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IBAO ADR Submission

The Insurance Brokers Association of Ontario (IBAO) welcomes the opportunity to submit its views to the Ontario Dispute Resolution System Review. A well functioning auto insurance dispute resolution (DR) system is of important interest to IBAO, as it directly affects the six million customers of the more than 12,000 member brokers that we represent. Ontario drivers, our customers, are entitled to a DR system that is timely, fair, and efficient. Injured consumers need timely access to the benefits they have purchased and to the treatment they need.

The Problem

The current DR system is broken. A healthy DR system should, among other things, provide timely access, function to reduce the opportunity for fraud, and remove unnecessary costs from the insurance system. Unfortunately, the current DR system is being gamed by a small minority of bad actors that are taking advantage of a complex and creaky auto insurance regime. Between 2007 and 2011, applications for mediation soared by 155% from 14,281 in 2007 to 36,496 in 2011[1]. This extraordinary increase resulted in a backlog that soared from 2,496 cases in 2007 to 29,305 in 2011, an increase of 1074%. Once identified as a serious problem by Ontario's Auditor General (AG) in his 2011 Annual Report, the Financial Services Commission of Ontario (FSCO) took remedial action to reduce and eventually eliminate the mediation backlog. On August 19, 2013, FSCO announced that the backlog was eliminated.[2] However, applications for arbitration have skyrocketed during this time period. In 2012-2013, 10,510 applications for arbitration were received, a 151% increase from 2010-2011.[3] The spike in applications seemed to coincide with the new set of auto insurance reforms that went into effect on September 1, 2010. Those reforms were designed to tighten the rules to fight the abuse of accident benefits (AB), the claims for which soared in the prior few years.

[1] http://www.fsco.gov.on.ca/en/drs/Pages/mediation-statistics-timelines.aspx
[2] http://www.fsco.gov.on.ca/en/drs/Pages/mediation-backlog-initiatives.aspx
[3] ibid

According to the AG, mediation resolutions were taking up to 12 months,[4] much longer than the 60 day legislated maximum. Interestingly, 80% of all mediation applications during this period originated in the GTA even though only 45% of auto accidents involving injury occurred there. The Auto Insurance Anti-Fraud Task Force identified that a disproportionate amount of fraud and abuse in the system originates in the GTA. Clearly, these backlogs work to deny timely benefits to those who truly need them. Innocent consumers are being needlessly penalized with these delays that are extremely costly, the price being borne by all drivers in Ontario. The current DR system, one can conclude, is exacerbating the fraud and abuse problem, not mitigating it.

Recommendations

The current DR system consists of mandatory mediation to be followed by an arbitration process run by FSCO if mediation fails. Arbitration decisions can be appealed to the courts if they are unsatisfactory for either the plaintiff or defendant. Resolution of a dispute can take a long time even without the recent well documented backlogs.

The DR system was originally designed with the consumer in mind. Well intentioned governments over the years have been rightfully concerned with the perceived or real fact that insurance companies could bring their corporate resources to bear against individuals with far fewer resources. Indeed, IBAO is well aware of instances when insurance companies fail to meet their obligations. One of our fundamental responsibilities is to help our customers get the benefits they need when their insurer is not fulfilling its obligation. However, we believe that the pendulum has swung too far by not having balanced minimum accountabilities on plaintiffs that are using the system. The result is that the DR system is failing everyone by denying timely access to benefits to those who are deserving of them. For example, the cost of the mediation is borne entirely by the company. There is no penalty for those who game the system by scheduling mediations and not showing up. This is a common tactic of delay in order to rack up fees and costs for the insurer as an incentive for them to settle. As part of any change to the system, we recommend that plaintiffs who abuse the system through frivolous activity be penalized financially for this type of abuse.

Another significant issue found in the arbitration system is that arbitrators often issue rulings that are wrong in law, sometimes contrary to the regulatory intent of the SABS. FSCO arbitrators often write that they are bound by past arbitration decisions so that erroneous rulings become entrenched as precedent. The fact is arbitrators are not bound by previous rulings. Indeed, the government and FSCO have the authority to issue policy directives and guidelines to clarify the intent of the SABS and to help the system work. For some reason, they choose not to exercise this authority. For example, when an arbitrator clearly writes a decision that is wrong in law, a directive could be issued to correct the matter going forward. The arbitrators would then be compelled to address the issue openly in a subsequent ruling.

[4] 2011 Annual Report p.47, http://www.auditor.on.ca/en/reports_en/en11/2011ar_en.pdf

With all this discussion in mind, IBAO respectfully submits the following are recommendations for improving the auto insurance DR system in Ontario:

1) Mediation should not be mandatory – either party should have the option to proceed straight to arbitration for accident benefit disputes;
2) Limit what can be mediated to just personal injury treatment determinations and nothing else such as ancillary billing disputes;
3) Mediation cases should be triaged – the system should recognize that all issues in dispute are not of the same degree;
4) Arbitration should be graduated according to injury. For minor injuries and billing disputes, a paper process may be appropriate. For more serious injuries, a more robust arbitration approach would be appropriate;
5) Place penalties for inappropriate behaviour and abuse on both plaintiffs and insurers;
6) Only medical experts should be able to determine medical injuries on either the plaintiff or company side;
7) Only qualified experts should be making medical diagnoses. Arbitrators should be able to draw on medical experts independent of either plaintiff or defense expert determinations. Dispute resolution should then only be used to determine the quantum of compensation;
8) Prescriptive rules for expert testimony – FSCO should prescribe which health professionals can give expert testimony and FSCO should prescribe a Policy Directive for Expert Testimony. The directive should clearly establish the order and matter the specified expert must address by injury type and severity;
9) Use the authority contemplated in the Insurance Act for the government and FSCO to help the DR process function properly by regularly clarifying the intent of the SABS when the intent has clearly been misinterpreted.

Further Options

The following suggestions would also improve the DR process. The catastrophic definition exists in the Ontario auto insurance product to help the most seriously injured in auto accidents. The benefits available for those deemed catastrophically injured are significantly richer - $1,000,000 in AB versus $50,000 - $100,000 for regular AB. The threshold for a catastrophic injury has been lowered over the years by arbitration and court decisions. This has resulted in more and more cases being brought to DR to obtain access to these richer benefits. Currently, the government has before it a more modern, rigorous catastrophic injury definition based on medical evidence. However, it continues to be consulted upon which is having the effect of exacerbating uncertainty as to how insurers are to account for this moving target. This has the effect of keeping overall premiums higher than they otherwise might be.

One option would be to eliminate the catastrophic definition entirely thereby eliminating a significant number of disputes in the DR system. In its place, the government would mandate optional first party AB coverage be sold and advertised by insurers. There would then be no dispute as to whether coverage existed. If one purchased it, they have it. If they didn't buy it, they don't have it. If this approach were adopted, minimum policy liability limits should also be increased from $200,000 to $2,000,000. This change reflects the reality that 94 per cent of consumers already purchase at least $1 million in policy limits. This change is needed to ensure fairness as to which party is paying for at fault costs. If the at fault insurer had sold inadequate limits, the cost would be transferred back to the not-at-fault insurer. This would need to be accompanied by adequate explanation provided by sales intermediaries as to appropriate coverage for individuals.

The government may also want to consider whether the DR system needs to be administered by the government at all. Currently, it resides at FSCO. The government may want to consider privatizing it. The important consideration is that it be run effectively and that it has appropriate government oversight and standards. The government should determine if private DR can be administered more effectively at a lower overall cost. FSCO has experience for contracting out regulated activities. Education for mortgage brokers and agents are run by a number of non-government entities for which the standards are set by FSCO. IBAO would not recommend granting a monopoly provider if it chooses to privatize. Rather, the government should contract with a number of private providers to encourage choice and competition.

Should you have any questions regarding this submission, please contact Randy Carroll, CEO, at rcarroll@ibao.on.ca.