

IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, section 268 and Regulation 283/95 there under;

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

AND IN THE MATTER OF AN ARBITRATION;

BETWEEN:

RBC GENERAL INSURANCE COMPANY

Applicant

- and -

TD MELOCHE MONNEX AND CERTAS DIRETC INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

James V. Leone for the Applicant

Don Harvey for the Respondent – TD Meloche Monnex

Ralph D'Angelo for the Respondent – Certas Direct Insurance Company

ISSUES:

1. Should the time for service of Notice of Intention to Dispute be extended in this case pursuant to section 3(2) of Regulation 283/95?

DECISION:

1. The time for service of the Notice of Intention to Dispute should not be extended and accordingly RBC cannot proceed with this arbitration.

FACTS & ANALYSIS:

This arbitration arises out of a motor vehicle accident that occurred on June 25, 2004. On that date, Mr. Jacob Sikorski was a passenger in a motor vehicle insured by TD Meloche Monnex (“TD”). At the time of the accident Jacob Sikorski did not have a motor vehicle liability policy of his own, although his father and stepmother, Andrew Sikorski and Grace Lewinski had a policy with RBC General Insurance Company (“RBC”). In addition his mother Sabina Sikorski had a policy with Certas Direct (“Certas”).

On July 23, 2004 RBC received an application for accident benefits. On February 22, 2005 RBC served TD and Certas with a Notice of Intention to Dispute between Insurers taking the position that one of the companies was properly responsible to pay accident benefits in accordance with section 268 of the Insurance Act. TD and Certas have denied that they are in priority and have also asserted that RBC did not service the Notice of Intention to Dispute within 90 days of receiving the completed application for accident benefits as required by section 3(1) of Regulation 283/95. It is that issue that I will deal with at this time.

In response to the respondents' claims that the Notice was served beyond the 90 days required by section 3 of Regulation 283/95, RBC makes two submissions. Firstly they argue that they did not receive a completed application until December 30, 2004 and alternatively, if they were late, they fall within the requirements of the saving provisions as set out in section 3(2) of Regulation 283/95.

WHEN WAS THE COMPLETED APPLICATION FOR ACCIDENT BENEFITS RECEIVED?

RBC concedes that they received a signed application for accident benefits on July 23, 2002. They point out, however, that in Part 10 of the Application, Mr. Sikorski filled in the "no" box to the question "do you, your spouse or anyone you are dependent upon (e.g. parents) have any other benefit plan that covers you (e.g. group or private, union, disable medical or dental etc.)?" RBC takes the position that the claimant had, apparently innocently, answered the question incorrectly and the time frame did not begin to run until such time as it was corrected. It was corrected, in this submission, on December 30, 2004, when RBC received the completed questionnaire from Jacob Sikorski's parents, indicating that insurance might be available through TD or Certas. I have some difficulty with this position. To begin with I am of the view that at best there may have been an incorrectly filled out application rather than an incomplete application. Just because it might have been filled out incorrectly does not necessary mean that it was incomplete. In addition, Part 10 of the application appears to deal with the issue of collateral benefits rather than motor vehicle liability insurance which is dealt with in Part 4 of the application. There was no evidence in front of me to suggest that there were other collateral

benefits available to Jacob Sikorski, and accordingly nothing to suggest that he completed the application incorrectly. For these reasons RBC's arguments in this regard fail.

SHOULD THE SAVING PROVISIONS OF REGULATION 283/95 APPLY?

Section 3(2) of Regulation 283/95 states:

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.

In order to obtain the benefit of section 3(2) RBC must show that 90 days was not enough time to make a determination that another insurer might be liable and also that RBC make reasonable investigations within the 90 day period. In order to determine if RBC fulfilled both parts of the test, it is necessary to briefly review the facts of this case.

The accident occurred on June 25, 2004. The file was assigned to a RBC adjuster on June 28, 2004 and on that same day she sent out an accident benefits package to Mr. Sikorski. Possibly as early as June 28, 2004, but certainly by June 30, 2004, the adjuster was aware that there might well be a priority issue. On that date the adjuster was aware that Jacob lived with his father and step-mother and she had also done a search that revealed that Jacob had previously been a listed driver on his natural mother's policy with Certas, but had moved and was no longer a listed driver with Certas. She called Jacob's lawyer's office that day to set up an appointment to give

statements from the step-mother, natural mother and father regarding the 90 day issue. She also set up an appointment to meet with Jacob Sikorski at the lawyer's office on July 14 to take a statement. On July 5, 2004 the adjuster called the lawyer's office again in order to attempt to set up a meeting with the mother, stepmother and father to arrange for the dependency statement but the lawyer was on vacation.

On July 12, 2004 another adjuster or supervisor at RBC reviewed the file and noted that further investigation was required on the priority issue and that they should obtain a statement from both parents. They were clearly aware that if Jacob were dependent on his mother then Certas would be responsible for accident benefits and if not dependent on either parent, the insurer of the vehicle Jacob was in at the time of the accident would be responsible for the payment of accident benefits.

On July 14, 2004, a statement was obtained from Jacob Sikorski. That statement was filed as an exhibit at the hearing. A considerable amount of information was obtained with regard to the accident, as well as Jacob's employment situation and his living arrangement and what work he did around the house. There was little, if any, information obtained regarding what support either parent provided to Jacob.

On July 22, 2004, the adjuster contacted Jacob's lawyer and arranged to have a road adjuster attend at the lawyer's office to obtain a statement from Jacob's mother, father and step-mother. This was eventually set up for August 23, 2004. The adjuster prepared questions for the road adjuster to ask the parents regarding dependency.

On July 23, 2004 RBC received the completed application for accident benefits and the 90 day notice period began to run.

Unfortunately, the road adjuster who was to attend at the meeting of August 23, 2004 was on vacation that day and did not attend. The parents had attended for the meeting and were not pleased that the adjuster did not attend or advise them in advance that he would be unable to be there. Jacob's lawyer therefore requested that any questions regarding dependency be sent to the lawyer in writing and they would be given to the parents. On that same day the adjuster wrote to the lawyer with questionnaires for both parents and the step-mother.

On August 27, 2004 the adjuster received the police report of the accident which revealed that TD was the insurer of the vehicle in which Jacob was a passenger at the time of the accident.

On September 7, 2004, having not received the completed questionnaire from Jacob's lawyer, the adjuster again wrote requesting the completed questionnaires. She also stopped payment of any further income replacement benefits pursuant to section 33 of the Statutory Accident Benefits schedule for failure to provide the dependency information.

On October 21, 2004 the 90 notice period expired.

On October 26, 2004, having still received no response from the lawyer, the adjuster once again wrote requesting the completed questionnaires. Still having received no response, the adjuster

once again wrote the claimant's lawyer on November 24, 2004 reminding him of the obligations pursuant to section 33 of the Statutory Accident Benefit Schedule and requested the questionnaire be returned.

On December 3, 2004 she wrote yet another letter to the lawyer requesting the completed questionnaires. This was repeated on a final occasion on December 24, 2004.

Finally, after seven requests over a period of 4 months, the claimant's counsel returned the completed questionnaire of Andrew Sikorski, Grace Lewinski and Sabina Sikorski on December 30, 2004.

On February 22, 2005 RBC served TD and Certas with Notice of Intention to Dispute between Insurers.

When determining whether the 90 day notice provisions should be extended, one must keep in mind that the test is what is reasonable in all these circumstances. The test is not one of perfection. Adjusters, particularly accident benefit adjusters, are extremely busy individuals with a multitude of matters to deal with, many of which have short timelines attached to them. They must investigate accidents, arrange for benefits to be provided to injured parties, contact medical care providers, deal with paralegals, lawyers and other associated duties. At the same time they must investigate possible priority issues involving section 268 of the Insurance Act. Despite this, the courts have made it clear that there are only limited circumstances in which the notice period

should be extended (see: Kingsway General Insurance vs. West Wawanosh Insurance Company 58 O.R. (3rd) 251, [2002] O.J. No. 528 (Ontario Court of Appeal)).

In our particular case, it is clear that RBC was aware very early on that dependency was an issue. They were aware as early as June 30, 2004 that Jacob's mother might well have a policy of motor vehicle liability insurance. They also knew by August 27, 2004, when they received the police report, that TD was the insurer of the car in which Jacob was a passenger. Thus, they knew very early on that there was a possible dependency issue and the name of the two insurers who might have been in priority. What RBC did not know, at this stage, was if Jacob Sikorski was a dependent of his mother or father and step-mother or none of them. The question then becomes, was the 90 days sufficient time to get the necessary information and what efforts did RBC make during that time frame.

I have already outlined the efforts made by RBC during their investigation. It would appear that the RBC adjuster was extremely busy arranging for care, obtaining accident information and attempting to get the priority information during the relevant time frame.

While counsel for TD and Certas concede that RBC made some efforts to obtain the pertinent information from Jacob Sikorski's mother, father and step-mother, by contacting Jacob's lawyer, they suggest that RBC should be faulted for not attempting to contact these individuals directly since they themselves were not making accident benefit claims. They also point out that Grace Lewinski was RBC's own insured and that they could have contacted her directly. While each fact situation must be examined individually, I do not criticize RBC for failing to contact these

persons directly. From very shortly after the accident, Jacob Sikorski was represented by counsel and arrangements were made very early on to get the priority information through Jacob's lawyer. It must be remembered that Jacob Sikorski was a young adult, living at one parent's home and have just left the other parent's home. There may well have been a tort action in which there could well have been family law act claims. Once having set up arrangements to get the information via Jacob's lawyer, it would not likely have been productive to then attempt to get it without the lawyer's knowledge and consent.

I am more troubled by the failure to obtain more information regarding priority at the meeting of July 4, 2004 when a representative of RBC met Jacob Sikorski at his lawyer's office. While numerous questions were asked regarding Jacob's work situation and his injuries, few, if any, questions were asked about the financial dependency if any, upon either of his parents. While I appreciate that numerous efforts were made after that date to obtain the dependency information, there was no adequate reason given for why it could have been obtained at that time.

An appointment was later made for August 23, 2004 to get information but unfortunately the RBC road adjuster was away that day and the parents indicated there after that they preferred to supply answers by way of a questionnaire.

When giving notice to another insurer regarding priority, it is important to realize that certainty is not required before giving such notice. The insurer must simply have a reasonable belief that another insurer may be in priority. While insurers should not send out notices without any basis for doing so, when there is a reasonable possibility of another insurer being in priority they

should do so. If anything, they should err on the side of caution and if there is any doubt, send out the notice and continue their investigation thereafter.

While the failure to obtain the information at the initial meeting, and missing the second meeting is, in my view, fatal to the request for an extension, I am also troubled by the failure to send the notice in a timely fashion once the questionnaires were received by RBC on December 30, 2004. It was not until February 22, 2005, that notices were actually sent. While I appreciate that this was during the holiday season and employees have to catch up with numerous matters upon their return from holidays, it took approximately seven weeks after receiving the information before RBC sent the notice. There was not, in my view, sufficient reason give for such delay.

In light of the above I am not prepared to extend the time for service of the notice and accordingly the arbitration may not proceed.

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

Dated at Toronto this _____ day of February 2007.

**M. Guy Jones
Arbitrator**