

## Notice to Claimants in Priority Disputes

**Kevin Adams**

**March 2018**

In *The Dominion of Canada General Insurance Company v. Unifund Assurance Company*, 2018 ONCA 303, Dominion gave notice of a priority dispute to Unifund within the required 90 day period, but it delivered notice to its insured nearly two years after the application was received.

At first instance, Arbitrator Novick found that the timing of the notice given to the insured claimant was inconsequential to the priority dispute between insurers and permitted Dominion to arbitrate the priority issues.

Arbitrator Novick's decision was appealed to Justice Faieta. In his June 2016 decision, Justice Faieta reversed the decision of Arbitrator Novick and found that "the [90 day] time limits for notice under section 3 of the Regulation also apply to notice provided under section 4 of the Regulation [to the claimant]", which Dominion failed to satisfy. Justice Faieta further found that "relief from forfeiture in respect of a failure to comply with the time limits for the delivery of notice" is not available to Dominion.

As such, he concluded that as a consequence "of having failed to comply with section 4 of the Regulation ... Dominion's dispute is barred."

Justice Faieta's decision was appealed further. In its decision on March 27, 2018, the Court of Appeal found that Arbitrator Novick's decision was reasonable and restored it. The Court of Appeal stated:

The prescribed DBI Notice form appears to anticipate that notice will be given to the claimant at or around the same time as it is given to the other insured. There is no practical reason why notice could not be given at the same time. The question however is whether the failure to give such notice in a timely way should preclude the priority claim altogether, or whether it should be up to the arbitrator to determine the consequences of late notice. The arbitrator in this case concluded that, while there is no time limit for notice to be given to a claimant, it will be up to the arbitrator to determine whether the notice required by s. 4 has been given too late to permit the claimant to exercise the participation rights afforded by the regulation. This is a reasonable approach as the arbitrator is well-positioned to safeguard those rights and to address any prejudice.

Here, the insured did receive notice before the arbitration hearing commenced, and did not object to the transfer of the claim. He was therefore not entitled to further participation in the insurers' priority dispute. There was no prejudice. The arbitrator reasonably concluded that, while the notice was late, the lateness was not an impediment to the insurers' arbitration of the dispute.

Based on this decision, it appears that as long as notice is given to the insured claimant at some point before the arbitration hearing is commenced and there is no prejudice, there is no consequence to providing late notice of dispute to the insured claimant.