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Commercial Motor Vehicle Section:

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LOSS TRANSFER & WORKERS COMPENSATION



Robert A. Fitch

Under New York law, an employer who pays workers compensation benefits to an employee injured in a motor vehicle accident may be able to collect up to \$50,000 in benefits from the other party's no-fault carrier. This article will explain how this is done through the application of the loss-transfer provisions of the no-fault law.



Ryan M. Burns

As the trucking industry is now well aware, New York's no-fault scheme provides that each vehicle's own no-fault carrier is responsible for medical bills

and wage loss benefits up to \$50,000 per person (basic economic loss) due to injuries sustained in an accident, regardless of liability or fault. The insured driver and the no-fault carrier are barred from bringing suit for those payments. The only exception to this general rule is if one of the vehicles involved is over 6,500 pounds or a vehicle for hire. In that case, a no-fault carrier may recover payments it paid out from the at-fault party. This is called loss transfer and the payments may be recouped through binding arbitration.

It is important to note here that it is irrelevant which vehicle involved qualifies the incident for loss transfer. In a situation involving a truck over 6,500 pounds and a passenger car under 6,500 pounds, both no-fault insurers may claim loss transfer, alleging the other party was at fault for the accident. It should also be noted that loss transfer is not an all or nothing proposition. Just as in the court system, a no-fault arbitration can find parties comparatively negligent and apportion liability and award damages accordingly.

What may complicate this scheme is when one of the drivers involved in an accident is driving within the scope of his employment and the accident qualifies for loss transfer. In this situation, the workers compensation carrier for the driver's employer will become the primary insurer for the driver's medical bills and wage loss. Therefore, for the first \$50,000 in workers compensation benefits, the workers compensation carrier would be making payments ordinarily reserved to the no-fault carrier. These payments are called payments in lieu of first party benefits and

New York provides a mechanism for workers compensation carriers to take advantage of loss transfer. New York Insurance Law specifically provides that, “any compensation provider paying benefits in lieu of first party benefits which another insurer would otherwise be obligated to pay...has the right to recover the amount paid from the insurer of any other covered person to the extent that such other person would have been liable.” In other words, for the first \$50,000 in benefits paid, the workers compensation carrier becomes a no-fault carrier with regard to loss transfer.

It is also important to note that a loss transfer action, whether brought by a no-fault carrier or a workers compensation carrier, is subject to a three-year statute of limitations. This statute is measured from the date of the first payment of benefits and not from the date of loss.

Workers compensation carriers should be aware that the right to loss transfer is wholly separate from the compensation carrier’s lien on third party actions. If an employee driver involved in an accident suffers “serious injuries”, he may sue an at-fault party for personal injury in a third party action. However, if that employee is already receiving workers compensation, the compensation carrier has a lien on any award equal to the amount paid over \$50,000. The compensation carrier is prohibited from collecting the first \$50,000 in benefits paid because those may only be sought in a loss transfer proceeding and are specifically excluded from the plaintiff’s third party action. This

scheme prevents double recovery on the part of both the driver and compensation carrier.

In practice, this means that for motor vehicle cases involving employees who are not “seriously injured,” compensation carriers may only seek recovery of the benefits paid from the at-fault party’s no-fault carrier. However, if the employee is “seriously injured,” the compensation carrier can seek the first \$50,000 in benefits from the at-fault party’s no-fault carrier and collect the balance through a lien on the employee’s third party action. While procedurally somewhat more burdensome, this two track method of recovery does allow compensation carriers access to two separate insurance policies – the at-fault party’s no-fault policy and the at-fault party’s liability policy (through the lien on the third party action).

One final wrinkle presented when the compensation carrier acts as both compensation carrier and no-fault carrier is settlement. Specifically, if the parties involved want to settle an action, parties and carriers alike must be careful regarding the waiver of liens and rights. Settlement papers stating that the compensation carrier is “waiving the lien” or “waiving all liens” will only act to waive the compensation carrier’s lien on the proceeds of the third party action. This language will not extinguish a compensation carrier’s right to seek recovery through no fault loss-transfer for payments in lieu of first party benefits. To waive the right to loss transfer, a compensation carrier must explicitly waive the right in open court or ex-

PLICITLY waive the right in a stipulation that complies with the requirements of CPLR 2104.

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