

# When in Doubt, Send it Out

There's no fault in sending out a Notice of Dispute Between Insurers as soon as possible in priority insurer cases, thus making sure the 90-day notice provision doesn't become an issue.



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Accident benefits (AB) adjusters are faced with more regulated timelines than ever before. A failure to meet these timelines can result in paying for an assessment or treatment plan that may not have otherwise been payable. However, there is no oversight greater than failing to put a priority insurer on notice within 90 days as stipulated in Ontario Regulation 283/95, the "Dispute Between Insurers Regulation" (hereafter abbreviated as "the Regulation").

The 90-day notice provision is set out in subsection 3(1) of the regulation. It says: "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 accident benefits to every insurer who it claims is required to pay under that section."

If a priority insurer is not put on notice within 90 days of the completed application for accident benefits, then the only way for an insurer to extend the time for putting another insurer on notice is by satisfying the requirements of subsection 3(2) of the regulation. An insurer seeking to extend the 90-day notice period must demonstrate that: (a) 90 days was an insufficient period of time to make a determination that another insurer or insurers is liable under section 268 of the Act, and (b) the insurer made reasonable

investigations necessary to determine if another insurer was liable within the 90-day period.

## LESSONS IN ECHELON

The Ontario Superior Court of Justice dealt with this issue recently in *Echelon v. CGU*<sup>1</sup>, in which Ontario Superior Court Justice Thea Herman upheld a decision by Financial Services Commission of Ontario (FSCO) Arbitrator Guy Jones. *Echelon* serves as another example of a case in which an insurer, who may not have been the priority insurer, remains responsible for the payment of accident benefits on the basis of a failure to comply with the 90-day notice period.

In *Echelon*, the claimant was a pedestrian struck by a vehicle insured by Echelon. The claimant suffered catastrophic injuries in the accident. Echelon received a completed application for accident benefits and retained an independent adjusting firm at a very early stage to carry out a priority investigation. A potential existed that the 21-year-old claimant was dependent upon his father. If the claimant was dependent upon the father, and the father had an insurance policy, that policy would be the priority policy under section 268 of the *Insurance Act*. Efforts to obtain information from the father and family failed because the family did not co-operate in providing information.

The claimant and his family eventually retained counsel. After several attempts to obtain information, the independent adjuster received correspondence from counsel's office approximately two weeks prior to the expiry of the notice period. This correspondence indicated the claimant's father had an insurance policy with CGU prior to the loss, but the policy had lapsed prior to the accident for non-payment of premiums.

The independent adjuster testified at the arbitration that he had contacted the broker about the CGU policy to confirm that the CGU policy was not in force at the time of the accident. There were no (or limited) records confirming this conversation. During the arbitration, Jones found as a fact that the discussion between the independent adjuster and the broker did not occur. On appeal, Herman saw no basis for interfering with this factual finding.

A further Autoplus report was eventually run with respect to the father. The report found that the father had a vehicle insured with CGU at the time of the accident. Approximately two months after the expiry of the notice period, a Notice of Dispute was mailed to CGU.

The issue addressed at the arbitration was whether Echelon could rely upon subsection 3(2), the saving provision, to extend the time for service of the Notice of Dispute. In arbitration, Jones acknowledged that Echelon made considerable efforts to attempt to locate a priority insurer.<sup>2</sup> However, he refused to extend the notice period.

The testimony of the independent adjuster highlights a common misconception with respect to the notice period. The independent adjuster testified that his understanding was that the 90 days did not begin to run until "we have information that there is another policy which was in effect at the time. So I don't really begin measuring the time or worrying about it, until I have information that another policy exists [that] is valid."

This is incorrect. The 90-day notice period commences from the time of receipt of the completed application for accident benefits.

Although it is not specifically stated in Jones' decision, it is implied that had the

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## There is little, if any, downside to putting another insurer on notice.

independent adjuster understood when the 90-day notice period starts to run, he would have immediately conducted further inquiries after receiving information about a potential policy.

Herman upheld the arbitrator's decision. The end result is that Echelon remained responsible for a catastrophic claim that they might not have otherwise paid.<sup>3</sup>

Echelon highlights some of the difficulties that can arise in the investigation of priority disputes.<sup>4</sup> By many accounts, Echelon, through its independent adjuster, carried out a very diligent and thorough investigation. However, the case highlights some pitfalls that an insurer can fall into in the course of investigating priority.

### HOW TO HANDLE PRIORITY INVESTIGATIONS

The following list of suggestions, although not exhaustive, can help an insurer deal effectively with potential priority issues:

#### 1. Priority investigations should commence immediately upon receiving knowledge of a potential claim.

Should an insurer be in the position of having to demonstrate that 90 days was an insufficient period of time in which to make a determination, it may be easier to convince an arbitrator to invoke the saving provision if immediate investigative steps were taken.

#### 2. Every step in the priority investigation should be carefully documented.

In *Echelon v. CGU*, the independent adjuster advised that he had contacted the broker to make inquiries about the potential CGU policy. If the independent adjuster had documented the conversation, and if his notes clearly indicated that the broker told him the policy had lapsed, the arbitrator may have come to a different determination with respect to extending the time for notice.

#### 3. Do not simply rely upon information provided by the claimant.

All reasonable steps to obtain information should be taken. Although incorrect information provided by a claimant might be a consideration in determining whether to extend the 90-day time line, insurers are not expected to rely solely upon the information provided by the claimant.

#### 4. Send the Notice by fax and mail.

Proving service of a Notice of Dispute frequently arises as an issue in priority matters. Insurers often simply mail the Notice of Dispute Between Insurers form; the insurer to whom it was mailed often alleges that it never received the notice. The Regulation requires that the notice be in writing, but the method of service is not stipulated. Sending the notice by fax and mail is prudent practice and helps to avoid this issue all together.

#### 5. Investigate prior policies.

If there is evidence of a prior policy that might be a primary policy near the time of the accident, request that the prior insurer provide evidence that it properly cancelled or failed to renew the policy. If it fails to provide this information, and the 90-day notice period is coming to an end, put that insurer on notice. If the insurer can establish that the policy was cancelled appropriately, there is no need to commence an arbitration.<sup>5</sup>

#### 6. Never rely upon the ability to extend the 90-day notice period.

The saving provision of the Regulation has been interpreted very strictly. The onus is on the insurer seeking to extend the time to demonstrate that it satisfies the requirements of subsection 3(2). This is not an easy task, and arbitral decisions regarding this issue are unpredictable. Further, the need to rely upon subsection 3(2) virtually guarantees that legal costs will be incurred; in addition, an arbitration will often be necessary.

#### 7. Understand the 90-day notice period and implement a "tickler system."

In *Echelon*, the independent adjuster misunderstood when the 90-day notice

period begins to run. The 90-day notice provision starts to run from the date of receipt of a completed application for accident benefits. It is imperative that there be a “tickler” or “bring forward” system in place to ensure the 90-day notice period does not get missed. The safest practice is to start the 90 days running from the date that the insurer is first contacted and advised that the claimant may be applying for benefits.

### **8. If in doubt, send it out!**

In Echelon, the arbitrator made a finding that a reasonable adjuster should have carried out further investigations after learning of the potential CGU policy. The safe thing to do would have been to serve a Notice of Dispute upon CGU immediately. Further investigation and clarification can be carried out after the 90-day notice period. Subsection 7(2) of the Regulation provides that an insurer must initiate arbitration within one year from the date that the insurer first gives notice of a dispute between insurers. Accordingly, there is ample time to determine if an insurer’s position on priority is reasonable and whether or not proceeding to arbitration is warranted. There is little, if any, down side to putting another insurer on notice.

The facts of each case dictate what steps should be taken in carrying out a priority investigation. What is reasonable and required in one case may not be reasonable and required in another. The potential consequences of failing to comply with the 90-day notice period should not be overlooked. It is hoped that the above-noted suggestions may help an insurer from becoming a victim of the 90-day notice period. ☰

<sup>1</sup> *Echelon General Insurance Company v. CGU Insurance Company* (2008) CanLii 27175 (ON SC); upholding the decision of Arbitrator Guy Jones.

<sup>2</sup> Echelon made repeated requests of the claimant’s family and lawyer; received assurances from the family’s lawyer that they would attempt to get insurance information; conducted two Autoplus reports on the father (one of which used an incorrect name, and the other of which did not re-

veal an active policy); they followed up with a number of previous insurers that did show up on the Autoplus to confirm that no policy existed; and had been told by the claimants lawyer’s office that the father did not have insurance.

<sup>3</sup> The actual issue of priority, and whether the claimant was dependent upon the father was not addressed in the arbitration.

<sup>4</sup> Echelon had an unco-operative father; they had a difficult time even ascertaining the correct

name for the father, and were provided incorrect information on the Application for Accident Benefits with respect to the existence of the father’s policy of insurance.

<sup>5</sup> See *Ontario (Finance) v. Progressive Casualty Insurance Company of Canada* (2007) (CanLii 15475) (ON SC) for an example of a case where an insurer who purportedly cancelled a policy prior to the accident was found to have done so improperly and required to pay benefits.