IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c.I.8, as amended,
and Ontario Regulation 283/95

AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c.17

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

KINGSWAY GENERAL INSURANCE COMPANY

Applicant

\- and -

ZURICH INSURANCE COMPANY

Respondent

AWARD

Counsel Appearing

Angela James for the Applicant

Nathalie Rosenthall for the Respondent

Introduction

This matter comes before me as an arbitration to resolve a dispute between two insurers. The insurers are both automobile insurers carrying on business in the Province of Ontario. They both have a connection with an incident in which one Lanza B.[1] was injured in a motor vehicle accident on August 18, 2006.

Kingsway asserts that it has been called upon to respond to a claim for statutory accident benefits in this instance. It now comes before me pursuing a loss transfer arbitration claiming indemnity in accordance with section 275 of the *Insurance Act*.

There is a dispute between the two insurers as to whether or not Kingsway is entitled to loss transfer indemnification from Zurich in the circumstances of this case.

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[1] In recognition of the privacy interests of non parties I have deleted references to surnames from these reasons.

Background Facts

The claimant was injured in an automobile accident August 18, 2006. He had been the operator of a heavy commercial vehicle at the time of the accident. The vehicle apparently was insured by Markel Insurance Company.

The accident involved another vehicle, also a heavy commercial vehicle that was insured by the respondent Zurich.

The claimant made claims for statutory accident benefits (SABS) and presented those claims to Kingsway. Evidently the claimant had a personal automobile insurance policy with Kingsway. In accordance with Ontario Regulation 283/95 Kingsway commenced handling the statutory accident benefits claims. However, it appears that Kingsway disputed its obligations and served a Notice of Dispute between insurers upon Markel. This occurred about September 29, 2006. In that Notice of Dispute, Kingsway said "it appears Markel Insurance has priority to handle his SABS claim".

Although Kingsway had given notice to Markel, it did not follow up by commencing a private arbitration within one year of that notice. Accordingly, in accordance with the provisions of Ontario Regulation 283/95, no arbitration can be commenced against Markel and Kingsway's assertion that Markel is obliged to pay the benefits in this instance cannot now be enforced.

Kingsway has now turned in the other direction and is pursuing Zurich, the insurer of the other involved heavy commercial vehicle, claiming indemnification in accordance with the loss transfer rules found in the regulations and the *Insurance Act*, as authorized by section 275 of the *Insurance Act*.

Zurich has declined the claim for loss transfer in the circumstances.

The Statutory Scheme

There are two classes of intercompany disputes with respect to SABS indemnification that come before arbitrators in accordance with the *Arbitration Act*. The first class of cases are those priority dispute between insurers where there is a controversy as to which insurer is the highest-ranking insurer obliged to pay the statutory accident benefits in accordance with subsection 268 (2) of the *Insurance Act*. These are commonly referred to as priority disputes.

The second class of disputes are known as loss transfer disputes. These arise as a result of the statutory provision in section 275 the *Insurance Act* and the regulations thereunder. Section 275 of the *Insurance Act* provides as follows:

> **275. (1) The insurer responsible under subsection 268 (2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose.**
> **Idem**
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> **(2) Indemnification under subsection (1) shall be made according to the respective degree of fault of each insurer's insured as determined under the fault determination rules.**

Deductible

(3) No indemnity is available under subsection (2) in respect of the first $2,000 of statutory accident benefits paid in respect of a person described in that subsection.
Arbitration

(4) If the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the *Arbitrations Act*.
Stay of arbitration

(5) No arbitration hearing shall be held with respect to indemnification under this section if, in respect of the incident for which indemnification is sought, any of the insurers and an insured are parties to a mediation under section 280, an arbitration under section 282, an appeal under section 283 or a proceeding in a court in respect of statutory accident benefits.

Clearly the legislature has created a statutory right of indemnity with these words. There is no common law equivalent to this process i.e. allowing direct contribution between insurers on such basis. For valid policy reasons the legislature saw fit to provide for this indemnity in limited circumstances involving heavy commercial vehicles, and in some other circumstances involving motorcycles and similar vehicles. The statutory framework is all that exists to support this intercompany right of indemnification and we must find the legal basis for such indemnity in the statute.

Pursuant to section 275, provisions have been embedded in Ontario Regulation 664 to address loss transfer disputes. Those provisions are as follows:

INDEMNIFICATION FOR STATUTORY ACCIDENT BENEFITS (SECTION 275 OF THE ACT)

9. (1) In this section,

"first party insurer" means the insurer responsible under subsection 268 (2) of the Act for the payment of statutory accident benefits;

"heavy commercial vehicle" means a commercial vehicle with a gross vehicle weight greater than 4,500 kilograms;

"motorcycle" means a self-propelled vehicle with a seat or saddle for the use of the driver, steered by handlebars and designed to travel on not more than three wheels in contact with the ground, and includes a motor scooter and a motor assisted bicycle as defined in the *Highway Traffic Act*;

"motorized snow vehicle" means a motorized snow vehicle as defined in the *Motorized Snow Vehicles Act*;

"off-road vehicle" means an off-road vehicle as defined in the *Off-Road Vehicles Act*;

"second party insurer" means an insurer required under section 275 of the Act to indemnify the first party insurer.

(2) A second party insurer under a policy insuring any class of automobile other than motorcycles, off-road vehicles and motorized snow vehicles is obligated under section 275 of the Act to indemnify a first party insurer,

(a) if the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a motorcycle and,

(i) if the motorcycle was involved in the incident out of which the responsibility to pay statutory accident benefits arises, or

(ii) if motorcycles and motorized snow vehicles are the only types of vehicle insured under the policy; or

(b) if the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a motorized snow vehicle and,

(i) if the motorized snow vehicle was involved in the incident out of which the responsibility to pay statutory accident benefits arises, or
(ii) if motorcycles and motorized snow vehicles are the only types of vehicle insured under the policy.

(3) A second party insurer under a policy insuring a heavy commercial vehicle is obligated under section 275 of the Act to indemnify a first party insurer unless the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a heavy commercial vehicle.

The Dispute

Zurich takes the position that Kingsway cannot now turn to Zurich for indemnity based on loss transfer principles, having not effectively pursued a priority dispute against Markel.

During the course of argument, much of the discussion about this turned on the question of whether or not Zurich was obliged to indemnify Kingsway if Kingsway paid a benefit which was not its legal obligation to pay.

In my view there is some strength to this argument. Nonetheless I am sympathetic to the line of cases which suggest that in loss transfer litigation the loss transferee should not be able to second-guess the claims handling decisions of the loss transferor. However, it appears to me that there is a range of improper conduct or payment which ought not to be foisted on loss transferees. Whether one characterizes the payments as being those which are made as result of negligence, gross negligence, or otherwise, it seems to me that it is entirely logical that there should be a dividing line beyond which indemnity cannot be sought from a loss transferee.[2]

This case crosses that line. From the facts are before me, it appears that Kingsway paid benefits that it was not obliged to pay. According to its own assertion, it was not the highest-ranking insurer obliged to pay benefits in accordance with section 268 (2) of the *Insurance Act*. Therefore, it ought to have transferred the loss to the higher ranking insurer, by timely completion of the process that started with the notice of dispute which it in fact sent to Markel.

However, in view of Kingsway's failure to commence arbitration proceedings against Markel, that opportunity to shift the loss to Markel, where it apparently belonged, was lost. I conclude that these facts illustrate a claim for payment which ought not to be transferred to the loss transferee as a result of the first insurer's mishandling of the claim. The mishandling is of a degree that goes beyond a mere error in judgment. I do not wish to encourage second-guessing of ordinary claims handling decisions. But there is no evidence here that this failure

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[2] Some arbitration cases have applied such a concept. The standard imposed allows the handling insurer to recover indemnity notwithstanding imperfect handling. But the cases have not allowed recovery where the handling has been more serious and various standards have been applied. e.g. unreasonable, grossly negligent, gross mishandling, bad faith. *Progressive Casualty Insurance Company vs. Markel Insurance Company of Canada*, May 13, 1997, Stephen Malach; *Commercial Union Assurance Company of Canada vs. Boreal Property and Casualty Company*, December 21, 1998, Philippa G. Samworth; *Dominion of Canada Insurer vs. Royal & Sun Alliance*, August 20,2001, Stephen Malach; *Primmum Insurance Company vs. Aviva*, March 2008, Guy Jones.

was a claims handling decision. This was an oversight not a misjudgment, and it is an oversight of significance. This was not some collateral detail that was understandably lost in a frenzy of claims handling activity. This was a failure to follow the well known steps understood to be necessary to pursue a priority dispute. In the circumstances, I conclude that this omission amounts to gross mishandling. It was indeed a very marked departure from the expected standard of behaviour of an insurer handling a SABS claim.

Additionally, this controversy may be answered by the words of the *Insurance Act*. Section 275 creates a statutory scheme for indemnification only in limited circumstances. The only insurer who is entitled to pursue loss transfer is the insurer responsible under subsection 268 (2) "for the payment of statutory accident benefits...". No other insurer has the right to invoke the indemnity provisions described in section 275 and in regulation 664. This may be an answer to Kingsway's claim to a right to indemnity. If Kingsway is not the highest ranking insurer, then it is not the insurer responsible under subsection 268 (2) for the payment of statutory accident benefits.

That subsection, as informed by subsections (5.2), points towards Markel as being the insurer that would, theoretically, have the right to advance a claim under section 275. However, as Markel is the insurer of a heavy commercial vehicle as well, it seems likely that loss transfer would be precluded by the rules in the regulations. Generally speaking, loss transfer is not provided between insurers where both insurers insure heavy commercial vehicles.

In considering the problem brought to me by this arbitration, I am mindful of what ought to have been the correct theoretical result if all the parties had acted in a manner as would be normally expected. If Kingsway had pursued Markel, presumably Markel ultimately would have been found liable to pay the accident benefits claim. As insurer of a heavy commercial vehicle, it seems likely that Markel would not have had any right of loss transfer against Zurich. To allow Kingsway to succeed in this matter would have the effect of transferring this loss to Zurich which would not be shifted to Zurich if all the parties had diligently followed the normal procedural requirements. To my mind, this is completely backwards. In truth, as between the three insurers on the horizon, Markel stands to have a windfall. The question comes down to finding which of the other two insurers is going to suffer the cost of that windfall. Choosing between Kingsway, whose error led to that windfall, and Zurich compels me to find no sympathy for Kingsway's position in this case.

Counsel brought the case of *RBC v. Lloyds*, Arbitrator Robinson, June 24, 2005, to my attention. This case is based on similar facts to the case before me. In the RBC case, Lloyds put forward the brazen defence that loss transfer should not succeed against Lloyds because RBC had not pursued a priority claim against Lloyds. I am not surprised that Arbitrator Robinson did not accept that position. I note that the context of the claims handling decisions in the RBC case were very much different than here. There the claim had numerous confounding features, not the least of which was the oddity of having the Lloyds in the multiple roles of priority insurer, loss transferee, and tort defendant's insurer. In addition the claims handling was challenged by an array of proceedings including WSIB assignments, owner-operator issues, a Superior Court tort claim, conflict of laws issues with the U.S. accident locale, FSCO mediation, FSCO arbitration and WSIAT applications.

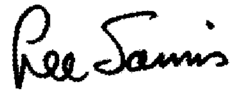
For me to make a determination of whether or not Kingsway's claims handling should deprive it of loss transfer rights does require me to be sensitive to the facts of the case and the context of the dispute. From that standpoint I do not find the *RBC* decision applicable.

Conclusion

I am not satisfied that Kingsway is entitled to pursue a loss transfer proceeding against Zurich in the circumstances of this case. If Markel is the higher ranking insurer then Kingsway's failure to pursue Markel should not create a loss that should be visited upon Zurich.

Counsel should make any submissions with respect to costs within the next 30 days.

Dated at Toronto this 4th day of April, 2011.



LEE SAMIS
Arbitrator