

**IN THE MATTER OF THE INSURANCE ACT,
R.S.O. 1990, c. I. 8, Section 268 AND
REGULATION 283/95 THEREUNDER**

**AND IN THE MATTER OF THE ARBITRATION ACT, S.O.
1991, c.17**

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant

- and -

PRIMUM INSURANCE COMPANY

Respondent

DECISION WITH RESPECT TO PRELIMINARY ISSUE

COUNSEL

Angelo G. Sciacca
Schultz Law Group LLP
Counsel for the Applicant, Economical Insurance Company
(hereinafter referred to as "Economical")

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TD Insurance Staff Legal
Counsel for the Respondent, Primum Insurance Company
(hereinafter referred to as "Primum")

ISSUE: 90-DAY NOTICE - MOTION TO DISMISS

[1] In the context of a priority dispute pursuant to s.268 of the *Insurance Act, R.S.O. 1990, c. I.8* the preliminary issue to be determined is whether the Applicant Economical is barred from proceeding with this dispute for having failed to properly put Primum on notice within 90 days following the receipt of a completed OCF-1 as required by S. 3(1) of *Disputes Between Insurers O. Reg. 283/95*. It is essentially a motion to dismiss brought by the Respondent

Primum. The determination requires consideration of the issue as to when the Applicant Economical received a “completed application” for the purposes of s. 3 of the *Regulation* and whether Economical is permitted to give notice after 90 days in accordance with the saving provision of s. 3(2) of the *Regulation*.

PROCEEDINGS

[2] The issue proceeded on the basis of Document Briefs, Books of Authority and written submissions.

APPLICABLE LEGISLATION

[3] The notice requirements for disputes between insurers set out in *O. Reg. 283/95* provide:

3. (1) 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 benefits to every insurer who it claims is required to pay under that section. *O. Reg. 283/95*, s. 3 (1).

(2) An insurer may give notice after the 90-day period if,

(a) 90 days was not a sufficient 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 the reasonable investigations necessary to determine if another insurer was liable within the 90-day period. *O. Reg. 283/95*, s. 3 (2).

FACTS

[4] The accident in question occurred on October 4, 2022. The 55 year old Claimant, James Hipolito Guzman, was a passenger in an Uber vehicle insured by the Applicant Economical and involved in a collision with another vehicle.

[5] The Claimant submitted an OCF-1, dated October 15, 2022, on October 21, 2022, to the Applicant Economical. The OCF-1 form indicated that the claimant resided at 2 Rothbury Road in Richmond Hill. The Claimant stated that he was single with no dependents and self-employed as a construction worker. He denied being covered under a spouses' policy. He denied being covered under a policy with respect to a company car. The Claimant denied that he was insured under any other motor vehicle policy.

[6] If the OCF-1 served on October 21, 2022 were to be considered a "completed application", the last day to meet the 90 day notice requirement would have been January 19, 2022.

[7] On November 2, 2022, the Claimant submitted an OCF-2 dated October 17, 2022. The Claimants address was again shown as 2 Rothbury Road, in Richmond Hill. The Claimant's self employed gross income was \$214,486.22. The OCF-2 was signed by the Claimant himself.

[8] On November 18, 2022, an OCF-3 dated November 11, 2022 was submitted to Economical. The document confirmed the Claimants previously noted address and his status as a self-employed individual at JJG Construction.

[9] On January 10, 2023, the Applicant conducted a priority EUO of the claimant Guzman. He claimed he was divorced with a daughter living in Portugal. He again stated that he resided at 2 Rothbury Road in Richmond Hill. He denied residing elsewhere at the time of the accident. He denied living with anyone. The Claimant admitted to being financially independent and to not having a drivers license. He further denied any regular use of a vehicle for personal or work purposes. He indicated that he was the owner and only employee of JJG Construction Design. Despite this, the corporate tax returns identified motor vehicle expenses with respect to insurance, gas and maintenance. He could not advise on motor vehicle expenses declared on his corporate tax return. He later admitted to renting a van and trailer through a friend, "Francis," from Home Depot.

[10] Economical retained an accounting firm, Davis Martindale, to assess the Claimant's self-employed income for the purpose of paying an income replacement benefit. In the report dated January 12, 2023, it was noted that Davis Martindale had been sent various documents including T1 General personal income tax return, T2 corporate income tax return, and TD business bank statements from January to December 2022. Contrary to the Claimant's EUO evidence that he was single as having been previously divorced, the T1 General indicated that

the Claimant was “separated”. The T2 corporate income tax return indicated that the corporation had tangible capital assets in the form of motor vehicles.

[11] The TD Business Bank Statements for January 1, 2022 to December 15, 2022 revealed that the corporation regularly paid for gas and insurance with TD and Gore Mutual, including in October 2022, the month of the accident. Economical was also in possession of the TD Business Bank statements for 2021 which showed a similar pattern.

[12] On January 17, 2023, a corporate search was conducted on the Claimants business.

[13] In early January 2023 and prior to the January 19, 2023 notice deadline, the Applicant also conducted surveillance of the Claimant by Northwood & Associates which revealed that the 2 Rothbury Road residence was vacant and undergoing renovations. Through inquiries, an associated address was determined to be 95 Pemberton Road in Richmond Hill. Surveillance at that address revealed a white GMC cube van bearing plate no. BE49001 found at such residence. This vehicle is registered to the Respondent's Insured, Carla Rabaza Vargas ("Ms. Vargas"). Ms. Vargas is insured with the Respondent Primum under policy no. 00132904251. Observations were made on January 17, 2023 at 6:52 am of a male individual placing garbage on the curb before departing in the aforesaid GMC cube van. This individual proceeded to pick up other males from another residence then stopping at a Tim Horton's. When the vehicle left Tim Horton's, the individual earlier observed at 95 Pemberton was a passenger. This information was forwarded by the investigator by email to Economical on January 17, 2023. Ultimately, the formal surveillance report of Northwood & Associates confirmed that the claimant owned both the 2 Rothbury Road and 95 Pemberton Road residences.

[14] On receipt of the surveillance information on January 17, 2023 Economical conducted an Autoplus search which was received on January 19, 2023 confirming that the vehicle shown in the surveillance was owned by Carla Rabaza and insured by the Respondent Primum. Furthermore, the address with respect to Carla Rabaza was the same 2 Rothbury Road address as the claimant Guzman.

[15] I am advised that the Applicant, on the basis of the aforesaid information, is taking the position in this priority dispute that the Claimant is the common law spouse of Ms. Vargas Rabaza and therefore an “insured” under the Primum policy. As well, I am advised that Economical is taking the position that the claimant is an “insured” under the Primum policy

by reason of his “regular use” of the vehicle owned by Ms. Vargas Rabaza in his business. The “spousal” and “regular use” issues are not to be determined in the present motion before me which is restricted to the preliminary issue as to whether the Applicant Economical has provided Primmum with notice of the priority dispute in a timely fashion in accordance with s. 3 of *O. Reg. 283/95*.

[16] On January 19, 2023, the Applicant served a Notice of Dispute on the Respondent Primmum via fax. However, Primmum claims that the timestamped fax sent at 4:01pm contained only the cover page of the priority package. They claim that the remaining 13 pages of the fax were not received. There were errors with the transmission noted. However, according to the Applicant’s facsimile confirmation, pages 1-2 out of 14 were successfully transmitted. This would include not only the fax cover sheet, but also a letter dated January 19, 2023, which had the following information:

- a. The name of the Claimant;
- b. The name of Primmum’s insured;
- c. The date of loss;
- d. Primmum’s policy number;
- e. Notice that Economical was disputed priority, and that it considered Primmum’s policy higher in priority to the Economical policy.

[17] The fax cover page data may have noted that 2 pages were sent, but also notes “receive failure”.

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04:01 PM 01/19/2023 Transmission Record
Send to: Primmum Insurance Company
Phone: 14167743120@172.18.0.110
Billing information: ", "
Remote ID:
Unique ID: "IEK63C96951BCC9"
Elapsed time: 1 minute, 49 seconds.
Used Channel 7 On Server "PMRK1INFX01"
No ANI data.
No AOC data.
Resulting status code(0/339, 4/24): Receive failure (Phase B)
Pages sent: 1 - 2
04:08 PM 01/19/2023 Transmission Record
Send to: Primmum Insurance Company
Phone: 14167743120@172.18.0.110
Billing information: ", "
Remote ID:
Unique ID: "IEK63C96951BCC9"
Elapsed time: 8 minutes, 37 seconds.
Used Channel 5 On Server "PMRK1INFX02"
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[18] The Respondent admits to receiving the following on January 19, 2023:

Message: Claim Information
Our Claim Number: 1822889
Date of Loss: 04-OCT-2022
Our Claimant Name: Hipolito Guzman
Claimant Address: 2 Rothbury Rd., Richmond Hill, ON, L4S 0A9
Claimant Phone number: (647)-896-8644
Adjuster: Brendan Hayes
Phone number: (519)-286-2592

Reason for/communication contains: Notice to Applicant of Dispute Between Insurers

Internal Use
Document Type : Priority - Dispute Between Insurers
Title : Letter to Primum w/ Notice of Dispute

[19] According to Primum’s Log Notes only 1/14 pages were received on January 19, 2023. Primum’s log note dated January 25, 2023:

Priority dispute received
Related To - none (Claim-level)
There was only one page out of 14 pages in the email

████████████████████
████████████████████

-Greg Plume (25/01/2023 08:14)

[20] A voicemail was left to the Applicant Economical on February 1, 2023 advising that only the coversheet was received and not the Notice of Dispute. A full package was requested.

[21] The complete 14-page priority package was received by Primum on Feb 6, 2023, at 11:53am from Economical, which included the completed OCF-1 form. The Respondent requested more information from the Applicant on numerous occasions:

- On February 13, 2023, the Respondent requested various information including a police report, auto plus, signed statement for priority and dependency, accident benefits file information, and any other evidence of a priority claim.
- On August 8, 2023, the Respondent requested a police report, auto plus, and signed statement for priority and dependency.
- On October 5, 2023, the Respondent requested a signed statement for priority and dependency.

[22] Economical claims that further surveillance of the claimant was conducted in the spring of 2023 showing the claimant operating the vehicle insured by Primmum and attending job sites in the vehicle.

[23] On December 13, 2023, the Applicant served their Demand for Arbitration.

ANALYSIS AND FINDINGS

[24] Section 3(1) of *O. Reg. 283/95* requires that an insurer must put any other insurer with whom priority may rest on notice within 90 days following receipt of a completed OCF-1. Since the Applicant received an OCF-1 on October 21, 2022, the deadline to put another insurer on notice would be January 19, 2023 provided that the OCF-1 contained sufficient information to be considered a “completed application”.

[25] The Respondent Primmum has claimed that there must be strict compliance with the 90 day notice requirement and that the Applicant Economical has failed to meet that requirement.

[26] In *State Farm Mutual Automobile Insurance Co. v. Ontario (MOF)*, [2001] OJ No. 1115, the Superior Court was asked to review two separate Arbitrator decisions to address the proper interpretation of s. 3 of *O. Reg. 283/95*. In Justice Nordheimer's decision regarding the first priority matter in dispute, *State Farm v. Her Majesty the Queen*, it was confirmed that the requirements of section 3(1) are not vague. It specifically identifies the 90-day notice period upon receipt of the OCF-1. Justice Nordeimer states:

“I do not see any reason why the parties here should not be held to strict compliance with the requirements of the Regulation. In both of these appeals, we are dealing with three large insurance companies and a branch of the Provincial Government. It goes without saying that these parties are sophisticated and experienced participants in the insurance industry. They have available to them all of the advisors of the highest quality that they could need in order to determine their rights and obligations under the prevailing statutory regime. There is, therefore, no unfairness visited upon them by insisting on strict compliance with the notice requirements... Further, in cases involving disputes between insurers, strict compliance promotes certainty for the parties in terms of their handling of claims. While it might redound to the detriment of State Farm in this case, it is just as likely that State Farm will be the beneficiary of the strict compliance in some other case.”

[27] In *Kingsway General v. West Wawanosh*, 2002 CanLii 14202 the Court of Appeal confirmed that the scheme in sections 2(1) and 3(1) require strict compliance with notice requirements, as insurance companies are deemed to represent sophisticated parties with the highest quality advisors, and stated the following on the context of the notice provisions of the regime:

“The Regulation sets out in precise and specific terms a scheme for resolving disputes between insurers. Insurers are entitled to assume and rely upon the requirement for compliance with those provisions. Insurers subject to this Regulation are sophisticated litigants who deal with these disputes on a daily basis. The scheme applies to a specific type of dispute involving a limited number of parties who find themselves regularly involved in disputes with each other. In this context, it seems to me that clarity and certainty of application are of primary concern. Insurers need to make appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records. Given this regulatory setting, there is little room for creative interpretations or for carving out judicial exceptions designed to deal with the equities of particular cases.”

[28] It is the Respondent's position that strict compliance, as explained in the jurisprudence above, was not met. The Respondent did not receive the complete application for benefits, as set referred to in s. 3(1) of *O. Reg. 283/95*, until after the 90-day limitation period had expired. The Respondent claims that it was in no in position to begin to adjust the priority claim until the complete package was received February 6, 2023, because there was not enough information in the first page of the cover sheet faxed over on January 19, 2023.

[29] Given that February 6, 2023, was 18 days outside of the 90-day limitation period, it is the Respondent Primmum's position that the Applicant should be barred from proceeding with this arbitration to dispute priority.

[30] In response, the Applicant Economical claims that 2 pages of its Notice of Dispute were received by Primmum on January 19, 2023 providing sufficient information for it to conduct its priority investigation. Such notice was therefore within 90 days of having received the claimant's alleged completed OCF-1.

[31] In the alternative, Economical claims that the OCF-1 that it received on October 21, 2022 cannot be considered a “completed application” for the purposes of s. 3 of *O. Reg. 283/95*. Economical claims that it is only a “completed application” for the purposes of s. 3 that triggers the 90-day time period for serving a Notice of Dispute. The OCF-1 did not contain information that would identify another insurer potentially in priority. Economical claims that it was not until January 17, 2023 and the receipt of the initial report from its investigator was

there sufficient information to identify another insurer and that the 90 day deadline should begin from that date. The investigation report indicated that the claimant may have a “spouse” who owned a motor vehicle of which the claimant may have had “regular use”. Accordingly, Economical had until April 17, 2023 to provide notice. Their Notices of Dispute dated January 19 and February 6, 2023 were therefore both delivered well within that timeframe.

[32] Economical also claims that it is protected by the savings provision with respect to notice contained in s. 3(2) of *O. Reg. 283/95*. Economical claims that given the alleged misinformation provided by the claimant, 90 days was not a sufficient period of time to make a determination that another insurer might stand in priority and that it made reasonable investigations within that 90-day period. The OCF-1 had indicated that the claimant was single, not living common law, and that he did not have regular use of a spouse’s vehicle or company car.

[33] I will firstly deal with the issue of the Notice of Dispute delivered on January 19, 2023. Primmum claims that only the cover page was received. Economical claims that 2 pages were transmitted before a transmission error was noted. This would include not only the fax cover sheet, but also the letter dated January 19, 2023, which had the following information:

- a. The name of the Claimant;
- b. The name of Primmum’s insured;
- c. The date of loss;
- d. Primmum’s policy number;
- e. Notice that Economical was disputed priority, and that it considered Primmum’s policy higher in priority.

[34] No expert evidence was provided explaining the transmission record and providing an opinion as to the number of pages that were received by Primmum and the information contained therein. There was no expert opinion provided as to whether the “receive error” noted on the fax cover sheet was the fault of Economical’s equipment, negligence in forwarding the transmission or fault of Primmum’s equipment. In the circumstances, I am unable to find on the evidence before me that Primmum had received more than one page or sufficient information to commence its priority investigation on the basis of that faxed to them on January 19, 2023. This finding is supported by the contents of Primmum’s log notes. The Primmum log notes confirm that a priority dispute was received but without reference to what it was related

to other than a first party accident benefits claim of Hipolito Guzman. There is no reference to the name of Primmum's insured or the Primmum policy number. The log note clearly indicates that a voicemail was left with Economical's adjuster indicating that only the fax coversheet and not the Notice of Dispute was received. The voicemail asked that the complete Notice of Dispute be forwarded. This was not done until February 6, 2023. Therefore, if the OCF-1 received by Economical can be considered a "completed application", then its Notice of Dispute received February 6, 2023 would be beyond the 90 days required by the *Regulation*.

[35] I will now deal with the "completed application" issue. The Regulation provides:

3. (1) 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 benefits to every insurer who it claims is required to pay under that section. O. Reg. 283/95, s. 3 (1).

[emphasis mine]

[36] It is clear from the wording of this section that it is the receipt of a "completed application" that triggers an insurers obligations to provide notice. Was the OCF-1 received on October 21, 2022 a "completed application"? The Ontario Court of Appeal decision in *Ontario (Finance) v. Pilot Insurance Company, 2012 ONCA 33 ("Pilot")* assists in answering the question. The court in *Pilot* stated at paragraphs 52-55 that a "completed application" may be different for the purposes of section 2 and 3 of the *Regulation*:

- a) To be functionally adequate for the purpose of section 2, an application must contain sufficient information to allow the insurer to assess and process the injured person's claim for benefits.
- b) To be functionally adequate for the purposes of section 3 – and thus trigger the 90-day period and insurer has to notify another insurer that it is disputing its obligation to pay benefits – an application must contain sufficient information to allow the first insurer to give notice of dispute to another insurer

[37] It is also clear from this decision that once a means is determined to identify an insurer that might stand in priority reasonable and timely steps must be taken to identify such insurer. In *Pilot (supra)* the claimant cyclist was struck by an unidentified motor vehicle. On receipt of the application for accident benefits it was learned that the driver of the vehicle had made a 911 call to the police which might identify the driver. 911 information can only be obtained by

a Freedom of Information request, and if denied, by a court order. The last denial from the Freedom of Information office was on January 17, 2008. A motion for a court order was brought on August 21, 2008. A court order was obtained September 4, 2008. The information obtained identified the driver of the vehicle. On October 10, 2008 Pilot was served with a Notice of Dispute. The Court of Appeal held that the Fund had sufficient information to give written notice to Pilot for the purposes of s. 3 when the 911 call information was obtained in September 2008. However, the Fund's delay in pursuing the call information meant that the Fund should be treated as if it had received the completed application in February 2008. When the Freedom of Information request was denied in January 2008, the Fund was obligated to continue to pursue the information using other means, yet it did not seek a court order for 7 months. It was found that it would be contrary to the legislative intent to allow the Fund to sit on an application without adequate investigation for months at a time. It was held that the Fund had not met the notice requirements of s. 3.

[38] The decision in *Pilot*, with respect to what constitutes a functionally adequate application for the purposes of s. 3, was recently followed by the Superior Court in *Unifund Assurance Co. v. Certas Home & Auto Insurance Co.*, 2023 ONSC 1377 ("*Unifund*"). The court in *Unifund* upheld the decision of Arbitrator Samworth in holding that the 90-day deadline did not commence until Unifund had sufficient information to place another insurer on notice. In that case the claimant was a passenger in a friend's vehicle when involved in a collision. She only knew the friend by his first name, "Sean," and had no contact information. An OCF-1 was delivered to her grandmother's insurer Unifund. The claimant claimed that she was financially dependent on her grandmother at the time of the accident, a fact disputed by Unifund. The OCF-1 did not provide information as to the owner or operator of the vehicle in which she was a passenger at the time of the accident. Within a month of receiving the OCF-1 Unifund completed an EUO of the claimant. Claimant's counsel undertook to obtain a police report which was provided to Unifund a few days later. The police report identified the owner and operator of the vehicle in which the claimant was a passenger as well as the insurer of the vehicle Certas. Certas was served with a Notice of Dispute more than 90 days following receipt of the OCF-1 but within 90 days of receiving the police report. The Arbitrator held that a "completed application" for the purposes of s. 3 requires sufficient information to put another insurer on notice. Arbitrator Samworth held that the 90-day notice period started when Unifund received the police report identifying the insurer of the vehicle in which the claimant was a passenger and that Unifund had taken reasonable and timely steps to obtain such report. On

appeal, Senta J. found the approach and findings of Arbitrator Samworth reasonable and the appeal of Certas was dismissed.

[39] I accept the law as set out in the *Pilot* and *Unifund* decisions that a “completed application” for the purposes of s. 3 requires sufficient information to identify another insurer that may stand in priority. The OCF-1 received on October 21, 2022 indicated that the claimant was single, as opposed to living common law, and specifically denied having insurance coverage through a company car or automobile owned by a spouse. There was simply no information contained in the OCF-1 to identify any other insurer that might stand in priority to Economical. On the facts before me, I am satisfied that Economical did not have sufficient information to identify Primmum, or any other insurer for that matter, as a potential priority insurer on the basis of the contents of the OCF-1. It was not until an accounting investigation to deal with the claimant’s income replacement benefit claim that revealed motor vehicle expenses claimed in the claimant’s business. The report is dated January 12, 2023. This led to an EUO of the claimant where the motor vehicle expenses found on the claimant’s tax returns could not be reasonably explained. This in turn led to an investigator being retained. It was not until it received the investigator’s initial report on January 17, 2023 identifying Ms. Vargas as a potential “spouse” of the claimant and the fact that the claimant may have had “regular use” of a vehicle that she owned being insured by Primmum. Economical’s Notice of Dispute served February 6, 2023 was within 90 days of what I find to have been receipt of a “completed application”, being the date Economical received the investigator’s report on January 17, 2023.. The pink slip issued by Primmum to Ms. Carla Rabaza showed the same 2 Rothbury Road address where the claimant claimed to be living at the time of the accident. The vehicle owned by her was observed at the address where the claimant was temporarily living while his house was being renovated in January 2023. I am therefore satisfied that the full Notice of Dispute received by Primmum on February 6, 2023 was within 90 days of first having received a “completed application”, which given the facts of this case was on January 17, 2023 date Economical received the surveillance report containing the information outlined above. It was the first time Economical had information in its possession that identified another insurer that may stand in priority.

[40] I will now deal with the issue as to whether Economical is also protected by the savings provision set out in s. 3(2) of O. Reg 283/95:

- (2) An insurer may give notice after the 90-day period if,
- (a) 90 days was not a sufficient 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 the reasonable investigations necessary to determine if another insurer was liable within the 90-day period. O. Reg. 283/95, s. 3 (2).

[41] How can Economical say that 90 days from receipt of the OCF-1 was not a sufficient time to make a determination that another insurer might stand in priority when Primmum was so identified and an attempt was made to fax the Notice of Dispute on the 90th day? The savings provision of s. 3(2) does not apply to the facts of this case. This case turns on whether Economical put Primmum on notice within 90 days of having received a “completed application for benefits”. As I have found, it was only receipt of the investigation report on January 17, 2023 that Economical had sufficient information to identify another insurer that might stand in priority. Economical then had 90 days from that date to provide Primmum with notice and it did. I find that Economical completed a reasonable and timely investigation once in receipt of the investigation report of January 17, 2023. It identified the owner and insurer of the vehicle parked in the driveway within 2 days and immediately attempted to fax a Notice of Dispute to Primmum.

[42] However, it must be kept in mind that if it is later found that Ms. Vargas was not a “spouse”, as defined in s. 224 the *Insurance Act*, of the claimant at the time of the accident, that the claimant did not meet the “regular use” requirements set out in Section 3(7)(f) of the *Statutory Accident Benefits Schedule* so as to be a deemed named insured and the Applicant Economical is unable to prove that the claimant was an “insured” under the Primmum policy, then the Respondent Primmum will be successful in this priority determination. Therefore, the priority dispute ought proceed on the merits and any award of costs ought be in the cause.

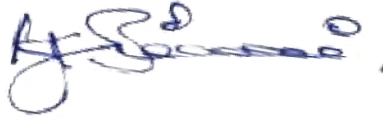
ORDER

[43] On the basis of my findings aforesaid, I hereby order that:

1. Primum's motion is dismissed with costs in the cause.

DATED at TORONTO this)

30th day of May , 2024.)



KENNETH J. BIALKOWSKI