IN THE MATTER OF AN ARBITRATION PURSUANT TO THE ARBITRATION ACT, 1991, c. 17 as amended;

AND IN THE MATTER OF A DISPUTE UNDER s. 275 OF THE INSURANCE ACT, R.S.O. 1990, c. I.8 AND THE REGULATIONS there under;

BETWEEN:

PRIMMUM INSURANCE COMPANY

Applicant

- and -

ING INSURANCE COMPANY OF CANADA and THE CO-OPERATORS GENERAL INSURANCE COMPANY

Respondents

DECISION

COUNSEL:

Jamie R Pollock for the Applicant

Jeffrey M. K. Garrett for the Respondent Co-operators

Michael Burgar for the Respondent ING

ISSUES:

1. Are ING and/or Co-operators "second party insurers" for the purposes of loss transfer pursuant to Section 275 of the Insurance Act, and if so, which insurer is responsible for reimbursing Primmum Insurance Company for accident benefits paid to and on behalf of Mr. David Farrell?

DECISION:

1. Both ING and Co-operators are second party insurers and Co-operators is in priority and therefore must pay the loss transfer payments.

HEARING:

The hearing in this matter proceeded by way of an agreed statement of facts and written submissions. Oral submissions were made by way of a teleconference call on November 20, 2006.

FACTS & ANALYSIS:

This loss transfer arbitration rises out of a motor vehicle accident, which occurred on August 27, 2000. On that date Mr. David Farrell was driving a motorcycle insured by Primmum Insurance Company ("Primmum") which collided with a Ford van owned by an auto dealership, Courtesy Ford Lincoln Sales ("Courtesy Ford"). Courtesy Ford insured the van, by way of a " garage policy" with ING Insurance Company of Canada ("ING"). At the time of the accident, Mr. Mark Dooreleyers of an automobile detailing business, Finishing Touches Inc. ("Finishing Touches") was driving the van in the course of his employment, Finishing Touches had a garage policy with Co-operators General Insurance Company ("Co-operators") covering the van as a "customer's automobile".

Mr. Farrell was injured in the accident and applied for and received accident benefits from his own insurer, Primmum. Primmum then commenced an arbitration against ING and Co-operators, pursuant to Section 275 of the Insurance Act, for loss transfer. It is agreed by all the parties that Rule 7(3) of the fault determination rules would apply to this fact situation and Mr. Dooreleyers, the driver of the van, would be 100% responsible if the fault determination rules apply.

Before determining whether ING or Co-operators is in priority in the loss transfer claim, it is first necessary to determine if the claim is a valid loss transfer claim given that Mr. Dooreleyers was in breach of his insurance policy at the time of the accident, in that he was driving with an expired license.

Co-operators' argument is essentially that since the insured was in breach of the policy it did not have to provide the third party coverage to its insured and it is therefore not required to respond to the loss transfer claim. Justice Spiegel, in Jevco Insurance Company vs. Wawanesa Insurance Company, 42 O.R. (3rd) 276 dealt with a similar issue. In that case the at fault driver had been operating an automobile without the owner's consent. The hearing arbitrator held that the loss transfer only applied where there was an "insured" within the meaning of Section 239 of the Insurance Act and since the definition of "insured" in Section 239 specifically excludes a "without consent" driver from third party coverage, there was no "insured" to whom fault could be attributed and therefore no insurer from whom loss transfer could be sought. Justice Spiegel held that loss transfer was applicable, stating:

> ….there is nothing in Section 275(1) or the Regulation to suggest that the second party insurer's obligation is dependent upon the existence of and enforceable third party liability coverage in its policy.
>
> Section 275 creates a statutory obligation, imposed on one insurer to indemnify another that has nothing to do with the obligation of an insurer to indemnify its own insured for third party liability. Third party liability is imposed by law on an insured. Loss transfer indemnity is liability imposed by law on an insured…

I am of the view that Justice Spiegel's approach is applicable in this case. The failure to have a valid driver's license is not fatal to a claim for loss transfer pursuant to Section 275 of the Insurance Act. Having decided that, it is now necessary to look at the question of which insurer

is first in priority to pay the loss transfer claim. In order to determine this question it is first necessary to look at the enabling legislation.

Section 275(1) of the Insurance Act states:

> The insurer responsible under sub-section 268(2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms and conditions, provisions, exclusions and limits as may be prescribed, to indemnification and relation to such benefits paid prior from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay statutory accident benefits arose.

One must then turn to the applicable regulation, R.S.O. 1990, 664, in order to determine who is subject to loss transfer. Section 9(2) of that regulation requires that:

> A second party insurer under a policy insuring any class of automobile other than motorcycle, off-road vehicles and motorized snow vehicles is obliged under Section 275 of the Act to indemnify a first party insurer….

A "second party insurer" is defined in Section 9(1) of the regulation as:

> An insurer required under Section 275 of the Act to indemnify the first party insurer.

As noted above, ING was the insurer of the van, as "owner" under the garage policy with Courtesy Ford and Co-operators insured the "customer driver" through its garage policy with Finishing Touches. The real issue in this arbitration is, in essence, whether the insurer of the owner or the driver is responsible to make the loss transfer payments to Primmum. At first

blush, Section 9 of Regulation 664 is of little assistance as it simply refers one back to Section 275 of the Insurance Act.

Counsel for Co-operators argues that Section 275(2) creates liability on automobiles " involved in the accident" and not the driver. In other words, the coverage goes with the automobile rather than the driver.

Counsel refers to Section 277 of the Insurance Act in support of his proposition. That Section states:

> Subject to Section 255, insurance under a contract evidenced by a valid owners policy of the kind mentioned in the definition of "owner's policy" in Section 1 is, in respect of liability accruing from or occurring in connection with the ownership or directly or indirectly from the use or operation of an automobile owed by the insured named in the contract and within the description or definition thereof in the policy, a first loss insurance, and insurance attaching to any other valid motor vehicle liability policy is excess insurance only.

Accordingly, since ING's insured is the owner, under the terms of its policy, it would be first in priority.

Counsel for ING maintains that since Section 275 does not, in his view, address the priority by different insurers of the same automobile involved in the accident, one should look at the motor vehicle provisions of the loss transfer as a whole as well as the language of the garage policies in order to establish which insurer is in priority.

The words of the garage policy are identical. Counsel for ING points out that under the terms of the garage policies, Co-operators rather then ING would be in priority for indemnification related

to tort and physical damage arising out of the negligent use of the van by the Finishing Touches employee.

I note that this obligation as it arises from the policy relates only to indemnity to the insured rather than an insurer. In addition, the mere fact that the third party tort and physical damage claims are handled in a certain fashion is not at all determinate of the issue.

Counsel for ING also relies on Section 247 of the Insurance Act which states:

> The insurer may provide under a contract evidenced by a motor vehicle liability policy, in either or both the following cases, that it shall not be liable,
>
> (a) to indemnify any person engaged in the business of selling, repairing, maintaining, servicing, storing or parking automobiles for any loss or damage sustained while engaged in the usual operation of or while working upon the automobile in the course of that business unless the person is the owner of the automobile or is an employee of the owner of the automobile;
>
> (b) for loss of or damage to property carried in or upon the automobile or to any property owned or rented by or in the care, custody or control of the insured.

Counsel for ING points to paragraph 6.18 of their garage policy which states:

> No person who is engaged in the business of selling, repairing, maintaining, storing, servicing or parking automobiles shall be entitled to indemnity or payment under this policy for any loss, damage, injury or death sustained while engaged in the usual

> operation of or while working upon or occupying the automobile as defined in this Policy in the course of business unless the person is the insured or an employee or partner.

Counsel for ING argues that this paragraph of the policy, when read with Section 247 of the Insurance Act is a full answer to Co-operators' claim.

Even if I were prepared to accept that Finishing Touches by "detailing" the car in question at the time of the accident was " repairing, maintaining or servicing" the van, I do not think that this is necessarily determinate of the issue.

Loss transfer is, of course, a creature of statue and one should look first at the statue rather then the policy itself for determining the priority as between two policies. Section 9 of Regulation 664 directs us to Section 275 of the Insurance Act. Section 275(1) is, by itself, of little assistance as to which insurer is to be in priority. Section 275(2) however, states:

> Indemnification under sub-section (1) shall be made according to the respective degree of fault of each insurer's insured as determined under the fault determination rules.

In our particular case ING's insured is Courtesy Ford and Co-operator's was Finishing Touches, whose employee, Mr. Dooreleyers, actions caused the accident. When dealing with loss transfer issues, one must keep in mind that the legislature was attempting to create a quick, efficient and economical method of resolving disputes between insurers. It chose a system that is somewhat arbitrary in some circumstances. Loss transfer is based, however, on the fault of the insured as Section 275(2) and the fault determination rules make clear. In our case, it is the actions of Mr. Dooreleyers acting as an employee of Finishing Touches, who was at fault for the accident. If one considers the overall scheme of loss transfer it is clear that the legislature was attempting to distribute loss based on the degree of fault. Accordingly in this case Co-operators, as the insurer of Finishing Touches is first in priority and must pay the monies paid out to Mr. Farrell by Primmum.

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

Dated at Toronto, this _____ day of August 2007.

_____

M. Guy Jones
Arbitrator