

## **Security National v. Markel Priority Disputes Involving Commercial Vehicles**

### **A Commentary by John D. Strung Strung Mediations and Arbitrations Inc.**

In [\*Security National Insurance Company v. Markel Insurance Company\*, 2012 ONCA 683](#), released October, 11, 2012, the Ontario Court of Appeal has resolved a long standing dispute as to whether the insurance carrier for a commercial vehicle involved in an accident or the insurance carrier for the driver's personal vehicle is responsible for statutory accident benefits in the case owner/operators.

By way of background, the owner/operator arrangement is a typical arrangement used by trucking fleets. Typically, under an owner/operator arrangement, the trucker has beneficial ownership of his own vehicle, but leases it to a transport company. The transport company plates and insures the vehicle and employs the trucker as an independent contractor to haul goods on its behalf.

If the trucker is then injured in an accident while using the truck, the question arises as to whether the insurer of the truck or the insurer of the trucker's personal vehicle is responsible for statutory accident benefits.

This turns on Section 66(1) of *Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996*, O. Reg. 403/96 ("SABS"), enacted pursuant to the *Insurance Act*, R.S.O. 1990, c. I.8. which deems certain persons to be named insureds for the purposes of s. 268(2) of the *Insurance Act*. This affects the priority in which insurers are to pay statutory accident benefits under s. 268 of the Act.

Section 66 is headed "Company Automobiles and Rental Automobiles" and reads:

(1) An individual who is living and ordinarily present in Ontario shall be deemed for the purpose of this Regulation to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,

(a) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity;

Until the decision in *Security National v. Markel*, the leading case was *Axa Insurance v. Markel Insurance Company of Canada* (Arbitrator Fidler, December 9, 1996), *aff'd* [1997] O.J. No. 2186 (Gen. Div.). In that case, the Arbitrator Fidler reluctantly held that the

trucker was making his vehicle available for use by the transport company, not the other way around, and that the individual therefore was not a deemed named insured. Accordingly, the injured trucker's personal vehicle insurer was responsible for paying his statutory accident benefits. Arbitrator Fidler expressed discomfort with this result which he felt did not reflect the commercial realities of the situation but felt bound by the wording of the section. Subsequent arbitrators followed this decision with similar reservations.

The Court of Appeal has now expressly overruled this decision. On the Court of Appeal's analysis, the trucker was a sole proprietor who was making the truck available to himself for his regular use, bringing him within the deeming provision of s. 66(1)(a).

In particular, the Court stated, "In my view, s. 66(1)(a) permits an insured vehicle to be made available for an individual's regular use by the individual's sole proprietorship. This is evident from the language of the provision and its legislative purpose."

This seems like a rather odd construction, particularly in view of the fact that the Court endorsed the view that, "From a legal and practical standpoint, 'there is no separation between the sole proprietorship business organization and the person who is the sole proprietor.' As a result, 'all benefits from the business accrue to the sole proprietor and all obligations of the business are his responsibility'."

The court held that to make the insurer of the truck responsible for the statutory accident benefits of the driver reflected the legislative intent of the section and the commercial realities of the situation.

In summary, then, it would appear that in almost all cases now, the insurer of a commercial vehicle will be responsible for the statutory accident benefits of a driver who has regular use of that vehicle.

Subject to any further appeals, this would appear to put to rest a matter that has been a contentious subject of arbitration and litigation for some years.

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