

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of March 6 to 10, 2009

Notice Provisions and Forfeiture of Benefits in Section 33 Requests

Abdul Zaher Wahidpur and Unifund Assurance Company, FSCO Appeal P-08-00006 , March 25, 2009, Director's Delegate Lawrence Blackman

December 2 and 15, 2005 collisions. This Appeal was of a preliminary issue decision holding that the insured was precluded from receiving income replacement benefits ("IRBs") from February 27, 2006 to June 6, 2007 as a result of section 33 of the *Schedule*.

The insurer issued an OCF-9 on January 9, 2006, advising it is making a production request under section 33 and stating that no benefit is payable for any period during which the insured is non-compliant with the request. There was no mention of collateral benefits such as short-term disability benefits. A second OCF-9 was issued on February 2, 2006, requesting short-term disability pay stubs, but not section 33. A third OCF-9 was issued on May 15, 2006, and requested the disability stubs and mentioned section 33, but failed to advise that the insurer is mandated to pay all amounts that were withheld during non-compliance if the insured provides a reasonable explanation for the delay. A final OCF-9 was issued on December 27, 2006, and requested a release for the disability file, mentioned section 33, and advised that benefits back to February 17, 2006 would not be paid until compliance with the request. The Appellant then responded on January 3, 2007 advising the disability provider had not paid anything.

Delegate Blackman began his analysis by stating that the individual provisions of the *Schedule* are complicated and do not exist in a vacuum without a larger purpose. He acknowledged that one of the main objectives of insurance law is consumer protection and that the insurer's duty to promptly provide the insured with information to assist the person in applying for benefits is a continuing obligation throughout the life of the claim. Consistent with this purpose, insurers must explicitly and unambiguously advise, amongst other things, the specific consequences of non-compliance with section 33 requests, as well as the "reasonable explanation" provision of clause 33(4)(b) of the *Schedule*. This must be done in straightforward and clear language, directed towards an unsophisticated person, regardless of whether the insured is represented.

In this matter, the first three OCF-9's did not include the "reasonable explanation" provision. They read as if non-compliance would lead to forfeiture rather than delay of the benefit. The final OCF-9 did acknowledge delay in the benefit rather than forfeiture, but it was inconsistent with the prior OCF-9's without explanation.

Additionally, the insurer failed to advise, pursuant to section 32(3.1), that the insured's answer of January 3, 2007 was not satisfactory and incomplete. Accordingly, the preclusion of IRB's from February 27, 2006 to June 6, 2007 cannot stand as there was no written proper notice of the consequences of non-compliance, and there was no notice that the information provided in January 2007 was inadequate.

Implications:

This decision outlines some of the complexities involved in the *Schedule* and the onerous burden placed on insurers to clearly advise the insured of his or her rights in clear and straightforward language, directed towards an unsophisticated person, regardless of whether the insured is represented. There are likely to be many instances where the insured has not been properly advised and may be able to resist an insurer's claims of forfeiture or denial of benefits. Consequently, it is always advisable to seek counsel from those experienced in the intricacies of the *Schedule* to address or prevent improper denials by an insurer.

Accessing Arbitration Decisions

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