

IN THE MATTER OF The *Insurance Act*, R.S.O. 1990, c. 1.8, as amended
AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c. 17, as amended
AND IN THE MATTER OF an Arbitration

BETWEEN:

ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Respondent

AWARD

Heard: July 4, 2012

Counsel:

Daniel Strigberger for the applicant, Economical Mutual Insurance Company

James Greve for the respondent, State Farm Mutual Automobile Insurance Company

SCOTT W. DENSEM: ARBITRATOR

Introduction

This is a Statutory Accident Benefits Schedule (“SABS”) priority dispute between the applicant, Economical Mutual Insurance Company (“Economical”), and the respondent, State Farm Mutual Automobile Insurance Company (“State Farm”). This arbitration will resolve which of Economical or State Farm has the responsibility to pay SABS to or on behalf of Munir Nuri-Saed, and Shilan Hasan arising out of an accident occurring July 29, 2009.

On July 29, 2009, Shilan Hasan was driving a 2000 Ford Windstar van owned by a friend, Mr. Ali Abu Al Hour. State Farm insured this vehicle. Ms. Hasan’s husband, Munir Nuri-Saed, was a passenger in the vehicle.¹ In the accident Mr. Nuri-Saed was ejected and sustained catastrophic impairments.²

At the time of the accident Ms. Hasan was the owner of a 1994 Toyota Tercel. Economical had previously issued a policy of motor vehicle liability insurance with Ms. Hasan as a named insured in respect of this vehicle.

A SABS application was submitted to Economical by Hasan and Nuri-Saed. Economical has paid SABS to or on behalf of Hasan and Nuri-Saed. Economical seeks to transfer responsibility for the SABS claim to State Farm. Economical submits that at the time of the accident its policy did not provide SABS coverage because of changes made to the policy before the accident at the request of Ms. Hasan.

¹ The parties agree that although Ms. Hasan and Mr. Nuri-Saed were separated at the time of the accident they were still spouses as that term is defined for the purposes of the *Insurance Act*.

² Motor Vehicle Accident Report, Exhibit 1, tab 1. Examination under Oath of Shilan Hasan, July 26, 2011, p. 5, Q. 22, Exhibit 1, Tab 5 (“EUO Hassan”).

Economical would be the priority insurer if its policy did provide SABS coverage at the time of the accident.³ If the Economical policy did not provide SABS coverage at the time of the accident, then State Farm would have the obligation to pay SABS.⁴

The Issue

1. Is Economical or State Farm the priority insurer pursuant to section 268 of the *Insurance Act*?

Evidence

One documentary exhibit was entered into evidence and *viva voce* evidence was received from two witnesses. The particulars are listed below:

- Exhibit 1: Economical's Arbitration Brief, 6 Tabs
- Witness: Shilan Hasan, Economical insured and SABS claimant
- Witness: Tony Panetta, licensed insurance broker, Olsen-Sottile Insurance Brokers Inc.

Analysis

The determination of the issue in this case turns on whether the changes made to Economical's policy at the request of Shilan Hasan were properly effected by the insurance broker, Mr. Panetta. This question has three parts. First, it must be resolved what Ms. Hasan was seeking to accomplish in making changes to her policy. Second, whether Mr. Panetta was required to use an OPCF 16 – Suspension of Coverage form

³ By operation of section 268 (2) 1. i, of the *Insurance Act*.

⁴ By operation of section 268 (2) 1. ii, of the *Insurance Act*.

approved by the Superintendent of Insurance (“OPCF 16”) to complete the changes requested by Ms. Hasan. Third, even if Mr. Panetta was not required to use an OPCF 16, did Mr. Panetta properly carry out Ms. Hasan’s instructions in completing the changes to her policy.

To address these parts to the main question of whether the changes to Ms. Hasan’s policy with Economical were properly completed I will review and comment on the evidence.

Ms. Hasan testified at the arbitration hearing. She was also examined under oath prior to the hearing. The transcript of her examination is an exhibit in these proceedings.⁵

Generally speaking I found that her *viva voce* testimony was consistent with the evidence she gave on her examination under oath. I thought she was a credible witness who was attempting to give an accurate account of the relevant events to the best of her recollection. It goes without saying that her memories of events dating back to July, 2009 were much more focused on the aftermath of the accident in which her husband was seriously injured than on events concerning changes to her insurance coverage before the accident. She knows that she and her husband will continue to receive SABS whether Economical or State Farm is the responsible insurer. Hence there was no reason for her to colour her evidence in any particular manner.

Ms. Hasan had dealt with the Olsen-Sottile brokerage since at least 2006. It was Mr. Panetta with whom she dealt to place insurance coverage. On her examination under oath and in her arbitration hearing testimony she was clear in stating that she relied upon Mr. Panetta to advise her concerning automobile insurance matters. She

⁵ Exhibit 1, Tab 5.

found that he explained things to her as necessary, and she trusted him to provide her with appropriate advice and recommendations concerning her automobile insurance.

It was apparent to me from her evidence that she was not a sophisticated consumer as far as automobile insurance is concerned. Her understanding of the various coverages available was quite basic. She did not really understand the nature of SABS coverage, and counsel had to explain this to her on her examination under oath.

She testified on her examination under oath that when placing automobile insurance, "*whenever I do the insurance, I always do full coverage... because like I have family.*"⁶ This comment in her examination under oath testimony and other similar comments she made in her arbitration hearing evidence lead me to conclude that her primary interest as far as automobile insurance was concerned was to ensure that she had the appropriate coverage to protect herself and her family depending on circumstances.

She did not strike me as a person who was concerned solely with seeking out the least expensive insurance coverage possible. Although she was interested in trying to save some money on her car insurance while she was going to be away with her family in Iraq, her description of her discussions with Mr. Panetta on making changes to her insurance coverage for this period of time did not seem to me to be indicative of someone making coverage changes with the sole focus of saving as much money as possible at the expense of potentially restricting her coverage while in Canada.

When she contacted Mr. Panetta to discuss changes to her automobile policy while she and her family were going to be away, this was the first time that she had attempted to make temporary coverage reductions in her automobile coverage. It was

⁶ EUO Hassan, p. 34, Q. 201.

clear to me from her evidence that she was not knowledgeable about exactly what type of coverage changes could or should be made in the circumstances. She explained in her arbitration hearing testimony that she knew she should not cancel her automobile insurance completely while the family was away in Iraq because her car would still need to be protected. She stated that her husband knew "*something else*" could be done in terms of insurance coverage for the car. Rather than full coverage, they could "...*make it just for the car*".

She first contacted Mr. Panetta by telephone. She could not recall the date of the telephone conversation. She told Mr. Panetta in this telephone conversation that she wanted to make changes to her automobile coverage so a meeting was arranged at Mr. Panetta's office to discuss the details.

Ms. Hasan could not recall the date of the meeting at Mr. Panetta's office. The date for the meeting can be narrowed down somewhat from other evidence (including Mr. Panetta's evidence, which I will review next). Ms. Hasan related that as part of the discussion at the meeting about policy changes Mr. Panetta told her that her July automatic monthly premium bank withdrawal had already taken place. She testified that this withdrawal normally took place on the 15th of each month. Sometimes it happened a day or two sooner, or a day later, but generally it was on the 15th. The Olsen-Sottile brokerage sent a fax memo to Economical dated July 20, 2009 requesting changes to Ms. Hasan's policy. A date stamp on this document indicates that it was received by Economical on July 22, 2009.⁷ Ms. Hasan testified that she did not meet with Mr. Panetta on a weekend. She always met with him on a business day.

⁷ Exhibit 1, Tab 3.

Based on this evidence, the meeting between Ms. Hasan and Mr. Panetta to discuss changes to her Economical policy most likely took place on Thursday, July 16, 2009, Friday, July 17, 2009, or Monday, July 20, 2009.

Ms. Hasan candidly admitted that she did not recall much of the details of her discussions with Mr. Panetta at his office. She did say that her husband was in attendance for the meeting.

On her examination under oath Ms. Hasan explained that she told Mr. Panetta the family was traveling to Iraq. She testified both on her examination under oath and in her arbitration hearing evidence that she told Mr. Panetta they were planning on leaving August 2, 2009. When questioned on examination under oath about this departure date, the following exchange took place:⁸

Q. You were planning to travel on August 2?

A. 2nd, yes.

Q. Everything had been booked already?

A. Kind of.

Q. What does that mean?

A. Because like we did not book it by ourselves, we give the money to -- like, we had a friend so he was going to book it for us. So, we give him the money, he was going to book it, so ---

Q. Why August 2nd? Is there any particular reason?

A. Well, it's -- not really like because that is the time it was fine, like good for us, and yeah, no reason.

Q. How long were you planning to stay?

A. it was around, I think, 6 to 8 weeks.

⁸ EUO Hasan, p 15, 16, Q. 90 – 96.

In her arbitration evidence she testified that the family was planning to leave for Iraq on August 2, 2009. They were “*working to get the tickets*”. They were, “*80% on that date*”.

Ms. Hasan’s arbitration hearing evidence was somewhat different from her examination under oath evidence as to whether she asked for a specific type of coverage for her vehicle while she and her family were going to be away, or whether she simply told Mr. Panetta that they were going to be away in Iraq for an extended period of time, and wanted to reduce the coverage on her vehicle since it was not going to be used in their absence.

In her arbitration hearing evidence she stated that she told Mr. Panetta she “... *wanted to change her policy to fire and theft from full coverage*”. He confirmed to her that fire and theft coverage only was available.

In her examination under oath however, the following exchange took place:⁹

Q. Do you remember what it was you told Tony, when you went to see him?

A. Like I said, I talked to him -- honestly, when I went there, I do not remember like if I talked to him for long or not, but the only thing I told him, I want to -- like, because we are going away, I am not going to use the car. So, he tell me like there is for fire and theft and I can do it for like for -- like leave it for that, yeah.

Given my overall impression of Ms. Hasan’s lack of sophistication concerning automobile insurance, I tend to think it is more likely the import of her discussion with Mr. Panetta was that she told Mr. Panetta about the family’s intended travels and wanted to know what kind of reduced coverage might be available for her car while they

⁹ EUO Hasan, p. 20, Q. 121.

were away. I would not conclude that she was knowledgeable enough about automobile insurance to ask for a specific kind of coverage certain that she wanted that kind of coverage instead of any similar coverage that might be available.

She was asked on both her examination under oath and at the arbitration hearing whether Mr. Panetta discussed with her the OPCF 16 and the type of coverage that it could provide. Her evidence on both occasions was virtually identical.

The following exchange took place on her examination under oath:¹⁰

Q. Do you remember Tony telling you anything about what is called an OPCF 16 form? Have you heard that term before?

A. Honestly, I don't remember. I am not sure if he did or not.

Q. Do you recall if Tony advised you that you could keep accident benefit coverage in addition to comprehensive coverage?

A. To be honest, I don't remember.

Q. Do you know what accident benefits coverage is?

A. Not for sure.

At the arbitration hearing she testified that she did not remember whether there was any discussion about the OPCF 16 form, but she did not think so. She did not remember whether there was any discussion about keeping SABS coverage in addition to comprehensive coverage. She did say that, "*I knew my car was going to be insured for theft and fire.*"

I found Ms. Hasan's evidence on the issue of signing the Confirmation of Discussion memo similarly honest. She did not attempt to deny being shown the memo by Mr. Panetta, or signing it, in either her examination under oath evidence or her arbitration hearing evidence. She readily admitted that her signature appears at the

¹⁰ EUO Hasan, p. 20, Q. 123 – 125.

bottom of the form. She did not however, have a recollection of the specific details contained in the form. She admitted that she probably read it, but has no recollection of doing so. She did say in her arbitration testimony that she is able to read English "*slowly*". She conceded that it was possible Mr. Panetta reviewed the details of the form with her but she had no specific recollection of him doing so.

Ms. Hasan testified on the question of the significance of the date of July 26, 2009 that appears in the Confirmation of Discussion memo as the effective date for the change from full coverage to comprehensive coverage only. On her examination under oath she stated that she did not recall any discussion about July 26, 2009 being the applicable date to make the change in coverage. In answering questions on this issue she explained that she thought the effective date for the coverage change would be August 15, 2009 because she had already paid her monthly premium that would cover the period from July 15, 2009 to August 15, 2009. Mr. Panetta explained to her that starting August 15, 2009 there would be a reduction in the amount being debited from her bank account to reflect the coverage change.

When asked what meaning the July 26, 2009 date could have if it was not the commencement date for the coverage change Ms. Hasan suggested that it could have been the date that she had her meeting with Mr. Panetta. When she was reminded of the evidence previously discussed indicating that the meeting took place at the latest by July 20, 2009, she immediately conceded that she was not sure and could not remember.

In her arbitration hearing testimony she said much the same. She could not think of any reason why July 26, 2009 would have been put into the Confirmation of

Discussion memo. She stated that the family was not leaving for Iraq on that date, they were planning to leave on August 2, 2009, and August 2, 2009 is the date that she gave Mr. Panetta as a planned departure date.

On the issue of her intended use of her vehicle while away in Iraq, she testified on her examination under oath that she was going to leave it parked at the family's townhouse. No one was going to be using it.

With respect to her intended use of the vehicle until the family left for Iraq, it was her evidence both on examination under oath, in direct examination, and on cross-examination at the arbitration hearing that she was going to continue to drive the vehicle until she left the country.

Most significantly, on the question of what insurance coverage she thought she had and that she wanted until the family departed for Iraq, she stated the following on her examination under oath:

Q. Did you drive the Tercel any time between the 20th and the 29th?

A. 20th to 29th?

Q. Yeah.

A. Of course I did, from 20th, yeah.

Q. So, you drove it right up to the date of this accident?

A. Yes.

Q. You presumed that you had full coverage on your vehicle up to that time?

A. Of course, because I told him we are leaving on August 2, like ---

Q. is there any possibility that Tony could have misunderstood you to say that you were leaving on 26 July?

A. I don't think so, I --

Q. You don't think so?

A. -- just clearly I told him, like, August 2, we are going away.

At the arbitration hearing she was asked whether she wanted to maintain and pay for SABS coverage while there were still in the country. She responded, "*yeah, of course*" stating she would pay for SABS coverage while still in the country. She wanted "*full coverage*" until they left for Iraq. She stated that she did not have any idea that she did not have SABS coverage at the date of the accident, July 29, 2009. She maintained this evidence on cross-examination.

In my opinion the following exchanges that took place on Ms. Hasan's examination under oath fairly describe her intentions with respect to her automobile insurance arrangements before and after she left for Iraq, and her understanding of the arrangements she thought were in place after her discussions with Mr. Panetta.

Q. ...the purpose of changing your coverage was to save money?

A. Kind of... We all going to go away, nobody driving it. So, like there is not reason to I have full for that certain time...

Q. So, would you have paid the extra \$20 or \$30 for something that wouldn't have even apply to you in Iraq?

A. I think not...

Q. So, is it fair to say that you would have rejected that extra coverage?

A. I think so...

Q. Now, if you were going away August 2, and he (Tony Panetta) said that it would kick in on August 15, right –

A. Yeah.

Q. -- Or at least the change. Had it applied earlier than August 15th, and that meant that you would have saved some more money, would that have been something that you would have agreed to?

A. I wasn't really, to be honest, cared about it because I remember, I asked him from when because I have to make sure I have enough money in the account.

Q. Right.

A. ...I don't exactly remember he told me that time how much they going -- its going to be when he change it, ... But I asked him from when they will take that less amount so I can make sure like how much I put. And he told me from August 15, because already they already take from full amount. I cannot do anything about that because its gone, but from August 15, when they take your next -- like, when they take your next one, then they take less amount.

Q. Did he mention anything to you about them putting money back into your account?

A. No, he said that is gone for a whole month, I remember that. So, they will start like from 15 of the month.

Q. So, in terms of any refund or anything, that wasn't on ---

A. No, he didn't mention, no.

My interpretation of this evidence, when considered with her other evidence, is that Ms. Hasan wanted and thought that she would have full insurance coverage on her car until at least August 2, 2009 when the family left for Iraq. After that she would not have paid extra for coverage that would not be of any use to her while in Iraq. She thought the reduced fire and theft or comprehensive coverage would take effect August 15, 2009 and that this would save her some money. She did not consider seeking to reduce her coverage between August 2, 2009 and August 15, 2009 to save more money because it was her understanding that she had already paid for the time on risk up to August 15, 2009, and she could not get a rebate or reduction in premium before August 15, 2009. She may have been mistaken in this conclusion since there was some evidence introduced at the examination under oath that suggests she may later have received a rebate for reduced coverage back to July 26, 2009¹¹, the effective date of the coverage change Mr. Panetta put in his Confirmation of Discussion memo. From the

¹¹ EUO Hassan, Q. 272 – 284.

standpoint of considering her intentions however, and when she anticipated coverage changes would go into effect, at the time she was making her reduced coverage arrangements with Mr. Panetta it was her understanding she could not get any credit or reduced premium until August 15, 2009.

Tony Panetta testified that he has been with Olsen-Sottile Insurance Brokers for 25 years. He is a licensed broker and an employee of Olsen-Sottile. He recalled that Ms. Hasan was a client of his from approximately 2006. She was insured through Echelon Insurance prior to coming to Mr. Panetta. He had placed insurance coverage on Ms. Hasan's Toyota for just less than 4 years leading up to the accident. He did not have what he would call regular dealings with Ms. Hasan. He remembered that she changed the vehicle once and he had to call her a few times because cheques were not available to cover her premium but he was not concerned about this and told her not to worry about it.

Initially he stated that he recalled meeting with Ms. Hasan on July 20, 2009. He then stated that he was unsure about the date of the meeting. He remembered that they had scheduled a meeting for a certain date that he could not recall but that Ms. Hasan had told him she could not get in to see him until "*Friday*". At this point in his evidence he mentioned that he knew he needed to get Ms. Hasan's signature on the Confirmation of Discussion memo.

The meeting was preceded by a telephone call initiated by Ms. Hasan. With respect to the purpose of the phone call, he remembered that Ms. Hasan had telephoned him indicating that she wanted to cancel her automobile insurance because "*she was leaving for two to three months in Iraq*". He was not sure when this telephone

call took place it could have been days before they met or even weeks before. He did not record the date of the telephone call nor did he make any notes about the call. In response to a question about his knowledge of Ms. Hasan's intended departure date, he stated, "*I am not sure if I asked her when she was leaving for Iraq.*"

Mr. Panetta suggested to Ms. Hasan during the telephone call not to delete all coverage on her vehicle or cancel the policy. Instead, he suggested that she keep comprehensive coverage on the vehicle. He recalls that they then made an appointment to meet on "*Friday*". He recalled that Ms. Hasan mentioned she was "*bringing her kids to Niagara*". She had been in Toronto visiting friends and was "*coming back*". He stated again that he remarked to Ms. Hasan in the context of the Friday meeting something to the effect of, "*that's good because I've got to get this thing signed*". This was another reference to the Confirmation of Discussion memo.

Mr. Panetta met with Ms. Hasan on "*Friday*". This evidence, combined with Ms. Hasan's evidence leads me to conclude that it is most likely the meeting between Mr. Panetta and Ms. Hasan took place on Friday, July 20, 2009. I do not believe however, that anything turns on determining with certainty the exact date of this meeting. The important fact is that there is no doubt on the evidence that a meeting between them took place in the days preceding the sending of Exhibit 1, tab 3 to Economical by the broker.

Apart from the Confirmation of Discussion memo (which appears to have been prepared before the meeting) he has no notes of the meeting. He remembers that they discussed the various coverages available. He mentioned that he had tried to describe some of this to her during their telephone call. He explained what coverage would be

deleted while she was away and that it would be reinstated when she returned. He told her that in reducing the coverage while she was away she would receive a rebate of premium but not “*cash back*” – it would just be a reduction of her monthly premium payment. He agreed that by the time of the meeting she had already made her monthly premium payment which meant her policy was paid up with full coverage until August 15, 2009.

With respect to any discussion at the meeting about Ms. Hasan’s intended departure date from Canada, Mr. Panetta testified that he was not sure there was any discussion about the date when she was leaving. He said, “*I’m not sure that she knew. It was not too long after that.*”

When asked what significance the July 26, 2009 date might have as the effective coverage change date that appears in the Confirmation of Discussion memo, he stated, “*that date was given to me by her. She must have told me she would not be driving the vehicle after July 26, 2009.*” He acknowledged however that this was not the date that she said that she was leaving the country.

Mr. Panetta followed up these comments with what sounded to me like rather self-serving evidence volunteering the remark, “*I’ve never taken the initiative to put that date in – that date is probably the most important date in the industry*”.

Mr. Panetta was then examined concerning the OPCF 16. In commenting on his knowledge of the OPCF 16 and whether he was accustomed to using it he stated:

“when we suspend coverages we don’t write (the) OPCF 16. Very few brokers do it... I know what the OPCF 16 looks like... We very rarely use it... If I tell regular customers to sign an OPCF 16 they won’t know what I am talking about. If I use (a Confirmation of Discussion memo) I can put it in understandable language.”

Mr. Panetta explained that his brokerage would not have sent Exhibit 1, tab 2, the Confirmation of Discussion memo to Economical. Instead, Exhibit 1, tab 3 was sent to Economical on July 20, 2009. The document was sent by Debbie Lauzon of Olsen-Sottile Insurance Brokers and received by Economical on July 22, 2009.¹²

On direct examination Mr. Panetta stated that he knew the OPCF 16 preserved SABS while the insured was in a vehicle other than the “described automobile, a newly acquired automobile and a temporary substitute automobile”. Given his earlier evidence however, about the July 26, 2009 effective coverage change date being a date that Ms. Hasan must have given to him as a date after which she would no longer be driving her car even though she would not yet have left for Iraq, I had some doubts that Mr. Panetta appreciated the difference between SABS coverage provided by an OPCF 16, and what he asked Economical to do. He agreed that had an OPCF 16 been used, Ms. Hasan and her husband would have been covered under the Economical policy for SABS while in Mr. Ali Abu Al Hour’s vehicle.

In what I consider to be important testimony for the issue in this case, Mr. Panetta followed up this testimony with these comments, “I should have explained that to her. I knew she wasn’t leaving right away”.¹³

Cross-examination and re-examination on these issues only served to reinforce my doubts about whether Mr. Panetta truly understood how the OPCF 16 coverage differed from what he had done by simply removing all coverages except for comprehensive coverage with the directions given to Economical by way of Exhibit 1,

¹² The document bears a date stamp dated July 22, 2009

¹³ arbitrator’s emphasis.

Tab 3. My overall impression of Mr. Panetta's evidence was that if he did know the difference between the coverage that an OPCF 16 would have provided, and what he directed Economical to do, he certainly did not turn his mind to it, or advise Ms. Hasan about it when inserted the July 26, 2009 effective coverage change date into the memo knowing that was not the date she and her family were leaving for Iraq.

Based on my review of the evidence given by Ms. Hasan in her examination under oath as well as the arbitration hearing, and Mr. Panetta's evidence, I conclude that Ms. Hasan contacted Mr. Panetta to obtain his advice on how to reduce the coverage on her automobile policy while she was away in Iraq with her family. I believe that she had a general idea that reduced coverage might be available and that she could save some money on her premium by reducing her coverage. I do not think however, that she had any clear idea what her options were, and what the cost savings would be. She most definitely had no idea what an OPCF 16 was and how the coverage under that endorsement might differ from simply instructing Economical to remove all policy coverage with the exception of comprehensive coverage.

Indeed, I have my doubts that the broker, Mr. Panetta fully understood how the OPCF 16 worked, the difference in coverage it provided, or the cost differential in using it. Based on his own evidence it is certainly not an endorsement he was accustomed to using. In any event, for the purposes of the issue in this case, it is abundantly clear that not only did he not discuss the OPCF 16 with Ms. Hasan, he did not consider implementing an OPCF 16 to reduce Ms. Hasan's coverage. It would have preserved a greater amount of SABS coverage under the Economical policy for her and her family

while they were in Canada than what ultimately was done by the instructions he gave to Economical.

I am also of the opinion that the evidence confirms it was Ms. Hasan's intention to maintain full coverage on her vehicle while she was in Canada right up until the time she and her family left for Iraq. She was quite clear in her evidence both on her examination under oath and at the arbitration hearing that she intended to operate vehicle right up until the time she left for Iraq. It was also clear to me that Ms. Hasan would not have wanted to pay extra for coverage that would not have benefited her and her family while they were in Iraq.

I accept her evidence that she told Mr. Panetta the family's intended travel date was August 2, 2009. She was under the impression however, that the reduced coverage would only come into effect on August 15, 2009. I also accept her evidence that she was not concerned about trying to save additional money by bringing the reduced coverage into effect before August 15, 2009. Her main concern appeared to be to make sure that she had sufficient money in her bank account to pay whatever the premium was going to be when the coverage changes took effect on August 15, 2009. She was under the impression that since she had already paid her premium up to August 15, 2009 for full coverage that she could not get any money back for reducing her coverage before that date. Although she may have been factually mistaken in this understanding, given her lack of sophistication in automobile insurance matters, I can see how she may have misunderstood Mr. Panetta's explanation of how the premium reduction would operate. He told her that she would not get "cash back" for reducing the

coverage, but only a reduction of premium that would take effect for her premium payment starting August 15, 2009.

Having made these findings of fact based on the evidence, I will now address the issue of whether Mr. Panetta was required to use an OPCF 16 to reduce the coverage under Ms. Hasan's policy in accordance with her instructions.

There is no doubt on the evidence that Mr. Panetta did not use an OPCF 16 to complete the changes requested by Ms. Hasan. Instead, Mr. Panetta confirmed the instructions received from Ms. Hasan in a memo type form entitled "Confirmation of Discussion".¹⁴ The instructions as understood by Mr. Panetta were communicated to Economical by Ms. Lauzon by way of Exhibit 1, tab 3.

The essential difference between using an OPCF 16 and a memo confirming the insured's instructions where the insured seeks to reduce policy coverage to comprehensive coverage only is that the OPCF 16 preserves some coverage that the memo method does not. The OPCF 16 removes all coverage except comprehensive coverage for the automobile described in the policy, a newly acquired automobile, and a temporary substitute automobile.

This means that an insured would still have liability, SABS, and uninsured automobile coverage while operating or an occupant of a vehicle other than those described in the OPCF 16.

If I were to find that Mr. Panetta was required to use an OPCF 16 to complete the coverage changes intended by Ms. Hasan then the inquiry would end there. Had an OPCF 16 had been used, required or not, there would have been SABS coverage in

¹⁴ Exhibit 1, Tab 2.

effect with Economical for Ms. Hasan and her family while she was operating Mr. Ali Abu Al Hour's vehicle.

It is on this issue that the parties' positions diverge significantly. Economical submits that an OPCF 16 is not mandatory under the *Insurance Act* to reduce coverage in an automobile policy in the manner in which Ms. Hasan requested of Mr. Panetta. The insured is entitled to request and obtain exactly the coverage that the insured wishes to have. Economical argues that section 227 of the *Insurance Act* dealing with the use of forms approved by the Superintendent of Insurance ought not to be interpreted so as to require the use of an OPCF 16 where the insured seeks to reduce automobile insurance coverage from full coverage to comprehensive coverage only. Instead, the insured should have the option of choosing the enhanced coverage provided by an OPCF 16 for other vehicles, or to have only comprehensive coverage on the insured's own vehicle if that is what the insured wants.

State Farm submits that the use of an OPCF 16 is mandatory where an insured seeks to reduce coverage under a motor vehicle liability policy in the manner Ms. Hasan requested. State Farm argues that section 227 of the *Insurance Act* requires that the insurer use the OPCF 16 endorsement that has been approved by the Superintendent of Insurance. It is not an option for the insured to decline the enhanced coverage provided by the OPCF 16 endorsement. There are sound public policy and public protection reasons why the OPCF 16 is the endorsement the Superintendent of Insurance has mandated as the minimum insurance coverage an insured must maintain in the circumstances. Therefore, Mr. Panetta had no option but to advise Ms. Hasan that to effect the coverage reduction she was requesting, she would have to accept an

OPCF 16 endorsement with whatever premium charge that entailed, but also with the enhanced coverage previously discussed.

Three arbitral decisions dealing with this issue were discussed in counsels' submissions. Two decisions support State Farm's position, while the most recent decision assists Economical.

The first case is a decision of Arbitrator Samis – *Certas v. CGU/Aviva*.¹⁵ In that case the insured had a policy of motor vehicle liability insurance with Certas. On August 22, 2002 the insured communicated with Certas and requested that all "road coverages" on the insured vehicle be deleted and that only "comprehensive coverage" should continue in force. Certas reduced the coverage on the policy to comprehensive only and issued a Certificate of Automobile Insurance, which it described as "endorsement" confirming the reduced coverage. On September 23, 2002 the insured's son was struck by an automobile insured by CGU/Aviva while riding his bicycle. An application for SABS was made to Certas. Certas took the position that SABS coverage had been removed from the policy and sought to transfer responsibility for the claim to CGU/Aviva by way of a priority dispute.

Arbitrator Samis stated that the case raised two issues. The first issue concerned whether it was possible for an insurer in Ontario to issue a policy of insurance that has only comprehensive coverage (covering for non-collision damage to the insured vehicle) without also providing SABS coverage. The second issue concerned the effect, if any, of Certas' failure to use an OPCF 16 for the purposes of altering the policy.

Arbitrator Samis begins his analysis by noting that section 268 (1) of the *Insurance Act* mandates that every contract of automobile insurance issued as a motor

¹⁵ December 5, 2005 ("*Certas v. Aviva*").

vehicle liability policy must include SABS. Therefore, a contract between the insurer and the insured solely to provide protection against damage to the insured vehicle cannot, by definition, be a motor vehicle liability policy. He concludes however, relying upon an earlier arbitration decision¹⁶, that it is quite permissible for an insurer and an insured to enter into a contract providing for protection with respect to only comprehensive losses, without any SABS coverage.

He distinguishes the facts of the case before him however, on the basis that the policy the insured originally had with Certas started out as a motor vehicle liability policy with full liability and SABS coverage. The insured was seeking to reduce the coverage of a motor vehicle liability policy when he contacted Certas to request the changes.

Arbitrator Samis agreed with Certas' description of its amended Certificate as an "endorsement". He then stated that the Superintendent of Insurance has approved a form of endorsement for the purposes of changing a motor vehicle liability policy to remove all coverage except comprehensive coverage. This is the OPCF 16 endorsement. Arbitrator Samis states that the OPCF 16 is issued by the Superintendent of Insurance pursuant to section 227 of the *Insurance Act*. He describes the effect of the OPCF 16 endorsement as follows:

...this approved endorsement...does not contemplate total elimination of liability coverage or accident benefits coverage. The approved endorsement would require an insurer to carry on with some residual risk to the extent that there is limited coverage under the policy for Statutory Accident Benefits or for liability coverage that may arise out of the use or operation of some other automobile.

¹⁶ *Coseco v. Pilot*, Arbitrator Paul Torrie.

In concluding that Certas remained responsible for the payment of SABS to its insured's son, Arbitrator Samis commented as follows:

If Certas had issued the approved form OPCF 16 instead of the documentation proffered, Certas would remain as an insurer on risk for accident benefits coverage... the regulator has specified a particular form to be used when a person intends to suspend the coverage except for Comprehensive Coverage. By the terms and conditions of that form, the Superintendent requires the person to continue to have residual liability coverage and accident benefit coverage and other features. If it is permissible for Certas to delete coverage in the manner in which they have purported to do so, then the approved form, the OPCF 16, serves no purpose whatsoever... Regulators have seen that it is important for people that have coverage under suspension to continue to have residual protection for liability coverage and accident benefits coverage. Hence regulators have issued the OPCF 16 to provide this residual protection... In this limited way coverage is extended beyond comprehensive coverage in order to protect interests of the insured person that the regulator considers in need of protection... As such, in my view, Section 227 of the (Insurance) *Act* requires that the insurer use the available approved form for this purpose, the OPCF 16... where the regulator has specifically approved an endorsement for the transaction requested by the insured, it is not open to the insurer to use another form.

The approach taken by Arbitrator Samis was followed by Arbitrator Jones in *Enterprise Rent-A-Car v. ING Insurance Company of Canada*,¹⁷ although he suggests in his analysis that the insured should be advised about the OPCF 16 so that the insured can make an informed choice about whether to take the coverage. This seems to me somewhat inconsistent with the idea that the OPCF 16 is mandatory. There would be no need to discuss options with the insured if the OPCF 16 was the only way to reduce full policy coverage to comprehensive coverage only. I suppose he could mean

¹⁷ November, 2006 ("*Enterprise v. ING*").

that the insured's choice would be to either take the OPCF 16, or not reduce his policy coverage to comprehensive coverage only.

It also should be noted that technically Arbitrator Jones' comments on this issue are *obiter dicta*. He decided the case on the basis that ING, having first accepted priority, could not be permitted to withdraw its acceptance. He held that it was only in unusual and extreme circumstances that such a withdrawal should be allowed. He then went on to consider the evidence on the OPCF 16 issue that had been dealt with by Arbitrator Samis in *Certas v. CGU/Aviva*.

The facts in Arbitrator Jones' case were that in November, 2003 ING's insured made a written request to his broker to change the coverage on his motor vehicle liability policy to comprehensive coverage only. As in the *Certas v. CGU/Aviva* case, ING made the coverage change and then issued an amended Certificate of Insurance to confirm the change.

In addressing ING's argument that the policyholder got "*exactly what he wanted*" when he requested comprehensive insurance only, Arbitrator Jones comments as follows:

This may or may not be the case. Insurance coverage in Ontario is a highly complex and highly regulated industry. The average consumer will not necessarily have a complete understanding of the complexities of insurance coverage, including when accident benefit coverage continues and when it does not. Because of the complexities involved, the legislature, by means of Section 227 of the *Insurance Act*, has required the changes be made in accordance with the approved forms... It is far from clear that the policyholder wanted the changes set out in the certificate as oppose the (*sic*) OPCF 16 form. In any event, the policyholder had the right to receive the information as set out in the OPCF 16 and either agree to it or not. By simply sending out the certificate, the insurer denied the policyholder the opportunity to review and choose the benefits as approved by

the Superintendent... In short, the legislature, by way of Section 227 of the *Insurance Act*, required that changes be made in accordance with the approved form. Because of the complexities of insurance coverage in Ontario there are good reasons for the use of such forms. If ING had used the correct form the statutory accident benefit coverage would have continued...

The third arbitration decision is a decision of Arbitrator Jarvis Scott in *State Farm Mutual Automobile Insurance Company v. TD General Insurance Company a.k.a. Security National Insurance Company*.¹⁸ The facts of this case were that on August 9, 2006, the insured telephoned TD to reduce coverage under a motor vehicle liability insurance policy to comprehensive coverage only effective August 10, 2006. An underwriting note was prepared by TD, described as follows by Arbitrator Scott:

An underwriting note... refers to the insured having 'called to park vehicle with 500 comp. only'. The note refers to the insurer 'offering endorsement 16' and this was refused by ph' (presumably the person on the phone and the insured).

On November 3, 2006 the insured called and added liability coverage back to the policy effective November 4, 2006. On December 13, 2007 the insured called and once again deleted liability coverage requesting comprehensive coverage only effective December 14, 2007. On this occasion there is no indication that an OPCF 16 endorsement was offered. On May 18, 2008 TD issued a renewal of the insured's policy with comprehensive coverage only. Comprehensive coverage was the only coverage on the vehicle from the renewal on May 18, 2008 until an accident occurring May 3, 2009 giving rise to a SABS claim by the insured. The insured applied for SABS to State Farm, the vehicle in which she was a passenger at the time of the accident. State Farm paid

¹⁸ 2012 ("*State Farm v. TD*")

SABS as required by Regulation 283/95, and notified TD of a priority dispute asserting that TD was responsible to pay SABS. TD denied responsibility on the basis that its policy had only comprehensive coverage in effect at the time of the accident.

In the arbitration of the priority dispute State Farm argued, as it has in this case, that TD was obliged to use the OPCF 16 endorsement to effect a reduction in the coverage requested by the insured. The use of this form, argued State Farm was the only way to put into effect the insured's desired to reduce coverage and have only comprehensive coverage on the vehicle.

Arbitrator Scott summarizes the parties' positions as follows:

At the very heart of State Farm's case is an argument that an OPCF 16 was the only way that TD could restrict or limit the coverage when the insured requested comprehensive coverage only, having initially issued a policy with liability and SABS coverage.

The essence of TD's argument is that the parties should be free to contract to achieve the result and the coverage that they want. Insureds should be able to obtain only comprehensive coverage and not be obliged to pay any increased premiums associated with the extended coverage provided by an OPCF 16 – Suspension of Coverage.

Arbitrator Scott does a thorough review of the case law in the area. He refers to earlier arbitration decisions that hold an insurer and an insured may enter into a contract providing for comprehensive coverage only. He then analyzes in detail the more recent decisions in *Certas v. Aviva*, and *Enterprise v. ING*. He also makes reference to a decision of Arbitrator Malach in *West Wawanosh Mutual Insurance Company v.*

*Federation Insurance Company, Lloyd's Of London Insurance Company and Allstate Insurance Company.*¹⁹

Arbitrator Scott notes that Arbitrator Malach distinguishes the approach taken in the *Certas v. Aviva* and *Enterprise v. ING* cases. Although he notes that the facts in *West Wawanosh v. Federation* were complicated, in essence Arbitrator Malach found that the failure to use an OPCF 16 to reduce coverage under motor vehicle liability policies did not result in the insurer having to continue with SABS coverage. He distinguished the facts of his case by saying that unlike the Certificates of Insurance issued to reduce coverage in the other cases, in his case the Certificates issued confirming the coverage reduction were clear and left no doubt about what coverage was eliminated and what remained. Although not stated directly, it would appear that Arbitrator Malach does not subscribe to the view that using an OPCF 16 is the only method by which coverage under a motor vehicle liability policy can be reduced to comprehensive coverage.

Arbitrator Scott is of the view that an insured can reduce coverage under a motor vehicle liability policy to comprehensive coverage only, without being obliged to accept an OPCF 16 endorsement and the enhanced coverage it provides. He notes there may well be occasions when it would be unnecessary for an insured to have the coverage provided by the OPCF 16. He gives the example of an insured who owns two vehicles, one being used in the summer, and one being used year-round. He states that it would be unnecessary to have the benefit of the OPCF 16 coverage on the summer vehicle when the coverage was reduced to comprehensive only during the winter months, since

¹⁹ December 19, 2007 ("*West Wawanosh v. Federation*").

SABS coverage would be available to the owner through the full coverage that was in effect for the year-round vehicle.

He points out as well that it seems inconsistent to him that an insured can initially contract with an insurer for a policy of comprehensive coverage only, but once the insured has a policy of motor vehicle liability insurance, the insured cannot reduce the coverage under that policy to comprehensive coverage only, unless the insured agrees to take the OPCF 16 endorsement which gives some enhancements to the limited coverage but at a greater cost. In essence, he concludes that an insured should have an informed choice as to what coverage he wants, rather than the coverage of an OPCF 16 being imposed upon him should he want to reduce coverage under a motor vehicle liability insurance policy.

He concludes as follows:

Despite the decisions to the effect that use of an OPCF 16 is mandatory, for policy reasons, to reduce full coverage to comprehensive coverage only, there would appear to be, at least in my mind, an inconsistency in finding that it is also perfectly fine to issue a policy with only comprehensive coverage at first instance. Why should an initial request for limited coverage and presumably a lower premium than that which would exist without an OPCF 16 be any different than a mid-policy term request for the same or limited coverage? The insured should be able to purchase the coverage she wants from an insurer... It is my view that when an insured seeks to reduce coverage to comprehensive only an insurer and/or broker likely has an obligation to the insured to describe the availability of an OPCF 16 and the enhanced coverage it provides. As long as the endorsement and the provisions are adequately explained, an insured then can make an informed decision. If enhanced coverage is chosen, the approved form must be used... If an insured chooses to maintain comprehensive coverage and wishes to have extended continuing liability coverage and Statutory Accident Benefits coverage such as that provided in the OPCF 16, the OPCF 16 is the form to use. An insured is at liberty to purchase the optional endorsement upon payment of whatever the

appropriate premium may be in the circumstances... An insured seeking to reduce comprehensive coverage is likely entitled, from a broker or an insurer, to be informed about the availability and benefits coverage of the OPCF 16. It is not my view that an insured must purchase the additional coverage when reducing the coverage mid policy... An insurer such a State Farm, seeking to establish a priority on the part of the insured's personal policy provider, should at a minimum establish in the evidence at an arbitration that the insured would have purchased the coverage had it been explained and offered to him...

I am in agreement with the approach taken by Arbitrator Scott. Although there may very well be good policy reasons to try to encourage operators of automobiles to have a minimum level of certain types of insurance coverage in all circumstances, I do not believe the law is that the insured must accept a certain kind or level of coverage absent a specific statutory requirement to that effect. In my opinion Section 227 of the *Insurance Act* is not such a specific statutory requirement. That is not what it is designed to do. The section reads as follows:

S. 227 (1) an insurer shall not use a form of any of the following documents in respect of automobile insurance unless the form has been approved by the Superintendent;

1. An application for insurance
2. A policy, endorsement or renewal
3. A claims form
4. A Continuation Certificate

In my opinion, all that this section does is require an insurer to use the approved form, if there is one, in connection with certain automobile insurance transactions as itemized in the section. It does not say that an insurer must use, and an insured must accept, an endorsement that provides a certain minimum level of coverage whether or

not the insured wants the coverage. I accept that the section has a public interest purpose. In my view however, that purpose is not to make sure that consumers have a certain minimum level of coverage whether they want it or not. The purpose is to ensure that the dealings between insurers and insureds are clearly articulated in standard forms where possible so as to be understood by the parties – particularly the consumer of insurance products, and to ensure that the intentions of the parties to the insurance contract are accomplished.

To put this in the context of the issue in this case, as Arbitrator Scott states, if an insured who has been informed about the option of what I will term the “enhanced reduced” coverage of an OPCF 16 elects to take the coverage, then the insurer must use the OPCF 16 form to establish that coverage. The insurer cannot implement what amounts to OPCF 16 coverage by using a memo. That is quite different however, from saying that the insured wanting comprehensive coverage only has no choice but to accept the coverage as set out in the OPCF 16 endorsement even if the insured has been advised about the nature of that coverage and makes an informed decision not to take it.

In my view, interpreting section 227 of the *Insurance Act* as I have suggested accords with proper principles of statutory interpretation. The section mandates the use of standard forms to reduce to writing agreements between insurers and insureds concerning automobile insurance coverage. The forms are the means by which the agreements are implemented, they do not set minimum standards for those agreements. The section is not intended to be a substantive section that establishes requirements for certain minimum coverage an insured must have in an automobile

policy. There are other sections in the *Insurance Act*, and in other statutes, that do establish certain minimum coverage levels or requirements, but in my opinion they are clearly identifiable as such, and Section 227 is not one of them.

With some limitations, the consumer of automobile insurance has a choice as to what coverage he wants when placing automobile insurance. One limitation that has been noted by the arbitrators in most of the other cases is that if an insured wants a policy of motor vehicle liability insurance, then he has no choice but to accept a policy that will also provide SABS coverage. This does not come about however, by operation of section 227 of the *Insurance Act*, which requires approved application and policy forms be used when the motor vehicle liability policy is contracted for. It occurs by operation of section 268 (1). This is a substantive section which states that every contract evidenced by a motor vehicle liability policy shall be deemed to provide for statutory accident benefits. I should mention here that a second such substantive section is found in the *Compulsory Automobile Insurance Act*, which is the reason why the owner of a motor vehicle would be looking to obtain a policy of motor vehicle liability insurance in the first place.

The *Compulsory Automobile Insurance Act* requires owners and lessees of motor vehicles that will be operated on a highway to be insured under an automobile insurance contract that provides liability coverage.²⁰

Similarly, a consumer contracting for a motor vehicle liability policy will have no option but to accept a policy that provides for minimum third-party liability limits of \$200,000.00. This is not because the form approved by the Superintendent of Insurance for a motor vehicle liability policy stipulates that the policy has liability limits of

²⁰ *Compulsory Automobile Insurance Act*, R.S.O. 1990, C. 25, s. 2.

\$200,000.00. The form says that because section 251 (1) of the *Insurance Act* requires that all motor vehicle liability policies issued in Ontario have minimum third-party liability limits of \$200,000.00.

In my opinion if the legislature had intended that an insured who wishes to reduce coverage under a motor vehicle liability policy to comprehensive coverage only must accept and pay a premium for the continuation of certain liability and SABS coverage provided by the OPCF 16, there would be a substantive section in the *Insurance Act* saying so.

Therefore, on this issue I conclude that Mr. Panetta did not have to use an OPCF 16 to reduce Ms. Hasan's automobile coverage to comprehensive coverage from full coverage. As an insurance broker providing coverage advice to a client however, he did have an obligation to properly advise her about this option so that she could make an informed decision whether to take the coverage under the OPCF 16, or have the lesser, comprehensive coverage only.

Is now necessary to consider the effect, if any, of Mr. Panetta's failure to advise Ms. Hasan about the availability of the OPCF 16 endorsement. Like Arbitrator Scott in *State Farm v. TD*, I am of the view that Mr. Panetta had an obligation in his capacity as Ms. Hasan's insurance broker to advise her of the availability and value of the OPCF 16. Indeed, Mr. Panetta admitted as much himself. In my view he was negligent for not doing so.

A possible, but in my opinion unlikely result had Mr. Panetta advised Ms. Hasan about the OPCF 16 is that Ms. Hasan might have elected to add the OPCF 16 to her policy. Counsel for Economical referred me to the decision of the Ontario Superior Court

in *Zefferino v. Meloche Monnex Insurance Company*. Subsequent to the arbitration hearing in this case that decision was affirmed by the Ontario Court of Appeal.²¹

In that case a broker failed to advise an insured about the availability of optional SABS that could have been added to his policy. He was involved in an accident and would have benefited from having the optional SABS. Both in the Superior Court and in the Court of Appeal it was found that the broker was negligent in failing to advise the insured about the availability of the additional SABS. The issue however, was whether even though the broker was negligent in not advising the insured about the availability of additional SABS, did this cause a loss to the insured? In answering this question the focus was on whether the insured would or would not have elected to take and pay an extra premium for the additional SABS had the broker told him about their availability. The Court of Appeal upheld the trial judge who concluded the evidence supported a finding that the insured would not have opted to purchase the additional SABS had the broker advised him about them, and therefore there was no causal connection between the brokers negligence and the insured's "loss".

Counsel for Economical argued that there was no evidence in this case to support a finding that Ms. Hasan would have agreed to take the OPCF 16 endorsement had Mr. Panetta told her that it was available. In fact, counsel for Economical argues that the evidence is to the contrary and suggests that Ms. Hasan would likely not have taken the OPCF 16 endorsement had it been offered to her.

I agree with counsel for Economical's characterization of the law and with his submission that it is unlikely Ms. Hasan would have taken the OPCF 16 had it been offered to her.

²¹ 2013, ONCA 127.

I believe it is unlikely Ms. Hasan would have taken the OPCF 16 had been offered because the only reason that would make sense for her to have added the OPCF 16 to her policy would have been if she intended to stop using her vehicle before she left for Iraq but wanted to have the enhanced coverage available under the OPCF 16 until she left Canada. She was clear in her evidence however, that she intended to use her vehicle right up until the time she left for Iraq and she wanted "full coverage" until then. As I discuss in more detail later in this Award, I prefer Ms. Hasan's evidence to Mr. Panetta's evidence on the issue of what she told him about her intended date of departure, her intended use of her vehicle until she left for Iraq, and when she wanted the reduced coverage to be effective.

If causation was dependent only on whether Ms. Hasan would or would not have chosen to add the OPCF 16 to her policy, then Economical would have a successful argument. In my opinion however, that is not the only way in which Mr. Panetta's failure to advise Ms. Hasan about the OPCF 16 could have changed the outcome this case.

In my view it is probable that this negligence did cause a change in the outcome. I say this because according to Mr. Panetta's understanding, Ms. Hasan was not going to be using her own vehicle as of July 26, 2009, but she was still going to be in the country as he knew that July 26, 2009 was not her intended date of departure for Iraq. He should have made more detailed inquiries about her intended use of her own or other vehicles at the very least between July 26, 2009 and when she was leaving for Iraq.

Specifically with respect to the OPCF 16 he should have asked her about the possibility that she might use another vehicle other than the automobile described in the

Economical policy, a newly acquired automobile, or a temporary substitute automobile before she left for Iraq, and explained the enhanced coverage available under the OPCF 16 that was not available by simply deleting all coverages on her Economical policy except for comprehensive coverage.

There is a reasonable likelihood that Ms. Hasan would have told Mr. Panetta that while she would continue to use her own vehicle for shorter trips in the city, she did not like to use it for longer trips outside the city, and since she had a trip upcoming to Mississauga from Niagara Falls she may have even mentioned that she was planning on either renting a car or borrowing a friend's vehicle to make the journey.

Mr. Panetta should then have explained to Ms. Hasan that the OPCF 16 might be something she would want to consider for the time period between July 26, 2009, and when she departed for Iraq, but that it would not be worth her while to keep the OPCF 16 on her policy after she left for Iraq. The enhanced coverage would not be available to her and her family in Iraq because SABS coverage does not extend outside of Canada and the United States.²²

Had he properly explained the OPCF 16 in this way to Ms. Hasan, in my view a detailed discussion of the OPCF 16, including the extremely time-limited value of having the OPCF 16 on the policy, would have drawn the attention of both Ms. Hasan and Mr. Panetta to the apparent misunderstanding about the date when Ms. Hasan wanted the reduced coverage to be effective. Ms. Hasan likely would have realized that Mr. Panetta was mistaken about when she wanted the coverage under her policy to be reduced. She would have pointed out to him that she did not want the coverage reduced until she actually left for Iraq, and they would have cleared up any further misunderstanding as to

²² See section 3 (2), SABS.

Ms. Hasan's intended use of her vehicle while she was still in the country. This would have caused her to reinforce the fact that she was going to use her vehicle right up until August 2, 2009, so she would not want the coverage reduced on the vehicle effective July 26, 2009.

Therefore, although I agree with Economical's position that the evidence indicates Ms. Hasan would not have wanted to pay extra for the OPCF 16 endorsement while she was in Iraq, it does not follow on the facts as I have found them that Mr. Panetta's negligence in failing to advise Ms. Hasan about the OPCF 16 had no causal connection with creating a change in Ms. Hasan's insurance coverage earlier than she intended.

In my opinion, the negligent failure to advise Ms. Hasan about the OPCF 16 on a balance of probabilities caused a change in the outcome in this case not because Ms. Hasan likely would have opted to add the OPCF 16 to her policy had it been discussed with her, but rather because a proper discussion of the OPCF 16 would probably have resulted in Mr. Panetta properly implementing Ms. Hasan's intentions for the reduction in coverage on her policy by stipulating the correct date for the coverage reduction to take effect.

I will turn now to the final question of whether Mr. Panetta properly carried out Ms. Hasan's instructions in completing the changes to her policy. I think it can be gleaned from my findings and comments so far that I am of the opinion Mr. Panetta did not properly carry out Ms. Hasan's instructions in completing the changes to her policy.

In my view Mr. Panetta was not very thorough in his handling of Ms. Hasan's request to reduce her automobile coverage while she was in Iraq. He made what I

would consider to be some rather basic errors for a broker of his experience, even without considering what should or should not have been done with respect to the OPCF 16.

First of all, he made no record of the date of his telephone conversation with Ms. Hasan, nor did he make any notes of the telephone conversation. This is when she first brought up the subject of reducing her automobile coverage. As a result he was unable to say whether this conversation took place days or weeks before the meeting at his office.

In his arbitration testimony he stated Ms. Hasan told him during this conversation that she wanted to cancel her insurance because she was going away to Iraq for two or three months. One would have thought that when the subject of policy cancellation came up with all the potential problems that could entail, it would have motivated Mr. Panetta to be quite precise about his handling of the matter. Instead, apart from the Confirmation of Discussion memo that I will address further in a moment, he kept no notes about the telephone discussion he had with Ms. Hasan. He testified that he explained to Ms. Hasan during the telephone call that she should not cancel her policy entirely, but that she should keep comprehensive coverage on the vehicle.

Based on the way he gave his evidence, it sounded to me as if he prepared the Confirmation of Discussion memo either during or following his telephone conversation with Ms. Hasan, but before he met with her at his office. I come to this conclusion because in the course of testifying about the telephone conversation Mr. Panetta said that while speaking with Ms. Hasan on the telephone he thought to himself that he would have to get the Confirmation of Discussion memo signed, and later in the

conversation when discussing the time for the meeting being "Friday", he said to Ms. Hasan that this would be good because he had to get the Confirmation of Discussion memo signed.

When I found difficult to understand however, is that when asked about his knowledge of Ms. Hasan's intended date of departure for Iraq, he responded that he was not sure that he had asked her when she was leaving for Iraq. This begs the question as to how Mr. Panetta would have known an accurate date to specify as the date upon which the reduced coverage should take effect without knowing when his client was departing the country. After all, according to him the triggering event for reducing the coverage, and what prompted her phone call to him was the fact that she was leaving the country with her family for extended period of time.

In testifying about what took place at their meeting, Mr. Panetta was similarly vague on what I believe to be the crucial date, based on what Ms. Hasan intended with respect to her automobile coverage. He stated that he did not obtain clear information as to when Ms. Hasan was leaving for Iraq. He said he was not sure that Ms. Hasan knew when she was going to leave but that it was not too long after that (in reference to the date of their meeting).

I pause here to note that Ms. Hasan was not vague in her testimony about her intentions as to when she wanted the coverage reduced or as to the date that she and her family were intending to travel to Iraq. Although there seemed to be some uncertainty in her mind as to whether her friend was going to be able to obtain the tickets allowing for their planned August 2, 2009 departure, she was at least 80% sure

this would happen, and she was clear in her evidence that she gave the August 2, 2009 date to Mr. Panetta as their intended date of departure.

Nowhere in his testimony about his telephone call with Ms. Hasan or his meeting with her at his office did Mr. Panetta provide what I would consider to be reliable evidence as to his reason for choosing July 26, 2009 as the effective date for the reduced coverage that he put in the Confirmation of Discussion memo. When questioned about the date, he offered what seemed to me to be little more than uncertain speculation that "...*She must have told me she would not be driving the vehicle after July 26, 2009.*" This comment sounded to me more like an afterthought to explain the use of the date, rather than unequivocal evidence of his client's intentions. Mr. Panetta offered no persuasive evidence that would support the conclusion Ms. Hasan told him that she was going to cease using the vehicle before the family's intended date of departure for Iraq, or that she wanted her full coverage reduced before the family left for Iraq.

In fact, he stated that he knew July 26, 2009 was not the intended date of departure for Ms. Hasan and her family. Based on his own evidence then he clearly thought there was going to be a time gap between when Ms. Hasan allegedly told him she was going to stop using her vehicle and when the family was departing for Iraq. As I have previously indicated, if that was his understanding then that would have immediately given rise to an obligation on his part to advise Ms. Hasan about the option of adding the OPCF 16 to the policy until they left.

Most significantly however, selecting a date to reduce the coverage before Ms. Hasan and her family had left for Iraq is in my opinion is a complete failure to properly

execute the intentions of Ms. Hasan with respect to her coverage reduction request. To find that Mr. Panetta properly carried out Ms. Hasan's instructions by reducing the coverage effective July 26, 2009 would require me to reject Ms. Hasan's evidence with respect to her coverage reduction intentions, and with respect to the August 2, 2009, and July 26, 2009 dates. I would then have to accept what I consider to be Mr. Panetta's vague recollections and unconfirmed speculation on what he has deemed "the most important date in the industry." Where Ms. Hasan's evidence conflicts with the evidence of Mr. Panetta, I prefer the evidence of Ms. Hasan, so I am not prepared to do that.

In concluding that Mr. Panetta failed to properly carry out Ms. Hasan's coverage reduction instructions, I must address the issue of Ms. Hasan having signed the Confirmation of Discussion memo. The question is, what legal consequence, if any, does it have, and does it relieve the broker of responsibility for what occurred?

The Confirmation of Discussion memo in and of itself is not conclusive of anything. It is merely evidence to be considered with respect to what the intentions of the parties were in making changes to this policy. The ultimate question is still, what was the nature of the agreement between the insured and the insurer (in this case the broker on behalf of both the insured and the insurer) to reduce the coverage under the policy?

I am not prepared to find on the evidence before me that the Confirmation of Discussion memo properly reflects the intentions of Ms. Hasan with respect to coverage reductions in her automobile policy. The memo is undated, but based on Mr. Panetta's evidence, he appears to have prepared it either during or after his telephone

conversation with Ms. Hasan, but before their meeting. It is far from clear to me when, if at all, Mr. Panetta would have obtained from Ms. Hasan the information that he placed in the memo about the effective date for the reduction in coverage. The only specific evidence Mr. Panetta gave about what Ms. Hasan told him in the telephone conversation was that she wanted to cancel her policy because she was leaving for two or three months in Iraq. He did not describe any discussion either in the telephone call or at their meeting about Ms. Hasan telling him she intended to stop using her vehicle before leaving for Iraq. He never clarified in the telephone conversation or during their meeting Ms. Hasan's intended departure date for Iraq. As I have stated, Ms. Hasan's evidence is clear in that she intended to use her vehicle right up until the time she departed for Iraq on August 2, 2009, and that she told this to Mr. Panetta.

I heard no evidence from Mr. Panetta that in obtaining Ms. Hasan's signature at the bottom of the Confirmation of Discussion memo he reviewed the content of the memo with her, particularly what he described as the "*most important date in the industry*" – the July 26, 2009 effective date for the reduction in coverage. I would have thought that he would have very carefully reviewed the details of the memo with her, especially since it was not on any type of standard form, and made sure that it properly reflected her intentions regarding the change in coverage.

Although she signed the form, I find that she did so trusting that Mr. Panetta had properly completed the form to reflect the type and timing of the coverage changes she wanted to make. I accept her evidence that she had no idea the coverage reduction was going to come into effect on July 26, 2009. Ms. Hasan was not a sophisticated automobile insurance consumer, and Mr. Panetta would clearly have been aware of

this. English was also not her first language so obviously anything reduced to writing about coverage changes whether it be in an approved form or in a memo ought to have been scrupulously reviewed with her.

In my opinion, an experienced insurance broker of 25 years who has professional obligations in advising the insured and implementing the insured's wishes concerning coverage changes must meet a higher standard than was met here if any reliance is going to be placed on a document such as Exhibit 1, Tab 2 as evidence of the parties' intentions with respect to the insurance coverage amendment.

I will conclude my comments on this part of the case by making reference to a decision of the Ontario Court of Appeal in *Gore Mutual Insurance Company v. 1443249 Ontario Limited Operating As En Route Towing and Yassin Abderrahman-Mohammed*²³.

I find this decision helpful both on the issue of the significance of the OPCF forms approved by the Superintendent of Insurance, as referred to in section 227 of the *Insurance Act*, as well as on the issue of the value of these and similar documents as evidence of amendments to contracts of automobile insurance.

The issue in that case was whether Gore was relieved of its obligation to provide insurance coverage by operation of an OPCF 28A Excluded Driver endorsement. The OPCF 28A had been completed, naming the excluded driver, but the endorsement was not signed. The trial judge concluded, after considering all of the evidence, not just the unsigned OPCF 28A, that there was insufficient evidence of an agreement between the insured and the insurer that the driver be excluded. Therefore Gore had to provide coverage. The Court of Appeal upheld the trial judge's conclusion. The analysis of the

²³ 2004 CanLII 43772 (ON CA), ("*Gore v. En Route Towing*")

trial judge and the Court of Appeal is interesting in that they do not conclude that the presence of a signature on the OPCF 28A would have given the document unchallengeable validity. To the contrary, both the trial judge and the Court of Appeal conclude that the entire OPCF 28A form itself is merely evidence of the agreement between the insured and the insurer. The analysis of both the trial judge and the Court of Appeal are, in my opinion, relevant to the issues in this case.

The trial judge stated as follows:²⁴

In my view the form itself does not create a legal precondition requiring signatures. The requirement that insurers only use the form approved by the Superintendent does not give the Superintendent authority to create any new obligations not otherwise authorized by law. The form itself is not set out in regulation. The approval of the form by the Superintendent ensures implementation of the legal requirements but also permits consistency and the reflection of sound policy and practical considerations. The fact that the form is written in plain language and requires the written acknowledgment of the insurer and the excluded driver are prudent policies that ensure the insured and excluded driver understand the serious impact of the exclusion. It also provides evidence of agreement and assists in preventing disputes such as have arisen in the instant case. There are good practical policy reasons why the endorsement should be acknowledged and signed by both the insured and the excluded driver.

In upholding the trial judge, the Court of Appeal stated as follows:²⁵

There must be an agreement between the insurer and insured that the contract of insurance be amended in order to exclude coverage for a driver who was otherwise driving with the consent of the insured since an exclusion changes the terms of the contract of insurance. We share the application judge's view that the best evidence of such an agreement is a properly executed OPCF 28A form but agreement can be proven by evidence other than a signed form... Indeed, both

²⁴ Arbitrator's emphasis

²⁵ Arbitrator's emphasis.

the respondent and the intervenor conceded at the oral hearing of this appeal that the signature of the insured was an evidentiary rather than a legal requirement.


In this case the Confirmation of Discussion memo completed by Mr. Panetta is merely one piece of evidence to be considered in deciding what the intentions of the insured, Ms. Hasan, were in amending her automobile coverage, and whether what ultimately was done properly reflected those intentions. In my opinion the memo, notwithstanding that it was signed by Ms. Hasan, does not properly reflect what was intended by her in amending her automobile policy coverage.

In my view the broker, Mr. Panetta, failed to meet the appropriate standard of care for advising the insured and in carrying out the insured's instructions in connection with the desired amendments to her automobile policy. The fact that he had the insured sign the memo after he had inserted the incorrect date for the reduced coverage to take effect does not, in my opinion, change the result. His negligence in both failing to properly advise the insured regarding coverage options, and in improperly carrying out the insured's instructions for the coverage reduction resulted in a situation where the SABS coverage under the Economical policy was removed sooner than it should have been. I conclude that had the broker properly fulfilled his duties, there still would have been SABS coverage on Ms. Hasan's policy with Economical on the date of the accident, July 29, 2009.

Conclusion

1. Economical is the priority insurer pursuant to section 268 of the *Insurance Act*.
2. Regulation 283/95, Section 9, states that unless otherwise ordered by the arbitrator, the costs of the arbitration for all parties, including the cost of the arbitrator, shall be paid by the unsuccessful party or parties to the arbitration. Should the parties wish to make submissions concerning costs I invite them to contact my Coordinator to schedule a post-arbitration conference to discuss arrangements for costs submissions.

Dated at Toronto, June 27, 2013.


Scott W. Densem
Scott W. Densem, Arbitrator