IN THE MATTER OF the *Insurance Act,* R.S.O. 1990, c I.8, as amended
AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c. 17, as amended
AND IN THE MATTER OF an Arbitration

BETWEEN:

CO-OPERATORS GENERAL INSURANCE COMPANY

Applicant

- and -

ECONOMICAL MUTUAL INSURANCE COMPANY

Respondent

AWARD

Counsel Appearing:

Kathleen O'Hara: Counsel for Co-operators General Insurance Company (hereinafter called Co-op)

Ashleigh Leon: Counsel for Economical Mutual Insurance Company (hereinafter called Economical)

Introduction:

This matter comes before me as a private Arbitrator pursuant to the *Arbitration Act* 1991 to arbitrate a dispute as to which of two insurers is obliged to pay Statutory Accident Benefits pursuant to the *Insurance Act*, R.S.O. 1990 c I.8, as amended, to the Claimant as a result of a motor vehicle accident that occurred on April 15th, 2021.

The parties selected me as their Arbitrator on consent. The hearing in this matter was a written hearing only.

By way of background, on April 15th, 2021, the claimant was involved in a motor vehicle accident. She was driving a Hyundai Accent that ostensibly was insured by Economical under Policy No. 57366477. It was later determined that the pink slip establishing that coverage was fraudulent.

Co-op insures a Toyota Sienna which was another vehicle involved in the April 15th, 2021 accident. There is no dispute that the Co-op policy was in full force and effect.

Due to the unusual facts that will be outlined in this decision, Co-op takes the position that despite Economical's policy being acknowledged as fraudulent, that in fact, they are the priority insurers responsible for paying Statutory Accident Benefits to the claimant.

The Arbitration Agreement sets out that the issue for my determination is "which insurer is responsible to pay the claimant's Statutory Accident Benefits under Section 268 of the *Insurance Act*."

However, each of the insurers in their submissions set out sub-issues for the Arbitrator to decide.

The issues put forth by Co-op are set out below:

1. Who was the first insurer to receive a completed Application?
2. Was there a sufficient "nexus" with respect to Economical?
3. Did the first insurer to receive a completed Application comply with its obligations under Section 3 of Ontario Regulation 283/95? If not, what are the consequences of that?

The issues put forth by Economical are set out below:

1. Was Economical an "insurer"?
2. Was there a breach of Section 2 or 3 of Ontario Regulation 283/95?
3. If yes, what are the consequences?

The Record:

The parties provided the following in support of their respective positions:

1. An Agreed Statement of Facts, dated June 2022.
2. A Joint Book of Documents containing the Police Report, a VIN claims history, the alleged pink slip, copies of OCF-1s submitted, copies of various emails and correspondence between the insurers and the Claimant.

Facts:

On April 15th, 2021, the claimant was involved in a motor vehicle accident. She was driving a Hyundai Accent which she had borrowed from a friend and understood this was a rental vehicle.

The actual registered owner of the Hyundai is ET Prestige Contracting Ltd. The VIN history related to this vehicle shows it was registered to ET Prestige Contracting Ltd. on March 17th, 2021, had a plate attached on March 17th, 2021 and had the plate removed on June 17th, 2021.

There was a pink slip inside the Hyundai that indicated it was insured by Economical under Policy No. 75366477 for the policy period January 3rd, 2021 to January 3rd, 2022.

The Toronto Police Service generated a Motor Vehicle Accident Report for Accident No. 2021-692426. This showed the accident date of April 15th, 2021. It noted that the accident was reported on the same date. It identified the driver, the vehicle that she was in by way of plate number, as well as a description of the vehicle. Further, vehicle one (the Hyundai) was noted to be insured under an Economical policy with the same number noted above. The Police Report also identified the second vehicle involved as a gray Toyota Sienna insured by Co-op under Policy No. 4000880879. The Police Report identified the owner of the Hyundai as ET Prestige Contracting Ltd. and an address in Waterloo was given. Also, the drivers of both vehicles were identified on the Police Reports with their full name, address and driver's licence number.

Both insurers agree that the pink slip in the Hyundai was fraudulent. Both parties acknowledge that the Co-op policy was in full force and effect at the time of the accident.

By letter dated May 7th, 2021, the Claimant's solicitors forwarded an OCF1: Application for Accident Benefits by fax to Economical. The OCF1 indicated that the claim was being made under the Economical policy that had been issued to ET Prestige Contracting Ltd. and a copy of the Motor Vehicle Accident Claims Report was enclosed with the OCF1.

On May 7th, 2021, a claims assistant from Economical sent an email to the Claimant's solicitor at 5:19 p.m. The email is reproduced below:

> "In reference to the attached letters received today by Economical, please note I was unfortunately unable to locate this insured's policy in our system.
>
> Policy No. 75366477 doesn't return any results, nor did a search of the insured's name TCB (Claimants name not set out due to privacy issues). I also tried locating a company ET Prestige Contracting and was unsuccessful in locating a policy for that company as well. Please confirm the name of our named insured, and the policy number if applicable.
>
> Any questions please let me know."

Economical did not on May 7th, 2021 or in fact at any time forward an Application for Statutory Accident Benefits to the claimant and/or her counsel.

The evidence is that Economical did not receive any reply to their email. Economical did not open a claim. Economical did not serve a Notice of Dispute Between Insurers on Co-op.

On May 18th, 2021, approximately eleven days after Economical had received the Claimants OCF1, the Claimant's counsel sent another OCF1 to Co-operators. This was a carbon copy of the OCF1 initially submitted to Economical with the exception of the insurance information and the

signature date. It also enclosed a motor vehicle accident report. It was deemed received by Co-op on May 19th, 2021.

On May 19th, 2021, Co-op served a Notice to Applicant of Dispute Between Insurers on Economical. The Notice of Dispute indicated under Reasons for the Notice that "as per the accident report dated April 15th, 2021 it indicates that the Claimant has a policy with Economical Insurance Company. The policy number provided is 75366477. As such, Economical Insurance would be the priority insurer." By letter dated June 11th, 2021 Economical responded to the Notice of Dispute advising that it does not have a policy as described in the Notice nor does it have an insurance product for either the claimant or ET Prestige Contracting. The letter indicates that Economical is not accepting priority.

The parties agree that there was no evidence that the Claimant was complicit or involved in obtaining the fraudulent pink slip.

Co-op then commenced this Arbitration as against Economical in accordance with Regulation 283/95.

Parties Submissions:

Applicant

It is Co-op's position that Economical is an insurer and that as such it received the first completed Application for Accident Benefits.

Co-op submits that having received the first completed OCF1, Economical was obliged in accordance with Section 2.1(1) of Regulation 283/95 and Section 32 of the Statutory Accident Benefits Schedule (Ontario Regulation 34/10) to commence paying benefits to the Applicant in accordance with the provision of the schedule pending any resolution of any dispute as to which insurer may be required to pay the benefit. Co-operators submits that Economical effectively deflected or refused to accept the claim, and as a result, an Application was sent on to Co-operators by Claimant's counsel.

Co-op submits that the Regulation is mandatory in its terminology and irrespective of the fraudulent nature of the pink slip and/or the fact that Economical could not locate a policy number or a policy in its system based on the information provided that as the first insurer to receive a completed Application it was still obliged to commence payments of benefits pending the dispute. Co-op submits that there was a sufficient nexus between Economical and the Claimant that required Economical to properly respond to the OCF1.

Co-op relies on the decision from the Court of Appeal and the Supreme Court of Canada in Zurich Insurance *Company v. Chubb Insurance Company of Canada* 20140MCA 400 and 2015SCC19. The

Chubb case, Co-op submits, stands for the proposition that a sufficient nexus is established as long as the insureds choice of insurer is not arbitrary or random.

Co-op also relies on the decision in *Danilov v. Unifund Assurance Co.*, [2009] O.F.S.C.D. No. 69. In that case, it was determined that even where there is a fraudulent Certificate of Insurance that it can result in a sufficient nexus where a Claimant submitted the OCF1 to the insurer based on the information in the Police Report. As long as the insured was not complicit in the fraud, turned their mind to the choice of insurer and applied to an insurer based on the information available to them, there is a sufficient nexus.

Co-op's position is that as Economical was the first insurer to have received a completed Application that it then failed to comply with its obligations under Section 3 of Ontario Regulation 283/95 in that it did not put Co-op on notice with respect to a dispute within the required 90 days. Co-op submits that as Economical was the first insurer to receive the Claimant's OCF1 and given there was sufficient nexus, that Sections 2 and 3 of the Regulation were then triggered for Economical on May 7th, 2021. Economical should have commenced payment of benefits and at the same time provided written notice to any insurer it claimed was required to handle the claim within 90 days of the receipt of the OCF1.

Co-op submits that the failure of Economical to put Co-op on notice as required now prevents Economical from disputing its obligation to pay benefits. Co-op relies on Section 3(1) of the Regulation which states:

> "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."

Co-op submits that the failure of Economical to meet its obligations either as the first insurer receiving the Application and/or with respect to putting Co-op on notice result in being unable to dispute its obligation, and unable to dispute priority even in the context of this Arbitration commenced by Co-op as against Economical. In that regard, Co-op submits that insurers should be held to strict compliance with respect to Regulation 283/95. While Co-op recognizes that their argument can have the effect of requiring Economical to pay a claim that was not otherwise payable that that is what the Regulation and the case law has directed. Co-op relies on *Kingsway General Insurance Co. v. West Wawanosh Insurance Co.*, 2002 CanLII 14202 (ON CA) in that regard. As is often quoted from that case the Court of Appeal confirmed that the parties in a dispute such as this are sophisticated organizations and engaged in conducting this type of business on a regular basis and accordingly there is no unfairness visited upon them by insisting upon strict compliance with the Regulation.

Co-op also submits that by virtue of Section 2.1(7) of Regulation 283/95 that as Economical did not meet its obligations on receipt of the completed OCF1 and in essence deflected the claim then there are mandatory cost consequences. Section 2.1(7) of the Regulation sets out that the

deflecting insurer "shall reimburse the Fund or another insurer for any legal fees, adjuster fees, administrative costs and disbursements that are reasonably incurred by the Fund or other insurer as a result of the non-compliance." Co-op therefore submits that Economical must refund Co-op's costs related to adjusting the claim and pursuing the priority dispute.

Finally, as to Economical's position that it is not an insurer due to the fraudulent pink slip, Co-op submits that clearly Economical is an insurer and it is bound by the priority rules and related Regulation. Once a nexus has been established, the fact that the policy is not valid is not a consideration to be taken into account when determining which policy is in priority to pay. Co-op points to *Danilov* and *Unifund* (supra) to support its position that Economical is an insurer. Co-op also submits that their position is consistent with the decision in *Chubb*.

Respondent

Economical submits that as it did not provide a motor vehicle liability policy that would have provided coverage to the Claimant with respect to the accident of April 15th, 2021 that therefore it is not an insurer. If it did not have a policy with the Claimant's name, a policy covering the vehicle or a policy covering the owner of the vehicle, then it cannot be an insurer for the purposes of a SABS claim and therefore is not bound by Regulation 283/95.

Economical also submits that at no time did it deflect the claim or refuse to accept the OCF1 sent on May 7th. Economical points to the fact that the claims representative from Economical in his email to the Claimant's counsel did not refuse to pay, did not refuse to accept the OCF1 but simply asked for further information. The email notified Claimant's counsel that Economical had been unable to locate a policy with the information provided to date and asked for the representative to provide the required information. No response was received to the email and Economical therefore had the right to assume that the intent of the Claimant to advance a Statutory Accident Benefit claim with Economical had, in essence, been withdrawn.

Economical submits that the fact that the Claimant's counsel submitted an OCF1 to Co-operators some eleven days later is consistent with that position. Economical submits that at no time did the Claimant request benefits from it, nor did it refuse to pay anything. Therefore, it cannot be found to have deflected the claim.

Economical submits that this position is consistent with Section 2.1(5) of Ontario Regulation 283/95. This provision states that an insurer who is given an Application for Accident Benefits is not to take any action intended to prevent or stop the Applicant from submitting the completed Application to the insurer and nor shall it refuse to accept the completed Application or redirect the Applicant to another insurer. Economical submits it took no action intended to prevent the Applicant or stopping the Applicant from submitting its OCF to Economical. Economical submits it did not refuse to accept the completed Application. Finally, Economical submits it did not redirect the Applicant to another insurer. Rather, when the Applicant's counsel was questioned

with respect to further information as to the policy, the Applicant chose to redirect her own Application to Co-op.

Economical also submits that while an OCF1 was submitted to it on May 7th, 2021, that it was not complete. Economical submits that the Application did not contain enough information to reasonably assist the insurer with the processing of the Application and the assessment of the claim. Economical submits that the proper insurance policy number was not provided to it with the OCF1 and therefore, it did not have a completed Application.

As to whether or not Economical breached Section 3 of Ontario Regulation 283/95, Economical says it did not. Economical says that with there being no response from Claimant's counsel to Economical's email inquiry and with the Claimant filing its OCF1 with Co-operators some eleven days later, that Economical did not have an opportunity to make a determination as to whether or not it was in a position to have to put another insurer on notice of a priority dispute.

Co-operators put Economical on notice on May 19th. Economical submits that between May 7th and May 19th was not a sufficient period of time for Economical to determine whether or not the claim had been abandoned or whether it even needed to put another insurer on notice.

Economical takes the position that as it was put on notice by Co-op within the 90 day period that Economical would have been required to put Co-op on notice that it does not make practical sense to require a duplication of process. In other words, with a Notice of Dispute having already been served by Co-op on Economical it does not make sense for Economical also to have to put Co-op on notice. Economical submits that the Arbitration as between Co-op and Economical is the forum to determine priority and it would be unjust for Economical not to have an opportunity to have a determination made as to whether it can be a priority insurer in circumstances where it is acknowledged that no policy existed and the pink slip produced was fraudulent.

Economical also submits that as it rightfully believed that the Claimant had abandoned her claim for benefits, that it was therefore not the insurer required to pay benefits under Section 2 as Co-op had accepted the claim. As such, Economical submits it did not have to meet the Section 3 notice requirements in any event.

Finally, Economical submits that in the circumstances of this case, it should not be saddled with the payment and handling of the Claimant's Accident Benefit claim even if there is a finding that it deflected the Application or was in breach of Section 3. Economical submits that that is not an appropriate remedy. Economical submits that if it is found that there was a deflection or a breach of Section 3 by it, then the appropriate remedy is under Section 2.1(7) and that is for Economical to reimburse Co-op for any reasonable legal fees, adjusters fees, administrative costs or disbursements. However, Economical suggests that these should be minimal given that Co-op is in fact the priority insurer and was well aware from the outset that Economical had a fraudulent policy and would not be found to be the priority insurer.

Analysis and Findings:

This is a difficult case as the fact suggest an inherent unfairness to make a finding that Economical is by virtue of a technicality the priority insurer of the Claimant when there is no dispute that Economical did not issue a policy that would cover the Claimant, her vehicle or the owner of the vehicle on the date of loss. However, despite what may seem the inequities of such a conclusion, I have determined that Economical is in fact responsible for paying Statutory Accident Benefits to the Claimant as a result of the accident of April 15th, 2021 for the reasons that I set out below.

1. Did Economical receive a completed Application and was it the first insurer to receive an Application pursuant to Section 2.

I find that Economical was the first insurer to receive the OCF1 on May 7th, 2021 and that the Application it received was complete.

With respect to the completeness of the Application, Economical was given all the information it needed to make an informed decision with respect to the issue of nexus. It knew the name of the Claimant. It knew the name of the other driver and who the other driver was insured by. It had the name of the owner of the vehicle. It was provided with a policy number based on a pink slip that was in the vehicle. It was provided with the Police Report which also identified Economical as the insurer of the vehicle the Claimant was driving and provided the policy number. There was no additional information that Economical required in order to be able to respond to the OCF1. While certainly it makes sense for the claims adjuster to contact Claimant's counsel and ask for clarification about the policy number as that information could not be located in Economical's system that does not mean that it did not have a completed Application. The case law is clear that a completed Application is one that contains enough information to reasonably assist the insurer to process the Application and the assessment of the claim. Where the insurer has been provided with the name of the injured party, the date of the accident and the insurance policy number that is sufficient information to allow the insurer to process and assess the claim. This is supported by the decision in Liberty Mutual Insurance *Company v. Commerce Insurance Company* [2001] O.J. No. 5479.

In my view, Economical received a completed Application with sufficient information in order to allow it to process and start assessing the claim. While additional information was warranted with respect to clarifying policy numbers, that did not stop the Application being complete. Further, Economical had sufficient information to determine whether or not it had to engage another insurer in a priority dispute. It was aware that Co-op was the insurer of another vehicle involved in the accident and it had full information with respect to Co-op's insurance policy through the Police Report that was submitted together with the OCF1.

I could really see no argument that can be made that Economical was not the first insurer to receive an OCF1. Economical argues that it was not an insurer because technically it did not insure the actual vehicle. I agree with the submissions of Co-op on that point and I find that Economical was an insurer for the purposes of Regulation 283/95 as it received a completed Application for Accident Benefits and as I outline below, there was a sufficient nexus with Economical to trigger its obligations under Section 2 of Regulation 283/95.

2. Was there a sufficient nexus with respect to Economical?

I conclude that there was more than sufficient nexus with Economical for its obligations under Section 2 of Regulation 283/95 to be triggered. On that point, the decision of the Supreme Court of Canada in *Zurich* and *Chubb* (supra) is not only binding on me but is on point. In that case, Ms. Singh had rented a vehicle from Wheels 4 Rent. The rental vehicle was insured under a motor vehicle liability policy issued to Zurich Insurance Company. Chubb Insurance Company of Canada had issued an accident policy as well to Wheels 4 Rent. However, this policy contained no coverage for liability to others as a result of the motor vehicle accident. It provided optional death and dismemberment insurance to Wheels 4 Rent customers unrelated to motor vehicle accidents as long as the injury or death occurred during the rental period.

Ms. Singh did not purchase Chubb's optional coverage. She had a single motor vehicle accident that took place in 2006. She had at some point obtained a pamphlet for the optional Chubb policy and then therefore submitted a claim for Statutory Accident Benefits to Chubb. Chubb refused to pay on the basis that it was not an insurer within the meaning of Section 268 of the *Insurance Act.* Chubb also argued that there was an insufficient nexus as between Chubb and Ms. Singh and therefore it was not obligated to pay her benefits under the pay first dispute later provisions of Regulation 283/95.

Justice Juriansz in his dissent (which was accepted by the Supreme Court of Canada) concluded there was a sufficient nexus. Justice Juriansz felt that the crux of determining the obligation to respond to an OCF-1 is the nexus test. Where an Applicant applies to an insurer based on a non-arbitrary, albeit mistaken belief, with respect to the availability of coverage, that triggers the requirement for the insurer to pay benefits. Justice Juriansz suggested that it would be best to allow Adjudicators to continue to consider whether there is some connection between the parties through the Arbitration process rather than allow an insurer to not pay. He noted that it was the overriding public policy of the Regulation to provide timely delivery of benefits to people injured in motor vehicle accidents in Ontario despite the inconvenience to some insurers who must provide benefits to individuals that they may not cover and rather seek reimbursement from the correct insurer at a later date. Justice Juriansz noted that it is only in extreme cases where the connection with the insurer is totally arbitrary that the insurer can refuse to pay.

The Supreme Court of Canada supported that even though Chubb issued a non-motor vehicle liability policy and was a non-motor vehicle liability insurer that the submission of the OCF-1 based on the connection or nexus established by the Claimant with Wheels 4 Rent was sufficient

to trigger Regulation 283/95. The Court notes that public policy would be seriously eroded otherwise.

In applying that decision to the facts of this case, it is clear that the Claimant did not make a random selection of Economical to submit her OCF-1. She chose Economical because she had a pink slip that indicated Economical insured the vehicle and that pink slip was accepted by the police officer and noted in the police report. It was far from a random choice. The Claimant was not compliant in the fraudulent pink slip and accordingly I find that there was a sufficient nexus with Economical to trigger its obligations under Section 2 and it was obliged to accept the Claimant's OCF-1, open a claim, and commence its payments and adjustment of her benefit entitlement.

Deflection:

Having found that Economical was the first insurer to receive a completed application with a sufficient nexus to trigger Section 2 of the Regulation, I now move on as to whether or not Economical deflected the claim, and, if so, what flows from that deflection.

It is my finding that Economical did in fact deflect the Claimant's application. While I agree with Economical that it was not what I would describe as an active deflection, the fact is they did not send out a letter accepting the OCF-1, did not advise the Claimant of the various benefit entitlement she may have, open a claim, assign a claim number, or in any way start adjusting the claim. While I appreciate it was a relatively short period of time between Economical receiving the OCF-1 on May 7 and sending out its "inquiries" to the Claimant, the fact remains that at no time did Economical start adjusting the Claimant's application. It is my conclusion that on receipt of the OCF-1, Economical was obliged to send out its formal letter to the claimant acknowledging receipt of the OCF-1 and in accordance with Section 32 of the Statutory Accident Benefit Schedule to promptly provide the Claimant with any appropriate application forms such as a Disability Certificate, an OCF-2 Employers Certificate, to provide her with a written explanation of the benefits available, to provide her with information to assist in applying for benefits, or any information with respect to a possible election as between weekly benefits. None of this was done.

Therefore, while I agree that Economical did not stop the Applicant from submitting an OCF-1 and did not re-direct her to another insurer, their actions in essence were a refusal to accept the completed application. There was nothing in the email sent by the Economical adjuster to suggest that Economical was going to accept and adjust the application. There was no follow up by Economical. It did not attempt to make any contact with the Claimant or her counsel other than with the email asking about the policy number.

In all the circumstances, I find that this qualifies as a deflection and the real issue is what flows from the deflection.

Did Economical breach Section 3 of Ontario Regulation 283/95, and, if so, what are the consequences:

Section 3 of Ontario Regulation 283/95 is set out below:

> "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".

There is no dispute that Economical never put Co-op on notice. As Economical was the first insurer to receive a completed OCF-1, Economical's obligation in accordance with the Regulation and the case law (*Zurich v Chubb* supra) was to pay now and dispute later. As I have found above, Economical's obligation was to proceed forward with adjusting the Claimant's Application for Accident Benefits and commence payment of appropriate benefits. As it did not, however, have a policy of insurance that covered the vehicle that the Claimant was driving on the date of loss, Economical had the right to put Co-op on notice as the insurer of another vehicle involved in the accident and take the position that it was the priority insurer under Section 268 of the *Insurance Act*. If Economical had done that, then this Arbitration would never had occurred. As there is no dispute that the pink slip was fraudulent one could surmise that when Co-op was put on notice of Economical's position and provided with appropriate evidence of the fraudulent nature of the pink slip, Co-op would have accepted that in those circumstances it was the priority insurer and accepted Economical's position. However, Economical did not process the Claimant's application and did not put Co-op on notice of this dispute within the 90-days required. In fact, Economical has never put Co-op on notice. Section 2 of Ontario Regulation 283/95 sets out that it is the <u>first insurer</u> who had received the completed application that is responsible for paying the benefits then proceeding with a dispute. Economical was the first insurer to receive the completed application and it failed to comply with its obligations under Section 3 and put Co-op on notice.

Economical argues that there was not a sufficient time for it to put Co-op on notice. However, the information in the OCF-1 included everything that was needed for Economical to identify Co-op as the potential insurer on the priority dispute ladder as set out under Section 268 of the *Insurance Act*. It took Co-op less than a day after the receipt of the OCF-1 to put Economical on notice and it was based on the same information that was set out in the application Economical received.

As Economical failed to put Co-op on notice within the 90-days, I conclude that failure prevents Economical from disputing its obligations to pay benefits to the Claimant. This is consistent with Section 3(1) of Regulation 283/95, which states:

> "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".

I agree with Co-op that the Regulation is intended to be applied strictly and I accept the direction of the Court of Appeal in *Kingsway v West Wawanosh* (supra) that there is little room for creative interpretation or carving out judicial exceptions to deal with the equities of particular cases. I appreciate that the result of this decision means Economical must pay benefits to a Claimant for which it has little or no connection due to the fraudulent pink slip. However, if Economical had followed its obligation under Section 2 and 3 of the Regulation, we would not be where we are today. If Economical had paid now and disputed later, Co-op would be paying the Claimant's benefits. My decision on this issue is consistent with Arbitrator Jones' decision in the *Liberty Mutual Insurance Company v The Commerce Insurance Company* decision (Arbitrator Jones July 2001). In that case Arbitrator Jones concluded that where Commerce was the first insurer to receive an OCF-1 and had 90-days to put another insurer on notice and failed to do so it became responsible for paying the claim. I also find my conclusion consistent with the comments of Justice Juriansz in *Zurich v Chubb*. I agree with Co-op that while a deflection does not necessarily result in the deflecting insurer becoming the priority insurer that the consequences of the failure to comply with Section 3 of the Regulation can result in the insurer having to pay the claim anyway.

Costs consequences of deflection:

As I have concluded that Economical's conduct constituted a deflection under Regulation 283/95 I also agree with Co-op that then triggers the mandatory costs consequences of Section 2.1(7) of the Regulation. I find that as Economical was a deflecting insurer it is to reimburse Co-op with respect to any legal fees, adjuster's fees, administrative costs, or disbursements that were reasonably incurred by Co-op as a result of Economical's noncompliance.

There were no submissions by Co-op or Economical with respect to the actual quantum being claimed. Economical did submit that it should be relatively modest in the circumstances. If counsel are unable to agree on the costs consequences of Section 2.1(7) then we will schedule a further pre-hearing to discuss whether a costs hearing is going to be required.

Costs:

While I have found that Economical has an obligation to refund costs to Co-op as set out in Regulation 2.1(7), it is not abundantly clear whether that Regulation also speaks to costs of the Arbitration.

The Arbitration Agreement signed by the parties provides that the costs of the Arbitrator and the expenses of the Arbitrator are to be determined by me taking into account the success of the party, offers to settle, the conduct of the proceedings, and principles generally applied in litigation before the courts in Ontario.

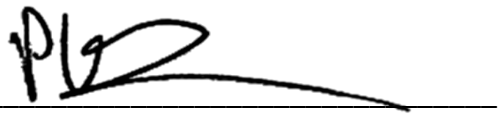
I do not know whether there has been any offer to settle that I should be considering. I therefore leave it in the parties' hands to see if they can reach an agreement with respect to the costs of

the Arbitration and the expenses of the Arbitration. If not, again, we can schedule a pre-hearing to discuss the necessity of a costs hearing.

The parties have 60 days from the date of this decision to reach an agreement with respect to the various costs issue. I will follow up with counsel 60 days from now to see whether further submissions are required.

I thank both counsel for their very able and excellent submissions in this case. These were novel arguments and both counsel did justice to their respective positions and advocated well.

DATED THIS 9th day of September, 2022 at Toronto.



Arbitrator Philippa G. Samworth
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