

IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8 (as amended)
AND ONTARIO REGULATION 283/95 (as amended)

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

UNIFUND ASSURANCE

Applicant

- and -

TRAVELERS INSURANCE COMPANY

Respondent

DECISION

COUNSEL

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

George Wray – Borden Ladner Gervais LLP
Counsel for the Respondent, Travelers Insurance Company
(hereinafter referred to as "Travelers")

ISSUE – PRODUCTION AND EUO ENTITLEMENT IN A PRIORITY QUANTUM DISPUTE

[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, and with priority having been accepted by Travelers, the remaining issue is the determination of the indemnity to which Unifund is entitled with respect to payments it made to or on behalf of the accident benefits claimant. This involves an assessment of the "reasonableness" of the payments Unifund made to or on behalf of the claimant. In order to explore the issue of "reasonableness", Travelers now seeks by way of motion further production of documentation and communications, the right to an Examination Under Oath of a representative of Unifund and the right to an adjournment of an arbitration hearing scheduled approximately one month hence.

PROCEEDINGS

[2] The motion brought by Travelers proceeded on the basis of written submissions and books of authority.

ORDER SOUGHT BY TRAVELERS

[3] The Respondent, Travelers Insurance Company, have requested:

A) An Order compelling Unifund Assurance Company:

i) to provide the job titles, duties and CVs for each of Melinda McLean, Judy Corrigan, Norma Grisolia, Sue Giffen, Jeff McComb, Sandra Harrison, Joanna Sakorafas Purushottam, Vishwakarma, Maria Jolly and Dania Hussein;

ii) to provide complete unredacted adjuster log notes from all adjusters;

iii) to provide all records, worksheets, notes (written or electronic) from any Unifund supervisors and/or managers involved in the claimant's AB file;

iv) to provide all written records produced by any Unifund employee involved in the claimant's AB file;

v) to provide any internal communications (e-mail or otherwise) of Unifund employees involved in the handling of the claimant's AB file;

vi) to provide any reports, communications to and from any reinsurer;

vii) to provide any and all "disposition plans" prepared by Unifund and "review reports" and/or any similar plans/reports;

viii) to provide all reserve information and reports;

B) An Order compelling Unifund Assurance Company to produce the claims representative responsible for settling the claimant's AB file, on a full and final basis in July 2019, for an Examination Under Oath;

C) An Order adjourning the Arbitration hearing presently scheduled to proceed on May 5, 2020.

ANALYSIS AND FINDINGS

[4] A priority dispute arises when there are multiple motor vehicle liability policies that may be available to a person injured in a motor vehicle accident to pay statutory accident benefits. Section 268(2) of the *Insurance Act, R.S.O. 1990, c.1.8*, sets out the priority rules to be applied in order to determine which insurer stands in priority and therefore liable to pay statutory accident benefits. *O. Reg 283/95 – Disputes Between Insurers* requires the first insurer to have received a completed application for accident benefits to commence payment and in the event it feels that another insurer stands higher in priority, engage the dispute mechanism set out in the *Regulation*. This involves an arbitration to determine which insurer stands higher in priority. If another insurer is found to be higher in priority, the Arbitrator must then determine the indemnity to which the insurer having paid benefits to the claimant is entitled. At risk of oversimplification, the priority insurer is obligated to reimburse the insurer having paid the benefits, all sums "reasonably" paid to or on behalf of the claimant. The remaining issue in the present priority dispute is the reasonableness of payments made by Unifund to the claimant. In order to deal with the "reasonableness of payment" issue, Travelers now seeks further production, a right to an Examination Under Oath of the Unifund adjuster and an adjournment of a hearing date a month hence, which had been fixed 4½ months earlier.

[5] By way of background, the priority dispute arises as a result of injuries sustained by one JS (referred to herein as "the claimant") in a motor vehicle accident which occurred on September 22, 2017. An accident benefits claim was presented to Unifund. Pursuant to *O. Reg 283/95*, Unifund commenced payment of accident benefits and commenced this priority dispute seeking an Order that Travelers was the priority insurer as per the hierarchy set out in s. 268(2) of the *Insurance Act* and seeking reimbursement for payments made. A Notice to Arbitrate was served on or about October 18, 2018. This priority dispute has proceeded through six different pre-arbitration hearing teleconferences (February 5, 2019, April 6, 2019, October 3, 2019, November 19, 2019, December 18, 2019, and January 16, 2020). The Arbitration dates of May 4 & 5, 2020 were agreed upon during the pre-arbitration teleconference on November 19, 2019. At this same pre-arbitration teleconference, Travelers indicated that it wanted both priority and quantum decided at the same hearing. In normal circumstances, the issue of priority would be dealt with at a hearing and a subsequent hearing set for the issue of quantum in the event the parties could not resolve the issue through negotiation. It was not until a subsequent pre-arbitration telephone conference on January 16, 2020, that Travelers confirmed that it had accepted priority and that the ongoing issue was simply that of quantum of indemnity. It should be noted that copies of the non-privileged portions of the Unifund AB file were produced on or about May 9, 2019 and that further documents were forwarded to Travelers on or about February 20, 2020.

[6] Travelers claims that the information and documentation sought and the need for an Examination Under Oath of a Unifund representative are needed to fully explore the reasonableness of payments issue.

[7] Travelers has pointed out that as of mid-December 2018, counsel for Unifund advised that the following payments had been made to and/or on behalf of the claimant: (a) NEB of \$11,655; (b) med/rehab of \$29,627.64; and attendant care of \$31,002.62. This was 15 months post-accident and then a full and final settlement was concluded seven months later in the amount of \$670,000, without input from Travelers. The total settlement according to the SDN was \$670,000, as follows: NEBs of \$1,295; medical and rehabilitation benefits of \$300,000; attendant care benefits of \$340,000; housekeeping of \$20,000; and \$8,705 for disbursements. This settlement was reached only 22 months post-accident. Clearly the settlement was for an amount far in excess of the non-CAT limits set out in the *Statutory Accident Benefits Schedule*. The materials provided to me indicate that reasonableness of paying beyond non-CAT limits is central to Travelers' position.

[8] Despite that set out above, Travelers has claimed that there are no details or documentation yet provided as to how this settlement was broken down, or how it was quantified and supported internally by Unifund. They advise that no payment schedule has been provided indicating the amounts that were paid (weekly or otherwise). According to Travelers, the issues in dispute will focus on the information (medical and otherwise) obtained and considered by Unifund, the rationale for Unifund's decision to settle the claimant's AB claim on a full and final basis at the time it did for such a significant amount given the claimant's age, pre-accident issues and potential for recovery.

[9] In response, Unifund claims that Travelers is not entitled to any of the relief sought on the basis of the legal doctrine of "settlement privilege" and have referred me to jurisprudence to support its position. None of the jurisprudence provided deals specifically with the application of "settlement privilege" in the context of an indemnity issue in a priority dispute.

[10] Unifund has submitted that written and oral communications made in furtherance of settlement of a litigious dispute are subject to privilege. In *Inter-Leasing Inc. v. Ontario (Finance)*, 2009 CanLII 63595 (ON SCDC), it was held that written and oral communications in furtherance of a settlement of a litigious dispute are subject to privilege. The Divisional Court listed three conditions that must be present for settlement privilege to apply:

- (1) A litigious dispute must be in existence or within contemplation;
- (2) The communication must be made with the express or implied intention that it would not be disclosed in a legal proceeding in the event negotiations failed; and
- (3) The purpose of the communication must be to attempt to effect a settlement.

[11] According to Unifund, a presumption of non-disclosure applies to communications protected by settlement privilege.

[12] Furthermore, Unifund has referred to the decision in *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, where Gascon J. held that there are two types of privileges in law: class privileges and case-by case privileges. A class privilege entails a presumption of non-disclosure once the conditions for its application are met. This is "...more rigid than a privilege constituted on a case-by-case basis". Justice Gascon acknowledged that courts have already characterized settlement privilege as a class privilege on numerous occasions. Exceptions to a class privilege are narrow. In *Lizotte*, Gascon J held that the exercise of balancing competing interests is not associated with class privileges. Justice Gascon provided several specific exceptions that apply to litigation privilege (a class privilege), which the Applicant submits are equally applicable to settlement privilege in this context. These include: (1) public safety exceptions; (2) innocence of an accused and criminal communications; and (3) evidence of a party's abuse of process or similar blameworthy conduct. Justice Gascon held that other exceptions may be identified in the future, but they will always be based on narrow classes that apply to specific circumstances.

[13] Unifund maintained that the settlement agreement between Unifund Assurance and the claimant is protected by such privilege, as the agreement meets each branch of the test in *Inter Leasing Inc.*. They claim that it is uncontentious that litigation was in existence prior to the settlement agreement. The Applicant provided the Respondent with redacted log notes indicating that the claim was settled on a full and final basis and provided the corresponding Full and Final Release and Settlement Disclosure Notice. The log notes were otherwise redacted for privilege. The redacted log notes and settlement agreement, together with the Applicant's litigation strategy for settling the claim, were not intended for third parties. Similarly, internal communications within Unifund Assurance and all external communications between Unifund Assurance and the claimant's legal representatives regarding Unifund's approach to settlement, were not intended to be accessed by third parties. These are communications for which settlement privilege applies. Production of the additional information and documentation and an examination of the Unifund claims representative, would effectively eliminate the privilege that attaches to those communications.

[14] Unifund has also submitted that there are strong policy reasons that favor nondisclosure of privileged information requested by third parties. In *Lizotte*, Gascon J. held that the disclosure of documents to third parties that are protected by litigation privilege, creates a risk that the documents could subsequently be disclosed to the public or other parties, which could have a serious effect on the conduct of the litigation in question. Justice Gascon raised concerns regarding the chilling effect forced disclosure would have as parties would fear that documents otherwise protected by litigation privilege could be made public. The Applicant submits that these concerns apply equally to settlement privilege and communications. The Applicant should not be compelled to share their litigation strategy with a third party, as this would negatively impact on their ability to confidentially engage with claimants and their legal representatives regarding settlement.

[15] I have carefully reviewed the jurisprudence provided to me and find that the legal doctrine of "settlement privilege" does not apply to the production requests made in this priority dispute. The negotiated settlement of the accident benefits claim between Unifund and the claimant cannot be said to have been made with the express or implied intention of not being disclosed in a subsequent priority dispute proceeding. Hence, the second branch of the three-pronged test in *Inter-Leasing* has not been satisfied. Every motor vehicle liability insurer ought to know full well that the settlement details of an accident benefits claim may well be challenged for reasonableness in a subsequent priority or loss transfer dispute. Application of "settlement privilege" doctrine in a priority or loss transfer dispute would effectively bar a proper analysis of the "reasonableness of payments" issue and, in my view, cannot be a reasonable interpretation of *O. Reg. 283/95*. At the same time, the extent of production allowed should not be unlimited and an insurer's general settlement and reserve strategy ought to be protected. Disclosure of same would negatively impact the ability to engage with claimants, their legal representatives and other insurers in litigation matters.

[16] Therefore, I find that in dealing with a "reasonableness of payment" issue in a priority dispute, production by the insurer of the non-privileged portions of the accident benefits file, a payment summary, medicals and documentation in its possession and Settlement Disclosure Notice ought to be made. Reserve information and communication with a re-insurer, in my view, goes beyond reasonable production. The central issue is whether the documentation and information at hand at the time of the payments and at the time of settlement justifies the payments made.

[17] The situation here is little different than would exist in a solicitor's negligence case where improvident settlement was alleged. To say that the communications and documentation involved in settlement of the claim at first instance is protected by "settlement privilege", would make no sense. Similarly, where the reasonableness of payments is an issue, as is the case here, it would make no sense to restrict production of the documentation and communications involved in the resolution of the claim.

[18] I further find that an insurer disputing the "reasonableness of payments" ought, under normal circumstances, be entitled to examine a representative of the insurer who paid the accident benefits, so as to explore what was paid under each heading, the documentation and information in possession of the paying insurer at the time the payment was made and what was considered and relied upon in making the decision to pay such benefits. The difficulty which exists in the case before me, is that the request is being made one month prior to a scheduled arbitration hearing and 4½ months after the date for the arbitration hearing had been fixed. Clearly, these requests ought to have been made much earlier. However, there are two factors which are worthy of consideration in the present fact situation. Firstly, given the Covid-19 restrictions presently existing, the May 5, 2020 hearing may not have proceeded in any event. Secondly, the arbitration can still be completed within the two years prescribed by s. 8(2)5 of *O. Reg. 283/95*. The arbitration was commenced in mid-October 2018 and the parties have until mid-October 2020 to complete the arbitration in compliance with the section. Given these circumstances, I am prepared to grant an adjournment of the May 5, 2020 hearing date, order further production and order the

Examination Under Oath of the Unifund adjuster responsible for settling the claimant's accident benefits claim in July 2019. The ordered productions are to be made forthwith. The Examination Under Oath is to be arranged within one month of the additional productions having been made and is to be completed by videoconferencing, in the event personal attendance cannot be made due to the Covid-19 restrictions, so as to avoid any further delay.

[19] The costs of this motion are to be in the cause.

ORDER

[20] I hereby order that:

A) Unifund Assurance Company;

i) provide the job titles, general description of duties and CVs (should CVs exist) for each of Melinda McLean, Judy Corrigan, Norma Grisolia, Sue Giffen, Jeff McComb, Sandra Harrison, Joanna Sakorafas Purushottam, Vishwakarma, Maria Jolly and Dania Hussein, provided that each individual was involved in the accident benefits claim of the claimant and whose names have been referred to in the documents already produced;

ii) to provide complete non-privileged portions of adjuster log notes from all adjusters involved in the handling of the subject accident benefits claim, if not already produced;

iii) to provide the non-privileged portions of all records, worksheets, notes (written or electronic) from any Unifund supervisors and/or managers involved in the claimant's AB file, if not already produced;

iv) to provide the non-privileged portions of all written records produced by any Unifund employee involved in the claimant's AB file, if not already produced;

v) to provide the non-privileged portions of any internal communications (e-mail or otherwise) of Unifund employees involved in the handling of the claimant's AB file, if not already produced;

vi) to provide the non-privileged portions of any and all "disposition plans" prepared by Unifund and "review reports" and/or any similar plans/reports, if not already produced;

B) Unifund Assurance Company to produce the claims representative responsible for settling the claimant's AB file on a full and final basis in July 2019, for an

Examination Under Oath to be completed forthwith after the ordered productions aforesaid are made;.

- C) The Arbitration hearing presently scheduled to proceed on May 5, 2020 is hereby adjourned and to be rescheduled no later than October 18, 2020;
- D) That Travelers produce to Unifund any expert report that it intends to rely on at the Arbitration hearing at least six weeks in advance of the rescheduled arbitration;
- E) That the costs of this motion be in the cause.

DATED at TORONTO this 13th)
day of April, 2020.)



KENNETH J. BIALKOWSKI
Arbitrator