

## HAVING RESERVATIONS ANYONE?

By Joy Stothers

### *Uka and Aviva Canada (FSCO A07-001692, October 31, 2008)*

The Applicant brought a motion for production before the Financial Services Commission of Ontario in a Preliminary Issue heard by Arbitrator Denise Ashby. The Applicant sought production of information regarding setting of reserve amounts for accident benefit payments.

Mr. Uka argued that he required reserve information to support his claim for bad faith or a special award. Aviva argued that the reserve information was not relevant and that to provide reserve information was misleading, as reserves consider non-benefit expenses, such as legal costs. It is unclear from the decision whether Allstate made any submissions of the issue of privilege.

Arbitrator Ashby cited the FSCO appeal decision in *Allstate Insurance Company of Canada and Al-Obaidi* (FSCO P99-00009, May 2, 1999) as the authority in determining the factors to be considered regarding disclosure. The relevance of the documents sought must be weighed against the sensitivity of the information, the practicalities of compliance and the timing of the request. Documents sought are required to be produced if there is a “reasonable possibility” of relevance, similar to the “semblance of relevance” test found in Ontario Courts (see *Bensuro Holdings Inc. v. Avenor Inc.* (2000), 186 D.L.R. (4<sup>th</sup>) 182 (S.J.C.). Arbitrator Ashby quoted from *Nigro and State Farm Mutual Automobile Insurance Company* (FSCO A99-000656m April 28, 2000), which stated:

(I)f an applicant demonstrates a reasonable possibility that a document in an insurer’s file is relevant to the issues at arbitration, that is sufficient to allow an arbitrator to order production of the document, **subject to any claim for privilege.**(emphasis added)

The reserve information at issue in Mr. Uka’s case was found to be reasonably possible of relevance on the basis that “the process by which they were set may give insight into how

the adjuster viewed the merits of the insured's claim and the supporting documentary and medical information. If such information is inconsistent with the adjuster's denial, termination or withholding of benefits then it would be relevant to the reasonableness with which those decisions were made." It seems the Arbitrator was contemplating the test for finding an insurer liable for a special award: if an insurer unreasonably withheld or delayed payment of benefits found in s. 282 (10) of the *Insurance Act*.

The Arbitrator rejected the decisions of the Ontario Superior Court in *Osborne v. Non-Marine Lloyd's of London*, (2003) 68 O.R. 770 (ON S. C. J.) and Master Dash's comments found in *Mamaca (Litigation Guardian of) v. Coseco Insurance Co.* [2007] O.J. No. 1190 (ON S.C.J.) that reserve information is not relevant except in "rare and exceptional circumstances, in concluding that reserve information was producible.

Arbitrator Ashby considered whether or not reserve information was privileged. The Arbitrator quoted with agreement from *Rama and Allstate Insurance Company of Canada* (FSCO A06-002177, October 23, 2007) as follows:

With great respect, I find that it is incumbent on insurers to tell their first-party insureds exactly what they may be entitled to regarding their claims for accident benefits, subject to the express exceptions of solicitor-client or litigation privilege. There is, in a law, a legitimate protected zone of privacy regarding communications with counsel. There is also a legitimate protected zone of privacy regarding litigation. There is no protected zone of privacy for adjusting a first-party insurance file.

Arbitrator Ashby noted that the insurer had not provided a rationale for withholding reserve information either on the basis of privilege or relevance and order Aviva to produce the information sought by the applicant.

An appeal is pending.