

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

For the week of July 13 - 17, 2009

### Without 'Reserve' . . . Why Arbitration may be the Route to Go.

**Nancy DeVries and Western Assurance Company; FSCO A08-002046; June 24, 2009; Arbitrator John Wilson**

MVC Feb. 26<sup>th</sup> 2001. Insured applied for and received benefits which the Insurer then terminated. Mediation failed and Insured applied for arbitration requesting a special award. The Insured and the Insurer were unable to agree on the extent of documents to be produced. The Insured wanted to view documents called *reserve documents* – which related to how the Insurer perceives how much money it would have to pay its own insured (also called “first party insured”). The Insurer took the view that the reserve documents were irrelevant and privileged.

Arbitrator Wilson thoroughly reviewed the law, noting that reserve information is an important tool used by an Insurer in assessing the risk on a specific Insured claim. He noted that broader levels of documentary disclosure may be allowed during the pre-hearing process. He was of the view that documents should be disclosed, subject to a proper claim for privilege.

The Arbitrator stated that the simplest way a ‘first party’ insured can identify whether the Insurer acted in good faith was by production of the Insurer’s internal file and other related information. He also noted that Judges and Courts have been cautious and less than consistent in ordering production of reserve information to Insureds. The Arbitrator took steps to distance and differentiate the arbitration ‘*special award*’ remedy, from its law suit cousins ‘*bad faith*’ and ‘*punitive damages*’. Arbitrator Wilson had “*no quams in finding that reserve information “has a semblance of relevance to the matters in issue” and should be produced, subject to any consideration of privilege*”.

### Implications & Commentary

This arbitration decision (along with many others at FSCO) identifies the role that specialized arbitrator experience has in the fair determination of first party Insured claims where Insurer conduct and reasonableness is in issue. Insureds are often at the mercy of Insurers in the management of their claims. It is only through disclosure of the motivations of the Insurer as appears in its reserve related materials that Insurer conduct can be identified and sanctions brought to bear, if required.

Unfortunately, Judges and Courts are generalists. First party auto Insured issues are not as common before the Courts as Arbitrators. Additionally, the never ending insurance industry reforms, and the relative inexperience of Judges and



Courts in dealing with 'special awards' and 'bad faith' leads to an unpredictable and a cautious approach to reserve information and its disclosure and production. This is sometimes to the detriment of significantly injured Insureds whose Insurers have acted unreasonably. Without reserve, I would suggest that Insureds seriously consider the Arbitration route when reserve information ought to be disclosed.

### **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.

If you have questions or comments about this edition of the newsletter, contact Dr. Brian Murphy at Legate & Associates: [bmurphy@legate.ca](mailto:bmurphy@legate.ca).