

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

For the week of October 26 to 30, 2009

**The CAT DAC came back, we thought it was a goner.**

***Aviva Canada Inc. and Dorothy Shaughnessy, Appeal P07-00036 David Evans***

This Appeal was raised by Aviva to challenge the preliminary issue decision of November 6, 2007, that Aviva was precluded from challenging the catastrophic impairment finding of a Designated Assessment Centre (CAT DAC). Aviva's main ground on this appeal was that the decision of the Court of Appeal in *Liberty Mutual Insurance Co. v. Fernandes* (2006), 82 O.R. (3d) 524, was binding on the Arbitrator. The conclusion in *Fernandes* was that sections 279 to 283 of the Insurance Act provide a meaningful remedy for the insurer and that "it was not the intent of the legislature that an insurer would be forever bound by a CAT DAC that is favourable to the insured, and that the dispute resolution mechanism is only available to an insured who wishes to dispute an unfavourable CAT DAC finding." The Court in *Fernandes* determined that an insurer cannot initiate a court proceeding or Arbitration to challenge a CAT DAC finding, but may challenge a CAT DAC finding using a precise method available through the dispute resolution system.

The FSCO preliminary issue decision, that the insurer is precluded from challenging a CAT DAC finding, was premised on the conclusion that the analysis in *Fernandes*, regarding how an insurer can challenge a CAT DAC through the dispute resolution process, was merely *obiter dicta* and not binding on the Arbitrator. In this FSCO Appeal, Director's Delegate David Evans concluded that the analysis in the Court of Appeal was not *obiter dicta*, and that the Court's conclusions as to how a CAT DAC can be disputed using the dispute resolution process are binding on Arbitrators.

### **Comment:**

The law regarding disputing a CAT DAC had arguably been in a state of confusion since the Arbitration decision of November 6, 2007. It appeared that a CAT DAC could be disputed through the dispute resolution process if the matter was addressed through the court process, but could not be disputed if the matter was addressed through the Arbitration process. This undesirable confusion has been rectified by this FSCO Appeal decision. The state of the law, as outlined in *Fernandes*, is as follows:

If an insurer wishes to dispute the findings of a CAT DAC, it may initiate a mediation pursuant to section 280(1) of the Insurance Act and identify its dispute of the CAT DAC finding as an issue in dispute. The insurer must initiate the

mediation process within 2 years of its refusal to pay benefits in relation to the catastrophic impairment designation. If the issue fails at mediation, the insurer shall pay benefits in accordance with the last offer of settlement it made before the failure. Pay pending resolution provisions are not applicable in this type of dispute. The insured is now faced with the decision to accept the payments made by the insurer in accordance with its last offer of settlement, or to proceed to Arbitration or a court proceeding to obtain a decision regarding the validity of the CAT DAC. This is the only process by which an insurer may challenge a CAT DAC and any deviation from this procedure will preclude the insurer from disputing the CAT DAC finding. An insurer cannot initiate an Arbitration or court proceeding to dispute the CAT DAC. Further, an insurer cannot raise a defence disputing a CAT DAC finding in an Arbitration or court proceeding unless the issue has been mediated by the insurer and identified as an ongoing issue in dispute.

Although an old CAT DAC can come back to haunt an insured, the findings of that CAT DAC can only be disputed if the insurer has followed the very narrow dispute resolution process described above.

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](mailto:rsteiner@legate.ca).