

INSURANCE LAW BULLETIN

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Court Rules 1% Interest Applies to Transitional Policies

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Summary

In a decision released on November 6, 2017, the Divisional Court overturned the Director's Delegate at FSCO in holding that 1% interest applies to any overdue SABS payments for accidents occurring on or after September 1, 2010.

FSCO Arbitration¹

The applicant was injured in a motor vehicle accident in October, 2010 and claimed income replacement benefits from State Farm. State Farm conceded that she was entitled to the benefit but continued to dispute the rate of interest payable on the overdue payment. State Farm argued that it was only required to pay 1% per month compounding monthly according to section 51(2) of the 2010 SABS ("New SABS"). The applicant, Ms. Kulaveerasingam, argued that because she had signed her insurance contract under the 1996 SABS ("Old SABS"), 2% was owed pursuant to section 26(2) of the Old SABS.

Sections 2 and 68 of the New SABS govern policies existing at the time the New SABS came into effect, also known as "transitional policies". Section 2 states:

"2(1) Except as otherwise provided, the benefits set out in this Regulation shall be provided under every contract evidenced by a motor vehicle liability policy in respect of accidents occurring on or after September 1, 2010."

Arbitrator Deborah Pressman found this language to be unambiguous and clear. If the accident occurred after September 1, 2010, accident benefits provided were subject to the New SABS with the only exceptions being those outlined in section 68. Section 68

¹ *Kulaveerasingam v State Farm Mutual Automobile Insurance Co.*, [2015] OFSCD No. 26.

deemed specific benefits to be included and available as optional benefits to a claimant with a transitional policy. As this section made no mention of interest, Arbitrator Pressman held that the transition provision was determinative in its intent for the New SABS to apply to all accidents on or after September 1, 2010.

Arbitrator Pressman also concluded that an accident benefits claim materialized on the date of the accident and therefore, the applicant's claim vested on October 29, 2010, after the New SABS came into effect. Finally, she determined that while the applicant's insurance contract created rights and obligations as soon as it was formed, the terms of the policy were not fixed for its entire duration and the legislature was permitted to amend the benefits through section 268 of the *Insurance Act*. Thus, there was no vested right to the 2% interest rate. The applicant appealed.

Appeal to the Director's Delegate²

Director's Delegate Lawrence Blackman saw things differently. He determined that the arbitrator erred in law by looking at s. 2(1) of the New SABS in isolation. Delegate Blackman referred to ss. 3(1.4) of the Old SABS. This subsection stated that an amount that would be paid under the Old SABS after August 21, 2010, but for ss. 3(1.2), shall be paid under the New SABS but in the amount determined under the Old SABS (with similar language existing in ss. 2(2)2 of the New SABS). Notably, ss. 3(1.2) indicated that the interest provisions did not apply after August 31, 2010. However, Delegate Blackman determined that ss. 3(1.2) pertained to procedural provisions rather than 3(1.4) which addressed substantive rights.

Delegate Blackman agreed with the arbitrator that the applicant's rights crystallized at the time of the accident; however, he determined that the applicant maintained a vested right in the interest provisions of her insurance contract and that these rights could only be taken away with a sufficient indication from the legislation. As ss. 3(1.3) of the Old SABS and ss. 2(2)2 of the New SABS specifically spoke to the payable amount of interest, but appeared to conflict with the transitional provision, this ambiguity prevented any clear intention to retrospectively take away an insured person's vested right to 2% interest. As such, it was presumed that the vested right remained, and the applicant was owed 2% interest on the overdue payment. State Farm appealed.

Appeal to Divisional Court³

At Divisional Court, Justice Swinton reversed Delegate Blackman's decision. She held that there was no need to determine whether the right had vested or not. It was clear from the wording of s. 2(1) of the New SABS that the legislature intended it to apply to all accidents on or after September 1, 2010, even if the insured was covered by a policy entered into before that date. The transitional provision under s. 68 of the New SABS explicitly dealt with transitional policies and optional benefits meaning that, apart from the specific benefits referenced in that section, interest on overdue payments was to be determined in accordance with the New SABS. As such, the Delegate's decision was unreasonable, and the court held that 1% interest was payable.

² *Kulaveerasingam v. State Farm Mutual Automobile Insurance Co.*, [2016] OFSCD No. 188.

³ *State Farm Automobile Insurance Co. v. Kulaveerasingam*, 2017 ONSC 6278.

Commentary

The Court found a “serious flaw” in the Delegate’s analysis of the New SABS, noting that ambiguity was discovered where none existed. The Court was befuddled at the Delegate’s pronouncement that the matter before him was similar to *State Farm Mutual Automobile Insurance Company v. Federico*⁴ noting that Mr. Federico’s accident occurred on December 20, 2006, well before the date the New SABS took effect. It is clear from the Divisional Court’s ruling that eligibility under the proper SABS must be determined before commencing an analysis of vested rights.

⁴ 2014 ONSC 109 (Div Court).