

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of August 4 to August 7, 2009

Arbitral case law gets on track with the courts on production of Reserves

***Aviva Canada Inc. and Afrim Uka*, FSCO Appeal P-08-00036, July 16, 2009, Director's Delegate David Evans**

Three decisions are being released simultaneously to address the topic of whether reserves are to be produced in the Dispute Resolution Process. *Rama and Allstate Insurance Company*, *Qazi and Security National Insurance Co.* and *Uka and Aviva Canada Inc.*, are all arbitration decisions where the Arbitrators found that reserve information is relevant regarding the insurer's investigation and assessment of a claim and therefore should be produced. All three decisions were appealed with reasons released concurrently. Director's Delegate David Evans' analysis on the issue is outlined in all three appeal decisions.

Director's Delegate David Evans outlined previous arbitral decisions that did not concur with the recent trilogy of decisions, noted above, supporting production of reserve amounts. He described how prior decisions noted concerns such as whether the reserve information can confuse applicants while not expediting their receipt of benefits.

Additionally, it was noted that requests for reserve information have not been granted by the courts. Director's Delegate David Evans noted that the decisions on *Osbourne v. Non-Marine Underwriters* (2003) 68 O.R. (3d) 770 is devoted to the essential immateriality of reserve information. Similarly, the 2007 decision in *Mamaca v. Coseso Insurance Co.* [2007] O.J. No. 1190, and subsequent appeal, asserts that "absent rare and exceptional circumstances" information for setting a reserve is not relevant to an insurer's conduct in assessing and responding to a claim.

Director's Delegate David Evans concluded his analysis by stating "I see no reason why arbitral case law should differ from the courts in this area. I find that providing irrelevant information to an insured does not serve the purpose of consumer protection, or that the provisions of the SABS require their production. He further concluded that there is a "zone of privacy" with respect to this portion of a first party insurer's file and that reserve information is confidential and should generally be protected from disclosure to promote settlement and business efficiency.

Implications:

The likely result of these decisions will be that insurer's carry on business as usual. The creation and use of reserves is an established practice in personal

injury matters that functions almost exclusively as an internal operation conducted by the insurer to allow it to carry-on business in a manageable and predictable fashion. Where the use of reserves can go wrong is where the adjuster begins to adjust the claim based upon the reserve amount, rather than the evidence. For example, if an adjuster receives new medical information that supports future benefits in excess of the reserve amount and decides to deny the claim due to giving greater weight to the assessed reserve amount than the medical evidence, then the insured would have a bad faith claim.

Consider in such a situation whether the amount of the reserve really makes any difference whatsoever. Evidence of a low reserve amount in and of itself does not demonstrate bad faith. In fact, one would often expect a low reserve amount when there is a dispute between the parties as to the extent of the insured's injury. The real issue remains whether the insurer is reasonably assessing the evidence in the matter, whether in regard to a specific benefit entitlement or toward creating a reserve amount. The reserve amount is secondary to the analysis of the evidence, and it is the analysis of the evidence that gives rise to any bad faith argument.

The adjuster should be asked in direct examination or on discovery whether he or she gave any weight to the reserve information when assessing the disputed benefit. If the answer is yes, the relevance of such information has arguably been established and the reserve information should be revealed; however, a peremptory request for reserve information is really just a fishing expedition.

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 Ryan Steiner at Legate & Associates: rsteiner@legate.ca.