Noteworthy

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"If In Doubt Send it Out" - Don't Become a Victim of the 90-Day Notice Provision

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EFFECTIVE LITIGATION SINCE 1918

By Greg Bailey

Accident benefits adjusters are faced with more Regulated timelines than ever before. A failure to meet these timelines can result in paying for an assessment, or treatment plan that may not have otherwise been payable. However, there is no oversight greater than failing to put a priority insurer on Notice within 90 days as stipulated in Ontario Regulation 283/95, the "Dispute Between Insurers Regulation" ("the Regulation").

The 90 day Notice provision is set out in subsection 3(1) of the Regulation. It indicates:

> *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 accident benefits to every insurer who it claims is required to pay under that section.*

If a priority insurer is not put on Notice within 90 days of the completed application for accident benefits, then the **only way** for an insurer to extend the time for putting another insurer on notice is by satisfying the requirements of subsection 3(2) of the Regulation.[1] An insurer seeking to extend the 90 day notice period must demonstrate: (a) that 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) that the insurer made reasonable investigations necessary to determine if another insurer was liable within the 90 day period.

The recent decision of Justice Herman in *Echelon v. CGU*[2], upholding a decision of Arbitrator Jones, serves as another example of a case where an insurer, who may not have been the priority insurer, remains responsible for the payment of accident benefits on the basis of a failure to comply with the 90 day Notice period. The *Echelon* decision highlights many of the difficulties and pitfalls faced by insurers in investigating priority.

In *Echelon v. CGU*, the claimant was a pedestrian struck by a vehicle insured by Echelon. The claimant suffered catastrophic injuries in the accident of May 11, 2002. On July 19, 2002 Echelon received a completed application for accident benefits. Echelon retained an independent adjusting firm at a very early stage (prior to receipt of the completed application for accident benefits), and the independent adjuster carried out a priority investigation. There was the potential that the 21 year old claimant

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1. Arbitrators under the *Arbitrations Act* have jurisdiction to grant equitable relief, however, in dealing with the 90 day Notice period under the Regulation, the legislature has occupied the field, and the only basis upon which an arbitrator can grant relief from the 90 day Notice period is if the situation satisfies the requirements of subsection 3(2).

2. *Echelon General Insurance Company v. CGU Insurance Company* (2008) CanLii 27175 (ON SC); upholding the decision of Arbitrator Guy Jones.

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was dependent upon his father, and accordingly, if the father had a policy of insurance, that policy would be the priority policy under section 268 of the *Insurance Act*. Efforts to obtain information from the father and family failed as the family did not co-operate in providing information.

Eventually, the claimant and his family retained counsel. The independent adjuster made further efforts to obtain the father's insurance particulars from counsel. There was a delay in providing this information. The independent adjuster received correspondence from counsel's office on October 7, 2002. The letter indicated that the claimant's father had an insurance policy with CGU that was effective as of March 8, 2002 and identified the broker. The letter also indicated that the father had advised that the policy lapsed for non-payment of premiums.

The independent adjuster testified at the arbitration that he had contacted the broker about the CGU policy to confirm that the CGU policy was not in force at the time of the accident. There were no, or limited, records confirming this conversation. Arbitrator Jones looked to the fact that the independent adjuster's report to Echelon made no reference to the independent adjuster's contact with the broker. During the arbitration, Arbitrator Jones found as a fact that the discussion between the independent adjuster and the broker did not occur. On appeal, Justice Herman saw no basis for interfering with this factual finding.

On November 19, 2002 (one month beyond the expiry of the 90 day notice period), Echelon held a claims committee meeting and determined that it was necessary to investigate the potential CGU policy further. A further Autoplus was eventually done with respect to the father, which identified that he had a vehicle insured with CGU at the time of the accident. On December 18, 2002 a Notice of Dispute was mailed to CGU[3].

The only issue addressed at the arbitration was whether Echelon could rely upon subsection 3(2), the saving provision, to extend the time for service of the Notice of Dispute. Arbitrator Jones acknowledged that Echelon made considerable efforts to attempt to locate a priority insurer[4]. He acknowledged that the test for what constitutes a reasonable investigation is "what a reasonable adjuster would do" and that the test is not one of "perfection".

Arbitrator Jones considered whether it would have been reasonable for Echelon to follow-up immediately with the broker after learning of the potential CGU policy on October 7, 2002.

The testimony of the independent adjuster highlights a common misconception with respect to the Notice period. The independent adjuster testified that his understanding was that the 90 days did not begin to run until there was information as to another valid policy. This of course is incorrect. The 90 day Notice period commences from the time of receipt of the completed application for accident benefits.

Ultimately, Arbitrator Jones found that a reasonable adjuster would have followed up with the broker after receiving the letter from the claimant's counsel. While it is not specifically stated in Arbitrator Jones' decision, it is implied that had the independent adjuster understood when the 90 day notice period starts to run, he would have immediately conducted further inquiries after receiving information about a potential policy on October 7, 2002. Arbitrator Jones made the decision not to extend the 90 day notice period. Justice Herman upheld Arbitrator Jones' decision, with the end result being that Echelon remained responsible for a catastrophic claim which it might otherwise not have been paying.

This decision highlights some of the difficulties that can arise in the investigation of priority disputes. On many accounts, Echelon, through its independent adjuster carried out a very diligent and thorough investigation. However, the case also highlights some pitfalls that an insurer can fall into in the course of investigating priority.

While this list is not intended to be all encompassing, the following suggestions may help an insurer deal effectively with potential priority issues:

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3. The Notice was mailed to CGU at 4950 Yonge Street, an address that CGU had not occupied for 2 years previous. However, as there was still a division of CGU listed at that address, Arbitrator Jones accepted that the Notice was properly served at that address.

4. Echelon made repeated requests of the claimant's family and lawyer; received assurances from the family's lawyer that they would attempt to get insurance information; conducted two Autoplus reports on the father (one of which used an incorrect name, and that other of which did not reveal an active policy); they followed up with a number of previous insurers that did show up on the Autoplus to confirm that no policy existed; and had been told by the claimants lawyer's office that the father did not have insurance.

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1. ***Priority investigations should commence immediately upon receiving knowledge of a potential claim.***

Should an insurer be in the position of having to demonstrate that 90 days was an insufficient period of time in which to make a determination, it may be easier to convince an arbitrator to invoke the saving provision if immediate investigative steps were taken.

2. ***Every step in the priority investigation should be carefully documented.***

In *Echelon v. CGU*, the independent adjuster advised that he had contacted the broker to make inquiries about the potential CGU policy. If the independent adjuster had documented the conversation, and his notes clearly indicated that the broker had advised that the policy had lapsed, Arbitrator Jones may have come to a different determination with respect to extending the time for Notice.

3. ***Do not simply rely upon information provided by the claimant.***

All reasonable steps to obtain information should be taken. While incorrect information provided by a claimant can be a consideration in determining whether to extend the 90 day time line, insurers are not expected to rely solely upon the information provided by the claimant.

4. ***Send out the Notice by fax and mail.***

Proving service of a Notice of Dispute frequently arises as an issue in priority matters. Insurers often simply mail the Notice of Dispute Between Insurers form and the insurer to whom it was mailed often alleges that it never received the Notice. The Regulation requires that the Notice be in writing, however, the method of service is not stipulated. There is at least one arbitral decision that indicates that the onus of establishing delivery is on the party wishing to rely upon it.[5] Sending the Notice by fax and mail is prudent practice and helps to avoid this issue.

5. ***Investigate prior policies.***

If there is evidence of a prior policy which may be a primary policy near the time of the accident, request that the prior insurer provide evidence that it properly cancelled or failed to renew the policy. If it fails to provide this information, and the 90 day notice period is coming to an end, put that insurer on Notice. If the insurer can establish that the policy was cancelled appropriately, there is no need to commence an arbitration.[6]

6. ***Never rely upon the ability to extend the 90 day notice period.***

The saving provision of the Regulation has been read very strictly. The onus will be on the insurer seeking to extend the time to demonstrate that it satisfies the requirements of subsection 3(2). This is not an easy task, and arbitral decisions regarding this issue are unpredictable. Further, it would be a rare occasion where another insurer would simply agree that the existence of its policy could not have been discovered within 90 days. Accordingly, relying upon subsection 3(2) virtually guarantees that legal costs will be incurred, and an arbitration will often be necessary.

7. ***Understand the 90 day notice period and implement a "tickler system".***

In *Echelon*, there was a misconception on the part of the independent adjuster with respect to when the 90 day notice period begins to run. The 90 day notice provision starts to run from the date of receipt of a completed application for accident benefits. It is imperative that there be a "tickler" or "bring forward" system in place to ensure the 90 day notice period does not get missed. The safest practice is to start the 90 days running from the date that the insurer is first contacted and advised that the claimant may be applying for benefits.

8. ***If in doubt send it out!***

In *Echelon*, Arbitrator Jones made a finding that a reasonable adjuster should have carried out further investigations after learning of the potential CGU policy. In this writer's

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5. *Hartford Fire Insurance Company v. Co-Operators General Insurance Company* (Decision of Arbitrator Robinson) (March 17, 2004)
6. See *Ontario (Finance) v. Progressive Casualty Insurance Company of Canada* (2007) (CanLii 15475) (ON SC) for an example of a case where an insurer who purportedly cancelled a policy prior to the accident was found to have done so improperly and required to pay benefits.

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view, the safe thing to do would have been to immediately serve a Notice of Dispute upon CGU. Further investigation and clarification can be carried out after the 90 day notice period. Subsection 7(2) of the Regulation provides that an insurer must initiate arbitration within one year from the date that the insurer first gives Notice of a dispute between insurers. Accordingly, there is ample time to determine if an insurer's position with respect to priority is reasonable, and commencing an arbitration is warranted. There is little, if any down side to putting another insurer on notice. Having costs awarded simply on the basis of putting an insurer on notice is unlikely. When this small potential exposure to costs is compared to the potential of being required to continue paying benefits because of a failure to comply with the 90 day notice period, the decision to send out the Notice should be an easy one.

The facts of each case dictate what steps should be taken in carrying out a priority investigation. What is reasonable and required in one case may not be reasonable and required in another. The potential consequences of failing to comply with the 90 day Notice period should not be overlooked. It is hoped that the above-noted suggestions may help avoid becoming a victim of the 90 day Notice period.

FIRM NEWS

Bruce Cook was one of the co-hosts at the 22nd annual Joint Insurance Seminar held in Hamilton on November 6, 2008. Jennifer Malchuk was a participant in a panel on Personal Injury Damages at the same seminar.

Mary Teal and Jamie Trimble spoke at a two day program on Evidence for Civil Litigators, put on by Osgoode Hall Law School's Professional Development Department.

Have a safe and happy holiday season!

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