IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c.I.8, as amended,
and Ontario Regulation 283/95

AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c.17

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

TD HOME & AUTO INSURANCE COMPANY

Applicant

- and -

MARKEL INSURANCE COMPANY OF CANADA

Respondent

AWARD

Counsel Appearing

Pamela Brownlee for the Applicant

Linda Matthews for the Respondent

Introduction

This matter comes before me as an arbitration between two insurers, each of whom carries on business as an automobile insurer in the Province of Ontario. The context for this arbitration is a priority dispute between these two insurers.

Pursuant to section 268 of the *Insurance Act,* automobile insurance policies in Ontario include mandatory Statutory Accident Benefits which provide an extensive array of benefits for a person injured in an automobile accident. The legislative scheme, as reflected within the Statutory Accident Benefits Schedule itself, provides that an injured individual might be an insured person as a result of a connection with various insurers. An individual could have access to Statutory Accident Benefits vis-à-vis an insurer as a result of being a named insured, or as a result of being the spouse or dependant of a named insured. Additionally, an individual may have access to accident benefits as a result of being an occupant of a vehicle, or a pedestrian struck by a vehicle. Furthermore, a person might have access to accident benefits as a result of being a listed driver under an automobile insurance policy, or as a result of being a person for whom a vehicle is made available for regular use.

As a result of the broad range of circumstances which would allow an injured individual to access Statutory Accident Benefits, the legislature has made it very likely that an accident victim will be able to access those benefits from one source or another.

In this case, I am being asked to decide a dispute between two insurers as to which of those insurers has the obligation to pay the Statutory Accident Benefits. That obligation will in part be determined by section 268 under the *Insurance Act* which sets out priority as between the various insurance companies connected with an injured individual. It is necessary for us to apply those priority rules when we are trying to sort out which, amongst many insurers, has the primary obligation with respect to the benefits.

That is the purpose of this arbitration.

In accordance with Ontario Regulation 283/95, a dispute between two insurers with respect to priority must be submitted to private arbitration in accordance with the *Arbitrations Act*, 1991.

Record in this Proceeding

An Arbitration Agreement entered into by the parties was marked as Exhibit #1 to this proceeding. The Affidavit of Marco Finocchi, the representative of the Applicant, TD Home & Auto Insurance Company, was marked as Exhibit #2 to this proceeding. The Affidavit of Tina Barnes, a representative of the Respondent, Markel Insurance Company of Canada, is marked as Exhibit #3 to this proceeding.

There are no serious factual issues that need to be determined at this juncture.

Our hearing of this matter proceeded on this record supplemented by written and oral submissions.

The Issues

These parties have brought this forward at this point for the determination of a preliminary issue as to whether or not TD is permitted to pursue the dispute between insurers in accordance with Ontario Regulation 283/95.

It is convenient to analyze the submissions as raising two issues.

The first issue is whether or not TD is precluded from changing its position with respect to acceptance of priority.

The second issue is whether section 10 of Ontario Regulation 283/95 prohibits a priority dispute in these circumstances.

The Waiver Issue Evidence

Essentially the waiver dispute between the parties in this case arises out of communications between the parties at the earliest stages of the dispute between insurers.

Markel, at the outset, was the insurer that put TD on notice of a priority dispute. It did so in the conventional manner, by sending TD a copy of the form which was prescribed as a

communication between Markel and its insured. It is customary in the insurance industry that this form, designed to be sent to the insured, is also sent to the targeted insurer against whom it is asserted there is an obligation to respond to the accident benefits. That is what happened in this case.

That form is entitled "Notice to Applicant of Dispute Between Insurers". And in this particular case, it was dated October 23, 2007. It was sent by Markel to TD Insurance. Under Part 3 of the form, noted as being the reasons why notice is given to other insurers, the following is stated:

> "The claimant is not a listed driver on our policy. He is a deemed named insured with TD Insurance.
>
> Therefore, the claimant is a named insured in respect to the TD Insurance policy, and only an occupant of a vehicle insured by Markel policy."

It is not clear when this document was actually received by TD, but it was sometime prior to November 6, 2007. On November 6, 2007, TD sent correspondence to Markel by way of response. This correspondence is found at Tab B of Exhibit #2. In that correspondence, the representative of TD refers to receipt of the Notice of Dispute form and says:

> "Upon review of our files, it was determined that Mr. S.'s insurance policy with TD Insurance was in full force at the time of the accident; therefore we will accept priority in this matter."

Thereafter, various claims file materials were sent from Markel to TD. Those subsequently submitted file materials included information about the claimant Baskaran S.[1] That information contradicted the Notice of Dispute previously submitted by Markel. The information indicated that Baskaran S. was in fact a listed driver on the Markel policy at the time of loss.

Relatively promptly, TD communicated back to Markel that fact and attempted to change course by asking Markel to resume acceptance of the Statutory Accident Benefits claim. This was by way of a letter dated December 5, 2007. Again a Notice to Applicant of Dispute Between Insurers was sent, this time by TD to Markel.

Markel did not accept the return of the claim.

This proceeding has followed.

Analysis and Law re the Waiver Issue

This is a difficult fact situation. It appears that each of the insurers was acting relatively expeditiously to address their respective interests with respect to a SABS claim, and these transactions took place within a few weeks of the accident, totally evolving over a period of about 8 weeks. This is in that critical interval following an accident when insurers can be expected to be very busy tending to the needs of an injured person and addressing a multitude of issues unrelated to possible priority disputes.

As to priority, the associated issues may be subtle, or even hidden from the insurers. The legal principles applicable are sometimes difficult, and the marshalling of relevant evidence can be

[1] In recognition of the privacy interests of non parties I have deleted references to surnames from these reasons.

challenging. Most importantly, for an insurer to understand whether or not it is the highest priority for a SABS claim requires having an understanding of the role of other insurers, in every case except one. The sole exception is where an insurer's named insured (or spouse or dependent of the named insured) is an occupant of the vehicle insured by the insurer at the time of injury. In that circumstance, and only in that circumstance, the insurer does not need to understand anything about the other insurance possibly involved. As a result of the provisions in section 268 of the *Insurance Act*, if the named insured (or spouse or dependent) is an occupant of the insured vehicle, then that insurer has the highest priority and that is the end of the inquiry.

But that is not the case here as far as TD is concerned. The claimant, Baskaran S., was not the occupant of the vehicle insured by TD at the time of the accident. Therefore, for TD to come to some conclusion about priority, it had to have an understanding about the role of other insurance at play. In particular, in this case, TD could not make a determination about whether it was the highest priority insurer or not without knowing about the possible applicability of the Markel policy. If it turned out that the claimant was a listed driver or a named insured under the Markel policy, then Markel might have the highest priority. Additionally, if the Markel insured vehicle was a vehicle made available for the regular use of Baskaran S., then it is possible that Markel would have a higher ranking priority and would be obliged to respond to the claim.

In the context of this case, when TD received a Notice of Dispute from Markel in late October or early November, 2007, TD's evaluation of whether or not it was the highest priority insurer was dependent on understanding that Baskaran S. was not a listed driver under Markel's policy. Markel, who presumably would be in the best position to know this fact, made the unequivocal representation in the Notice of Dispute that Baskaran S. was not a listed driver under its policy.

I regard Markel's representation in this regard as highly material to the transactions which followed. This representation cannot be isolated from the subsequent events. The documentation produced clearly demonstrates that TD accepted priority in this case on the belief that Baskaran S. was not a listed driver under the Markel policy. When TD received subsequent file materials, having already indicated that it would accept priority, TD promptly discovered the indication that Baskaran S. was in fact a listed driver under the Markel policy and communicated with Markel appropriately. At that point and ever since, Markel has taken the position that TD should not be permitted to resile from its position accepting priority.

Counsel have put before me their positions in the form of facta, and have relied upon numerous dispute between insurer cases including loss transfer and priority disputes. At the outset, I must say that I am in agreement with the tenor of these decisions. I certainly agree with the proposition that insurers who formally take a position about a loss transfer or priority matter, should not be allowed to resile from that position simply because they discover some new fact or circumstance later in the process. It would be most unsatisfactory if insurers could accept responsibility lightly, and then change their position, perhaps repeatedly, with the evolution of their understanding of a case.

On the other hand, I hasten to observe that what happened in this case was not a settlement agreement. No consideration flowed between Markel and TD. This is not a case where the parties could argue that they had entered into an agreement requiring TD to accept priority.

In fact, Markel properly and skilfully puts its case forward as a defence based on waiver. The argument is made that TD made a decision with full knowledge of the facts and communicated that decision to Markel and should not be allowed to reverse that decision. Markel asserts that

when an insurer unequivocally accepts liability, that insurer has waived its right to dispute liability and that there is no need for the other insurer to demonstrate prejudice as a result of that acceptance. It is probably correct that the doctrine of waiver does not require the other party to show reliance. Reliance, however, is probably a necessary component to establish an estoppel argument.

Not surprisingly, Markel does not rely on estoppel in this case, and there is no evidence of detrimental reliance by Markel.

While there are some inter-insurer dispute decisions which have talked about the concept of waiver, I believe that it is useful to consider the legal doctrine as applied by the courts. In the Supreme Court of Canada decision of *Saskatchewan River Bungalows v. Maritime Life*[2], the Supreme Court of Canada discussed the application of the law of waiver. This was a case that dealt with the question of whether or not an insurer could avoid responding to a claim after the expiry of a grace period for late payment of a premium. The court held as follows:

> "Although the parties argued in terms of waiver, Harradence J.A. considered the doctrine of promissory or equitable estoppel. Recent cases have indicated that waiver and promissory estoppel are closely related: see e.g. *W. J. Alan & Co. v. El Nasr Export and Import Co.*, [1972] 2 Q.B. 189 (C.A.), and *Re Tudale Explorations Ltd. and Bruce* (1978), 88 D.L.R. (3d) 584 (Ont. Div. Ct.), at p. 587. The noted author Waddams suggests that the principle underlying both doctrines is that a party should not be allowed to go back on a choice when it would be unfair to the other party to do so: S. M. Waddams, *The Law of Contracts* (3rd ed. 1993), at para. 606. It is not necessary for the purpose of this appeal to determine how or whether promissory estoppel and waiver should be distinguished. As the parties have chosen to frame their submissions in waiver, only that doctrine need be dealt with.
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> Waiver occurs where one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party: *Mitchell and Jewell Ltd. v. Canadian Pacific Express Co.*, reflex, [1974] 3 W.W.R. 259 (Alta. S.C.A.D.); *Marchischuk v. Dominion Industrial Supplies Ltd.*, 1991 CanLII 59 (S.C.C.), [1991] 2 S.C.R. 61 (waiver of a limitation period). The elements of waiver were described in *Federal Business Development Bank v. Steinbock Development Corp.* (1983), 42 A.R. 231 (C.A.), cited by both parties to the present appeal (Laycraft J.A. for the court, at p. 236):
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> The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.
>
> Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration."

There are two characteristics of waiver illustrated in the foregoing passage which are material to the dispute before me. Firstly, there is the requirement that waiver must be based on "full knowledge" of rights or deficiencies, concurrent with an unequivocal and conscious intention to abandon the rights.

Secondly, the principle identified by Waddams underlying the doctrine is that "a party should not be allowed to go back on a choice where it would be unfair to the other party to do so".

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[2] 1994 CanLII 100 (SCC) 115 DLR (4th) 478

On the peculiar facts of this case, I find that waiver does not benefit Markel. TD, when it made its decision about priority, did not have full knowledge about the fact that Baskaran S. considered himself to be a listed driver under the Markel policy. In fact, it had been led to believe the exact opposite by Markel. I reiterate that Markel would be the insurer expected to have the policy documents listing the claimant as a driver. Markel's presumed position of knowledge on this issue is key. Which brings me to the second point: If in fact Baskaran S. was a listed driver under the Markel policy, it would not be unfair to allow TD to reverse its position. In fact, it might be quite unfair to do otherwise.

Accordingly, if it is true that Baskaran S. was a listed driver on the Markel policy at the time of the accident, I hold that the doctrine of waiver does not prevent TD from presently advancing the position that Markel is the higher priority insurer. However, the materials clearly indicate a dispute between the parties as to whether or not, in fact, Baskaran S. was a listed driver on the Markel policy at the time of the accident. This is an issue which will have to be determined on some evidentiary record.

Markel has made various assertions that TD should have and could have conducted more extensive investigation before accepting priority. In a sense, Markel is arguing that TD should not have accepted the representations that Markel made to it. In the context of an intercompany dispute where one insurer has made an express representation about a material fact, which would be expected to be well known to the insurer making the representation, I do not think it is reasonably required for another insurer to make any further inquiry. It is entitled to accept the representation, in this case about whether Baskaran S. was a listed driver.

I do not fault TD for any failure to make further inquiries in that vein.

However, there may be a secondary issue in this case as to whether or not Baskaran S. was a "regular user" of the Markel insured vehicle. Markel made no representations about this. It was blank slate as far as TD was concerned.

If it turns out that Baskaran S. was a listed driver on the Markel policy, then I hold that TD has not waived its right to dispute priority, on any ground. If Baskaran S. is a listed driver on the Markel policy, waiver does not apply, TD's acceptance of priority may be reversed, and all issues may be pursued.

However, if the evidence shows that Baskaran S. was not a listed driver on the Markel policy at the time of the accident, TD's position as stated in its correspondence of November 6, 2007 is a waiver of its rights and it is not appropriate to allow TD to proceed to raise new issues such as "regular use" that it could have, and should have, considered prior to accepting priority.

If it turns out that the representation made by Markel about the listed driver status of Baskaran S. was accurate, then there is nothing unfair about holding TD to its acceptance of the priority. In that circumstance, I would hold that TD has waived the right to dispute priority. It might be that TD would argue that it did not have full knowledge about Baskaran S.'s status as a "regular user" of the Markel insured vehicle. In that regard, Markel made no representation to TD. Accordingly, in respect of that issue only, TD's knowledge was as fulsome as it wanted it to be. It might be that Markel had information about this issue when notice was given. However, Markel had no duty to volunteer such information, and made no representation whatsoever on this topic.

The Section 10 Issue

Markel has argued that section 10 of Ontario Regulation 283/95 does not permit TD to advance this dispute against Markel.

Markel submits that "Section 10 of the Regulation prohibits an insurer who receives notice under section 3 from serving a Notice on the insurer who initially gave notice of the dispute."

Sections 3 and 10 of the Regulation provide:

> **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).**
>
> **(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**
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> **(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).**
>
> **(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).**
>
> **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).**

Markel originally gave notice to TD. Thereafter, TD gave notice back to Markel. Thus, Markel argues that TD is "prohibited" from serving notice on Markel.

In my view, this is a misconstruction of the effect of subsection 1 of section 10 of the Regulation. The purpose of section 10 is to deal with the circumstance where insurer A gives notice to insurer B under section 3, and then insurer B determines that another insurer, insurer C, may have a higher priority. Section 10 calls for insurer B to give notice to insurer C in that scenario.

In effect, Markel's argument is that insurer B is precluded from raising priority issues with insurer A. I do not read this as the effect of the provision at all. Clearly, the drafters contemplated that insurer A and insurer B could have a properly constituted arbitration between them without requiring notice and counter notice.

Nowhere does section 10 exclude insurer B from pursuing issues about priority with insurer A. Nor does the Regulation clearly cloak Markel with protection in this arbitration simply because Markel, at an earlier stage, in a separate step, was in the role of insurer A.

Section 10 is not framed in the negative. It does not prohibit anything. To the contrary, it mandates the obligation to serve a notice in specific circumstances, which are not applicable here.

The effect of Markel's argument in this respect is to say that TD is absolutely precluded from having a forum in which to challenge the obligation to pay Statutory Accident Benefits. It would require the clearest possible language in the Regulation to justify such a harsh result and is contrary to every concept of due process. I cannot find such language in the Regulation, and I am unable to give section 10 the meaning ascribed to it by Markel in this case.

In any event, there is another way to view the procedure in this matter. Section 7 of the Regulation addresses the commencement of arbitration.

> **7. (1) If the insurers cannot agree as to who is required to pay benefits or if the insured person disagrees with an agreement among insurers that an insurer other than the insurer selected by the insured person should pay the benefits, the dispute shall be resolved through an arbitration under the *Arbitration Act, 1991*. O. Reg. 283/95, s. 7 (1).**
>
> **(2) The insurer paying benefits under section 2, any other insurer against whom the obligation to pay benefits is claimed or the insured person who has given notice of an objection to a change in insurers under section 5 may initiate the arbitration but no arbitration may be initiated after one year from the time the insurer paying benefits under section 2 first gives notice under section 3.**

Peculiarly, TD is both "the insurer paying benefits" and is also an "other insurer against whom the obligation to pay benefits is claimed". Accordingly, it was entirely appropriate for TD to initiate this arbitration.

The Regulation requires the dispute to be resolved by arbitration, and TD has appropriately brought this matter forward.

Conclusion

I conclude that TD is not precluded from proceeding with this arbitration if, and only if, Baskaran S. was a listed driver on the Markel policy at the time of the accident. If the parties are unable to reach an agreement on this issue, which seems likely from the record before me, we will arrange a hearing to address this specific point.

I will look forward to hearing from the parties with respect to their position on this.

Dated at Toronto this 24th day of August, 2011.

LEE SAMIS
Arbitrator