

**IN THE MATTER OF THE *INSURANCE ACT*,  
R.S.O. 1990, c. I. 8, Section 268 AND  
REGULATION 283/95 MADE UNDER THE *INSURANCE ACT***

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

**AND IN THE MATTER OF AN ARBITRATION**

BETWEEN:

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY  
and CERTAS HOME AND AUTO INSURANCE COMPANY

Applicant

- and -

UNIFUND ASSURANCE COMPANY

Respondent

**DECISION**

**COUNSEL**

D'Arcy McGoey – Thomas, Gold, Pettingill LLP  
Counsel for the Applicant, State Farm Mutual Automobile Insurance Company  
(hereinafter referred to as "State Farm")

Derek Greenside – Kostyniuk & Greenside  
Counsel for the Respondent, Unifund Assurance Company  
(hereinafter referred to as "Unifund")

**ISSUE - 90 DAY NOTICE – CAN APPLICANT PROVE FAX SENT SUCCESSFULLY?**

[1] In the context of a priority dispute pursuant to s.268 of the *Insurance Act*, R.S.O. 1990, c. I.8 and Ontario Regulation 283/95, the issue before me is to determine which insurer stands in priority to pay statutory accident benefits to or on behalf of the claimant Yolanda Pulgarin Garcias ("Garcias"), with respect to personal injuries sustained in a motor vehicle accident which occurred on April 23, 2015. The preliminary issue before me is whether the Applicant provided Notice of Dispute to the Respondent within the 90 days of having received the claimant's OCF-1 as required by s. 3 of O. Reg. 283/95 which governs priority disputes between insurers and will be determinative of the priority issue.

## PROCEEDINGS

[2] The preliminary notice issue herein proceeded on the basis of oral evidence of two witnesses heard on May 28, 2018, Document briefs including Examination Under Oath transcripts, Books of Authority and written submissions. This was followed by the submission of Affidavit evidence and oral submissions on January 29, 2019.

## FACTS

[3] The facts outlined in the paragraphs to follow must be viewed with regard to the crucial issue of whether a fax allegedly sent by State Farm on June 2, 2015 (within 90 days of having received the Garcias OCF-1 on May 22, 2015) with notice of a priority dispute with respect to the claimant, Yolanda Pulgarin Garcias, was successfully sent by State Farm and received by Unifund. The fax confirmation sheet showed "?????" in the spot where the fax number to which it was sent would ordinarily appear, rather than showing the number where it was received. However, under the heading "Result", it indicated "OK". Unifund claims it never received such fax as they have no record of same and a claims file would have been opened at that time, if received.

[4] This priority dispute arises out of a motor vehicle accident which occurred on April 23, 2015. At the time of the accident, Yolanda Pulgarin Garcias ("Garcias") and Sandra Medina-Solano ("Medina-Solano") were the driver and occupant, respectively, of a State Farm insured vehicle involved in a single vehicle accident on Highway 400.

[5] Both claimants submitted an OCF-1 to State Farm. State Farm, in turn, claims to have notified the Respondent, Unifund Assurance Company ("Unifund") of a priority dispute with respect to each of the two claimants. Unifund admits having received notice with respect to the Medina-Solano claim but, as indicated above, denies receiving notice with respect to the Garcias claim.

[6] State Farm has abandoned the priority dispute in respect of the claimant Medina-Solano. The dispute herein relates solely to the claimant, Garcias. As indicated, Garcias was an occupant of a vehicle insured by State Farm at the time of the accident. Unifund has admitted that Garcias was "an insured" under its policy. The sole issue in dispute is whether State Farm provided notice to Unifund within 90 days. If found that notice was sent within 90 days of having received the OCF-1 on behalf of Garcias, then Unifund would stand in priority.

### **Unifund procedure when Notice of Dispute received**

[7] Mary Comeau was examined under oath on behalf of Unifund on December 7, 2017 and the transcript forms part of the document brief before me. Ms. Comeau testified at her Examination Under Oath that any claim submitted to Unifund (including a priority dispute)

would be given to its "First Notice of Loss Unit" located at 10 Factory Lane, St. Johns, Newfoundland.

[8] In addition to the Notice of Loss Unit, Unifund also had in Newfoundland a Customer Care Centre ("CCC") located in Fort Williams, Newfoundland. The fax number utilized by State Farm to communicate with Unifund (709-737-1078) was the fax number associated with the CCC. All but one letter dispatched from State Farm to Unifund within the 90 day notice period utilized this fax number (the exception being correspondence dated August 5, 2015).

[9] If a fax made its way through to the CCC, it would be sent to the First Notice of Loss Unit. Once the fax was received at the Notice of Loss Unit, a claim would be set up. An adjuster would be assigned to investigate the claim, even if there was an issue in respect of coverage according to the evidence of Ms. Comeau.

[10] Affidavit evidence dated June 7, 2018 was also introduced by Unifund from Tim Hoskins, who was the manager of voice services at Unifund in Newfoundland at the time. The facsimile machine that would have received facsimile transmissions at 709-737-1078 was a Pitney Bowes MX-M350N and the machine was programmed by a Pitney Bowes technician to display 709-737-1078 to all transmissions sent to that number. All fax transmissions at that time were reviewed by Stacey Follett and would be distributed to the claims examiner if there was an open file. If it was a new claim, she would open a file and assign it to a claims examiner. In his Affidavit, Tim Hoskins indicated that he had never heard of the Unifund fax machines transmitting "?????" as the identifier and can only assume the problem must relate to the transmitting facsimile equipment and not Unifund's.

[11] Evidence was also introduced on behalf of State Farm by way of an e-mail from Jose Hernandez Jr., a technical specialist at Ricoh. It was a Ricoh facsimile machine that purportedly sent the notices to Unifund. The information provided indicated that "Result OK" meant the fax was sent successfully. The address field will only show the name or number programmed in the destination machine or "?????" if the destination machine was not programmed. If it was unsuccessful in sending, then the Result would show "Failed" and the pages would not update. I can only assume that this means a three page fax, if successfully sent would show 3/3 and if unsuccessful 0/3.

### **Chronology of events**

[12] State Farm received the claimant, Garcias' OCF-1 on May 22, 2015, and the claimant, Medina-Solano's OCF-1 on May 26, 2015.

**[13] ALL PARTIES AGREE THAT THE DEADLINE FOR SENDING UNIFUND A NOTICE OF DISPUTE BETWEEN INSURERS WITH RESPECT TO THE SUBJECT GARCIAS CLAIM, SO AS TO COMPLY WITH THE NOTICE REQUIREMENTS OF S. 3 OF O. REG. 283/95, WAS AUGUST 20, 2015.**

[14] State Farm allegedly faxed on June 2, 2015 to Unifund a letter dated June 1, 2015, containing a Notice of Dispute with respect to the claimant Garcias. The notice sent was allegedly three pages in total. The fax transmission sheet confirms a transmission of three pages. Under the heading "Address" on the fax transmission sheet an entry of "?????" was made. The "Address" heading would normally show the fax number to which the fax was sent. Under the heading "Result" was an entry "OK". Under the heading "Page" was the entry "3/3".

[15] Ms. Bibi Khan was called as a witness on behalf of the Applicant State Farm to testify at the arbitration hearing concerning the circumstances surrounding the subject facsimile transmission. Ms. Khan was a claims service assistant with State Farm at the time and responsible for sending faxes as directed by the adjuster handling the accident benefits claim. Ms. Khan testified that the existence of a "?????" on a fax confirmation sheet was not an unusual occurrence at the time. She would occasionally see such. It would occur once every 30 faxes or so. When this issue arose initially, some time before 2015, management became aware but telephone calls to recipients all confirmed receipt. The practice of calling recipients to confirm receipt stopped. Ms. Khan was satisfied, based on past experience, that the fax did go through to its intended destination, partly because of the balance of the confirmation sheet read "result OK" and "page 3/3". She testified that in her experience if a fax did not go through, there would be a blank or "0" under the heading "result" and the pages would show "0/3".

[16] Also part of the evidence before me was information from Jose Rodriguez Jr. from Ricoh Customer Support, which was the manufacturer of the fax machines used by State Farm. The information indicated that if the fax confirmation sheet showed "OK" under the heading "Result", it meant that the fax was successfully sent. If not successfully sent, the heading "Result" would show "Failed". If the "Address" field showed "?????", it simply meant that the fax machine of the recipient did not have their fax number programmed to show the recipient's fax number on the fax confirmation sheet provided to the sender of the fax.

[17] On the same day (June 2, 2015), State Farm also faxed the Notice of Dispute to counsel for the claimant using the same procedure as Ms. Khan used with respect to the notice to Unifund. The fax confirmation receipt under the Address field showed the fax number of claimant's counsel and not "?????".

[18] On June 26, 2015, State Farm faxed to Unifund priority notice in respect of the claimant, Medina-Solano. The transmission sheet indicates a successful transmission of nine pages with a "?????" entry noted under the Address field, just as it had with the earlier Garcias claim. Identical notice in respect of the claimant Medina-Solano was transmitted by fax to the claimant's counsel on June 26, 2015. The fax confirmation sheet showed under the Address field the fax number to which it had been sent.

[19] On June 30, 2015, State Farm received a form letter dated June 29, 2015 from Unifund rejecting the Notice of Dispute, indicating "policy was not in effect at the time of accident". This facsimile was nine pages in length and was transmitted commencing at

approximately 6:40 a.m. It is clear in reviewing the attachments to the form letter that Unifund had received the Notice of Dispute in respect of the claimant, Medina-Solano, notwithstanding the "?????" on the State Farm fax cover sheet.

[20] On June 30, 2015, State Farm received a second form letter from Unifund. This form letter was only six pages in length and was transmitted at approximately 9:30 a.m.. It is the position of State Farm that the transmittal by Unifund of two separate form letters is indicative of having received two separate OCF-1 documents and Notices of Dispute. However, both letters only referred to the Medino-Salarno accident benefits claim.

[21] The two separate form letters from Unifund were put to Ms. Comeau at her EUO. Ms. Comeau admitted that she had no explanation for the existence of two separate form letters if Unifund's position was that it received only one priority notice.

[22] When the form letters were put to Ms. Comeau at her EUO, she admitted that she had never seen a form letter before despite having worked as an ADR consultant with Unifund for some 12 years.

[23] On July 8, 2015, State Farm's log notes indicate "received letters from Unifund advising not accepting priority for either insureds.

[24] On July 10, 2015, State Farm faxed to Unifund follow-up correspondence concerning the priority dispute. Reference was made at that time to the claimant, Medina-Solano. The fax confirmation sheet again showed "?????" in the Address field.

[25] On July 13, 2015, State Farm's log notes indicate "*called Unifund and s/w [spoke with] Danielle who advised nothing on file re NOD, or DOL. Confirmed that the T/P who deals with NOD with OIC [other insurance company] and only way to contact is through fax. Thanked and ended call. Sending f/u letter to Unifund with fax # provided re: NOD*".

[26] On July 21, 2015, Unifund's log notes read "*caller: Lisa State Farm comments: called to see if she has correct fax # for us he [she ?] gave me the local NCC fax # so CONF it is a good # TKS*".

[27] Ms. Comeau at her EUO admitted that this entry indicates that someone from Unifund was advising someone from State Farm that State Farm has a correct fax number.

[28] On August 6, 2015, State Farm faxed Unifund at a different fax number referring specifically to the claimant Yolanda Pulgarin Garcias, attaching a July 9, 2015 letter with reference to the claimant Garcias. It was a request for proof that the Unifund policy was not in force at the time of the accident. Despite the different fax number, the Address field again showed "?????" on the fax confirmation sheet. Despite this, the Unifund log entry notes indicate that on August 7, 2015, "*caller: Lorisa Casuba comments: rec request from ADJ. Ashley Shaw to provide proof and/or verification that the POL period was not in force on DOL*".

[29] On August 20, 2015, the 90 day deadline expired.

### **ANALYSIS AND FINDINGS**

[30] A priority dispute arises when there are multiple motor vehicle liability policies which might respond to a statutory accident benefits claim made by an individual involved in a motor vehicle accident. Section 268 (2) of the *Insurance Act* sets out the priority rules or hierarchy of priority to be applied to determine which insurer is liable to pay statutory accident benefits.

[31] Since the claimant was occupant of a vehicle at the time of the accident, the following rules with respect to priority of payment apply:

- (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 (1), the occupant has recourse against the insurer of the automobile in which he or she was an occupant;*
- (iii) *If recovery is unavailable under (1) or (2), 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 (1), (2) or (3), the occupant has recourse against the Motor Vehicle Accident Claims Fund.*

[32] Since the claimant Garcias was admittedly an insured under the Unifund policy and only an occupant of the State Farm vehicle, Unifund would be the priority insurer if notice was sent by State Farm to Unifund in compliance with the Disputes Between Insurers legislation.

[33] Ontario Regulation 283/95, s. 3(1) provides as follows:

No insurer may dispute its obligation to pay benefits under s. 268 of the Act unless it gives written notice within 90 days of receipt of a completed application for benefits...

[34] State Farm claims that Notice of Dispute was delivered by fax within 90 days while Unifund denies having received such notice.

[35] A successful fax transmission sheet has repeatedly been accepted by priority arbitrators as evidence of service of a document to an insurer as reflected in the decisions of *Aviva Insurance v. Wawanesa Mutual Insurance* (February, 2009, Arbitrator Guy Jones), and *Markel Insurance Company of Canada v. State Farm Mutual Insurance Company*, (August 11, 2011, Arbitrator Bialkowski).

[36] In *Markel*, supra, the arbitrator held that a fax confirmation sheet presents prima facie proof that a document was sent, with the evidentiary burden shifting to the opposing party to prove it was not received.

[37] The Respondent does not dispute this, but simply claims that any purported transmission of notice with respect to the Garcias claim was not successful and insufficient evidence exists to satisfy the onus upon State Farm to so prove.

[38] The issue before me is therefore determined by the factual finding as to whether the subject notice was successfully faxed by State Farm to Unifund on June 2, 2015.

[39] Ms. Comeau was asked at her EUO how she knows that Unifund did not receive the facsimile Notice of Dispute at Tab 3. The response recorded is as follows:

Q. *Okay. And how do you know that you didn't receive this fax?*

A. *No claim was set up and there has been no other – this is the first time we have seen it, I have seen it.*

[40] However, Ms. Comeau had no explanation as to how it was that Unifund received the Medina-Solano notice but not the Garcias notice, as both notices were faxed to the same facsimile number and both generated the same facsimile transmission confirmation. Nor did Ms. Comeau have any explanation as to why two, as opposed to one, form letters were returned to State Farm, if only one Notice of Dispute was received.

[41] State Farm has submitted that the most plausible explanation is that the Unifund CCC did receive both Notices of Dispute, but through inadvertence or human error, replied to State Farm in respect of one claimant as opposed to two separate claimants.

[42] State Farm claims that not only did Unifund receive one Notice of Dispute in respect of the claimant Garcias, it received a follow-up notice in that regard. State Farm faxed Unifund on August 6, 2015 with a fax transmission sheet confirming three successful pages (again with a "????") specifically referencing the claimant, Garcias and forwarding prior correspondence dated July 9, 2015 referencing that claimant.

[43] The facsimile number associated with the August 6, 2015 communication is admitted by Unifund to be the main fax number in St. John's Newfoundland.

[44] Unifund has submitted that State Farm has failed to satisfy the onus upon it to prove that there was successful service by fax of the Notice of Dispute with respect to the Garcias

claim. It has simply relied on a defective facsimile transmission to establish service of a critical document. Although two form letters were forwarded to State Farm, each clearly specified that they were in relationship to the Medino-Solano claim and not the subject Garcias claim.

[45] Unifund further claimed that State Farm was obligated when aware of the curious fax alleged confirmation of "?????" in the Address field, to follow up to ensure that the Notice of Dispute was received by *Unifund* and relies on the decision of Arbitrator Novick in *Economical Mutual Insurance Company v. Lombard General Insurance Company* 2012 CarswellOnt 17688 in this regard. In *Economical*, a DBI Notice was sent by Economical by mail rather than by facsimile transmission. Economical claimed that they had served their DBI Notice on Lombard by mail within the 90 day interval prescribed under the Regulation. Lombard denied that the Notice was received. Arbitrator Novick stated that a follow-up mechanism should be in place so that a Notice sent by regular mail can be confirmed as having been received. While the Notice sent by State Farm Insurance, in this case, was sent by way of facsimile transmission, that facsimile transmission does not confirm the number to which the communication was transmitted. By way of analogy, Unifund has claimed that the State Farm representative should have contacted Unifund Assurance, at the very least, to ensure that their inconclusive facsimile transmission had actually been received.

[46] I agree with the findings of Arbitrator Novick in *Economical* on the facts before her. Where a DBI (Dispute Between Insurers) notice is sent by ordinary mail with no response I too feel that it is incumbent on the sender to follow up, particularly as in *Economical* where there was no contemporaneous log entry that the DBI notice was sent. Arbitrator Novick noted it is preferable for a DBI notice to be sent by fax, courier or registered mail so as to enable delivery to be confirmed.

[47] The crucial fact determination in the case before me is whether State Farm's fax of its DBI notice on June 2, 2015 was successful. On all of the evidence before me, I am satisfied that it was sent by State Farm and received by Unifund, despite the irregularity of a notation of "?????" under the heading where the recipient's fax number would normally be shown. I must rely on the only technical evidence before me that being the evidence of Jose Hernandez Jr. of Ricoh USA. The question posed of Ricoh was:

" we have a fax transmission sheet that reads: 'Result Ok, Page 3/3. But it has "?????" in the address line. Does this mean it was successfully sent?"

[48] The response from Jose Hernandez Jr. was:

"Result Ok" means the fax was sent successfully.

The address field will only show the name and number programmed in the destination machine, of ???? if not programmed.

If it was unsuccessful in sending, then the Result will show 'Failed' and the pages will not update"



[49] I accept the evidence of Jose Hernandez Jr. and his explanation of how a fax successfully sent might show "?????" in the address line. There was no technical evidence introduced by Unifund to contradict the evidence of Jose Hernandez Jr.. I can only assume that if such technical evidence had been available to Unifund, it would have been introduced at the arbitration hearing herein whether by oral evidence, Affidavit evidence or e-mail. On the evidence before me, the only technical evidence confirms that as long as the fax confirmation sheet shows "Result OK", it means that the fax was sent successfully.

[50] There are several other pieces of evidence to support my finding that the DBI notice was sent successfully on June 2, 2015. Firstly, I found the evidence of Ms. Bibi Khan of State Farm that she sent the DBI notice on June 2, 2015 to Unifund to be credible. Furthermore, and unlike the case in *Economical*, there was a contemporaneous log note entry confirming that the notice was sent. In addition, the notice to the claimant's solicitor was sent the same day and was received by claimant's counsel. The DBI notice to Unifund with regard to the Medina-Solano claim sent a few weeks later was received by Unifund, even though the fax confirmation sheet also showed "?????" in the address field. A follow up fax to Unifund with regard to the Medina-Solano claim was responded to with a telephone call, even though the fax confirmation sheet showed "?????" in the address field. All of this suggests that it was the Unifund fax machine that was the problem. If State Farm's DBI notice had been sent to the wrong number, then the wrong number would have been found in the address field. Clearly from the above, it was the Unifund machine that was responding with the "?????" in the address field, even though the faxes were being received by Unifund.

[51] On the evidence overall, I suspect that there was a technical problem with the programming of the Unifund Pitney-Bowes fax machine in June of 2015. Unifund personnel may not even have been aware of it with the problem simply fixed by the Pitney-Bowes technician on regular inspection or maintenance.

[52] It is unknown whether a claims file was not opened by Unifund because a computer screen showed that the policy had been cancelled or whether there was some human error on that occasion. The fact of the matter is that the fax of June 2, 2015 is found to have been successfully sent by State Farm and received by Unifund, given the un-contradicted technical evidence adduced by State Farm as supported by the several other pieces of evidence as outlined above.

[53] On the basis of my finding that written notice was provided within 90 days as required by s. 3(1) of O. Reg. 283/95 Unifund becomes the priority insurer.

**ORDER**

It is hereby ordered that:

1. Unifund is the priority insurer.
2. Unifund pay the legal costs of State Farm with respect to this arbitration on a partial indemnity basis.
3. Unifund pay the Arbitrators account.

DATED at TORONTO this 28th )  
day of February , 2019. )

  
\_\_\_\_\_  
KENNETH J. BIALKOWSKI  
Arbitrator