**IN THE MATTER OF A DISPUTE BETWEEN INSURERS UNDER REGULATION 283/95, as amended, MADE UNDER THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8**

**AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c.17**

**AND IN THE MATTER OF AN ORDER DATED MARCH 10, 2016 PURPORTING TO INCLUDE THE MINISTER OF FINANCE IN THIS ARBITRATION**

**AND IN THE MATTER OF THE *MOTOR VEHICLE ACCIDENT CLAIMS ACT*, R.S.O. 1990, c.M.41**

**AND IN THE MATTER OF AN ARBITRATION**

B E T W E E N:

ROYAL & SUNALLIANCE INSURANCE COMPANY

Applicant

- and -

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Respondent

**AND**

ROYAL & SUNALLIANCE INSURANCE COMPANY

Applicant

- and -

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY
and ~~THE GUARANTEE COMPANY OF NORTH AMERICA~~

Respondents

# DECISION WITH RESPECT TO PRELIMINARY ISSUE

**COUNSEL**

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(hereinafter referred to as "RSA")

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Counsel for the Moving Party, Her Majesty the Queen in Right of Ontario, as represented by the Minister of Finance
(hereinafter referred to as "the Fund")

**ISSUE**

The Fund brings this motion to rescind an Order dated March 10, 2016 requiring the Fund to participate in the above styled priority dispute arbitrations on the basis that the arbitrator lacked jurisdiction since the Notice served upon the Fund was invalid, not having met the new notice requirements of O. Reg 283/95 as amended September 1, 2010 by O. Reg 38/10.

**PROCEEDINGS**

The hearing of this preliminary issue took place on July 22, 2016 on the basis of Factums, Document Brief, Books of Authority and oral submissions.

**APPLICABLE LEGISLATION**

There are many situations which arise where an individual injured in a motor vehicle accident has access to more than one policy of insurance with respect to payment of statutory accident benefits. Section 268 of the *Insurance Act*, R.S.O. 1990, c.I.8, is a legislative scheme to determine which insurer must pay statutory accident benefits when more than one policy is potentially accessible. If a dispute arises with respect to the application of s.268, commonly known as a priority dispute, then the Dispute Between Insurers Regulation (Ontario Regulation 283/95), sets out the specific details that govern how a priority dispute is to be processed and provides for an Arbitration with regards to the dispute, to be in

accordance with guidelines set out in the *Arbitrations Act*, 1991, S.O. 1991, c.17, as amended.

The relevant sections of Ontario Regulation 283/95 as amended by Ontario Regulation 38/10, with the critical sections in the present dispute underlined, are as follows:

> **2.1** (1) This section applies in respect of benefits that may be payable as a result of an accident that occurs on or after September 1, 2010. O. Reg. 38/10, s. 3.
>
> (2) An insurer shall promptly provide an application and any other appropriate forms in accordance with the Schedule to an applicant who notifies the insurer that he or she wishes to apply for benefits. O. Reg. 38/10, s. 3.
>
> (3) The application provided by the insurer must include the insurer's name, mailing address and telephone and facsimile numbers. O. Reg. 38/10, s. 3.
>
> (4) The applicant shall use the application provided by the insurer and shall send the completed application to only one insurer. O. Reg. 38/10, s. 3.
>
> (5) An insurer that provides an application under subsection (2) to an applicant shall not take any action intended to prevent or stop the applicant from submitting a completed application to the insurer and shall not refuse to accept the completed application or redirect the applicant to another insurer. O. Reg. 38/10, s. 3.
>
> (6) The first insurer that receives a completed application for benefits from the applicant shall commence paying the benefits in accordance with the provisions of the Schedule pending the resolution of any dispute as to which insurer is required to pay the benefits. O. Reg. 38/10, s. 3.
>
> (7) An insurer that fails to comply with this section shall reimburse the Fund or another insurer for any legal fees, adjuster's fees, administrative costs and disbursements that are reasonably incurred by the Fund or other insurer as a result of the non-compliance. O. Reg. 38/10, s. 3.
>
> (8) In subsection (7),
>
> "insurer" does not include the Fund. O. Reg. 38/10, s. 3.
>
> **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. O. Reg. 283/95, s. 3 (1).
>
> (1.1) <u>If the dispute relates to an accident that occurred on or after September 1, 2010, a notice required under subsection (1) must also be given to the Fund if the insurer claims the Fund is required to pay benefits. O. Reg. 38/10, s. 4.</u>
>
> (2) An insurer may give notice after the 90-day period if,
>
> (a) 90 days was not a sufficient period of time to make a determination that another insurer or insurers is liable under section 268 of the Act; and
>
> (b) the insurer made the reasonable investigations necessary to determine if another insurer was liable within the 90-day period. O. Reg. 283/95, s. 3 (2).

(2.1) If the dispute relates to an accident that occurred on or after September 1, 2010, the Fund may give a notice under subsection (1) after the 90-day period and is not required to comply with subsection (2). O. Reg. 38/10, s. 4.

(3) The issue of whether an insurer who has not given notice within 90 days has complied with subsection (2) shall be resolved in an arbitration under section 7. O. Reg. 283/95, s. 3 (3).

**3.1** (1) This section applies to disputes relating to accidents occurring on or after September 1, 2010. O. Reg. 38/10, s. 5.

(2) Before giving a notice to the Fund under section 3, an insurer must,

(a) complete a reasonable investigation to determine if any other insurer or insurers are liable to pay benefits in priority to the Fund; and

(b) provide particulars to the Fund of the investigation and the results of the investigation. O. Reg. 38/10, s. 5.

**10.** (1) If an insurer who receives notice under section 3 disputes its obligation to pay benefits on the basis that other insurers, excluding the insurer giving notice, have equal or higher priority under section 268 of the Act, it shall give notice to the other insurers. O. Reg. 283/95, s. 10 (1).

(2) This Regulation applies to the other insurers given notice in the same way that it applies to the original insurer given notice under section 3. O. Reg. 283/95, s. 10 (2).

(3) The dispute among the insurers shall be resolved in one arbitration. O. Reg. 283/95, s. 10 (3).

## FACTS

Mr. Andrew Chavez and Mr. Arif Bahman were injured in a single vehicle accident that occurred October 9, 2013. The 2001 Honda Civic involved in the incident was owned by Arif Bahman but was plated and purportedly insured by RSA evidenced by a pink slip provided to Bahman by Via Max Group Inc..

In the arbitration proceeding herein, one of the central issues is whether a valid RSA policy existed. RSA maintains Via Max Group provided Arif Bahman with a fraudulent pink slip and that no valid policy existed with respect to the vehicle involved in the subject collision. It is alleged that Via Max Group obtained a garage policy with RSA on May 17, 2013 with one registered plate (not the plated vehicle involved in the subject accident). It is alleged that Via Max Group provided a copy of the RSA pink slip to the claimant Bahman even though RSA had apparently no knowledge of the subject vehicle. It is alleged that the owner of Via Max

Group was later charged with fraud for providing false pink slips. All of the allegations set out in this paragraph have yet to be proven in this priority dispute and will be dealt with following a determination of the preliminary issue herein with respect to the Fund's involvement.

Both claimants submitted accident benefits claims to RSA. The OCF-1 of Chavez was submitted October 28, 2013. The OCF-1 of Bahman was date stamped December 9, 2013.

On December 10, 2013, RSA put the Respondent ("State Farm") on notice of a dispute between insurers with respect to the Chavez claim. State Farm insured the Chavez family business and Mr. Chavez's father. Notice was sent to State Farm on the basis that Chavez may have been principally financially dependent on his father or may have had regular use of the family business vehicles which, if proven, may have made State Farm the priority insurer.

On December 13, 2013, RSA put both State Farm and Guarantee on notice with respect to the Bahman claim. State Farm insured Bahman's parents and Guarantee insured an employer of Bahman. Notice was sent on the basis that Bahman may have been principally financially dependent on his parents or may have had regular use of the employer's vehicles which may have made State Farm and/or Guarantee priority insurers.

The Notices above were served within the 90 days of receipt of the accident benefits claims as required by s.3 of O. Reg, 283/95.

RSA then served Notices of Commencement of Arbitration on State Farm and Guarantee in August or September 2014. Kenneth J. Bialkowski was appointed as arbitrator of the priority dispute in late 2014.

At no time prior to the Commencement of the arbitration did RSA put the Fund on Notice under O.Reg. 283/95.

On June 1, 2015, State Farm sent a Notice of Dispute to the Fund with respect to the Bahman claim. On August 17, 2015, State Farm sent a Notice of Dispute to the Fund with respect to the Chavez claim. The Fund did not respond and rejected the validity of these Notices.

On March 10, 2016 an Order was issued in the arbitration requiring the Fund to participate in the arbitration. The fund now claims that the arbitrator lacked the jurisdiction to issue such Order and brings the present motion to set aside such Order.

**ANALYSIS AND FINDINGS**

The Fund seeks to set aside the arbitrator's Order of March 10, 2016 requiring the Fund to participate in the arbitration on the basis that the arbitrator lacked jurisdiction to do so. The Fund confirms that it is clearly established by the case law that an arbitrator can and should rule on a preliminary jurisdictional issue (*Primmum Insurance v. ING* [2007] OJ No. 413 and *TD General v. HMQ* [2010] OJ No. 6142). The Fund further confirms that deciding whether a Notice is valid or timely is a preliminary jurisdictional issue (*Gore Mutual v. Markel* [1999] ILR 1-3740 and *ING Insurance v. ICB* [2008] OJ No. 3759).

Here the Fund was never put on notice by the Applicant RSA. The Fund was put on notice by the Respondent State Farm some 22 months after RSA received the Chavez claim for accident benefits and 20 months after State Farm was put on notice by RSA.

The jurisprudence with respect to priority disputes refers to the insurer first having received an application for benefits as the 1st tier insurer. The insurers put on notice pursuant to s.3 of O. Reg 283/95 by the 1st tier insurer as standing higher in priority are referred to as 2nd tier insurers. Insurers put on notice by a 2nd tier insurer pursuant to s.10 of O. Reg 283/95 are referred to as 3rd tier insurers.

Prior to the amendments to O. Reg. 283/95 of September 1, 2010, the case law confirmed that although 1st tier insurers had 90 days to put a 2nd tier insurer on notice (subject to the saving provision of s.3(2), there was no time limit on a 2nd tier insurer to put a 3rd tier insurer on notice. The rationale for this proposition is set out the following decisions:

> *Wawanesa v. Peel Mutual and Economical Mutual Insurance Company* (arbitrator Samis – January 28,2011 and June 21, 2011)
>
> *Certas v. Security National* (Arbitrator Bialkowski – February 2, 2012)
>
> *Economical v. MVACF* (Arbitrator Densem – January 7, 2015)
>
> *Co-operators v. Perth* (Arbitrator Bialkowski – February 3, 2015)

I have considered the submissions made by the Fund that these cases may be distinguishable but am unable to accept such argument. Variance on the number of months before putting the 3rd tier insurer on notice and the extent of information in the hands of the 2nd tier insurer do not change the basic premise for the case law set out above. Arbitrator Bialkowski in Certas writes at p.4 of his decision:

> "The Respondent Security National argues that if one were to accept Arbitrator Samis' reasoning, a 3rd tier insurer could possibly be put on notice by a 2nd tier insurer some ten to fifteen years after the 2nd tier insurer's receipt of the Notice of Intention to Dispute. On a practical level, this is unlikely to happen. No insurer wants to be saddled with the obligation of adjusting or paying benefits to a claimant when some other insurer might stand in priority. On a practical level, insurers will complete an investigation as quickly as possible, once put on notice by a 1st tier insurer, to determine if some other insurer stands in priority. The burden of having to adjust a claim and pay benefits is sufficient motivation to an insurer to determine whether another insurer stands in priority at the earliest possible date. The delay here of 16 months is, in my experience involving priority disputes, an anomaly and that 2nd tier insurers normally place potential 3rd tier insurers on notice as quickly as possible so as not to be saddled with the obligation to adjust and pay benefits while investigating whether another insurer stands in priority. If the legislators had intended a 90 day notice requirement on 2nd tier insurers it could easily have used specific wording of such obligation in s. 10 of Ontario Regulation 283/95 as set out above." [emphasis mine]

I am of the view that there is no time limit on a 2nd tier insurer putting a 3rd tier insurer on notice subject to any additional requirements arising from the September 1, 2010 amendments to O. Reg 283/95.

However, the accident giving rise to the present priority dispute arbitration occurred after the amendments to the Disputes Between Insurers Regulation – O. Reg 283/95 so the impact of the amendments must be considered. The issues which must be determined are whether the Notice provided by State Farm to the Fund is valid in the context of the September 1, 2010 amendments and whether RSA, as 1st tier insurer, is barred from now claiming against the Fund given those amendments.

The Fund takes the position that the wording of the new s.3 (1.1) when read in the context of the earlier notice provisions required RSA to put the Fund on notice within 90 days of having received the completed application for benefits and its failure to do so now prevents RSA from transferring priority to the Fund at this time.

> **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. O. Reg. 283/95, s. 3 (1).

> (1.1) If the dispute relates to an accident that occurred on or after September 1, 2010, a notice required under subsection (1) must also be given to the Fund if the insurer claims the Fund is required to pay benefits. O. Reg. 38/10, s. 4.
>
> (2) An insurer may give notice after the 90-day period if,
>
> (a) 90 days was not a sufficient period of time to make a determination that another insurer or insurers is liable under section 268 of the Act; and
>
> (b) the insurer made the reasonable investigations necessary to determine if another insurer was liable within the 90-day period. O. Reg. 283/95, s. 3 (2).
>
> [emphasis mine]

Simply stated and according to the Fund's submissions, since it is now being sought that the Fund pay benefits, notice ought to have been provided to the Fund by RSA within 90 days. Since that was not done RSA can no longer pursue priority against the Fund.

In response RSA has submitted that at the time notice was provided to State Farm and Guarantee, it was not claiming that the Fund was required to pay benefits. It was only after conducting Examinations Under Oath that it realized that the facts did not support findings that the claimants were principally dependent for financial support on others or had regular use of employer vehicles which would have placed those insurers (State Farm and Guarantee) in priority to RSA. Once this was realized, it was then that notice was served on the Fund by State Farm pursuant to s.10 of O. Reg. 283/95. RSA maintained that in light of the *Wawanesa, Certas, Economical* and *Co-operators* cases referred to above there was no time limit to adding a 3rd tier insurer and that the 3rd tier insurer was automatically joined into the existing arbitration herein by reason of s.10 of O. Reg 283/95 which states that "the dispute among the insurers shall be resolved in one arbitration".

It is clear to me that the September 1, 2010 amendments were designed to a large extent to provide additional protections to the Fund that were not provided in the previous legislation. For example, s.3.1 was obviously introduced to provide the Fund with protection from what is commonly known as "dumping". "Dumping" is situation where an insurer receives a claim for benefits and rather than incurring the time and expense of its own priority investigation merely places the Fund on notice thereby forcing the Fund to complete a reasonable investigation to determine if another insurer stands in priority. In many cases this is a costly

and time consuming exercise. Now with the new s.3.1, an insurer must complete a reasonable investigation to find possible priority insurers and provide the Fund with the results of their investigation before putting the Fund on notice. The manpower and out-of-pocket expenses in completing the priority investigation is now borne by the insurer first having received a completed application rather than the Fund.

Similarly the new s.2.1(7) provides the Fund with protection in the case of “deflection”. “Deflection” is a situation where the claimant approaches an insurer with respect to accident benefits and is simply told that it is not the priority insurer. A claim is then presented to the Fund which now must complete an investigation to determine what insurer is the priority insurer. In light of the new s.2.1(7) and s.7(6), the insurer deflecting the claim seems to be responsible for any legal fees, adjuster’s fees, administrative costs and disbursements incurred by the Fund and perhaps a special award should another insurer be found to stand in priority.

Similarly, it is argued in the present case that s.3 (1.1) also provides the Fund with additional protection by requiring the Fund to be involved at an early stage in the arbitration process in any priority claim where the 1st tier insurer feels that the Fund might ultimately be the priority insurer. The section, if interpreted as requiring notice to the Fund whenever the 1st tier insurer is looking ultimately for the Fund to be priority insurer, allows the Fund to participate at an early stage in productions and Examinations Under Oath. More importantly, it would allow the Fund to assume priority at an early stage, where that is warranted, so as to have control of the acceptance and denial of claims presented by the claimant. Counsel for the Fund strongly argued that the Fund wants to be involved at an early stage if the insurers feel that the Fund might ultimately be the priority insurer.

The Notice issue in the case before me appears to turn on the interpretation of s.3 (1.1) and specifically the words “a notice required under subsection 1 must also be given to the Fund if the insurer claims the Fund is required to pay benefits”. The Fund claims that since RSA is now seeking benefits from the Fund, it was obligated to put the Fund on notice at the same time as State Farm and Guarantee or at least within 90 days of having received a completed application and having conducted its reasonable investigation. Not having done that, it is

claimed that RSA is in breach of s.3 (1.1) and is now barred from seeking priority from the Fund. As I have indicated, RSA has submitted that at the time Notice was served on State Farm and Guarantee it was not claiming that the Fund was the priority payor but only now claims the Fund is in priority, having satisfied itself that it cannot establish “dependency” or “regular use” so as to make State Farm or Guarantee the priority insurer.

On careful review of the amendments, I am satisfied that the combination of the new 3 (1.1) and 3.1, when read in the context of O. Reg 283/95 as a whole, have changed the notice requirements upon a 1st tier insurer if the Fund is potentially involved. I find that a 1st tier insurer must provide the Fund with notice if reasonable investigation identified the Fund as a potential payor of accident benefits. Section 3 (1.1) requires an insurer paying benefits to provide notice ”to the Fund if the insurer claims the Fund is required to pay benefits”. That is exactly what is happening here. RSA (the party first having received an application for benefits and the party presently paying benefits) is now submitting in the present arbitration that the Fund is required to pay benefits.

Simply stated and in light of the new s.3 (1.1), for an insurer to take the position that “the Fund is required to pay benefits” it must have provided the Fund with “a notice required under subsection (1)”, namely a “written notice within 90 days of receipt of a completed application for benefits”. As indicated in s. 3(1), an insurer which does not provide such notice may not dispute its obligation to pay benefits.

It makes no sense for the 2nd tier insurer to put the Fund on notice pursuant to s.10 of the Regulation for either it is not in priority and the arbitration would be dismissed as against the 2nd tier insurer, or it is in priority making an attempt to involve the Fund (payor of last resort) of no value. Notice to the Fund in the fashion done in the present case appears to be an attempt to involve the Fund indirectly where it could not be done directly given the expiration of 90 days from when the 1st tier insurer received the completed application of benefits from the claimant and its failure to provide the Fund with notice within that timeframe.

In my view, the September 1, 2010 amendments require an insurer having received a completed application for accident benefits to complete a reasonable investigation and place the Fund on notice if it appears the Fund might be called upon to pay benefits. In the present case, RSA ought to have realized within 90 days that if it could not establish “dependency” or “regular use” as against State Farm and Guarantee, it would have to look to the Fund for payment. The Fund, in my view, ought to have been involved at an early stage to take part in early documentary production and Examinations Under Oath. Being involved at such a late stage may require a duplication of these steps. RSA may be satisfied that State Farm and Guarantee are not priority insurers but now the Fund would have to take steps to satisfy itself on the “dependency” and “regular use” issues. Perhaps there were questions it would have asked on the completed Examinations Under Oath that will have to be asked now if the individual is required to attend a second Examination Under Oath. Perhaps there were productions it would have sought that may no longer exist given the passage of time. The interpretation of the amended legislation in the fashion that I have would avoid such a situation. It would result in the early participation of the Fund in the production and Examination Under Oath stages of the arbitration process and enable it to assume priority at an early stage, in circumstances where so warranted, so as to control the benefits being paid to a claimant rather than relying on the discretion of another insurer.

I am of the view that the words “a notice required under subsection (1)” as contained in s.3 (1.1) means a written notice that must be given within 90 days of receipt of a completed application. In reaching this conclusion, It appears that the pre-amendment case law which seems to suggest that a 1st tier insurer need not put every insurer that might have priority on notice as indicated in the appellate decision of Justice Pollak in *Co-operators General Insurance Company v. Her Majesty the Queen in Right of Ontario as represented by the Minister of Finance* [2014] O.J. No. 672, has been supplanted by a positive duty imposed by the September 1, 2010 amendments to investigate and put the Fund on notice within 90 days if it appears that ultimate priority might rest with the Fund.

I am satisfied that read contextually, the amended regulation essentially places a burden on the 1st tier insurer to complete a reasonable investigation and place the Fund on notice within 90 days where it claims that the Fund may be the ultimate payor of accident benefits. While s.3 had previously provided the first insurer with a discretion to put on Notice only those “who

it claims is required to pay", the new section 3 (1.1) removes the first insurer's discretion when the Fund is required to pay benefits. Interpreted in this fashion, the Fund is provided with the benefit of having the 1st tier insurer absorb the time and costs of the needed reasonable investigation and gets the Fund involved an early stage when it can be involved in the production and Examination Under Oath stages of the arbitration process. This interpretation is consistent with the clear intention of the legislators to provide additional protections to the Fund as outlined in O.Reg 38/10. as outlined at pages 8 and 9 of the decision herein.

It should be kept in mind that s.3 (1.1) only impacts those claims where the 1st tier insurer claims that no valid policy existed. Examples of this would be in situations where the 1st tier insurer claims its policy was cancelled prior to an accident or in the rare circumstances, as the case here, where it is claimed that no real policy ever existed. In most cases, the 1st tier insurer is a priority insurer and merely seeks to have another insurer assume payment of benefits on basis that the 2nd tier insurer stands higher in priority as per the hierarchy of priority set out in s.268 of the *Insurance Act*. For example, a claimant is a passenger in a vehicle insured by X but is dependent on his parents insured by insurer Y or has regular use of his employers vehicle insured by insurer Z. The claimant presents a claim to insurer X. Insurer X begins payment of accident benefits, as per the "pay and dispute later" requirements of s.2.1 of O. Reg 283/95, then puts insurers Y and Z on notice never having to involve the Fund, for if unsuccessful as against Y and Z insurer X would still be in priority as passengers in the insured vehicle would be considered "an insured" for the purposes of accident benefits coverage but lower in priority to insurers Y and Z. As I have indicated, in the vast majority of cases, the Fund would not be involved and the new notice requirements of s.3 (1.1) of no application.

To complete the analysis, it is necessary to look at the notice provided by State Farm in light of the amendments. State Farm as 2nd tier insurer put the Fund as 3rd tier insurer on notice pursuant to s.10 of O. Reg 283/95. The earlier case law makes it clear that there is no time limit for so doing. Although this involves the Fund in the arbitration, it does not circumvent the notice obligation of the 1st tier insurer created by the new s.3 (1.1) and the prohibition of s.3(1) on the 1st tier insurer from disputing its obligation to pay where the notice required by s.3 (1.1) is not provided. It is the breach of s.3 (1.1) that prevents RSA from seeking payment from the Fund.

The combination of s.3 (1.1) and 3.1 (2) have the effect of having the insurer first having received a completed application and claiming no valid policy to exist to complete a reasonable investigation and provide the Fund with written notice within 90 days if it feels the Fund may be ultimately responsible for the payment of benefits. There had to be purpose for the inclusion of s.3(1.1) in the amendments which appear to have been introduced to provide the Fund with additional protections. The new s.3.1 provides the Fund with protection against "dumping". The new s.2.1(7) provides the Fund with protection against "deflection". It appears to me that the purpose of 3(1.1) was to prevent what counsel for the Fund describes as "blindsiding", that is involving the Fund at a late stage where it may not be entitled to Examinations Under Oath or have the benefit of early production of documents which may no longer exist by the time they become involved. I am satisfied that the purpose of s.3 (1.1) and s.3.1(2) was to ensure the early involvement of the Fund in cases where it might be found to be the priority insurer.

The next issue to be dealt with is the penalty for RSA not putting the Fund on notice within 90 days when a reasonable investigation would have resulted in a conclusion that the Fund would be the priority insurer if RSA could not establish "dependency" or "regular use". RSA claims that the penalty for such breach is set out in s.7(6) which reads:

> 7(6) If the dispute relates to an accident that occurred on or after September 1. 2010, the failure of an insurer other than the Fund to comply with s. 2.1 or 3.1 may be the subject of a special award made by the arbitrator.

I do not believe the penalty for not putting the Fund on notice within 90 days is limited to a special award. In my view s.7(6) only deals with breaches of s. 2.1 and 3.1. It does not apply to breach of s.3(1.1). The failure of an insurer giving notice within 90 days, subject to the saving provision of s.3(2), results in a situation where the insurer is now barred from pursuing priority against the insurer to whom it gave late notice. This penalty may seem harsh and excessive but has been applied in the pre-amendment jurisprudence. For example, in *Lombard Canada Limited v. Royal & SunAlliance Insurance Company and Motor Vehicle Accident Claims Fund* [2008] O.J. No. 5239, Lombard was the first insurer to have received a competed application for accident benefits. Lombard denied coverage on the basis that it's policy was cancelled two months prior to the subject accident. About a year after the accident, Lombard discovered that that the claimant was an insured driver under his employer's policy with RSA. It then served RSA with a Notice to Dispute but the arbitrator held that notice was in breach of the notice requirements in s.3 of O. Reg. 283/95. The

arbitrator held that Lombard was precluded from contesting priority as it had not provided notice to RSA within 90 days and was held permanently responsible for the payment of accident benefits to the claimant even though it's policy had been properly cancelled two months before the subject accident. O. Reg 283/95 required the first insurer to have received a completed application to pay now and dispute later. When Lombard got around to disputing it was too late. The case law makes it clear that a 1st tier insurer that fails to give timely notice can be penalized with having to pay the claim permanently even though not the true priority insurer. This may be the case here if RSA can establish that a valid policy did not exist at the time of the accident that would be required to respond to the claims of Chavez and Bahman.

The final issue to be dealt with is whether the Arbitrator had authority to execute the Order of March 10, 2016 requiring the Fund to participate in the existing arbitration herein. The appellate decision of *Dominion of Canada General Insurance Co. v. Certas Direct Insurance Company* [2009] O.J. No. 2971 deals with the jurisdiction issue in the context of a priority dispute. It was held that an arbitrator has no inherent jurisdiction. An arbitral tribunal gets its jurisdiction only from the instrument appointing it (either an agreement or a statute). In the case before me the jurisdiction would flow from O. Reg 283/95 generally known as the Dispute Between Insurers Regulation which governs priority disputes of the type before me. Justice MacDonnell at page 9 of the decision writes:

> "Counsel for Certas submits that arbitrators have broad authority to decide questions that arise out of priority disputes: Primmum Insurance Company v. ING Insurance Company of Canada [2007] O.J. No. 413 (Sup. Ct.) at paragraphs 11-12. I accept that submission, subject to the obvious qualification that the questions must be the ones that are necessary to resolve the dispute that has been submitted to the arbitrator. The authority cannot be construed as a source of general jurisdiction to resolve a different dispute, or as a basis for doing whatever the arbitrator feels is fair and reasonable."

In the case before me, a priority dispute had already been commenced between the parties set out in the Title of Proceedings above. Section 10 (3) of O. Reg. 283/95 requires that the dispute among insurers shall be resolved in one arbitration. I am satisfied that once the Fund was served with Notice by State Farm, it automatically became a party to the existing arbitration. Of course, the issues to be dealt with in the arbitration to which they were then a party included whether the notice served upon the Fund was valid and served within the time prescribed by the governing legislation and, as it turns out more importantly, whether the combination of s.3 (1.1) and s.3 (1) now prohibit RSA from pursuing priority against the Fund.

In the circumstances, I am satisfied that I had jurisdiction to order the Fund to participate. The alternative would have been for the arbitration to proceed undefended where I would not have had the benefit of the able argument advanced by counsel from the Fund with respect to the impact of the September 1, 2010 amendments.

**ORDER**

In light of the findings aforesaid, I hereby order:

1. that the application of the Fund to set aside the Order of March 10, 2016 requiring its participation in the arbitration herein is dismissed.

In the course of dealing with the preliminary issue herein, submissions were advanced by all parties with respect to the validity and timeliness of the Notice served upon the Fund by State Farm and the impact of the September 1, 2010 amendments on whether RSA can now pursue the Fund for priority. The findings that I have made may well result in a resolution of the main issues in the remaining arbitration subject to any right of appeal. Accordingly, I would appreciate hearing from counsel in that regard within 14 days as well as hearing from counsel with respect to the issue of costs.

DATED at TORONTO this 11th )

day of August, 2016. )

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KENNETH J. BIALKOWSKI
Arbitrator