associates' experience, the Fund is aggressive in its denial of responsibility to pay, requiring a thorough investigation prior to making application to them.