

IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, as amended, section 268 and Regulation 283/95 made thereunder;

AND IN THE MATTER OF THE ARBITRATION ACT, 1991
S.O. 1991, c. 17; as amended;

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

PRIMUM INSURANCE COMPANY

Applicant

- and -

ALLSTATE INSURANCE COMPANY OF CANADA

Respondent

DECISION

COUNSEL:

Jamie R. Pollock for the Applicant

Todd J. McCarthy for the Respondent

ISSUES:

1. Is Primum entitled to proceed with this priority arbitration despite not serving a Notice of Intention to Dispute Between Insurers within 90 days of receiving a completed application for accident benefits?

DECISION:

1. Primum is entitled to proceed with the priority dispute.

HEARING:

The hearing in this matter took place in the city of Toronto in the province of Ontario on February 7, and December 8, 2006.

FACTS & ANALYSIS:

This priority dispute arises out of a motor vehicle accident involving Mr. Edgardo Matias and Mrs. Farah Matias which occurred on April 30, 2002. On that date their motor vehicle came into contact with a motor vehicle owned and driven by Mr. Sarojoni Gokul and insured by Primum Insurance Company (“Primum”). Prior to the accident Mr and Mrs Matias had arranged for motor vehicle liability insurance on their vehicle with Allstate Insurance Company of Canada (“Allstate”). Allstate received an application for accident benefits for both Mr. and Mrs. Matias on or about June 3, 2002. Allstate for reasons that will be set out below, did not pay the accident benefits. On or about June 19, 2002 Primum, through its independent adjuster, received an application from Mr. and Mrs. Matias for accident benefits. Primum commenced payment of accident benefits, and on November 15, 2002 forwarded a Notice of Dispute Between Insurers to Allstate. It would appear that the notice was not received by Allstate until December 13, 2002. Allstate takes the position that Primum failed to give notice within 90 days of receiving the completed application for accident benefits as required by section 3 of Regulation 283/95 and is therefore precluded from proceeding with the arbitration. In response, Primum takes the

position that Allstate received the first completed application for accident benefits and failed to properly respond to it and should therefore be precluded from relying upon the notice issue.

The facts of this case create the following issues;

1. Which party received the first completed application for accident benefits?
2. Did Allstate properly cancel the policy of insurance and was there a sufficient nexus between Allstate and Mr. and Mrs Matias such that they should have provided accident benefits?
3. In the circumstances should Allstate be allowed to rely on Primmum's failure to give notice?

Which Insurer received the first completed application for accident benefits?

Section 2 of Regulation 283/95 requires that the first insurer to receive a completed application for benefits, pay the benefits and then, if it believes that it is not the appropriate insurer, to subsequently dispute it by putting the other insurer on notice and proceeding to a private arbitration.

There is no doubt but that Allstate received the first completed application. It is conceded that applications for both Mr. and Mrs. Matias were received by Allstate on June 3, 2002. Allstate takes the position, however, that the applications were incomplete. When questioned as to what was missing on the application, the representative from Allstate who testified indicated that in regard to Mr. Matias they needed an Employer's Confirmation of Income and disability certificate. In addition, neither application gave details of automobile insurance as requested in part 4 of the application.

Whether the claimant has completed an application for accident benefits is very much dependant upon the facts of each case. It is clear from the case law that in deciding this issue one can look beyond the form itself to see if all the required information has been provided. In addition, what is actually required to be provided may vary from case to case. In this particular case I am satisfied that Allstate had the essence of completed applications very early on. While it is true that the information regarding the Allstate policy was not on the forms, a review of the Allstate file indicates that Allstate had a telephone conversation with Mrs. Matias on May 1, 2002, wherein a considerable amount of information was provided. With regard to Mrs. Matias, Allstate was give information regarding her caregiver status, injuries, number and ages of dependents, the hospital she was treated at etc. With respect to Mr. Matias, Allstate was provided with his employment status, name of employer, injuries, where he had been treated etc. When the adjuster first spoke to Mrs. Matias she was unable to obtain particulars of the Matias's insurance as the computers were down, however, all of the relevant information regarding insurance was obtained the next day.

I am satisfied that by the time that the OCF-1 form was received by Allstate on June 3, 2002, they had sufficient information to constitute a completed application for accident benefits. While Allstate had not yet received the Employer's Confirmation of Employment or disability certificate, it is not necessary to have received these documents to constitute a completed application. They are, in this case, supporting documents.

Primum argues that since Allstate received the first application for accident benefits and it did not pay those benefits, Allstate cannot then rely on the failure by Primum to give Notice of

Intention to Dispute within 90 days to defeat Primmum's claim. In support of this proposition they would upon Liberty Mutual vs. The Commerce Insurance Company, (unreported decision of Arbitrator Jones, dated July 6, 2001, upheld on appeal, [2001] O.J. No. 5479) and Lombard vs. Saskatchewan Government Insurance, [2002] O.J. 4257. Both these cases stand for the proposition that when a company has received the first application, but wrongly refused to pay it, they cannot use the subsequent paying company's failure to give timely notice as a defence. While I am in agreement with that general principal, I do not think that it is an absolute one, and there may be exceptions when it may not apply. While it is fundamental that companies pay the benefits and dispute priority later, there may be situations where the waiving of the notice provisions is inappropriate. Once again, we must look at the facts of each case.

In this particular case, Allstate takes the position that there was not a sufficient nexus between the claimant and Allstate for it to pay the statutory accident benefits. This position is potentially dependent upon whether or not Allstate had properly cancelled its policy with Mr. and Mrs. Matias prior to the accident. Even if one were to assume the policy was properly cancelled, I am of the view that there would still have been a sufficient nexus such that Allstate should have responded. The Ontario Divisional Court, in Allstate Insurance Company of Canada vs. Brown, 40 O.R. (3rd) 610, made it very clear that only in the most extreme situation should the party that receives the first completed application not pay the accident benefits. That was a case where the insurer took the position that the policy had been cancelled prior to the accident. Nonetheless the Divisional Court held that the insurer should respond and serve a Notice of Dispute upon the insurer it said should have paid the benefits. This reasoning has been applied in many cases including my own decision in Her Majesty the Queen in right of Ontario as represented by the

Minister of Finance vs. Royal and Sunalliance et. al. (unreported decision dated January, 2003).

Allstate takes the position that our case is somewhat different from those cases, in that it says the policy with Mr. and Mrs. Matias was void from the beginning because the initial cheque payment did not clear the bank, for lack of funds. Even if I were prepared to accept that this distinction makes a difference, Allstate's position in this regard fails for factual reasons. In its cancellation letter to the policyholders, Allstate states:

The cheque submitted as your premium down payment has been returned by your bank. Unfortunately, we are unable to continue your insurance protection. This policy will continue in force only until the time and date shown below. Your cheque is enclosed.

As you can see, a period of time remains before your protection stops.....

The letter goes on to state:

Time and date your policy is cancelled: March 28, 2002, 12:01 a.m.

In light of this, I find that there was, in fact, a policy of insurance in place at least up until March 28, 2002. Accordingly there was a nexus between Allstate and the claimants.

Allstate also takes the position that Primmum had agreed to take over payments of the accident benefits and therefore there was no reason to make payments. Allstate also submits that this would be a sufficient reason not to allow the principle set out in Commerce vs. Liberty to apply, which would otherwise not allow Allstate to rely on Primmum's failure to give notice to Allstate.

There is no doubt but that there were discussions between Allstate and representatives of Primmum as to which insurer would be handling the accident benefit claim. A note in the Allstate claims file by adjuster Anne Cole on May 17, 2002 states:

O/L with adj acting for Primmum Insurance (TP Insurance Co.) he will be looking after accident benefits for Ins....he requests documentation supporting our denial. Advised I will fax letter issued by agent's office, along with documentation from post office indicating registered letter delivered to Ins. address... not pick up.

On June 21, 2002 there is a further note in the Allstate adjusting file stating:

Spoke to Doug @ Browser-King re: priority, he agreed that it would seem that they have priority, but requested that I put everything in writing and forward it to him.

It appears that this information was subsequently forwarded to Primmum. A review of the independent adjuster, Mr. Doug Johnson's notes indicate contact with the Allstate adjuster, Paul Curitti. On June 6, Mr. Johnson received a call from Mr. Curitti who indicated that the policy with Allstate had been cancelled and requested that Primmum take over the accident benefit file. Mr. Johnson requested that a copy of the cancelled letter and accident benefit application be forwarded to him on a "without prejudice" basis.

On June 19, 2002, Mr. Johnson attended at the claimant's solicitor's offices to obtain a statement from the claimants. At the meeting there was apparently some information provided by the claimants that suggested the policy with Allstate might not have been properly cancelled. Mr. Johnson's reporting letter to Primmum of June 28, 2002 indicates that at the June 19, 2002 meeting:

With the evidence presented by Mr. and Mrs. Matias, Neraum Sahay [the claimant's legal assistant] agreed to continue to press Allstate Insurance with

respect to the accident benefits claim.....Neraum Sahay provided copies of her file to me which included applications for accident benefits filed with Allstate. The application was provided as a courtesy pending Ms. Sahay's continuous contact with Allstate Insurance.

On June 20, 2002 Mr. Johnson received a copy of the registered cancellation letter and supporting documentation.

There is no doubt but that there were discussion between Allstate and Primmum's representatives with regard to Primmum paying the accident benefits. Those discussions, however, did not, in my view, reach the point where Primmum unequivocally agreed to take over the claim. Mr. Johnson in his reporting letter to Primmum on June 28, 2002 noted:

At no time during our investigation did I advise Allstate Insurance that you would be handling the accident benefits claim . I advised Allstate that I would be pleased to review all documents on a without prejudice basis. It appears there is sufficient documentation for Allstate to support that their policy was not in force on the date of the accident.

The note of May 17, 2002 by the Allstate adjuster is somewhat equivocal. My finding in this regard is strengthened by the fact that in its "Explanation of Benefits Payable by Insurance Company" (OCF-9) Allstate stated "we will be disputing priority with Canada Life". This form was filled out well after Allstate claims Primmum agreed to take over priority. Such a statement would seem inconsistent with the belief that Primmum had agreed to take over the payments.

In addition, on June 21, 2002 Mr. Curitti, on behalf of Allstate, wrote Mr. Johnson enclosing a Notice of Loss Transfer. I assume, and find that what Allstate had intended to send was a Notice

of Intention to Dispute regarding priority. If so, this to would seem to be inconsistent with an assumption that Primmum was in priority.

In light of the above, I am of the view that Primmum did not agree to take over the accident benefit payments. I further hold that in the circumstances, in accordance with the principle set out in Liberty vs. Commerce, Allstate ought not to be able to rely on section 3(1) of Regulation 283/95 to defeat Primmum's claim.

The remaining issues to be dealt with involve the notice given by Allstate to Primmum and whether Allstate properly terminated the insurance policy with Mr. and Mrs. Matias. I have already found that Allstate received the first completed application for accident benefits on June 3, 2002. On June 21, 2002, Mr. Paul Curitti of Allstate wrote Mr. Doug Johnson, the independent adjuster acting for Primmum in this matter, enclosing a "Notification of Loss Transfer". In the form, Mr. Curitti wrote:

Please be advised that no benefits have been paid to date as it is our information that the claimants are receiving benefits from Canada Life.

Counsel for Allstate submits that Mr. Curitti mistakenly sent the wrong form to Primmum and what they had intended to sent was a Notice of Intention to Dispute. I note, however, that no Notice of Intent to Dispute was given to the insured persons as required by section 4 of Regulation 283/95.

The courts have been very reluctant to allow for significant variation in what is allowed by way of notice. (see: State Farm vs. Her Majesty the Queen in right of Ontario as represented by the

Minister of Finance, and Kingsway General Insurance, 53 O.R. (3rd) 436, upheld on appeal, unreported decision dated February 15, 2002, court docket 36235). In that case, Mr. Justice Sharpe of the Ontario Court of Appeal stated that:

The Regulation sets out in precise and specific terms a scheme for resolving disputes between insurers. Insurers are entitled to assume and rely upon the requirement for compliance with those provisions. Insurers subject to this regulation are sophisticated litigants who deal with these disputes on a daily basis. The scheme applies to a specific type of dispute involving a limited number of parties who find themselves regularly involved in dispute with one another. In this context, it seems to me that clarity and certainty are of primary concern. Insurers need to make appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records. Given this regulatory setting, there is little room for creative interpretation or carving of judicial exceptions designed to deal with the equities of particular cases.

In light of the Court of Appeal's comments I do not think that Allstate's Notice of Loss Transfer can constitute an appropriate Notice of Intention to Dispute between Insurers. Even if it could be so construed, I am of the opinion that Allstate's claim fails because of its failure to properly cancel its motor vehicle liability policy with Mr. and Mrs. Matias, an issue that I will deal with at this time.

Allstate takes that position that it properly cancelled the policy by way of a letter to Farah Castillejos and Edgardo Matias dated March 8, 2002. That letter states that the policy is cancelled effective March 28, 2002, 12.01 A.M. That letter along with a post office registration receipt, dated March 8, 2002 was filed at the arbitration. In addition a "Track a Package" from Canada Post which tracks registered mail was filed at the arbitration. It indicates that the registered cancellation letter was sent out for delivery from the Mississauga post office on March 12, 2002, but the customer was not available to receive the letter. A card was left to advise the

customer to pick up the item at their local Canada Post outlet. The “Track a Package” also indicates that on March 24, 2002, the item was returned to the sender and on April 2, 2002 the item was successfully delivered back to the sender. The evidence before me was that Mr. and Mrs. Matias did not receive the registered letter, however, they were aware that the cheque for payment of the initial premium did not clear the bank.

Primum submits that the cancellation letter is defective in four ways. Firstly the letter was sent to Farah Castillejos and Edgardo Matias. According to the evidence of Ms. Caroline Fagan, who testified on behalf of Allstate, the two names came from the underwriting side of Allstate and would be more accurate than the claims side, which had the insured listed as Farah Matias and Edgardo Castillejos. I am prepared to accept, based on the evidence before me, that the cancellation letter was arguably sent to the correctly named insured. Primum also points out, however, that there was just one cancellation letter, sent to Mr. and Mrs. Matias despite the fact that they were both insured. In addition no notice at all was given to the lessor of the vehicle despite being a named insured.

Notice of cancellation of a motor vehicle liability policy is covered by section 11 of the Statutory Conditions of the Ontario Automobile Policy Form 1, which states:

Subject to section 12 of the compulsory automobile Insurance Act and section 237 and 238 of the Insurance Act, this contract may be terminated by the insurer giving the insured 15 days notice of termination by registered mail or five days written notice personally delivered....
(5) the 15 days mentioned in sub-condition (1) of this condition begins to run on the day following receipt of the registered letter at the post office to which it was addressed.

The essence of Primmum's position is that each insured has a potentially separate and distinct interest in the automobile policy. In the case of a lessor and lessee, this distinction is readily apparent. In the case of the Matias', this may be less so. However, it is quite possible that one of the Matias' having received a cancellation notice might choose to pay the premium and reinstate the policy whereas the other might not.

In support of this proposition Primmum cites the case of Transportation Lease Systems Inc. vs. The Guarantee Company of North America, 77 O.R. (3rd) 767 (Ont. C.A.). The facts situation in that case is somewhat different from our own, in that there the lessee directed the insurer to delete all insurance coverage on the vehicle except for fire and theft. The court held that the rights of the co-insured were several and not joint and thus knowledge, expressed or implied consent of the co-insured was required to terminate or delete the coverage. In that case the insurer did not give notice to the lessor and was therefore in breach of its obligations.

While our fact situation is somewhat different, I am satisfied that the same principle applies to our case. No notice was given to the lessor in our case and the letter was addressed to Farah Castillejos and Edgardo Matias. Separate letters should have been sent to all of them. In light of this failure, I hold that the cancellation was ineffective and accordingly there was a valid policy at the time of the accident

While the above would normally dispose of this matter, Primmum submitted that there was an additional problem with the notice sent by Allstate and I will deal with that at this time. As noted above, while the registered letter was sent on March 8, 2002 and was sent for delivery on

March 12, the “Track a Package” indicates that it was returned to the sender on March 24, 2002, from its Mississauga office and successfully delivered back to the sender (Allstate) from the Unionville post office on April 2, 2002. This is somewhat confusing. A letter from Canada Post filed as an exhibit at the hearing indicates that:

It is reasonable for you to assume that the item was returned to the sender from Mississauga on March 24, 2002 and that it was successfully received by the mailer on April 2, 2002.

If we are to assume that the 15 days are required by Statutory Condition 11 starts to run on March 12, 2002 then the 15 days will expire on or about March 27, 2002. This means that the cancellation letter was no longer at the post office in Mississauga should Mr. or Mrs. Matias had gone there within the 15 days to pick it up.

Allstate argues that it has complied with the provisions of Statutory Condition 11 and the failure by Canada Post to retain the letter for the full 15 days does not invalidate its cancellation notice. In support of this position Allstate relies on the cases of Ontario (Minister of Consumer and Commercial Relations) vs. Allstate Insurance Company of Canada, (1987) 25 C.C.L.I. 104; Delorenzo vs. Allstate Insurance of Canada, [1994] O.J. No. 4152; and Lumberman’s Mutual Casualty Company vs. Stone, [1995] S.C.R. 627.

The leading case in this area is Lumberman’s Mutual Casualty Company vs. Stone, a decision of the Supreme Court of Canada. In that case the insurer sent a notice of cancellation by registered mail. The letter was received at the post office, which made two unsuccessful attempts to deliver it to the insured. The post office left cards at the insured’s home indicating that there was a registered letter for him although the insured denied receiving the cards. It was agreed that the

insured did not receive the cancellation notice. In that case paragraph 3 of the insurance policy stated:

(2) this policy may be cancelled at any time by the insurer giving the insured 15 day's notice in writing of cancellation by registered mail, or 5 day's notice of cancellation personally delivered, and refunding the excess of paid premium beyond the prorata premium for the expired time. Repayment of excess premiums may be made by money, post office order, postal note or cheque. Such repayment shall accompany the notice and in such case, the 15 days above mentioned shall commence to run from the day following the receipt of the registered letter at the post office to which it is addressed.

Paragraph 15 of the policy stated:

Any written notice to the insurer may be delivered at or sent by registered post to the chief agency or head office of the insurer in this province. Written notice may be given to the insured by letter personally delivered to him or by registered letter, addressed to him at his last post office address, notified to the insurer, or, where no address is notified and the address is not known, addressed to him at the post office of the agency, if any, from which the application was received.

Mr. Justice Kellock, speaking for the majority, stated:

What, after all, it may be asked, is meant by "addressing" a letter but directing the government department which operates the postal service to carry the letter and deliver it through the agency of the department at the place of destination, i.e. the "post office" at that point, to the person whose name and other means of identification, if any, the letter theirs. Whether the post office undertaking the endeavour to find the person indicated or leaves the latter to call for his mail, is entirely a matter for the post office. This, in my view, is exactly the situation in which the policy conditions contemplate and for which they provide. The risk of the mails is entirely laid upon the insured.

While there are some differences in the wording of those clauses with Statutory Condition 11, quoted above, their meanings are essential identical. In addition, while the factual situation of the two cases are somewhat different the principles as stated by the Supreme Court of Canada are quite clear- the risk of the mails is entirely laid upon the insured. Accordingly the provisions the Statutory Condition 11 were complied with.

As noted above, however, there were other short comings with Allstate's notice which are fatal to their position. Accordingly there was a valid policy of insurance with Allstate at the time of the accident. In addition Allstate failed to give proper notice of dispute between insurers as required by section 3 of Regulation 283/95. In light of this, Allstate is responsible for payment of accident benefits to or on behalf of Mr. and Mrs. Matias and must reimburse Primmum for payment it has made in this regard.

In the event that the parties are unable to agree on the issue of costs, I may be spoken to.

Dated this _____ day of March 2007.

**M. Guy Jones
Arbitrator**