

**IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990,
c. I. 8, section 268 and *REGULATION 283/95***

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

RBC GENERAL INSURANCE COMPANY

Applicant

- and -

CERTAS DIRECT INSURANCE COMPANY

Respondents

DECISION

COUNSEL:

James Leone for the Applicant

Michael Hart for the Respondent

ISSUE:

1. Is RBC General Insurance Company (“RBC”) precluded from pursuing Certas Direct Insurance Company (“Certas”) for the accident benefits it has paid out to Angelica Guerrero, as a result of the application of section 3 of *Regulation 283/95* of the *Insurance Act*?

RESULT:

RBC is precluded from pursuing Certas for the benefits it has paid out to Ms. Guerrero as it did not notify Certas of its intention to dispute its obligation to pay benefits within ninety days of receiving a completed application for benefits, as required by section 3 of *Regulation 283/95*.

RBC has neither established that 90 days was not a sufficient time to make a determination that Certas was liable under section 268 of the Act, nor that it made reasonable investigations necessary to determine if Certas was liable within 90 days. RBC cannot therefore rely on the “savings provisions” in subsection 3(2).

HEARING:

The hearing in this matter was held on August 25, 2008 in Toronto, Ontario before me, Shari L. Novick, Arbitrator.

BACKGROUND:

Angelica Guerrero was injured when the vehicle that she was in was involved in a motor vehicle accident on July 14, 2006. The driver of the vehicle was her cousin, Ann Rosa Cevallos. The vehicle was insured by RBC.

Ms. Guerrero applied to RBC for benefits under the *Statutory Accident Benefits Schedule*. Her completed application was received by RBC on July 26, 2006.

RBC subsequently discovered that Ms. Guerrero's common-law spouse, Jorge Trivino, had an auto policy with Certas on the date of loss, and would therefore be in higher priority than RBC to pay the claim. RBC sent a copy of the Notice to Applicant of Dispute Between Insurers to Certas on November 23, 2006.

Certas agrees that it would be the priority insurer in accordance with section 268(2) of the *Insurance Act*, but contends that RBC is precluded from pursuing its claim as it exceeded the 90-day notice period set out in section 3 of the regulation.

RELEVANT PROVISIONS:

Section 268 (2) of the *Insurance Act* provides:

- (2) The following rules apply for determining who is liable to pay statutory accident benefits:
 1. In respect of an occupant of an automobile,
 - i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,
 - ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,
 - iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,
 - iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.

The relevant provisions of *Regulation 283/95* are:

1. All disputes as to which insurer is required to pay benefits under section 268 of the Act shall be settled in accordance with this Regulation.

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.
 - (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.
 - (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.

EVIDENCE :

Two witnesses were called to testify at the hearing - Leah Markham, the adjuster who was assigned to handle Ms. Guerrero's claim at RBC (who now works at TD Insurance), and Remo Moretto, an underwriter with Certas who formerly worked at CIBC Insurance.

The evidence was fairly straightforward and mostly confirmed by the documentation filed. Ms. Markham confirmed that Ms. Guerrero's Application for Accident Benefits was received by RBC on July 26, 2006. She testified that she reviewed the application and noted that while Ms. Guerrero indicated that she had a common-law spouse, she also indicated that she was not covered by his or anyone else's auto policy. She explained that she decided to obtain a signed statement from the claimant in order to clarify this issue, so that she could determine whether another insurer might be in higher priority to pay the claim.

Ms. Markham also confirmed that her first contact with the claimant took place on July 19, approximately one week prior to reviewing the application. Two interesting facts appear in the adjuster's log notes from that date. They reveal that Ms. Markham called Ms. Guerrero's home, spoke with her daughter, and was advised that Ms. Guerrero's spouse had a car that was insured. The notes also indicate that information from the property damage file suggests a "possible policy with CIBC", and a policy number was provided.

The log notes also indicate that approximately two weeks later, Ms. Markham requested that a meeting be set up in order to obtain a signed statement from Ms. Guerrero. An appointment was arranged for August 24, but was then cancelled by Ms. Guerrero and rescheduled for August 29. Ms. Markham confirmed that a RBC road adjuster did obtain a statement from Ms. Guerrero on that date. The September 5th log note indicates that the statement confirmed that Ms. Guerrero lived with a common law spouse who had car insurance. It is clear from this note that Ms. Markham determined on that date that that insurer would be in higher priority than RBC to pay Ms. Guerrero's claim.

Despite this knowledge, RBC did not provide its Notice of Dispute to Certas until November 23, 2006, over two and one-half months later.

Ms. Markham testified that she received and reviewed the claimant's statement on September 6. It referred to Ms. Guerrero's common-law husband as George Trevino, and also advised that he owned a grey Nissan. She testified that she requested that an Autoplus search be conducted on this name, although there are no documents in the file that confirm that this was done. Ms. Markham recalled that no useful information was obtained from that search. She noted at the hearing that Mr. Trivino's name was misspelled, and that the plate number of his vehicle was not provided in the statement.

Ms. Markham testified that she retained an investigator on September 7, and requested that a "driveby search" be done in order to obtain the plate number of the vehicle. It appears that the investigator only confirmed this assignment on September 15, and then

did not report back in a timely fashion. When Ms. Markham did not receive the requested information by October 10, some four weeks later, she placed a follow-up call to inquire on the status of her request. She was advised two days later that a few attempts at a driveby search had not yielded any results, but that they would continue to pursue it.

The information requested was finally provided by the investigators on November 20, 2006. Their report identifies a Jeep Liberty, registered to a Jorge Trivino, as having been parked in Ms. Guerrero's driveway on October 24. No explanation was provided as to why the investigator's observations were not reported to RBC in late October, when this information was obtained. I note that October 24 was the expiry of the ninety-day period provided in Regulation 283/95.

Ms. Markham testified that once she reviewed the investigation report, she requested that an Autoplus search be conducted on Jorge Trivino. The search revealed that the Jeep Liberty identified by the investigators actually belonged to Ms. Guerrero's husband's son, who has the same name as his father. The search also revealed that the son was a listed driver on his father's policy covering the grey Nissan vehicle that was referred to in the claimant's statement. This policy was issued by Certas. Armed with this information, Ms. Markham forwarded a Notice of Dispute Between Insurers to Certas on November 23, 2006. As stated above, this was thirty days after the deadline prescribed by the regulation.

While it appears that the priority investigation was hampered by the length of time it took the investigators to complete their task and report back to RBC, the most telling piece of evidence regarding the delay came from Ms. Markham herself. When asked under cross-examination how the ninety-day period referred to in section 3 of the regulation is calculated, she responded that the ninety day "clock" only begins to tick once a priority issue is identified, or when the priority of another insurer is confirmed. This is also borne out by her log notes. Her November 23 entry states as follows –

We confirmed a priority concern on Sept 6/06 when claimant provided her husband's information. Will count 90 days from Sept 6 -

It is clear that this misunderstanding of how the ninety-day period is to be calculated informed Ms. Markham's approach to the investigation she undertook.

I also heard the evidence of Remo Moretto, an underwriter employed by the Desjardins group. His testimony centred on how information requests for old policies issued by CIBC Insurance, which has since been purchased by Desjardins, were currently handled. I do not find this issue to be germane to my decision, and I will therefore not outline the evidence provided on this point.

ANALYSIS AND DECISION:

Both the language of section 3(2) of the regulation and the case law interpreting it create a significant uphill battle for any insurer seeking to excuse its late provision of notice of its intent to dispute the obligation to pay benefits. The rationale behind this strict interpretation is that an insurer is entitled to know at an early stage whether it will be adjusting a claim and is responsible for paying benefits. The courts have taken the view that as sophisticated litigants regularly involved in disputes of this sort, insurance companies should be well able to determine their rights and obligations under the prevailing regime, and that "no unfairness would be visited upon them by insisting on strict compliance with the notice requirements." (*Kingsway General Insurance Company v. West Wawanosh Insurance Company*, 2001 CanLII 28051, Nordheimer, J. at para. 22))

While many arbitration and appeal decisions have addressed the question of whether or not the 'saving provisions' in section 3(2) should be applied, each case turns on its own facts. However, some general principles have emerged from the jurisprudence. An insurer's investigation should not be held to a standard of perfection, and an arbitrator or

court should resist the temptation to review the relevant events through the lens of hindsight. The test to apply is perhaps best summed up by Justice Perell in the *Liberty Mutual Insurance Company v. Zurich Insurance Company* case (2007) Can LII 54080 Ont. S.C., at para. 23:

...an insurer seeking to deliver a notice after 90 days must show both that it exercised due diligence and also that there was something in all the circumstances that would justify requiring more than 90 days to make a determination about whether to issue a notice to a particular insurer.

It is against this legal backdrop that I turn to the facts of this case.

The evidence indicates that RBC received Ms. Guerrero's completed application for benefits on July 26, 2006. Counting ninety days from that date, the allowable period within which notice could have been provided expired on October 24, 2006. RBC in fact provided its notice to Certas on November 23, some thirty days past the deadline provided in the regulation.

What reasons underlie this delay? Counsel for RBC essentially argued that the combination of an unco-operative claimant with a language barrier (Ms. Guerrero speaks Spanish), the confusion created by Mr. Trivino's name being misspelled on the statement obtained, and the fact that both Mr. Trivino and his son use the same name led to it being practically impossible for RBC to make the required determination within ninety days.

Mr. Leone also pointed out that by indicating on the application that she was not covered under any other insurance policies, including that of her spouse, Ms. Guerrero misrepresented an important fact to RBC which hampered their investigation from the beginning. The facts, however, do not bear this out. While Ms. Guerrero was mistaken when she indicated on the application that she was not covered by any other policies, RBC became aware that this was not true early on in the process. Arguably, Ms. Markham was aware of this after making her first call to the claimant's home soon after

being assigned the file; at the very latest, Ms. Markham knew for certain by September 6 when she received the signed statement obtained by the road adjuster, that another policy was in force and was likely in higher priority to respond to the claim.

With regard to the other issues referred to above, it is my view that none of these alleged ‘twists’ were particularly difficult to work through, or created problems complex enough to get RBC over the hurdle of the strict two-pronged test set out in the regulation. The key steps conducted in Ms. Markham’s investigation – namely, obtaining a statement from the claimant, requesting the driveby search to confirm the license number of her spouse’s vehicle, and then conducting the Autoplus search, were all effective steps that yielded useful information. The problem was that each of the first two steps took much more time to complete than they should have. I note that after making the decision to obtain a statement from Ms. Guerrero, it took six weeks for it to arrive on Ms. Markham’s desk. The results of the driveby search, first requested by Ms. Markham on September 7, were not received until November 20, 2006, over ten weeks later.

I was not advised of any particularly unusual factors or incidents that would explain these delays. However, Ms. Markham candidly admitted in her testimony that she operated under the assumption that the “ninety day clock” only began to run on September 6 when she received the statement from the road adjuster, confirming that the claimant’s spouse was insured. If that were true, the deadline for sending a Notice of Dispute would be early December 2006. It is evident that Ms. Markham approached her investigation on priority from that standpoint. However, that is clearly incorrect; section 3(1) spells out that the ninety-day period begins to run once a completed application for benefits is received. This error clearly informed Ms. Markham’s approach to the investigation, and ultimately is fatal to RBC’s claim.

Consequently, I find that RBC has not satisfied the onus it faces to prove that ninety days was not a sufficient period of time to make its determination that Certas was liable to pay the claim, or that it made the reasonable investigations necessary to arrive at that conclusion within ninety days of receiving the application.

In the result, RBC may not proceed in its claim against Certas, and the application for arbitration is dismissed.

If the parties cannot agree on the disposition of costs of the arbitration, I may be spoken to.

DATED AT TORONTO, ONTARIO this _____ day of March, 2009.

Shari L. Novick
Arbitrator