

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:

PEMBRIDGE INSURANCE COMPANY

Applicant

- and -

ECONOMICAL INSURANCE COMPANY

Respondent

### **AWARD**

#### **Counsel Appearing:**

Jonathan B. Schrieder: Counsel for the Applicant, Pembridge Insurance Company (hereinafter called Pembridge)

Ashleigh T. Leon: Counsel for the Respondent, Economical Insurance Company (hereinafter called Economical)

#### **Introduction:**

This matter came before me pursuant to the *Arbitration Act* 1991 to arbitrate a dispute between two insurers involving a priority issue that had arisen pursuant to the *Insurance Act*, R.S.O. 1990 c I.8, as amended, and Regulation 283/95.

By way of background this claim arises out of a pedestrian versus car accident that occurred on March 30, 2020.

The claimant was in his driveway when he was struck by a Ford van.

At the time of the accident, the claimant had insurance coverage through two different policies. He was one of two named insured under a policy issued by Pembridge bearing policy number 258332929. The policy period was August 13, 2019 to August 13, 2020 and a 2019 GMC Sierra 1500 pick-up truck was insured.

He was also a named insured under a policy with Economical for a 2013 Honda and that policy was also in full force and effect on the date of loss. Both policies carried optional benefits but the Economical policy carried optional income replacement benefits up to \$1,000.00 a week while the Pembridge policy did not.

The claimant applied to Pembridge for Statutory Accident Benefits. Pembridge claims that Economical is the priority insurer relating to matters that revolve around the claimant's election of benefits, the existence of the additional optional benefits under the Economical policy, and as well questions around deflection.

**Proceedings:**

This matter proceeded by way of written submissions. The parties submitted an Arbitration Agreement dated January 19, 2023 as well as written submissions, Book of Documents, and Books of Authority. There were no oral submissions.

**The Issue in Dispute:**

According to the Arbitration Agreement, the issue in dispute is:

“(a) Which of the parties bears first priority for the payment of accident benefits to and on behalf of the claimant as a result of the March 30, 2020 accident?”

However, both counsel in their submissions further define issues.

According to Pembridge, the questions for determination by me are:

- a) Did the claimant make an uninformed election after the accident?; and,
- b) Is Economical at priority to respond to the claimant's Application for Accident Benefits?

However, Pembridge in its submissions also references the issue of deflection.

According to Economical, the questions for determination by me are:

- a) Did the claimant exercise his right to choose the insurer from which to claim accident benefits from?
- b) What affect does the OPCF-47 have in this case?; and,
- c) Did Economical deflect?

**Facts:**

The parties do not disagree on the facts, although, they do disagree as to what conclusions should be drawn from the facts particularly on the issue of an informed election.

The salient facts are set out below:

1. The Pembridge policy relevant to the motor vehicle accident of March 30, 2020 had a policy period that ran from August 13, 2019 to August 13, 2020. A certificate of automobile insurance shows the claimant's name along with one other individual on the certificate. The policy coverage for Accident Benefits shows that the insureds purchased the \$1,000,000.00 med rehab and attendant care benefit as well as the optional increased coverage for med rehab and attendant care where an insured is catastrophic. They also purchased death and funeral optional benefits. However, the certificate of insurance dated June 24, 2019 does not show that optional income replacement benefits were purchased.
2. The Economical certificate of insurance shows a policy number of 500544711 with a policy period commencing March 16, 2020 through to March 13, 2021. The claimant is the only named insured under this policy. The policy covers a 2013 Honda ATV. It indicates that the coverage was placed through a broker: Cambrian Insurance Brokers Limited. The Economical certificate of insurance indicates that in addition to the optional benefits that the claimant had purchased with Pembridge that he also purchased the increased optional income replacement benefits up to \$1,000.00 a week. This policy was in full force and effect on the date of loss as well.
3. At his Examination Under Oath that took place on March 8, 2021, the claimant indicated that prior to the accident he had purchased an ATV. He attended on his broker (Cambrian) to arrange for insurance on the ATV. The claimant stated he "signed up for optional benefits on the ATV". The insurance was placed with Economical.
4. The claimant's evidence was that at the same time that he was speaking to the broker about the optional benefits on the ATV, the broker advised the claimant that he did not have the optional income replacement benefits on the Pembridge policy.
5. The claimant therefore asked the broker to put the optional income replacement benefits on the Pembridge policy. He believed the broker would place the coverage on the Pembridge policy then and there. According to the claimant, this meeting took place in late February or early March.
6. The documents filed as part of the Arbitration confirm the claimant's evidence. An OAF1 (Ontario Application for Automobile Insurance) indicates an application for insurance to Economical dated March 16, 2020 signed by the claimant with a request for optional benefits including income replacement benefits. The claimant and the other named insured also signed an Optional Accident Benefits Confirmation form dated March 16, 2020 confirming the optional benefit coverage described above. This supports the

claimant's evidence that he met with his broker in early March (specifically March 16) when the optional benefit coverage was discussed.

7. However, the broker did not immediately submit the paperwork to Pembridge. In fact, the broker did not submit the paperwork to add the IRB optional benefits to the Pembridge policy until after the motor vehicle accident. The Pembridge policy with the enhanced IRB coverage was issued April 14, 2020 adding the optional IRB but backdated to April 7, 2020.
8. The accident then occurs on March 30, 2020. The claimant submits an OCF-1 dated April 23, 2020 to Pembridge. The OCF-1 was sent to Pembridge April 28, 2020.
9. The OCF-1 indicates that the claimant is seeking Accident benefit entitlement under his own policy with Pembridge covering the 2019 GMC Sierra AT4. The claimant did not provide any additional policy information and specifically did not list in his OCF-1 that coverage might be available under the Economical policy.
10. Although there is no specific evidence on this point, at some time the claimant became aware that as of the date of loss he did not have the optional income replacement benefits on the Pembridge policy as the broker had not put the paperwork through by March 30, 2020.
11. Again, the evidence is not clear as to how but at some point Pembridge became aware of the existence of the Economical policy. On May 6, 2020, Pembridge sent a letter to Economical serving a Notice of Dispute to Arbitrate and providing Economical with a copy of the Application for Accident Benefits. In that letter, the adjuster for Pembridge makes reference to a telephone conversation with someone from Economical on May 5.
12. In that conversation of May 5, Economical advised Pembridge that the claimant had a valid policy and that they had opened an Accident Benefits claim for the claimant on April 9, 2020. Economical also confirmed that the claimant had not only the increased med rehab optional benefits but as well the increased IRB coverage under their policy.
13. Pembridge confirmed that their policy only covered regular income replacement benefits and took the position and I quote:

“it appears that Economical policy 500544711 stands in priority due to increased income replacement benefits available”.

At the same time, the claimant's lawyer emailed Pembridge and advised:

“my client would like to pursue his optional benefits through Economical. Will you kindly advise once the file is transferred to them for carriage/handling”.

14. No application at the Licencing Appeal Tribunal has been commenced by the claimant as against Pembridge, nor was there any evidence before me that the claimant had commenced any court action against the broker Cambrian.
15. By email dated July 24, 2020, Economical advised Pembridge that:

“we are not in a position to accept priority at this time as there is not enough information to conclude that a motor vehicle accident occurred”.

16. By this time Pembridge had provided Economical with a police report and a completed Statutory Declaration.

17. The Notice of Commencement of Arbitration was then issued by Pembridge on November 26, 2020 and served shortly thereafter. This resulted in my appointment as Arbitrator.

**Relevant Legislation:**

Section 268 of the *Insurance Act* provides a code with respect to which insurer is liable to pay Statutory Accident Benefits. The code provides a hierarchy of ranking based on factors such as whether you are a named insured under a policy, or whether you are an occupant of a vehicle or struck by a certain vehicle. However on some occasions a claimant will be faced with having two or more policies of equal ranking. In those circumstances, Section 268 provides that the claimant is to be put to an election. Section 268(4) provides as follows:

**Choice of insurer**

(4) If, under subparagraph i or iii of paragraph 1 or subparagraph i or iii of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of statutory accident benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits.

Similarly, Section 268(5.1) provides:

**Same**

(5.1) Subject to subsection (5.2), if there is more than one insurer against which a person may claim benefits under subsection (5), the person, in his or her discretion, may decide the insurer from which he or she will claim the benefits.

It is notable that under subsection 268(4) references “absolute discretion” while for some reason subsection 268(5.1) only makes reference to “discretion”. Section 268(5.1) applies when a claimant is a named insured under more than one policy.

It is these provisions that provide the claimant in this case with the discretion to choose between Pembridge and Economical. This is generally referred to as making an election. Section 268(5.1) is the section that applies in this case.

The contents of the OPCF-47 are also relevant to this case. These are reproduced below:

**AGREEMENT NOT TO RELY ON SABS PRIORITY OF PAYMENT RULES  
OPCF 47**

Issued to	Policy Number	Effective Date Year Month Day
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**1. Purpose of This Endorsement**

This endorsement is part of your policy. It has been made because persons who are entitled to receive optional statutory accident benefits under this policy may, by the priority of payment rules in Section 268 of the *Insurance Act*, be required to claim under another policy that does not provide them with the optional statutory accident benefits that have been purchased under this policy. This endorsement allows these persons to claim Statutory Accident Benefits (SABS) under this policy including the optional statutory accident benefits provided by this policy, provided they do not make a claim for SABS under another policy.

**2. What We Agree To**

If optional statutory accident benefits are purchased and are applicable to a person under this policy, and the person claims SABS under this policy as a result of an accident and agrees not to make a claim for SABS under another policy, we agree that we will not deny the claim, for both mandatory and optional statutory accident benefits coverage purchased, on the basis that the priority of payment rules in Section 268 of the *Insurance Act* may require that the person claim SABS under another insurance policy.

All other terms and conditions of the policy remain the same.

On the issue of deflection, the relevant provision is set out in Regulation 283/95 to the *Insurance Act* and that is set out below:

2.1 (1) This section applies in respect of benefits that may be payable as a result of an accident that occurs on or after September 1, 2010. O. Reg. 38/10, s. 3.

(2) An insurer shall promptly provide an application and any other appropriate forms in accordance with the Schedule to an applicant who notifies the insurer that he or she wishes to apply for benefits. O. Reg. 38/10, s. 3.

(3) The application provided by the insurer must include the insurer's name, mailing address and telephone and facsimile numbers. O. Reg. 38/10, s. 3.

(4) The applicant shall use the application provided by the insurer and shall send the completed application to only one insurer. O. Reg. 38/10, s. 3.

(5) An insurer that provides an application under subsection (2) to an applicant shall not take any action intended to prevent or stop the applicant from submitting a completed application to the insurer and shall not refuse to accept the completed application or redirect the applicant to another insurer. O. Reg. 38/10, s. 3.

(6) The first insurer that receives a completed application for benefits from the applicant shall commence paying the benefits in accordance with the provisions of the Schedule pending the resolution of any dispute as to which insurer is required to pay the benefits. O. Reg. 38/10, s. 3.

(7) An insurer that fails to comply with this section shall reimburse the Fund or another insurer for any legal fees, adjuster's fees, administrative costs and disbursements that are reasonably incurred by the Fund or other insurer as a result of the non-compliance. O. Reg. 38/10, s. 3.

(8) In subsection (7),

"insurer" does not include the Fund. O. Reg. 38/10, s. 3.

### **Position of the Parties:**

#### **Pembridge**

Pembridge's main submission is that the claimant was not given an opportunity to make an informed decision when he elected to claim accident benefits from Pembridge.

Pembridge argues that the claimant's decision could not have been conscious and informed because he was not aware at the time of the election that the Pembridge policy did not have optional income replacement benefits. The claimant's evidence on his EUO was that he earned over \$100,000.00 in his pre-accident employment and therefore assuming an entitlement to an income replacement benefit clearly the enhanced optional income replacement coverage would be of benefit to the claimant.

Pembridge submits that the decision to elect Pembridge was made on the assumption that the claimant had the optional income replacement benefits. Had he been aware that the broker had not submitted the paperwork at the time of the accident, Pembridge suggests that the claimant would have made a different decision and have elected Economical.

Pembridge argues this is supported by the fact that once the claimant became aware that he did not have the optional benefits under the Pembridge policy that he then requested a transfer of

his file to Economical for handling so that he could access the optional income replacement benefits.

Pembridge submits that in determining whether or not the claimant made an informed choice that one should look at the following:

- a) The potential choice of insurers generally;
- b) The potential choice between claiming *SABS* under the other policy; and ,
- c) The level of *SABS* available under each policy.

Pembridge relies on the decision in *Primum Insurance Company v. L'Unique Assurances Generales Inc.*, 2017 ONSC 5235 in support of their position as to what constitutes an informed choice. Pembridge submits that if the claimant had been fully informed of the lack of optional income replacement benefits on the Pembridge policy he would have elected Economical, and, therefore, Economical should be the priority insurer. Pembridge submits that this is consistent with the OPCF-47. Pembridge also submits that a review of the OPCF-47 does not prohibit Pembridge from seeking a determination that Economical is the priority insurer. Pembridge submits that the OPCF-47 does not preclude a claimant from re-electing if they determine that they initially filed the form with the wrong insurer. Pembridge relies on the decision in *Intact Insurance v. Economical Mutual* 2021 ONSC 7750 on that point.

On the issue of the OPCF-47, Pembridge argues that the OPCF-47 does not require that only one application for benefits can be filed. Nor, Pembridge submits, is there any legislation to suggest that having filed an application by mistake with the wrong insurer that the claimant then does not have the right to send a completed application to a second insurer. On this point, Pembridge relies on the case of *Yaromich and Botbyl v. Heartland* 2021 ONSC 3759.

The final submission of Pembridge is that the actions of Economical in responding to both the priority dispute notice and to the claimant's request for Economical to take over the claim constituted deflection. In their Factum, Pembridge submits that it was clear that the claimant did not make a conscious or informed decision and that he quickly attempted to rectify that as soon as he realized his broker had made a mistake. He asked Economical to take over the claim. Pembridge submits Economical deflected this by alleging there was not enough information available to conclude that a motor vehicle accident had occurred. This despite the fact that Pembridge had provided to Economical a copy of the police report, Statutory of Declaration, and other information to confirm that the claimant had been struck by a van in his driveway.

Pembridge submits that this amounted to a deflection of the re-election. Pembridge submits that the request to re-elect was not arbitrary and that the claimant had purchased and paid for the policy to provide the precise type of coverage he was applying for: being enhanced IRBs. Pembridge submits that Economical simply denied the claim and Pembridge asks me to find that this constitutes a deflection.



## Economical

Economical takes the position that the claimant exercised a fully informed election to choose Pembridge as the insurer from which he wished to seek Statutory Accident Benefits.

Economical points out that at the time the Applicant made his choice, he believed that both the Pembridge and Economical policies had the same optional benefit coverage. He believed both policies had optional med rehab benefits, increased benefits for CAT impairment, optional death and funeral benefits, and the increased IRB up to \$1,000.00 a week.

Economical submits that the claimant, believing the policies were the same, therefore chose Pembridge. This was a conscious decision to elect Pembridge and not Economical.

While Economical acknowledges that the claimant's belief was mistaken, it points out that mistake lies with Pembridge and/or the broker, Cambrian. Economical submits that the broker or Pembridge's error in not adding the optional IRBs on as requested by the claimant in March of 2020 should not result in the claimant being given the right to re-elect to Economical.

Economical submits that the real issue is the failure of Pembridge and/or Cambrian to follow through on the claimant's request to add the optional income replacement benefits. That dispute is between the claimant and Pembridge/Cambrian and not between Pembridge and Economical. Economical suggests that the error of Pembridge and/or the broker should not be the subject matter of a priority dispute.

Economical points to the fact that Pembridge in fact added the increased optional income replacement benefits on April 14, 2020. This is evidenced in the Pembridge certificate of insurance issued April 14, 2020. The change in fact was back dated to April 7, 2020 and covered the remaining policy period to August 13, 2020. Both the April 7 and April 14 dates pre-date the completion by the claimant of his OCF-1. It was signed on April 23, 2020.

Economical disputes Pembridge's allegation that the failure of Pembridge and/or the broker to amend the policy prior to March 30, 2020 should result in any finding that Pembridge is not the priority insurer.

Economical submits that the claimant was aware that there was more than one policy to choose from. He was aware both policies had optional benefits. He chose Pembridge.

Economical relies on the decision of Arbitrator Samis in *Security National Insurance Company v. Markel Insurance Company* (Decision Samis, November 2009). Economical submits that case supports that an individual making an election under Section 268 does not have to have details and particulars about every possible insurer in order to make that decision. A general understanding that there is more than one insurer is sufficient.

Economical submits and I quote from their Factum:

“All else being equal had Pembridge/Cambrian put the optional IRBs on the claimant’s policy when it was supposed to, there would be no basis for this priority dispute at all. The claimant chose to claim his benefits from Pembridge. Pembridge is simply attempting to pin its mess upon Economical”.

Economical suggests that this situation should be compared to one involving cancellation. If Pembridge had believed it had properly cancelled its policy and it had not and the claimant elected Pembridge, Pembridge would still be obliged to respond to the Statutory Accident Benefits due to its failure to properly cancel the policy. Economical submits there is no difference between a failure to add on optional benefits and a failure to properly cancel the policy.

Economical submits that the claimant has other legal remedies available to him and he could choose to bring an action, for example, against Cambrian or Pembridge. Economical also suggests that it is relevant that the claimant did not choose to seek standing in this priority proceeding although he had an opportunity to do so.

On the issue of deflection, Economical submits that it is unfounded. No OCF-1 was ever submitted to Economical. The first OCF-1 was submitted to Pembridge. Economical is simply defending a priority dispute and has handled the file as such. Even after the claimant determined that Pembridge had not added the IRB coverage to his policy prior to the date of loss, he did not submit an OCF-1 to Economical and seek a clear re-election.

Economical also relies on the OPCF-47. Economical notes that the Pembridge policy did have optional benefits in place even though they did not have the IRB optional benefits and therefore the OPCF-47 is activated.

Economical submits that Pembridge in raising of the question of whether or not the claimant made an informed choice is an attempt to get around the provisions of the OPCF-47 which effectively do not allow Pembridge to dispute priority as an optional benefit provider.

As Pembridge received the first OCF-1 and optional benefits were applicable the OPCF-47 is therefore activated and in accordance with the provisions of the OPCF-47, Pembridge agrees that they will not “deny the claim for both mandatory and optional Statutory Accident Benefit coverage purchased, on the basis that the priority of payment rules in Section 268 of the *Insurance Act* may require that the person who claims *SABS* under another insurance policy”. Economical submits that Pembridge therefore has no right to pursue a claim as against Economical based on the priority rules set out in Section 268 of the *Insurance Act*. Economical relies on the decision of *Jevco Insurance Company v. Chieftain Insurance Company* (Arbitrator Samworth, March 2016).

Finally, Economical suggests that Pembridge has provided no authority for their position that if one insurer has different or better optional benefits available that automatically it would stand in priority to the insurer that does not have those optional benefits.

### **Analysis and Decision:**

While I have some sympathy for the claimant in this case who believed that Pembridge had placed optional income replacement benefits on his policy, having carefully reviewed all the submissions of the parties I must conclude that the claimant did make an informed election. I also find that the OPCF-47 in these circumstances does not permit Pembridge to pursue a claim for priority as against Economical. Finally, I could find no evidence that Economical had deflected the claim contrary to Regulation 283/95.

### **Informed Election**

Section 268 of the *Insurance Act* does provide that the claimant in his absolute discretion can choose as between two equal insurers to claim Statutory Accident Benefits from.

I agree with Arbitrator Samis in the decision of *Security and Markel* (Supra) that there must be some evidence that a claimant actually exercised their power of decision/discretion under 268(5.1). In the case before Arbitrator Samis neither the claimant nor anyone else on his behalf was aware that there was more than one insurer against whom he may be able to claim benefits. Therefore, there was in fact no decision made and no discretion exercised because no one knew that there was a choice to be made. Arbitrator Samis concluded that on the evidence before him, neither the claimant nor his family were aware that there was a possible choice amongst multiple insurers. Therefore no decision could have been made under Section 268(5.1).

Arbitrator Samis went on to make it quite clear that he was not making a decision that for an individual to make a decision under Section 268(5.1) that it is necessary for that person to have all the details about every possible insurer in order to make that decision. As long as they have a general understanding that is sufficient.

The claimant in this case had quite a detailed understanding about the coverage under the two policies. While his belief as to the coverage under the Pembridge policy was mistaken, that was only because Pembridge had failed to do what the claimant had asked them to do. I agree with Economical that does not mean the claimant did not make an informed decision as between the two policies. I also agree with Economical that the claimant's recourse lies elsewhere. The failure of Pembridge/Cambrian to increase the income replacement benefit coverage prior to March 30, 2020 is not the subject matter of a priority dispute. That in my view is an issue as between the claimant, Pembridge, and Cambrian and should be properly dealt with in a forum where those types of claims can be advanced. I carefully reviewed the decision from the Divisional Court in *Primmum v. L'Unique* (Supra) relied upon by Pembridge.

The facts of that case were somewhat different. The case involved a claim for loss transfer under Section 275 of the *insurance Act*. One insurer was resisting that claim on the grounds that the claimant had elected to receive Statutory Accident Benefits from a non-motorcycle policy even though he could have elected to make a claim under the motorcycle policy. The insurer took the position that if the SABS claim was not being dealt with by a motorcycle policy that there was no right of loss transfer. In this context, the claimant's choice of insurer became relevant. The only evidence before the Arbitrator as to "choice" was the fact that the claimant's father had signed the OCF-1 on his behalf and had submitted it to Primmum. It was also a question as to whether the issue of choice was even before the Arbitrator and whether the OCF-1 that he relied upon in making his decision was even properly before him. While the court held that the Arbitrator did not have that issue before him, they did go on to conclude that the OCF-1 was not sufficient evidence to reflect a choice to pursue that particular insurer.

In looking at what constituted an informed choice, the Court commented that an insured person must be aware that there was a choice available to them. Further, that with that knowledge that there were one or more insurers available to cover the Statutory Accident Benefit claim that the individual made a conscious choice. The Court commented and I quote:

"Where there are two insurers of equal rank between whom the insured person has a choice when claiming SABS, it is important that the insured person make an informed choice. For example, optional benefits may be available under one policy and not the other. In that circumstance, the insured person is entitled to exercise his or her discretion, with full information in hand, based on a conscious decision".

Mindful of the comments of the Court as noted above, I find on the evidence before me that the claimant's exercise of his discretion to choose Pembridge was an informed and conscious decision.

I am aware of the fact that the priority rules under Section 268 of the *Insurance Act* and the procedure under Regulation 283/95 are designed to be a simple, cost effective, and expeditious manner of determining priority disputes between two insurers. Many Arbitrators and Judges have commented that carving out exceptions and special circumstances relating to priority disputes will be problematic and contrary to the intent and purposes of the legislation, particularly taking into consideration that we are dealing with sophisticated insurance companies who should be well versed in these areas.

I do not believe that Section 268(5.1) of the *Insurance Act* intended for there to be an exhaustive analysis as to how and on what facts the insured exercised his discretionary rights. The Section says that the claimant has discretion and in my view that was to prevent insurers arguing over the exercise of that discretion as indeed has happened here. I agree that there are exceptions such as the case before Arbitrator Samis where the individual did not even know there was another policy that could be accessed. That however, is not the case before me. We are dealing

with a situation that in my view is similar to my decision in *Jevco and Chieftain* (Supra). I therefore conclude the claimant did make an informed and conscious decision to choose Pembridge.

**Effect of OPCF-47:**

Economical argues that irrespective of the issue of informed choice that once the claimant applied to Pembridge for Statutory Accident Benefits that the OPCF-47 was activated and that then prevents this priority dispute. While it may not prevent the claimant from pursuing other options as against Pembridge or the broker, it does prevent Pembridge claiming Economical has priority.

I agree with Economical on this point and my finding is consistent with my previous decision in *Jevco & Chieftain* (Supra).

The OPCF-47 provides that an insurer will not rely on Section 268 of the Priority Payment Rules to shift a claim of an insured once that insured applies for Statutory Accident Benefits and the policy provide optional coverage.

The OPCF-47 indicates that an insurer will not deny a claim for mandatory or optional Statutory Accident Benefits on the basis that the Priority of Payment Rules under Section 268 of the *Insurance Act* require that the person who claims SABS under another policy. That is in my view exactly what Pembridge is doing here. In the case of *Jevco & Chieftain* (Supra), I noted that the OPCF-47 Endorsement is to ensure that when an individual purchases optional benefits under one policy and applies to that insurer for those benefits that the insurer cannot deny the claim on the basis that another insurer is in fact higher priority. I pointed out that the OPCF-47 Endorsement was introduced in 1997 and has not been changed since that time. As the law presently stands, an insurer has no right to deny an insureds claim under Section 268 of the *Insurance Act* if they received the first application. (See Regulation 283/95). An insurer with almost no relationship to an insured is obliged to accept the first application so that an insured can have timely and prompt benefits paid to him/her. The fight on who is actually responsible to pay benefits under Section 268 is left up to intercompany dispute and that process is outlined under Regulation 283/95, as amended by Regulation 34/10.

In *Jevco & Chieftain* (Supra), I concluded that the only way the OPCF-47 could now be interpreted was that the insurer with optional benefits that had received the application did not have a right to make a claim for a priority dispute under Section 268. I found that the purpose of the Endorsement is that the optional benefit insurer gives up the right to pursue another insurer for priority if they receive the application for Accident Benefits.

My decision in *Jevco & Chieftain* (Supra), was not appealed but was accepted by the Court of Appeal in the decision of *Continental Casualty Company v. Chubb Insurance Company of Canada* 2022 ONCA 1A8 (See pages 36-48).

Pembridge argues that *Jevco & Chieftain* (Supra), is distinguishable because in that case only one insurer had optional benefits. I disagree. The same philosophy is applicable and in my view both Pembridge and Economical will be prohibited from pursuing priority disputes as they both carried optional benefits. However, Pembridge's OPCF-47 was activated when it received the first application. Therefore, irrespective of the issue of informed choice, I conclude that Pembridge has no right to pursue a priority dispute as against Economical due to the wording of the OPCF-47.

### **Deflection:**

The issue of deflection arises as a result of Section 2 of Regulation 283/95. Section 2 provides that an insurer who received notice that somebody wishes to apply for benefits must promptly send that individual an application and other appropriate forms for them to complete. The applicant who received that application is to use that application and is required under Section 2.1(4) to only send that completed application to one insurer.

The insurer that receives that application is to:

“not take any action intended to prevent or stop the applicant from submitting a completed application to the insurer and shall not refuse to accept the completed application or redirect the applicant to another insurer”.

In this case the evidence suggests that Pembridge is the insurer that was first notified of the accident. Pembridge sent out the application and the claimant sent the completed application to Pembridge. There is no evidence that Economical provided an application to the claimant. There is no evidence before me that Economical acted in a way to prevent or stop the applicant from submitting a completed application to them. Further, Economical never refused to accept a completed application nor is there any evidence that they tried to redirect it to another insurer.

I agree with Economical's submissions that their actions were all taken as part of the priority dispute. While the grounds for denying priority (there was not evidence to establish there was an accident) may have been questionable that does not constitute deflection under Section 2.1(5). By the time the claimant asked Economical in May to take over the file, Pembridge had already received the Application for Accident Benefits. Section 2.1 directs that a priority dispute is the appropriate process at that point.

There is no evidence before me that the applicant had sent an OCF-1 to Economical that predated the Pembridge OCF-1.

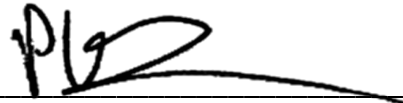
Therefore, on the facts of the case, I find that there is no evidence of deflection under Section 2.1(5) of Regulation 283/95.

**Costs:**

According to the Arbitration Agreement the costs of the Arbitrator including the Arbitrator's fees, expenses, disbursements, and costs of any Examination Under Oath shall be born by the unsuccessful party. Therefore, with respect to the related Arbitrations costs, I Order that Pembridge pay those costs. If they cannot be agreed upon, parties can contact me.

Section 10 of the Arbitration Agreement also provides that the successful party should be awarded party and party costs of the Arbitration either to be agreed upon or to be fixed at the discretion of the Arbitrator. In this case, Economical was entirely successful and I therefore award party and party costs of the Arbitration to Economical payable by Pembridge. If the parties cannot agree on the quantum of those costs, a costs hearing can be scheduled.

DATED THIS 15<sup>th</sup> day of February, 2023 at Toronto.

A handwritten signature in black ink, appearing to read 'PLG', is written over a horizontal line.

Arbitrator Philippa G. Samworth  
**DUTTON BROCK LLP**