IN THE MATTER OF SECTION 268(2) OF THE *INSURANCE ACT,* R.S.O. 1990, c. I. 8, and *ONTARIO REGULATION 283/95* THERETO;

AND IN THE MATTER OF THE *ARBITRATION ACT,* S.0.1991, c. 17; AND IN THE MATTR OF AN ARBITRATION

BETWEEN:

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY

Applicant

- and –

UNIFUND ASSURANCE COMPANY

Respondent

DECISION ON A PRELIMINARY ISSUE

COUNSEL:

D'Arey McGoey for the Applicant

Zeitoon Vaezzadeh for the Respondent

ISSUE:

1. Is Dominion precluded from pursuing this priority dispute against Unifund because it did not send a copy of the Notice to Applicant of Dispute Between Insurers to the Claimant, as required by section 4 of *Ontario Regulation 283/95,* until after the arbitration proceeding was commenced?

RESULT:

1. No, Dominion's late delivery of notice to the Claimant does not preclude them from proceeding with this priority dispute.

BACKGROUND:

1. Mr. Jing Hua Fan was injured as a result of being involved in a motor vehicle accident on November 1, 2011. Mr. Fan owned an automotive repair shop, and the accident occurred while he was test driving a customer's vehicle.

2. Dominion of Canada General Insurance Company ("Dominion") issued a garage policy to the auto shop in question. Mr. Fan submitted an application for payment of accident benefits under the *Schedule* to Dominion on January 4, 2012. They accepted his application and have paid benefits to him and on his behalf.

3. At the time of the accident, Mr. Fan was a named insured under a motor vehicle liability policy covering his personal vehicle, issued by Unifund Assurance Company ("Unifund"). Dominion forwarded a Notice to Applicant of Dispute Between Insurers form ("DBI Notice") to Unifund in late January 2012, asserting that Unifund was in higher priority to pay Mr. Fan's claim under section 268(2) of the *Act.*

4. It is not disputed that Dominion provided this notice to Unifund within the ninety days provided in section 3 of the regulation. However, Dominion did not provide a copy of the DBI Notice to the Claimant at that time.

5. On November 5, 2012, counsel retained by Dominion served a Notice of Commencement of Arbitration on Unifund. My office was contacted a few months later, and a pre-hearing teleconference was convened with counsel in December 2013. A further pre-hearing call was convened in late May 2014, at which time counsel for

Dominion confirmed that his client had not forwarded a copy of the DBI Notice to Mr. Fan.

6. On June 23, 2014 a Claims Adjuster from Dominion sent a copy of the DBI Notice, along with an explanatory cover letter, to the Claimant. The letter advised that if Mr. Fan objected to the proposed transfer of his claim to Unifund, he should complete Part 5 of the form and return it to her immediately. No response to this letter was received.

7. Counsel agreed that the question of whether Dominion is precluded from proceeding with this dispute as a result of its late provision of the DBI Notice to Mr. Fan would be argued as a preliminary issue. Written submissions were filed and exchanged on this point, as well as Briefs of Authorities containing various cases.

THE EVIDENCE:

8. The parties filed an Agreed Statement of Fact, the essence of which is outlined above. This statement also confirms the parties' agreement that Mr. Fan attended an Examination Under Oath in this matter in July 2014, after receiving the June 23, 2014 notice letter sent to him by the Dominion Claims Adjuster. Mr. Fan has not reached a settlement of his accident benefits claim with Dominion, and the claim remains open.

RELEVANT PROVISIONS:

The following provisions are relevant to the determination of this matter:

Regulation *283/95:*

3. *(1) No insurer may dispute its obligation to pay benefits under section 268 of the Act unless it gives written notice within 90 days of receipt of a completed application for benefits to every insurer who it claims is required to pay under that section.*

4. *(1) An insurer that gives notice under section 3 shall also give notice to the insured person using a form approved by the Superintendent.*

5. *(1) An insured person who receives a notice under section 4 shall advise the insurer paying benefits in writing within 14 days whether he or she objects to the transfer of the claim to the insurers referred to in the notice.*

(2) If the insured person does not advise the insurer within 14 days that he or she objects to the transfer of the claim, the insured person is not entitled to object to any subsequent agreement or decision to transfer the claim to the insurers referred to in the notice.

(3) Subject to subsection 7 (5), an insured person who has given notice of an objection is entitled to participate as a party in any subsequent proceeding to settle the dispute and no agreement between insurers as to which insurer should pay the claim is binding unless the insured person consents to the agreement or 14 days have passed since the insured person was notified in writing of an agreement and the insured person has not initiated an arbitration under the Arbitration Act, 1991.

7. *(2) If an insured person was entitled to receive a notice under section 4, has given a notice of objection under section 5 and disagrees with an agreement among insurers that an insurer other than the insurer selected by the insured person should pay the benefits, the dispute shall be resolved through an arbitration under the Arbitration Act, 1991 initiated by the insured person.*

(3) The arbitration may be initiated by an insurer or by the insured person no later than one year after the day the insurer paying benefits first gives notice under section 3.

RELEVANT CASE LAW:

9. In April 2014 I issued a decision in *Belair Direct Insurance v. Security National Insurance* (April 11, 2014), in which a similar issue was raised. In that case, the Claimant had resolved her accident benefits claim with Belair on a full and final basis a few months after the priority dispute arbitration was commenced. Belair had not sent a copy of the DBI Notice to her at any point prior to resolving her claim. I noted at that time that surprisingly, the question of whether an insurer who failed to provide a copy of the DBI

Notice to the claimant was precluded from proceeding with a priority dispute had not been raised before an arbitrator or judge before.

10. I determined that Belair's failure to provide notice to the Claimant of their intention to dispute that they were in priority to pay her claim precluded them from pursuing Security National under *Regulation 283/95*. My finding was based primarily on the mandatory language in section 4 of the regulation, and the fact that the regulation and the form in question were clearly drafted with the potential participation of claimants in mind.

11. No appeal was taken from that decision.

12. Counsel in this matter were both aware of this decision, and each cited it in their submissions. Counsel for Dominion emphasized that the circumstances of this case are different, in that notice was provided by Dominion to the Claimant, albeit late in the process. Counsel for Unifund contended that providing notice to Mr. Fan about two and one-half years after notice was provided to her client contravened section 4 of the regulation, and that Dominion should be barred from proceeding with the dispute.

PARTIES' ARGUMENTS:

Dominion's submissions

13. Counsel for Dominion provided brief comments in his initial factum, and filed more extensive submissions in a Reply factum in response to the many arguments raised by counsel for Unifund in her material.

14. While he acknowledged that section 4 of *Regulation 283/95* mandates the first insurer who receives a completed Application for accident benefits to give notice to the insured using the approved form, counsel emphasized that the section does not provide any time-deadline for its delivery. He argued that Dominion ultimately did provide notice

to Mr. Fan, and therefore complied with the requirement. He contended that there was accordingly no reason to preclude Dominion from proceeding with this dispute.

Unifund's submissions

15. Counsel for Unifund argued that Dominion was obliged to provide a copy of the DBI Notice to the insured within ninety days of receiving the OCF 1 Form filed, in the same way that they were required to notify Unifund within that time frame in accordance with section 3 of the regulation. She noted that in fact, notice was only provided to Mr. Fan some 27 months beyond the ninety-day limit, and argued that this excessive delay should result in Dominion being barred from proceeding with this dispute.

16. Counsel submitted that when the strict language in section 3 regarding the ninety day time limit for providing notice to a second insurer is considered, I should conclude that the drafters of the regulation could not have intended that no time limit would apply to the requirement to provide notice to the Claimant *I* insured. She noted that section 4 of the regulation requires that an insurer who gives notice under section 3 "shall also give notice to the insured person" using the approved form, and contends that the use of the word "also" suggests a connection between the requirement to provide notice under section 3 to a second insurer within 90 days, and the requirement to provide notice to an insured within the same time frame.

17. Counsel for Unifund acknowledged that the use of the term "also" in that context could support both interpretations proposed by the parties. She noted that the rules of statutory interpretation require me to consider an ambiguous phrase such as this in its grammatical and ordinary sense, within the context of the overall scheme of the regulation. She submitted that when doing so, it is clear that the phrase "shall also" should be interpreted as imposing a ninety-day time limit on the first insurer to provide notice to an insured.

18. Counsel also noted that the Cambridge Dictionaries Online defines "also" as meaning "in addition" or "similarly". She suggested that when the word "similarly" is

substituted for "also", it is clear that the drafters' intent was to require that notice be provided both to the "target insurer" and to the insured within ninety days of the OCF 1 Form having been received. She contended that sections 3 and 4 of the regulation are meant to be read together, and that they require a first insurer to provide notice simultaneously both to the second insurer and to the insured.

19. Counsel submitted that the right provided to an insured who objects to the proposed transfer of the claim to participate in the proceedings, is predicated on their receiving timely notice of a first insurer's intent to do so. She contended that Dominion's failure to provide such notice within ninety days to Mr. Fan essentially jeopardized any meaningful participation by him in the priority scheme, and prevented him from vocalizing his concerns during the course of the proceedings.

20. Ms. Vaezzadeh contended that Dominion's submission that no time limit should be applied to the provision of notice to an insured can lead to absurd results, and that the rules of statutory interp'etation dictate that an interpretation yielding an absurd result should not be accepted.

21. Counsel for Unifund submitted alternatively that if I do not accept that Dominion was required to provide notice to the Claimant of its intention to dispute its obligation to pay benefits within ninety days of receiving the OCF 1 form, it was at least required to do so by January 24, 2013, one year after it provided its notice to Unifund. She noted that section 7(3) of the regulation provides that an arbitration "may be initiated ...by an insured person no later than one year after the day the insurer paying benefits first gives notice under section 3", and stated that if notice of the priority dispute is not received by an insured within one year after the notice is provided to the second insurer, he or she would lose the opportunity to commence an arbitration.

22. Finally, counsel cited Arbitrator Jones' comment in *Ontario Municipal Insurance Exchange v. Liberty Insurance Company* (October 2000), in which he stated that "the notices are to be. given simultaneously".

Dominion's Reply submissions:

23. Counsel for Dominion acknowledged Arbitrator Jones' statement in the above case about the notices being provided simultaneously, but pointed out that the OMIE's failure in that case to provide the prescribed notice to the claimant was not found to be fatal to its right to pursue a priority dispute against Liberty Insurance.

24. Counsel submitted that there is no authority for Unifund's contention that an insurer must provide it notice to the insured within ninety days of receiving the OCF 1 Form, and that if such a time deadline was intended to apply, it would have been clearly spelled out in the regulation. He noted that an adjudicator called upon to interpret legislation or regulations may not "read in" any wording that does not appear in a section, and contended that that was precisely what Unifund was urging me to do.

25. Mr. McGoey submitted that the legislative intent behind section 4 of the regulation is to provide an insured person who would like to participate in the priority dispute with the opportunity to do so. He noted that section 5(3) of the regulation entitles an insured person who has filed an objection within the allotted time to participate in the proceeding, and that no agreement between insurers as to which insurer should pay the claim is binding without that insured's consent. If no consent is provided, and if an insured person is provided written notice of that agreement, he or she would have 14 days from the date of the notice to initiate arbitration.

26. Counsel submitted that practically speaking, the only time that an insured person would seek to initiate arbitration under section 7(3) would be when he or she hopes to set aside an agreement reached between insurers to transfer his or her accident benefits claim. He contended that in this situation, if an insurer had failed to provide notice to the insured under section 4 of the regulation, the appropriate remedy would be to preclude the insurers from relying on the one-year limitation period in section 7(3) as a defence to the insured's initiation of the arbitration.

27. Finally, counsel for Dominion contended that if Mr. Fan had exercised his right under the regulation to object to the proposed transfer of his claim, and an arbitration hearing had to be adjourned in order to accommodate his participation, Dominion could be penalised with a costs award, for the inconvenience caused. He submitted, however, that as no objection was received from the Claimant in this case, and therefore no prejudice suffered by any party, no costs award is justified.

ANALYSIS AND FINDINGS:

28. As I stated in the *Belair v. Security National, supra,* decision, the words in section 4 of the regulation are clear, and create a mandatory obligation on the first insurer who receives a completed application to provide notice to the insured person of its intention to dispute its obligation to pay benefits. The section states that an insurer that provides notice to another insurer under section 3 "shall also" give notice to the insured person using the approved form. It is clear that the drafters of the regulation intended that claimants be notified of an ongoing priority dispute between insurers regarding the obligation to pay their claims, and that they be provided with the opportunity to participate in it.

29. That said, it is difficult to understand the reason for permitting claimants to participate in these proceedings. After conducting numerous priority dispute arbitrations over the course of the last ten years, I have yet to preside over a case in which a claimant's participation in the process has affected the outcome. Claimants rarely resist the proposed transfer of their claim to another insurer, and if they do, it is often unrelated to the provisions of section 268(2) of the *Act,* which dictates the priority analysis.

30. If a claimant does believe that one insurer is in higher priority than another to pay his or her claims under section 268(2) of the *Act,* his or her "interests" would be protected by the insurers involved. If a claimant supports the first insurer's view that another insurer is in higher priority to pay the claim, their interests would be aligned with those of the first insurer, who would presumably present all arguments in that regard throughout

the process. If the claimant does not agree with the first insurer's view that another insurer is in higher priority, their interests would be aligned with those of the "target insurer", who would presumably make the necessary arguments in support of their position at a hearing.

31. In any event, arbitrators are bound to apply the evidence before them to the provisions in section 268(2) of the *Act,* and determine questions of priority on that basis, regardless of a claimant's stated views.

32. So, while I acknowledge that one of the underlying purposes of the priority regulation is to ensure that claimants receive benefits in a timely fashion, and that they are not affected by any dispute that may arise between insurers as to which one is in higher priority to pay the claim, it seems clear that the rights provided to claimants to participate in the process are entirely procedural. No determination of priority between insurers will affect a claimant's entitlement to obtain benefits under the *Schedule,* and in my view, questions regarding the nature of an insurer's obligation to provide notice to a claimant must be approached with that in mind.

33. As set out above, Dominion did provide notice to Mr. Fan that it was disputing its obligation to pay benefits to him, albeit a couple of years after notice was provided under section 3 to Unifund, and approximately six months after the first arbitration pre-hearing teleconference was held. Unlike in the *Belair, supra,* case, however, in which the claimant's accident benefits claim had already been resolved on a full and final basis when it was discovered that she had not been notified of the proposed transfer, Dominion did provide notice to the Claimant while his accident benefits claim was still open. In my view, this is a key difference, and merits a different result.

34. While insurers should ideally provide notice to claimants at the same time as they do to the "target insurer(s)", the fact remains that Mr. Fan was provided with the opportunity to participate in this process. I find that the notice provided by Dominion, albeit very late, satisfies the requirement in section 4 of the regulation.

35. Counsel for Unifund argued that the ninety-day time limit in section 3 of the regulation should also apply to an insurer's obligation to provide notice to an insured under section 4. I do not agree with this contention. Firstly, if the drafters of the regulation had intended this time line to apply, it would have been easy for them to have set that out. As contended by counsel for Dominion, in order to accept this submission, I would be required to "read in" a specific time limit to the provision that is not spelled out explicitly. I am not prepared to do so in these circumstances.

36. Further, the ninety-day time frame within which a first insurer must provide notice to another insurer makes sense in the context of what an insurer who receives a completed application for benefits is required to do. Various steps and investigations must be undertaken by that insurer in order to determine whether another insurer may be in priority. This will often take some time. However, it is better for all concerned if the priority insurer begins adjusting the claim early in the process. The ninety-day time limit has been chosen as a "saw-off point" or compromise, in recognition of these two competing interests. If a first insurer has not provided notice within the ninety days specified, and wants to proceed with the dispute, it must meet the fairly onerous conditions set out in the "savings provisions" in section 3(2) of the regulation.

37. In contrast, no steps or investigation need be undertaken by a first insurer who receives a completed application to provide notice to a claimant that it intends to dispute its obligation to pay benefits for priority reasons. Given these differences, I do not see the rationale for applying a ninety-day time limit to the requirement to provide notice to a claimant under section 4 of the regulation.

38. Counsel for Unifund argued in the alternative that if I did not accept that Dominion had ninety days within which to provide notice to Mr. Fan, that the latest point at which notice could be provided to a claimant is one year after the provision of notice to the other insurer(s) under section 3. In this case, that would have been January 25, 2013. The notice to Mr. Fan by Unifund was provided in late June 2014, some 17 months later.

Counsel noted that section 7(3) of the regulation provides that an insurer or an insured person may initiate arbitration "no later than one year after the day the insurer paying benefits first gives notice under section 3", and claimed that if a first insurer could provide its notice to a claimant beyond this point, the claimant would be precluded from initiating arbitration.

39. I must reject this contention as well. A close review of section 5(3) of the regulation persuades mt that allowing an insurer to provide late notice to a claimant does not preclude the claimant from availing themselves of the rights provided to initiate arbitration. While an insured initiating arbitration in the context of a priority dispute is extremely rare -if not unprecedented -the drafters of the regulation clearly intended to provide that right to insureds.

40. The right to initiate arbitration is referred to in both section 5(3) and section 7(3) of the regulation. Section 5(3) essentially provides that an insured who has provided notice of an objection to the proposed transfer of his or her claim, is entitled to participate in any subsequent proceeding. It then goes on to state that an agreement made between insurers regarding priority may only be binding if the insured person who has objected to the proposed transfer consents to it, or, if 14 days have passed since the insured was provided written notice of the agreement and that person has not initiated an arbitration. It is this fourteen day time line that dictates the insured's right to commence arbitration.

41. Presumably, if notice of an insurers' agreement is provided to an insured who has chosen to object to the proposed transfer, and the insured chooses to wait 60 or 90 days before initiating arbitration, they will not be permitted to do so. It is unclear how this clear directive fits together with the provision in section 7(3) of the regulation that an insured person may initiate arbitration no later than one year after the day the first insurer gives its notice to the "target insurer" under section 3.

42. In many cases, an agreement between insurers to transfer a claim that the objecting claimant has the right to dispute may take place a couple of years after the

section 3 notice was provided, well along in the arbitration proceeding. It would not make sense if a claimant who had participated in the proceeding over the course of a few years, and then objected to an agreement reached by the insurers to transfer his or her claim within the 14 days permitted, would somehow be precluded from maintaining such an objection because it occurred, through no fault of his or her own, more than one year after the section 3 notice was provided to the other insurer.

43. I can only conclude that the language in section 7(3) would not prohibit a claimant, who is otherwise validly exercising his or her right to object to an agreement in accordance with section 5(3) of the regulation, from initiating arbitration. Accordingly, Unifund's submission on this point must fail.

44. For the reasons set out above, I find that Dominion is not precluded from proceeding with this priority dispute by virtue of having provided late notice to Mr. Fan under section 4 of the regulation.

COSTS:

Given the outcome of this preliminary issue, Dominion is entitled to collect its costs incurred related to this issue, on a partial indemnity basis, from Unifund. If counsel cannot agree on the quantum of costs payable, they may contact me in writing and a further teleconference will be convened to discuss the issue.

The parties advised that other issues may remain in dispute, and I await further word from counsel regarding how the matter should proceed further.

DATED at TORONTO, ONTARIO this 20th DAY OF OCTOBER, 2015.

Shari L. Novick
Aribtrator