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

AND IN THE MATTER OF AN ARBITRATION HELD
PURSUANT TO THE ARBITRATION ACT, S.O. 1991, c. 17;

BETWEEN:

PILOT INSURANCE COMPANY

Applicant

- and -

ROYAL AND SUNALLIANCE INSURANCE COMPANY OF CANADA

Respondent

AWARD

COUNSEL:

Cara L. Boddy for the Applicant, Pilot Insurance

Geoffrey A. Bogo for the Respondent, Royal and SunAlliance

ISSUE:

1. Do the saving provisions of subsection 3(2) of Regulation 283/95 excuse Pilot Insurance from having provided late notice of its intention to dispute its obligation to pay accident benefits to Nasir Amiri, Fauzia Amiri, Babak Amiri and Bebal Amiri ?

RESULT:

1. Pilot Insurance is not entitled to rely on the provisions of subsection 3(2) of Regulation 283/95 to dispute its obligation to pay accident benefits in this case.

HEARING:

The arbitration of this preliminary issue took place on November 29, 2005 in the City of Toronto, before me, Shari L. Novick, arbitrator.

THE FACTS:

None of the essential facts in this matter are in dispute. The parties filed a joint Book of Documents comprising all of the relevant documentation. The Applicant called one witness, Mr. Cary Soules, an accident benefits claims advisor with Aviva Canada.

The documents and evidence from Mr. Soules establish the following facts: Five members of the Amiri family were involved in an accident on July 4, 2004. The vehicle involved in the accident was a 1994 Honda Accord, owned by Samira Amiri and insured by Pilot Insurance ("Pilot"). There is no dispute over Samira's application for accident benefits; the dispute in this matter revolves around those of her mother Fauzia, her father Nasir, and her two brothers Bebal and Babak. Nasir Amiri owned another vehicle at that time, which was insured by Royal and SunAlliance ("Royal"). All of the claimants, as well as Samira Amiri, live in the same household.

The Amiris applied to Pilot for accident benefits on July 26, 2004. The applications submitted by Fauzia and Nasir incorrectly state that Nasir Amiri is the owner of the Honda vehicle that was involved in the accident. They indicate that Pilot is the insurer of this vehicle, but list an incorrect policy number. Most importantly, the applications do not disclose the fact that there is a second vehicle in the household.

It does not appear that any action was taken on the applications for approximately one month after being received.

Pilot subsequently assigned an outside "road adjuster" to take statements from both Samira and Fauzia Amiri. This took place on August 30, 2004. The statements reveal that Samira is the owner of the vehicle involved in the accident, that Pilot is the insurer of the vehicle, and that Nasir owns a second vehicle. There is no mention of who insures this second vehicle in the statements. I note that no statement was obtained from Nasir Amiri.

The statements were received by the "Whiplash Unit" at Pilot on September 17, 2004. It is not clear why it took almost three weeks for them to arrive in the unit. Mr. Soules explained that the Whiplash Unit handles all claims in which the injuries sustained have been diagnosed as falling within the WAD I or WAD II designations, and are therefore subject to the PAF guidelines set out in the provisions of Bill 198. He explained that the unit is comprised of various groups of adjusters, and that each person in the group may work on a file assigned to their group at any time, as opposed to the usual practice of having one claims adjuster assigned to each file. He stated that a supervisor may determine at any point that a claim no longer fits within the PAF guidelines, and the file will then be transferred out of the Whiplash Unit.

That appears to be what happened in this case. The Amiri applications were transferred from the Whiplash Unit to Mr. Soules on November 1, 2004. There is no evidence before me regarding what action, if any, was taken on the applications from the date the statements were received on September 17 to November 1, when the file was transferred out of the unit, a period of six weeks. I note that the 90 day period prescribed by the regulation for filing a Notice of Dispute with another insurer expired on October 24, 2004, approximately one week before Mr. Soules took over the matter.

Mr. Soules testified that once he received the file he reviewed all of the material within a few days, including the statements taken. He stated that upon noting the mention in the statements of a second vehicle owned by Nasir Amiri, he immediately became concerned about the issue of

priority, and determined that he needed to pursuewhether there was an insurer with higher priority than Pilot to pay benefits to Nasir Amiri, his wife Fauzia and their dependants.

Mr. Soules then outlined the steps he took to investigate this matter. He testified that he checked the underwriting screen and determined that Nasir had had an auto policy with Pilot that had lapsed. He decided to contact the broker who had placed that policy, and was advised on November 12, 2004 that in fact a new policy for Nasir's vehicle, a 1991 Toyota, had been placed with Royal.

Armed with this information, Mr. Soules wrote to Nasir Amiri and advised that he should have applied to Royal for benefits in accordance with the priority rules between insurers. He then received a telephone call from an adjuster at Royal on November 25, 2004, advising that Royal was not prepared to accept the claim, given the expiry of the 90 day period. Mr. Soules consequently filed A Notice of Dispute Between Insurers on November 29, 2004, some thirty-six (36) days beyond the 90 day deadline set out in the regulation.

Mr. Soules admitted under cross-examination that he had no reason to believe that the Amiris had not been co-operative with Pilot. He agreed that it had not been difficult to determine that the second vehicle in the household was insured through Royal, once he made the effort to do so. Finally, he acknowledged that a variety of searches can be done through Autoplus, the Ministry of Transportation and the Insurance Board of Canada databases to verify sources of insurance coverage, and that these steps did not appear to have been taken in this case.

RELEVANT PROVISIONS:

The relevant provisions to consider in this case are:

> **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.

PARTIES' ARGUMENTS:

Pilot argues that the evidence discloses that it has met both branches of subsection 3(2) of the regulation, and that the 90 day time frame for disputing its obligation to pay benefits to the claimants in question should be extended.

Firstly, it contends that 90 days was not enough time to determine that Royal was liable to pay benefits, given that the Amiris did not disclose on their applications that Nasir owned a second vehicle that was insured by Royal. Counsel noted that the Amiris never advised Pilot of the existence of the Royal policy. She contended that the first branch of the saving provisions is meant to apply in circumstances such as these, when the first insurer receiving an application has difficulty obtaining important information regarding relevant insurance coverage, and relied on a line of cases in which late notice has been excused in peculiar or unusual circumstances. Among others, counsel cited the case of *Lombard Canada Inc. and Saskatchewan Government Insurance* [2002] O.J. No. 4257 (Ont Sup. Ct. of Justice) in which notice provided beyond the prescribed time limit was excused when an incorrect licence number was provided to the insurer.

Pilot also argued that it made reasonable investigations within the 90 day period to determine whether another insurer was liable to pay benefits, and therefore satisfied the second branch of the saving provision in the regulation. Counsel submitted that the applications were reviewed thoroughly upon being received, and that the additional step of sending a field adjuster out to obtain two statements from the claimants was taken. She noted that in the case of *Ontario Municipal Insurance Exchange and Liberty Mutual Insurance Company (*unreported decision,

October 2000) Arbitrator Jones found that an insurer was not required to take all possible steps to investigate whether another insurer may be liable, and that the jurisprudence in this area generally establishes that a standard of perfection is not required. She pointed out that the Whiplash Unit handles a large file load, and that their business reality should be taken into account when interpreting the regulation.

Finally, counsel pointed out that the Notice to Dispute filed on November 29, 2004 was received only 36 days beyond the prescribed period, and submitted that when that is compared to other situations in which the 90 day period has been extended, it constitutes a relatively short delay. She contended that once Mr. Soules had determined that Royal was involved, he took the required steps to notify them and filed the requisite Notice of Dispute in a timely manner.

The Respondents submitted that subsection 3(2) must be interpreted as written, and that an insurer can only invoke the saving provisions if it can prove that both branches of the section have been satisfied, regardless of how many days the deadline is exceeded by. Counsel for Royal contended that the evidence suggests that the misinformation provided by the Amiris in the initial applications for benefits was clearly a result of their own confusion or mistaken belief, as opposed to an active attempt to mislead Pilot.

Counsel for Royal argued that when the chronology of events is examined, it is clear that reasonable investigations were not carried out within the prescribed 90 days. He pointed out that once Pilot was advised that there was a second vehicle in the household on August 30, 2004, the date the statements were taken, 54 days remained to then take the appropriate steps to clarify whether or not other coverage was primary. Counsel suggested that various avenues could have been explored, such as taking a statement from Nasir Amiri, requesting clarification from the claimants' representative, or doing the usual searches of Ministry of Transport, IBC or AutoPlus databases. He highlighted the fact that none of these steps were taken until the file was transferred to Mr. Soules, and that it then took only two phone calls to obtain the relevant information.

Citing Arbitrator Robinson's decision in *Unifund Insurance Company and Simcoe and Erie General Insurance* (unreported, May 1, 1997), counsel for Royal contended that insurers are required to proceed with due dispatch in these situations, and that the evidence in this case reveals that this was not done.

FINDINGS/ ANALYSIS:

Having considered the evidence and arguments of the parties, I have concluded that Pilot's late notice of its intention to dispute its obligation to pay benefits to the Amiris cannot be excused by the saving provisions found in subsection 3(2) of the regulation.

As I read the arbitral and judicial jurisprudence on this issue, a balance must be struck between two competing interests. On the one hand, insurers are often faced with incomplete information and have limited resources to direct towards determining whether another insurer is in higher priority to them. On the other hand, there is a need for clarity and timeliness in dealings between insurers in this context. In this latter vein, I note the Court of Appeal's comments in *Kingsway General Insurance Co. v.West Wawanosh Insurance Co.* 58 O.R. (3d) 251 to the effect that insurers subject to this regulation are sophisticated litigants who are regularly involved in these types of disputes, and that "clarity and certainty of application are of primary concern", with "little room for creative interpretations" of the regulation (at p. 4).

It must be remembered that the focus of the inquiry is not necessarily whether 90 days was enough time for an insurer to make the correct determination of whether its policy or that of another insurer should answer the application for benefits, but rather, whether that time frame is sufficient to allow the insurer to gather the necessary information to make a determination. (see C*GU Group (Canada) Ltd. and Zurich Canada*, unreported decision of Arbitrator Jones, October 2001, at p. 3). The distinction may be subtle, but it is an important one; an arbitrator must consider whether in the circumstances, 90 days was insufficient time to gather the required information to determine whether another insurer may be liable to pay, as opposed to it being enough time for an insurer to definitively answer that question.

Applying the above principles, I find that Pilot has not met the onus it faces to prove that it has satisfied each branch of the prescribed test. The evidence discloses that it had the required information to determine that another insurer may have been in higher priority to respond to the applications filed by the Amiris in its possession within 90 days of receiving the applications, but did not carry out the required investigations in a timely manner.

While it is my view that the regulation does not mandate an arbitrator to second guess each step taken by an insurer in this context with the benefit of hindsight, and I recognise that the applications filed may not necessarily have raised the "red flag" that another insurer may be in priority to Pilot to pay benefits, there are two glaring omissions in Pilot's handling of this matter during the relevant period that followed receipt of the applications: Firstly, the statements taken that reveal the existence of a second vehicle in the household were never followed up on by anyone in the Whiplash Unit, and secondly, the file seems to have laid dormant from September 17, when those statements were received by the unit, to November 1 when it was transferred to Mr. Soules, a period of six weeks.

While there may well have been valid reasons for this delay, such as the heavy workload in the Whiplash Unit or the fact that no one adjuster is assigned to a specific file, once the decision was made to obtain statements from two of the applicants, Pilot was in possession of important information which suggested the existence of other potentially primary coverage. Despite this, no action was taken for a period of six weeks. To paraphrase the Court of Appeal's findings in the *Kingsway General* case (supra), as a sophisticated litigant who is regularly involved in these types of disputes, Pilot cannot be excused from not complying with the regulated time frame for making this determination when no action whatsoever was taken for almost half of the prescribed 90 day period.

Accordingly, Pilot is not entitled to dispute its' obligation to pay benefits to Fauzia Amiri, Nasir Amiri, Bebal Amiri and Babak Amiri, under section 268 of the *Insurance Act.*

COSTS:

The parties have agreed that costs are to be borne by the unsuccessful party. I may be spoken to if the parties are unable to come to an agreement on the quantum of costs payable.

Dated this _____ day of December, 2005 in the city of Toronto.

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Shari L. Novick
Arbitrator