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Bulletin

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Property & Casualty

- Auto

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Loss transfer: standardized forms and procedures

Loss transfer: standardized forms and procedures

Industry representatives, after observing the loss transfer process in operation, made several recommendations to the Commission. Upon reviewing the recommendations, it became apparent to the Commission that the loss transfer process could be significantly improved if insurers were provided with a clear understanding of how loss transfer is supposed to work.

This Bulletin provides, in a question-and-answer format, information about loss transfer and how the indemnification process is supposed to work. It also introduces two recently developed industry forms: (a) *Notification of Loss Transfer*, (b) *Request for Indemnification*

In order to inform the industry about the loss transfer process, I urge insurers to circulate this bulletin to persons responsible for administering loss transfer on a day-to-day basis.

What is Loss Transfer?

Loss Transfer permits insurers that pay accident benefits (the "first party insurer") to be indemnified by another insurer (the "second party insurer") for all or part of the accident benefits paid to an insured person, under certain

circumstances.

Loss transfer was introduced in order to balance the cost of providing accident benefits between specified classes of vehicles.

Loss transfer operates between insurers of classes of automobiles specified in the Regulation (see attached chart for summary) and applies only when the insured of the second party insurer was partly or entirely at fault in the accident.

Statutory authority for Loss Transfer is found in Section 275 of the *Insurance Act*, R.S.O. 1990, c.1.8, as amended, and section 9 of Regulation 664, Revised Regulations of Ontario, 1990.

It should be noted that there is **no right of subrogation** for accident benefits.

Why Loss Transfer?

Loss transfer was introduced in June, 1990, in order to address the cost implications of moving away from tort-based compensation and to a first party accident benefits provided on a no-fault basis.

Since June, 1990, insureds look to their own insurers for accident benefits instead of seeking compensation from third parties. Certain types of vehicles that might have been less likely to experience bodily injury claims under a tort-based compensation system are more likely to require accident benefits payments for such claims under a no-fault system. Loss Transfer balances the cost of providing compensation on a first party basis between these specified classes of vehicles. For example, loss transfer shifts costs from insurers insuring motorcycles to insurers of other classes of automobiles under certain circumstances. Loss transfer also shifts costs to insurers of heavy commercial vehicles from other classes of automobiles under certain circumstances.

When does loss transfer apply?

The situations where loss transfer will apply are set out below. Please see the summary chart (attached) for details.

A. Motorcycles

- The accident must involve an individual who is insured by a policy that insures a motorcycle.
- The accident must involve another class of vehicle (the other vehicle cannot be a motorcycle, motorized snow vehicle or off-road vehicle).

- The motorcycle must have been involved in the incident, unless the policy insures only motorcycles and motorized snow vehicles.
- Some degree of fault must be attributed to the other automobile, according to the *Fault Determination Rules* (Regulation 668, Revised Regulations of Ontario, 1990).
- The insurer of the motorcycle pays accident benefits to its insured.

B. Motorized Snow Vehicles

- The accident must involve an individual who is insured by a policy that insured a motorized snow vehicle.
- The accident must involve another class of vehicle (the other vehicle cannot be a motorcycle, motorized snow vehicle or off-road vehicle).
- The motorized snow vehicle must have been involved in the incident, unless the policy insures only motorcycles and motorized snow vehicles.
- Some degree of fault must be attributed to the other automobile, according to the *Fault Determination Rules*.
- The insurer of the motorized snow vehicle pays accident benefits to its insured.

C. Heavy Commercial Vehicles

- The accident must involve a heavy commercial vehicle and another class of vehicle.
- The person injured in the other vehicle must not be claiming accident benefits under a policy insuring a heavy commercial vehicle
- Some degree of fault must be assessed to the heavy commercial vehicle according to the *Fault Determination Rules*.
- The insurer of the other vehicle pays accident benefits to its insured.

Have recent amendments to the *Insurance Act* changed the availability of loss transfer?

Changes to the priority rules in section 268 of the *Act* now require persons who are named insureds under more than one insurance policy (also their spouses and dependants) and occupied one of their vehicles during the accident to apply to the insurer of that automobile for accident benefits. This might result in fewer claims made under motorcycle policies and might reduce the need to rely on loss transfer provisions.

When should a first party insurer notify a second party insurer?

The first party insurer should notify the second party insurer promptly. To date, we understand that loss transfer indemnification requests have been carried out in an ad hoc fashion. Industry representatives have recommended that the Commission develop a notification form that would be used by all first party insurers seeking to notify a second party insurer of a loss transfer situation. The Commission has developed a notification form in consultation with the industry. The *Notification of Loss Transfer* form is attached to this Bulletin.

What steps should insurers take to ensure smooth operation of the indemnification process?

Once the first party insurer notifies the second party insurer, the insurers should discuss how the loss transfer process should operate with respect to that claim. For example, the insurers should agree on the frequency of the indemnification requests (for example, requests for indemnification may be more frequent if an insured person is catastrophically injured), information to accompany the request, whether the second party is prepared to reimburse the first party insurer for specific claims control expenses, and timing of payments, payment terms, etc. If insurers engage in a regular dialogue, there is a greater likelihood that the loss transfer process will operate smoothly.

Industry representatives have recommended that the Commission develop a form that would be used by all insurers requesting indemnification. The form provides for the basic information that a second party insurer requires to indemnify a first party insurer. The Commission has developed an indemnification request form in consultation with the industry. The *Request for Indemnification* is attached to this Bulletin.

How are loss transfer indemnification payments to be treated by the second party insurer?

The second party insurer must treat the payment as a payment in respect of the accident benefits part of the policy of its insured. The Payment should also be recorded in this fashion for statistical purposes.

It is not correct for the second party insurer to record the payment as a payment in respect of the third party liability part of the policy because loss transfer payments are not a liability imposed by law upon the insured. Indemnification is a liability imposed by law upon the second party insurer.

Which statutory accident benefits may be the subject of a loss transfer indemnification request?

First party insurers are entitled to be reimbursed for all accident benefit payments made under the *Statutory Accident Benefits Schedule*, subject to the \$2,000 deductible discussed below. Now that the new *Schedule* is in effect, loss transfer is now available for the following kinds of benefits:

- the cost of any assessment conducted under the *Schedule*;
- the cost of services provided by a case manager related to the coordination of medical, rehabilitation and attendant care services; and
- all expenses covered by the *Schedule*

Is loss transfer available for interest payments and penalties assessed by an arbitrator?

Interest on overdue benefit payments and punitive awards are not benefits under the *Schedule*, they are sanctions imposed upon an insurer for failing to pay promptly. They are not subject to loss transfer. It would also be unfair to expect the second party insurer to reimburse the first party insurer for improper claims handling practices.

How does the \$2,000 deductible work?

Subsection 275(3) of the *Insurance Act* states that the first party insurer is not entitled to receive indemnification for the first \$2,000 of accident benefits paid. Indemnification is only available on the amount above \$2,000.

For example, the first party insurer requests indemnification from the second party insurer. The insured of the second party insurer is 75 per cent at fault according to the fault *determination rules*. The first party insurer has paid \$10,000 in accident benefits. The second party insurer will be liable for 75 per cent of the benefits paid in excess of \$2,000 $((\$10,000 - \$2,000) * .75 = \$6,000)$. Subsequent requests for indemnification will be for 75 per cent of any additional accident benefits paid by the first party insurer.

Should second party insurers have access to claim information?

The second party insurer should be entitled to receive a summary of accident benefits paid in respect of a request for indemnification as well as basic information about the condition of the person receiving accident benefits. The information furnished by the first party insurer should verify that amounts claimed by the first party insurer were amounts actually paid to its insured. The information contained in the *Request for Indemnification* form should be sufficient in most cases. It was not anticipated that the second party insurer would be entitled to receive a complete copy of the accident benefits file, detailed medical and other personal information about the insured person.

The second party insurer is not entitled to dispute the accident benefits payments made by the first party insurer to its insured. The second party insurer is entitled to dispute the reasonableness of a payment and that it should not

have to reimburse the first party insurer for that payment. The first party insurer is expected to act responsibly in administering an accident benefits claim where benefit payments will be substantially reimbursed by a second party insurer through loss transfer.

A second party insurer may be more willing to pay requests for indemnification if it is certain that the first party insurer is employing loss control measures. Second party insurers are not prohibited from reaching agreements with first party insurers on loss control measures and reimbursement for the cost of employing these measures. However, it is the responsibility of the first party insurer to ensure that benefits are paid correctly and promptly. The second party insurer should not be in a position to dictate claims handling decisions in respect of a claim where loss transfer applies.

When are payments by second party insurers due?

The legislation does not directly address when payments by second party insurers are due or the consequences of slow payment. It was expected that insurers would act in a business-like manner and pay each request for indemnification promptly.

A loss transfer arbitration award addressed the issue (Jevco Insurance Company and Royal Insurance Company). Although the arbitration award is not binding on other parties, it is persuasive. The arbitration decision recognized the power of an arbitrator to award interest in respect of an arbitration proceeding. The Arbitrator was of the opinion that interest begins to run in relation to loss transfer from the time that a request for indemnification is made.

How are disputes between insurers respecting loss transfer to be handled?

The *Insurance Act* provides that an insurer may refer a dispute respecting loss transfer to an arbitrator pursuant to the *Arbitration Act*.

Can a loss transfer arbitration be stayed?

The *Insurance Act* was amended to clarify when an arbitration could be stayed. An arbitration will be stayed where there is a dispute respecting accident benefits that is either at the mediation stage, arbitration stage (or arbitration appeal), or is before the courts. Once that matter is resolved, the loss transfer arbitration may proceed.

How can I get copies of the new loss transfer forms?

Forms in French or English are available on disk from the Commission by calling Sirak Sahle (416) 590-7058.

D. Blair Tully

Commissioner

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