SPECIAL CONSIDERATIONS FOR TRUCKS AND COMMERCIAL VEHICLES

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This paper will address several topics of importance to trucks and other commercial vehicles including loss transfer, coverage for uninsured/ unidentified and underinsured claims involving occupants of commercial vehicles and the obligation of trailer policies to respond to tort claims.

Loss Transfer:

Loss transfer is a mechanism by which, under certain circumstances, automobile insurers who pay accident benefits (the first-party insurer) may be indemnified by another insurer (the second-party insurer) for all or part of the claim. The purpose of loss transfer is to balance the cost of accident benefits between specified classes of vehicles. As such, loss transfer only operates between insurers of different classes of vehicles (see chart below for summary) and only applies when the policyholder of the second-party insurer is partially or entirely at fault in an accident (according to the *Fault Determination Rules*, Regulation 668, R.R.O 1990). Statutory authority for loss transfer is found in Section 275 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended and section 9 of Regulation 664, R.R.O. 1990.

Accident Benefits paid by the first party insurer under policy insuring the following classes of automobiles.	**Class of automobile insured by the second party insurer**
Any automobile *other than* a **heavy commercial vehicle**.	A **heavy commercial vehicle**
Motorcycle, or motorized snow vehicle.	Any automobile *other than* a motorcycle, off-road vehicle or motorized snow vehicle.

With respect to the first specified class of vehicle, the vehicle insured by the second party insurer must be both heavy and commercial. A "**commercial vehicle**" means, "an automobile used primarily to transport materials, goods, tools or equipment in connection with the insured's occupation and includes a police department vehicle, a fire department vehicle, a driver training vehicle, a vehicle designed specifically for construction or maintenance purposes, a vehicle rented for thirty days or less, or a trailer intended for use with a commercial vehicle" (Section 1, Regulation 664, R.R.O 1990). Passenger buses do not meet the definition of "commercial vehicle". A "**heavy commercial vehicle"** means "a commercial vehicle with a gross vehicle weight greater than 4,500 kilograms" (Section 9(1), Regulation 664, R.R.O 1990). Further, there is no obligation for the second party insurer to indemnify a first party insurer if the person receiving accident benefits from the first party insurer is claiming them under a policy insuring a heavy commercial vehicle.

The first party insurer is entitled to be reimbursed in proportion to the degree of fault of the vehicle driver covered by the second party insurer. However, no loss transfer is available for the first $2,000.00 of accident benefits paid out. All payments made under the *Statutory Accident Benefits Schedule*, subject to the $2,000.00 deductible are eligible to be reimbursed including the cost of any assessment conducted under the *Schedule*, 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.* 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.

The first party insurer should notify the second party insurer of a loss transfer claim promptly. The loss transfer provisions do not directly address when payments should be made or the consequence of delayed payment. However, it is generally expected that payments to the first party insurer should

be made on an ongoing basis and that the second party insurer is not entitled to withhold payment to the first party insurer until a claim is closed. A loss transfer arbitration award (*Jevco Insurance Company and Royal Insurance Company*) addressed the issue of timing of loss transfer payments. Although not binding on other parties, the arbitration decision recognized the power of the arbitrator to award interest on outstanding loss transfer payments, with interest beginning to accrue from the time a request for indemnification is made.

The second party insurer is 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 confirm that the amounts claimed were actually paid to or on behalf of its insured. The second party insurer is not generally entitled to receive a complete copy of the accident benefits file, detailed medical and/ or other personal information about the first party insured. Insurers can reach agreements with respect to 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 loss transfer provisions do not allow the second party insurer to intervene in the payment of benefits between the first party insurer and its insured. Any dispute over the responsibility of the second-party insurer to provide indemnity may be disputed with the first party insurer. Either insurer can refer such disputes to arbitration under the *Arbitrations Act* (Section 275(4)). A two year limitation period will apply and arbitration should be commenced by the first party insurer for any claim for indemnification within two years of any benefit paid (*State Farm Mutual Automobile Insurance Co. v. Dominion of Canada General Insurance Co.,(2006) 79 O.R. (3d) 78* and *York Fire & Casualty Insurance Co. v. Co-operators, (1999) 17 C.C.L.I. (3d) 16).*

A second party insurer who might otherwise be liable for loss transfer indemnity is not liable where the insured vehicle was driven by an excluded driver under the policy. However, where the insured vehicle was driven without consent (*Jevco Insurance Company v. Wawanesa Insurance Company (1998) 42 O.R. (3d) 276)*, there is no impact on the second party insurer's loss transfer obligations.

Coverage for Uninsured/ Unidentified and Underinsured Claims Involving Occupants of Commercial Vehicles:

In *Schneider v. Maahs Estate (2001), O.R.. (3d) 321 (C.A.),* Schneider, an OPP officer was injured in a car accident while she was on duty. She was parked on the shoulder of a highway, when the police cruiser she was driving was rear-ended by Maahs. Schneider claimed damages of $1,000,000.00, however the Maahs' vehicle only carried minimum limits of $200,000.00. Both Schneider's personal vehicle and the police cruiser she was driving had underinsured coverage under an OPCF 44 endorsement.

The question on appeal was which of the two policies must respond first: Schneider's private policy or the fleet policy. The OPCF 44 endorsement under each policy stipulated that, where an insured person is eligible under more than one policy, the policy covering the vehicle in which the insured was an occupant at the time of the accident is the first loss insurance with any other insurance being excess. It was not disputed that Schneider was an insured person and therefore an eligible claimant under the OPCF 44 endorsement in her private policy. What was disputed was whether Schneider was an insured person under the OPCF 44 endorsement in the fleet policy.

The relevant definition of "insured person" is contained in section 1.6(b)(i) of the OPCF 44 endorsement and provides as follows:

> (b) if the named insured is a corporation, an unincorporated association, partnership, sole proprietorship or other entity, any officer, employee or partner of the named insured for

> whose regular use the described automobile is provided and his or her spouse and any dependant relative of either, while
>
> > (i) an occupant of the described automobile, a newly acquired automobile or a temporary substitute automobile as defined in the Policy…

There was no dispute that the named insured under the fleet policy was Her Majesty the Queen in Right of the Province of Ontario and Schneider, as an OPP officer, was an employee of Her Majesty. Further it was agreed that the police cruiser Schneider occupied when she was injured was a "described automobile" under the fleet policy. Thus the narrow issue on appeal was whether the police cruiser was provided to Schneider for her regular use. The motions judge found that while Schneider "regularly" used a "described automobile" by virtue of her normal, habitual and long-standing use of an assigned cruiser for the duration of every working shift, in accordance with a predictable time and manner, the vehicle "was not provided for her use, since she had the vehicle for OPP business only".

However on appeal, the Court held that "regular use" did not require personal use or a personal component to regular use and therefore the fleet policy was held to be the first loss insurance. What is interesting about this case is that it did not matter that Schneider did not have a specific vehicle assigned to her and that it was sufficient that she drove one of the fleet vehicles on a regular basis.

The Obligation of Trailer Policies to Respond to Tort Claims:

In the past trailer policies were only obliged to respond to tort claims when there was a defect in the trailer. However, the law now appears to be in a state of flux. In *Amos v. Insurance Corp of British Columbia (1995) 10 B.C.L.R. (3d) 1*, the Supreme Court of Canada interpreted the meaning of the phrase "*arising out*" of the use, ownership or operation" in the context of deciding a question of

entitlement to accident benefits. In interpreting this phrase, the Supreme Court established a two-part test:

> (1) Did the accident result from the ordinary and well-known activities to which automobiles are put? (purpose test)
>
> (2) Is there some nexus or casual relationship (not necessarily a direct or proximate cause relationship) between the appellant's injuries and the ownership, use or operation of the vehicle, or is the connection between the injuries and the ownership, use or operation of the vehicle merely incidental or fortuitous? (causation test)

The effect of the *Amos* and subsequent cases applying the two part *Amos* test has been to weaken the causation test. A motor vehicle need not be the instrument of the injury to satisfy the casual connection requirement. Now where the use or operation of a motor vehicle contributes to or adds to the injury, there will be an entitlement to coverage. A 2003 Alberta Queen's bench decision (*Huack v. Dominion of Canada General Insurance Co., (2003), 6 C.C.L.I. (4th) 199),* has indicated that this means trailer policies will likely be obliged to respond to claims even where the trailer is not defective.

In this case, Huack cancelled third party liability coverage, accident benefit coverage and loss or damage coverage on his tractor during the winter months when his gravel hauling business was inactive. Huack resumes hauling operations in the spring with the mistaken belief that full coverage on the tractor had been reinstated. Huack was then involved in a motor vehicle accident while using the tractor to tow a trailer loaded with gravel. He turned directly into the path of a van which hit the right side of the tractor near the fuel tank causing a fire. The occupants of the van, the Boons, were

killed. On the date of the accident, Dominion of Canada General Insurance Co. ("Dominion") had valid coverage on the trailer and that policy afforded third party liability coverage. The policy provided that Dominion agreed to indemnify Huack against liability imposed by law upon Huack for the loss or damage arising from the ownership, use or operation of an automobile.

The Boons'estates brought an action against Huack for damages for negligence. Huack was noted in default and a consent partial judgment was signed awarding the Boons' estates $200,000.00 in damages. Huack then brought an action against Dominion, as the insurer of the trailer, for a declaration that it was required to indemnify him. The Court applied the two part *Amos* test literally and found that the accident arose out of the ownership, use or operation of the trailer. As the trailer was being used to haul gravel, the accident resulted from the ordinary and well-known activities to which the trailer was put. Therefore a nexus or casual relationship existed between Boons' deaths and the ownership, use and operation of the trailer. The connection between the deaths and the use or operation of the trailer was not merely incidental or fortuitous. The Court explicitly rejected the argument that the use of the phrase "arising out of" in the no fault accident benefits provisions indicates that "arising from" in the third party liability provisions was worthy of a more restrictive interpretation.

We do not believe this literally application of *Amos* is appropriate, however we note that the trial decision in *Huack* was upheld on appeal. This issue has not arisen in a reported Ontario decision.