

Transferring Losses



J. Claude Blouin
Founding Partner,
Blouin, Dunn LLP

*Special thanks to
Mona Gobran for her
contribution to the article.*

The rules around loss transfer appear to be straightforward enough, but court and arbitration decisions in Ontario have added a few new wrinkles to its application.

Loss transfer permits an insurer paying accident benefits to be indemnified by another insurer for all or part of the accident benefits paid to an insured person, under certain circumstances. Under the *Insurance Act*,¹ automobile insurers pay accident benefits to insured persons who are injured in motor vehicle accidents. In certain circumstances, the “first party insurer,”² the insurer responsible for the payment of the statutory accident benefits, is entitled to be indemnified by another insurer, known as the “second party insurer.”³ This entitlement to indemnification is known as a “loss transfer.”

Statutory authority for loss transfer is found in Section 275 of the *Insurance Act*⁴ and Section 9 of Regulation 664.⁵ Put simply, insurers of motorcycles and motorized snow vehicles can claim loss transfer from any other class of insurer involved in an accident (other than motorcycle, motorized snow vehicle or off-road vehicle) as long as some degree of fault is attributed to the other vehicle as determined by the *Fault Determination Rules*.⁶ Similarly, first party insurers of vehicles (other than heavy commercial vehicles) involved in accidents with heavy commercial vehicles can claim loss transfer from insurers of heavy commercial vehicles.

ENFORCEMENT OF LOSS TRANSFER

A request for loss transfer is usually preceded by a Notification of Loss Transfer from the first party insurer to the second party insurer. The second party insurer generally requests information

about the claimant. The second party insurer is not entitled to dispute the accident benefit payments made by the first party insurer to its insured. It is only entitled to dispute the reasonableness of a payment.⁷

There is no entitlement to indemnification for the first \$2,000 of benefits paid.

The second party insurer is generally entitled to receive sufficient medical records from the first party insurer to satisfy itself of the reasonableness of the payments made.⁸

If the second party insurer does not respond to the request or disputes its obligation to indemnify the first party insurer, the dispute must be resolved by arbitration pursuant to the *Arbitration Act*.⁹ The parties may either agree to arbitration or the court may order it to proceed. Typically, the parties draft their own arbitration agreement that provides for an appeal to the court on questions of law or questions of mixed fact and law.

SCOPE OF LOSS TRANSFER

In Ontario, Financial Services Commission of Ontario (FSCO) Director’s Bulletin No. 11/94 indicates loss transfer is available for the following kinds of benefits:

- the cost of any assessment conducted under the *Statutory Accident Benefits Schedule*;¹⁰
- the cost of services provided by a case manager related to the co-ordination of medical;
- rehabilitation and attendant care services; and
- all expenses covered by the *Schedule*.

Payments such as interest on overdue benefit payments, as well as punitive awards, are not benefits under the *Schedule*. Rather, they are sanctions imposed for the first party insurer’s failure to pay the benefits¹¹ and are therefore not subject to loss transfer. In addition to sanctions, it has been held that loss control efforts¹² — including administrative expenses and surveillance costs — are not subject to indemnification.¹³

The costs of Section 24 examinations have gen-

erally been found to be benefits. Therefore, they are subject to indemnification. However, the first party insurer's costs of Insurer Examinations (IEs) have generally been found to be loss control measures and therefore not reimbursable.

PRACTICAL MATTERS

While all of the above may seem straightforward, court and arbitration decisions over the years have added a few wrinkles into the process of loss transfer. Here are some things for insurers to think about when engaged in the process:


- There is a two-year limitation period for commencing a loss transfer arbitration. In fact, one Ontario court has found there is a "rolling limitation" period in loss transfer cases.¹⁴
- Disputes often arise about what constitutes a "heavy commercial vehicle." This is defined as a commercial vehicle with a gross vehicle weight greater than 4,500 kg. But the truth is, figuring out a vehicle's gross weight at the time of loss can be problematic.

- Lump sum settlements of statutory accident benefits claims are subject to loss transfer.
- A second party insurer reimbursing a first party insurer must record such payments as accident benefit payments and not liability payments.
- In Ontario, a fault chart governs the measure of indemnity, and therefore disputes arise as to the applicability of a particular rule from the fault chart. Liability is decided in accordance with ordinary rules of law if no particular rule applies. This often requires the arbitrator to conduct a mini-trial on the issue, which involves the *viva voce* evidence of the drivers and any witnesses to the accident.
 - 1 *Insurance Act, R.S.O. 1990, c. 1.8.*
 - 2 "*First Party Insurer*" means the insurer responsible under subsection 268 (2) of the Act for the payment of statutory accident benefits; R.R.O. 1990, Reg. 664, s. 9 (1).
 - 3 "*Second Party Insurer*" means an insurer required under section 275 of the Act to indemnify the First Party Insurer; R.R.O. 1990, Reg. 664, s. 9 (1); O. Reg. 780/93, ss. 1, 6.
 - 4 *Supra*, note 1.

- 5 *Insurance Act, R.R.O. 1990, Reg. 664.*
- 6 *Fault Determination Rules, R.R.O. 1990, Reg. 668.*
- 7 *Although the loss transfer provisions do not directly address when payments should be made or the consequence of delayed payment, it is generally expected that payments are to be made on an ongoing basis. Further, the Second Party Insurer may not withhold payment subsequent to the claim being closed.*
- 8 *State Farm and Citadel, February 21, 2006, Arbitrator Guy Jones, unreported.*
- 9 *Arbitration Act, 1991, S.O. 1991, c. 17. s. 10.*
- 10 *Statutory Accident Benefits Schedule – Accidents on or After November 1, 1996, R.R.O. 1990, Reg. 403/96, s. 24.*
- 11 *F.S.C.O. Bulletin: No. A-11/94.*
- 12 "*Loss control efforts*" have been defined as measures to limit the payment of benefits as opposed to benefits in and of themselves.
- 13 *Allstate Insurance Company of Canada and AXA Boreal Insurance Inc., May 7, 1999, Arbitrator Bruce R. Robinson, unreported.*
- 14 *State Farm Mutual Automobile Insurance Co. v. Dominion of Canada General Insurance Co., [2005] O.J. No. 5502.*

ADVERTISERS' INDEX

ACE INA Insurance	2
Assured Automotive	15
AVIS, Budget	39
CARSTAR Automotive Canada	21
Catlin Canada	17
Chubb Insurance	31
ClaimsPro - An SCM Company	61, 65
CNA Canada	37, 59
CSN Collision & Glass	33
Crawford & Company (Canada) Inc.	19
Cunningham Lindsey Canada	9
Economical Insurance	27
The Guarantee Company of North America	13
Great American Insurance Group	67
Impact Auto Auctions	25
Insurance Institute of Canada	5, 35, 52
Insurance Internet Directory	46
Intact Insurance	68 (OBC)
instouch.com	41
ORIMS	49
RIMS Canada Conference 2010 – Edmonton	43
RSA – Royal & Sun Alliance Insurance Company of Canada	7
The Ontario Broker magazine (IBAO)	55
Wawanesa Insurance	23
WICC	45, 51



Subscribe now to access

THE ONTARIO BROKER

The Ontario Broker magazine is a monthly 'priority-read' – receiving rave reviews from brokers across the province!

Broker Profiles – learn the interesting and unique stories that make-up our membership each month.

12 print issues packed with in-depth features and association's action plan on strategies, ideas and innovations.

Also includes special reports on hot topics such as auto reform and market environment.

Annual subscription rate is:
\$52 + gst

Order today:
TOB Subscriptions Department
TOB@ibao.on.ca