

**IN THE MATTER OF AN ARBITRATION**

**B E T W E E N:**

**ALLSTATE INSURANCE COMPANY**

- and -

**BOREAL INSURANCE COMPANY**

**AWARD**

THIS MATTER has been submitted to me for arbitration by Allstate Insurance Company and Boreal Insurance Company in order to determine issues which have arisen between these two insurers with respect to payment of no fault benefits (Statutory Accident Benefits, Accident after January 1st, 1994). The parties have submitted to me Agreed Facts which I summarize as follows:

- "1. Mrs. Lucia Hasou was injured in a motor vehicle accident which occurred on June 21, 1994. At the time of the accident she was a passenger in a 1989 Cutlass automobile. The Cutlass automobile is leased on a long term lease basis from Tilden. It is leased by the family business of the Hasous. The vehicle was insured through a policy of insurance issued by Boreal. The Hasous are specified drivers under the Boreal policy. The vehicle involved is provided for the regular personal use of Lucia Hasou and her spouse by their family business.

Allstate has a policy of insurance under which Lucia Hasou and her spouse are named insureds. The vehicle insured under the Allstate policy is not involved in the accident.

Boreal has advised that there are no endorsements which expressly or by definition identify any of the Hasous as named insureds, or any other language of that nature.

2. The parties have further agreed that I am to decide the issues between the parties by making reference to case law or statutes or arbitration decisions or any other material which I consider appropriate to determine the obligation of the parties. The parties have also agreed, in their submission, that there is no waiver of any right of appeal.
3. No one is affected by this arbitration other than the two insurers. They have agreed as to the outcome between them in terms of exchange of funds as a consequence of this award."

On these facts, the dispute which arises between the insurers has to do with the priority of coverage. In the no fault insurance era, legislation and benefit regulations have created an environment where an individual who is injured in a car accident might possibly claim against more than one insurer. By making numerous sources of benefits available to accident victims,

the scheme endeavours to provide at least one source of benefits for all possible accident victims. Since there is a likelihood that accident victims will have numerous insurers from whom they may claim benefits, the applicable legislation sets out a scheme of priority of payments to attempt to differentiate between the obligations of the various insurers.

The terms and provisions applicable to determining the status of an individual and the priority payments have changed over the years. For this purpose it is important to distinguish between accidents which occurred prior to January 1, 1994, and accidents which occurred in the calendar year of 1994, and accidents which occurred on or after December 31, 1994. Slightly different rules apply to the scheme in force during these different time intervals. I conclude that it is appropriate to apply the rules of the scheme in force at the time of the accident for the purpose of determining the status of an individual as an insured person and for the purpose of determining priority of coverage.

### Status as an Insured Person

Under the *Statutory Accident Benefits Schedule* the term "insured person" is defined as follows:

- "1 "insured person", in respect of a particular motor vehicle liability policy, means,
- (a) the named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured, and any dependant of the named insured or spouse, if the named insured, specified driver, spouse or dependant,
    - (i) is involved in an accident in or outside of Ontario that involves the insured automobile or another automobile, or
    - (ii) is not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside of Ontario that results in a physical injury to his or her spouse, child, grandchild, parent, grandparent, brother, sister, dependant or spouse's dependant,
  - (b) in respect of accidents in Ontario, a person who is involved in an accident involving the insured automobile, or
  - (c) in respect of accidents outside Ontario, a person who is an occupant of the insured automobile and who is a resident of Ontario or was a resident of Ontario at some point during the sixty days before the accident;"

As can be seen, a person may become an "insured person" in many different ways. On the facts of this case it is important to observe that Lucia Hasou was an insured person with respect to the Allstate policy because she was a "named insured" with respect to the Allstate policy. Equally important is the observation that Lucia Hasou is an insured person with respect to the Boreal policy because she was a person "involved in an accident involving the insured automobile". The "insured automobile" is the vehicle described under the Boreal policy.

Thus it is clear that Lucia Hasou has the status of being an "insured person" under both policies.

It is very important to note the effect of section 91 (1) of the Statutory Accident Benefits<sup>1</sup> Schedule. That section provides:

"91.(1) Subject to subsection (3) if an insured automobile is made available for the regular use of an individual who is living and ordinarily present in Ontario by a corporation, unincorporated association, partnership, sole proprietorship or other entity, or an insured automobile is rented to an individual who is living and ordinarily present in Ontario, the individual shall be deemed for the purpose of this Regulation to be the named insured."

Based on the facts as presented in this instance, Lucia Hasou is within the description in section 91.(1) with respect to the Boreal policy and, therefore, she is a person "deemed for the purpose of this Regulation to be the named insured". Accordingly, it seems clear that Lucia Hasou is an insured person under definition (a) of that term as set out above.

#### Priority of Coverage

Having concluded that Lucia Hasou is an insured person with respect to policies of both insurers, it is necessary to examine the priority rules in order to determine which of these two insurers is obliged to pay the no fault benefits (Statutory Accident Benefits) in this particular instance.

Whereas the provisions above quoted are set out in the *Statutory Accident Benefits Schedule*, a regulation under the Insurance Act, the rules for determining the priority of coverage are set out in the Insurance Act itself. The Insurance Act is the statute which creates the *Statutory Accident Benefits Schedule* and in this respect the *Statutory Accident Benefits Schedule* must be considered a subservient document to the Insurance Act.

The relevant provisions of the Insurance Act are found in section 268 which provide as follows:

"268. (1) Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the *Statutory Accident Benefits Schedule* is made or amended, shall be deemed to provide for the statutory accident benefits set out in the *Schedule* and any amendments to the *Schedule*, subject to the terms, conditions, provisions, exclusions and limits set out in that *Schedule*.

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<sup>1</sup> This is a provision which has changed with respect to accidents after December 31, 1994.

(2) The following rules apply for determining who is liable to pay statutory accident benefits:

1. In respect of an occupant of an automobile,

- 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 subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,
- iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to no-fault benefits arose,
- iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.

2. In respect of non-occupants,

- i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,
- ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,
- iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of the automobile involved in the incident from which the entitlement to no-fault benefits arose,
- iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund.

(3) An insurer against whom a person has recourse for the payment of no-fault benefits is liable to pay the benefits.

(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 no-fault benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits.

(5) Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or a dependant, as defined in the *Statutory Accident Benefits Schedule*, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy.

(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.

(5.2) If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependent of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant."

[Inapplicable subsections of section 268 have been omitted]

Section 268 (2) 1. sets out a priority of coverage with respect to a person such as Lucia Hasou who is the occupant of an automobile at the time of the accident. She first has recourse against "the insurer of an automobile in respect of which the occupant is an insured", and thereafter, if recovery is unavailable from such insurer, she has recourse against the insurer of the automobile in which he or she was an occupant. This unfortunate language seems to contemplate that an individual who is an occupant of the vehicle is not "an insured" with respect to the policy on that vehicle. In fact, the previously quoted provisions of the regulation suggest that an occupant is an "insured person". This appears to me to require one to read section 268 (2) 1. i. to be referring to "an insured" as having some meaning different than "insured person" pursuant to the regulation. Attempting to ascribe some meaning to this use of the term "an insured" does lead one to the conclusion that this concept embraces "named insured" and perhaps others who would have the status of being "an insured" irrespective of their connection with the automobile at the time of the accident. An example of this possible analysis can be seen in the O.I.C. arbitration case of Cattrysse. The Cattrysse decision is under appeal and the appeal decision has not yet been delivered.

Fortunately subsections (5), (5.1) and (5.2) provide further clarification by requiring a person who is a "named insured" to claim benefits from a policy where they are a named insured. Furthermore, if an individual is an "named insured" under more than one policy, and one of the policies is on a vehicle in which the person was an occupant at the time of the accident, the individual must claim the benefits from the latter policy. These provisions are directly relevant to the case at hand. If we were to look no further than section 1 of the *Statutory Accident Benefits Schedule* to determine the status of Lucia Hasou at the time of the accident, I would quickly conclude that section 268 (2) requires her to claim the benefits from the Allstate policy. Additionally, section 268 (5) would also lead to that conclusion.

However, we must consider the impact of section 91 of the *Statutory Accident Benefits Schedule*. This section has deemed Lucia Hasou to be a named insured "for the purpose of the regulation". It is abundantly clear that under the Boreal policy Lucia Hasou is not, in fact, a named insured. As a matter of law, she is deemed to be a named insured for the purpose of the regulation.

If this gives her the character of being a named insured for the purpose of section 268 (5) then it would seem that section 268 (5.2) would make Boreal the primary carrier in this instance.

It is my conclusion that section 91, as in force in 1994, has no impact on the evaluation of the priority rules set out in the Insurance Act. The deeming provision is expressly restricted to have an effect only upon interpretation of the regulation. The regulation does not contain the priority provisions. Therefore, I am unable to conclude that Lucia Hasou is deemed to be a named insured for the purpose of the priority rules.

This interpretation is required by the language of the provisions. It also seems to meet certain policy objectives of no fault benefits. Firstly to the extent that it is necessary to apply the provisions of section 91 to determine the status of an individual, very difficult factual and legal issues arise in determining the meaning of the section and the factual background to establish regular use, etc. Putting these issues forward as things which must be resolved prior to the payment of benefits is certain to lead to some delay and confusion. This would appear to be contrary to an important goal of no fault benefits: to provide appropriate compensation on an expeditious basis.

Secondly, any other interpretation means that some injured persons would be in the position of dealing with an insurer who is a stranger to them. In most other circumstances they would be dealing with an insurer from whom they bought insurance coverage. There would appear to be an important policy goal involved in the general nature of the scheme whereby injured victims are usually dealing with their own insurance company for the purpose of no fault benefits and, at the time that they buy insurance, are able to make a decision about the insurance company with which they will deal, if they find it necessary to make a claim.

To the extent that one interprets the legislation and regulation in another manner, one strays from these goals. Thus, only the clearest language would cause me to decide these issues differently.

As a result, I conclude that Allstate is the insurer against whom a claim should be made pursuant to section 268 (5).<sup>2</sup>

#### Effect of General Provisions of the Standard Automobile Policy

Reference has been made to the general provisions of the Standard Automobile Policy which put certain qualifications under the Definitions section with respect to insured automobiles. It is pointed out that under some circumstances the vehicle involved in this accident might not be within the definitions found in 5.2.2. of O.P.F. No. 1. Given the date of this accident it appears likely that the newer plain language policy wording is applicable and therefore different, but similar, provisions are applicable. In any event, it is my conclusion that those limitations on the definition of "the automobile" have no bearing on this interpretation. These provisions simply have the effect of identifying the vehicle which is insured under the policy and does not have any exclusionary effect with respect to no fault benefits coverage. These provisions might become relevant if we were dealing with persons who were occupants of a

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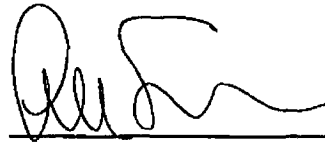
<sup>2</sup> An arbitration decision, Sittler v. Canadian General and a court decision AXA v. Western have both touched on related issues. To the extent that it is necessary to do so, I would conclude that the AXA v. Western decision is the preferred approach but I note that both of these decisions deal with the wording applicable prior to January 1, 1994.

vehicle being operated by an insured since they could acquire the status of "insured person" if the vehicle involved acquired the status of being "the insured automobile". That issue does not arise in this case.<sup>3</sup>

Conclusion

It is my conclusion that it is appropriate for Allstate Insurance Company to be paying the no fault benefits in this case since Lucia Hasou is a named insured under their policy and section 268 (5) requires her to claim the benefits from the policy where she is a named insured. The language found in section 91 of the regulation does not alter the interpretation of the statute which creates the regulation. The provisions with respect to definition of "insured automobile" do not act as an exclusion with respect to these losses.

DATED at Toronto, this 6th day of October, 1995.



Lee Samis

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<sup>3</sup> This issue has been more fully canvassed in a previous arbitration wherein the following comments were offered:

"The meaning of section 5.2.2 of O.P.F. No. 1 has been cause for concern for many in the claims environment since June of 1990. Unfortunately the policy conditions are rather convoluted and the logic becomes difficult to follow. The most important feature of section 5.2.2 is to understand that this is a definition of "the automobile" and is not a definition of "automobile" or a definition of "other automobile". The concept of "the automobile" is for the purpose of determining the definition of the automobile to which the standard automobile policy applies. However, for the purpose of no fault benefits, it is unnecessary that an insured person have any particular involvement with "the automobile" in order to receive no fault benefits. It is of no consequence that the Sealand vehicle might not be within the definition of "the automobile" in order for Allstate to have an obligation to pay no fault benefits. Allstate has an obligation to pay no fault benefits to its named insureds whether they are occupants of "the automobile" or whether they are occupants of some other vehicle, or whether they are not occupants of vehicles at all. Hence, any language which is found in section 5.2.2 is irrelevant for the purpose of determining no fault benefits payable to the named insured."