

CITATION: Nordik Windows Inc. v. Aviva Insurance Co., 2023 ONSC 151
COURT FILE NO.: CV-20-643386-CP
DATE: 20240108

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

RE: NORDIK WINDOWS INC., CASH AND CARRY INC., HARGAR9 STUDIOS INC., and REAL FOOD FOR REAL KIDS INC., Plaintiffs

– and –

AVIVA INSURANCE COMPANY OF CANADA, Defendant

BEFORE: Justice E.M. Morgan

COUNSEL: *Stephen Birman, Rahool Agarwal, Michael Currie, and Cole Pizzo*, for the Plaintiffs

Daniel S. Murdoch, Sam Dukesz, and Lesley Mercer, for the Defendant

HEARD: January 5, 2024

CONTENT AND COSTS OF NOTICE

[1] This case conference was convened to discuss the Notice to go out to class members pursuant to section 17 of the *Class Proceedings Act, 1992*, SO 1992, c. 6 (“CPA”), advising them of the certification of the claim and of their right to opt out, etc.

[2] Both sides have submitted rather fulsome written briefs on the issues that are outstanding between them. I have now had an opportunity to review them in detail.

[3] Counsel for Aviva objects to the form of Notice proposed by class counsel on the following grounds:

- a. The content of the Draft Notice, and in particular the inclusion of provisions encouraging all class members to make insurance claims;
- b. The scope and timing for delivery of Class Member information by Aviva;
- c. The scope of the Notice Program, and in particular the provision of notice to brokers and on Aviva’s website; and

d. Which party is responsible for notice costs.

[4] There appears to have been some misunderstanding among counsel as to the timing of the notice issues proposed by class counsel. Now that these have been discussed at a case conference, some of the disparity in the two sides' positions has disappeared.

[5] The most contentious part of the proposed Notice, according to Aviva's counsel, is the portion containing an advisor that class members should not neglect to submit their insurance claims to Aviva. Counsel for Aviva submits that this paragraph amounts to inappropriate advocacy being inserted into what is supposed to be an objective Notice provision. The challenged paragraph reads:

Each Class Member is encouraged to submit a claim for coverage under their policy. This is important because the timeline for submitting a claim is in dispute and it will also help the parties evaluate the number of potential claims. The Plaintiffs therefore strongly encourage all Class Members to submit claims as soon as possible. This is a quick and easy process that will take no more than five minutes to complete. Simply go to the following website and fill out the information requested in the form to submit notice of your claim:

[6] As class counsel explain it, this advisory tracks Aviva's own position that insureds must submit claims before coverage can be considered. It has been Aviva's position all along that the commencement of a proposed class action did not itself amount to a claim submitted by each potential class member. In Aviva's view, any insured/class member must first and foremost submit a claim in the usual way.

[7] Having taken this position, I see no reason why it should not be conveyed to the class members. The class is composed of insured parties. It is not improper advocacy for their counsel to notify them of their insurer's position and to encourage them to adhere to it. As Justice Perell said in *Fantl v. Ivori*, 2018 ONSC 4443, at para. 12, the point of the Notice is to ensure that class members can "make informed decisions about their legal rights".

[8] I have already observed in my reasons for certification that Aviva's position presents as one that puts form over substance: *Nordik Windows Inc. v. Aviva Insurance Co.*, 2023 ONSC 1804, at para. 36. To impose this requirement, and then to object to the insured parties being notified of it, suggests that Aviva wishes to eliminate as many claims as possible. Whatever else one might say about that approach, it does not comply with the purpose of a notice under section 17 of the *CPA*.

[9] I therefore approve the form of Notice as submitted by class counsel.

[10] In terms of timing, counsel for Aviva advises that there are approximately 44,093 policies in place as of March 2020. It will require at least a month, and possibly a little more, to compile all of those names and mailing addresses. It apparently does not have telephone numbers or other contact information for the policyholders. Aviva shall have 6 weeks from the date hereof to compile the names and mailing addresses of the relevant policyholders and provide this information to class counsel.

[11] The mailing itself will take another 2 months. The class members will be given 30 days to opt out of the class action.

[12] Class counsel also seeks to have Aviva post the Notice on its own website. Aviva's counsel responds that this is superfluous given that the policyholders will be given direct notice, and it has the potential to reputationally harm Aviva. I would agree that it is unnecessary. In addition, "this may send the wrong message and may be viewed incorrectly as a concession or admission of wrongdoing... [T]his matter is going to be defended and will have to run its course": *Pederson v Saskatchewan (Minister of Social Services)*, 2018 SKCA 4, at para. 19.

[13] Aviva need not post the Notice on its website.

[14] There are apparently an additional large number of policyholders for whom Aviva does not have mailing address, but who bought their policies through insurance brokers and the brokers can be expected to have the addresses. Aviva shall provide class counsel with the names and addresses of the 705 brokers that it has identified as offering Aviva products.

[15] Class counsel may mail the Notice to these brokers, but should do so with a short cover letter explaining the purpose of the mailing. Unless the brokers read the Notice carefully, it might not otherwise be apparent to them why they are receiving it.

[16] The cover letter is to be phrased as a request to the broker to forward the Notice to any relevant policyholder. It is not to be described as, or suggested as having been part of, a court order. Class counsel is seeking the brokers' assistance, not demanding or compelling their service, and the cover letter is to reflect this understanding.

[17] Notification of a class of this size, all by regular mail, will be a laborious process. The Plaintiff requests that Epiq Class Action Services Canada Inc. ("Epiq") be appointed as Administrator for the purposes of disseminating the Notice of Certification to Class Members and receiving opt-out forms. That is a reasonable request and I have no hesitation in granting it.

[18] The need to send the Notice out by regular mail has made it a relatively expensive proposition. Aviva's counsel point out that it has generally been the practice for the Plaintiff and class to pay the expenses of notification: *Quinte v. Eastwood Mall Inc.*, 2014 ONSC 249, at para. 62. That said, the Court has broad discretion under the *CPA* with respect to the costs of notice, including apportioning the costs among the parties: *Heller v. Uber Technologies Inc.*, 2022 ONSC 1998, at para. 31.

[19] Class counsel does not say that it lacks the funds to pay for the Notice process, it seems unfair to impose this cost entirely on the class under the circumstances. Financial ability to handle the costs is not, however, the only consideration. Aviva implemented a blanket denial of coverage for these policyholders, and I have already found there to be some basis in fact supporting common issues regarding breach of the duty of good faith. Having paid premiums and received no coverage, it seems unfair to also impose on the class members the cost of being told that they may thereby have been wronged.

[20] I understand Aviva's concern that it will already be incurring the expense and effort of searching for and providing thousands of addresses to class counsel. In light of that considerable

undertaking, I am not inclined to impose on Aviva the entire cost of sending the Notice to class members. But some apportionment of the mailing and other costs of getting the Notice to the class members is appropriate here.

[21] The costs incurred in giving Notice to the class members and brokers as discussed above, including Equip's fees and disbursements for this process, are to be shared equally between the class and Aviva.

A handwritten signature in blue ink, appearing to read "Morgan J.", is centered within a light blue rectangular box.

Date: January 8, 2024

Morgan J.