

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of October 12 to 16, 2009

Leave For Appeal Granted regarding discovery information relating to the basis of s.42 assessors' opinions.

***Babakar v. Brown* [2009] O.J. No. 2613 (Div. Ct.) per A. Karakatsanis J.**

Master Hawkins ordered that questions relating to the basis of the s. 42 assessor's opinion, prior to the insurer's denial of benefits, were to be answered under Rule 31.06. In this case, the insured commenced an action against the insurer for the benefits denied and for bad faith claims handling.

On Appeal, Lederer J. agreed that the questions were required to be answered but not on the basis of Rule 31.06. The information was not being sought from "experts" by virtue of Rule 31.06 and so Rule 31.06 did not apply. Rather, the information was being sought from "assessors" whose opinions were a proximate or immediate cause of the loss or damage claimed: viz., the denial of the benefits.

On the insurer's motion requesting leave for further appeal, the Divisional Court granted leave because the decision of Lederer J. was open to serious debate and raised a new question of principle regarding the interpretation of Rule 31.06(3) for which there is no settled law.

Comment:

The insurer has a duty to adjust its insured's claims in an open and fair manner. The insurer relies on the opinions of its s.42 assessors' to determine whether an insured is entitled to benefits. It is submitted that questions relating to the basis of any s.42 assessor's opinion seek to evaluate the basis of the insurer's decisions. If an insurer is permitted to refuse to answer these questions, this would allow an insurer to act inconsistently with its obligation to openly and fairly handle claims.

Accordingly, notwithstanding any serious debate or new questions of principle raised regarding the interpretation of Rule 31.06 that may be resolved on this further appeal, it is most interesting that an insurer would continue to refuse to adjust the claim openly and fail to turn its mind to the potential limitations of the opinions of its s.42 assessors', even after litigation has commenced. The insurer's post-litigation actions are still reviewable for bad faith conduct.



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 Sean Mackintosh at Legate & Associates: smackintosh@legate.ca.