Loss Transfer: Principles and Best Practices

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Publication Note

• This Presentation was done in 2010
The Origin of Loss Transfer

• Introduction of ‘no fault’ insurance caused shift in responsibility to handle accident benefits

• Recognition of inequity between insurers of different classes of vehicles based upon the potential for causing loss, and accident benefits paid
Spreading the Load

• Loss transfer created as a statutory scheme
• Reallocates losses between heavy loss causers and vulnerable loss sufferers
Principle #1

“The purpose of the legislation is to spread the load among insurers in a gross and somewhat arbitrary fashion, favouring expedition and economy over finite exactitude.”

_Jevco Insurance Co. v. York Fire & Casualty Co._
When Loss Transfer is Available

• Section 275(1) of the Insurance Act

• Insurer responsible to pay accident benefits entitled to indemnification of benefits paid, from the insurer of such classes of automobiles as named in the regulations, to the extent the second insurer’s driver is at fault for the accident
Naming Names

- Ontario Regulation 664
- Describes classes of insurers between which loss transfer is available:
  1. Insurer of motorcycle from insurer of any other class of vehicle
  2. Insurer of any other class of vehicle from insurer of heavy commercial vehicle
Best Practice #1

- Identify the classes of vehicles insured under the policy *that is issuing statutory accident benefits* to the injured third party
- *Always* request a copy of the declaration page
What’s in a Name

Heavy + Commercial + Vehicle
“Heavy”

- “Heavy” = gross vehicle weight of 4,500kg or more
- “Gross Vehicle Weight” = actual weight of vehicle, including its load, at a given time
- “Load” = cargo being hauled, fuel, driver, what driver ate for lunch, etc.
“Commercial”

• “Commercial” = used primarily to transport materials, goods, tools or equipment in connection with occupation
“Commercial”

Includes:
• Police Dept. vehicle
• Fire Dept. vehicle
• Driver training vehicle
• Construction or maintenance vehicles
• Vehicle rented for 30-days or less

Excludes:
• Ambulance
• Bus
• Funeral vehicle
• Limousine
• Taxi
Best Practice #2

• Identify the gross vehicle weight of the insured and third party vehicles at the time of the accident, including any cargo, passengers, fuel, etc.
• Identify the purpose of the vehicles
• Obtain bills of lading to assist in determining weight of cargo
Excluded Drivers

• A loss transfer claim is not available against an insurer whose vehicle was operated by an excluded driver at the time of the accident

*Jevco Insurance Co. v. Wawanesa Insurance Co.*
Unauthorized Drivers

• A loss transfer claim *is* available against an insurer whose vehicle was operated by an unauthorized driver at the time of the accident.


*Axa Insurance v. Jevco Insurance.* (Nov 5, 2001), Arbitrator B. Robinson
Best Practice #3

- Confirm whether or not the insured driver was excluded from the policy, generally by means of an OPCF 28 endorsement at the time of the accident.
Determination of Fault

• Loss transfer only available to the extent the second party insurer’s driver is at fault
• Fault determined in accordance with the Fault Determination Rules ("FDRs")
Principle #2

“The Fault Determination Rules set out a series of general types of accidents and allocate fault according to the type of a particular accident in a manner that in most cases, would probably, but not necessarily, correspond with actual fault”

Principle #3

“Fault is to be determined strictly in accordance with the Fault Determination Rules”


*Jevco Insurance Co. v. Canadian General Insurance Co.*

[1993] O.J. No. 1774
“Strictly In Accordance with the FDRs”

Principle #4

“The purpose of loss transfer and the FDRs is to provide for an expedient and summary method of reimbursement. The FDRs are to be liberally construed and applied.”

[1999] O.J. No. 2578

“Liberally Construed & Applied”

• “At an intersection” means “near an intersection” in Rule 14(2)

  Jevco Insurance Co. v. State Farm Insurance (July 25, 1995), Arbitrator Ayers

• A heavy commercial vehicle which loses its load into oncoming traffic has ‘crossed the centre line’, even though both tractor and trailer never leave own lane of travel

  Liberty Mutual Insurance Company v. A.I. Transport (May 26, 2004), Arbitrator Robinson
Ordinary Rules of Law

• Section 5(1) of the Fault Determination Rules

• If an incident is not described in any of the rules, degree of fault shall be determined in accordance with the ordinary rules of law.
Joint or Several?

• In the case of ‘ordinary rules of law’ liability is several and not joint

Best Practice #4

• If determining liability under ‘ordinary rules of law’, identify as many entities as possible that may bear some responsibility for the accident, even if not involved in the loss transfer dispute
Principle #5

“A common sense approach is to be used when considering the Fault Determination Rules and the diagrams in the regulation”

Royal & SunAlliance Insurance Co. v. Axa Insurance Co. (November 21, 2003), Arbitrator B. Robinson
Scope of Indemnification

• Generally speaking, ‘benefits paid to the insured person’ are recoverable by the first party insurer
• Lump sum settlements have been found to be ‘benefits’
• Benefit payments must have been reasonable
Not Subject to Indemnification

- Administrative expenses
- Loss control measures
- Insurer’s Examinations
- Overpayments
- Payments beyond the scope of the policy
Is it Subject to Indemnification?

- Designated Assessment Centre fees
- Interest
Best Practice #5

• Identify payments which are, or may be, items not recoverable under loss transfer
• Don’t assume what a payment is for – ask for clarification, further evidence, documentation or information
The Limitation Period

• What’s not in dispute:
  – Applicable limitation period governed by *Limitations Act*
  – As of January 1, 2004 = 2 years
  – ‘Rolling’ in nature
The Limitation Period

• What is in dispute:
  – When does the period start?
  – When does the period ‘roll’?
The Limitation Period

**Primum v. Lloyds**  
Arbitrator Robinson  
October, 2010

- Starts with each benefit payment
- Rolls with each benefit payment

**Federation v. Kingsway**  
Arbitrator Densem  
December, 2010

- Starts day after RFI delivered to insurer
- Rolls with each subsequent RFI presented
Best Practice #6... for now

• For benefit payments made on or after January 1, 2004:
  – Deduct sum of benefit payments made more than 2 years prior to the date Notice of Arbitration received from indemnification owed

• For benefit payments prior to January 1, 2004:
  – Deduct sum of benefit payments made more than 6 years prior to the date Notice of Arbitration received from indemnification owed
What to do about WSIAT?

- Loss transfer applies until first party insurer relieved of duty to pay
- Pending WSIAT determination *does not* relieve duty to pay
- Loss transfer disputes will not be stayed until a WSIAT determination made
What to do about WSIAT?

- Lack of an executed Assignment of Workplace, Safety and Insurance Benefits may delay duty to pay loss transfer
- May be raised as a quantum issue
Best Practice #7

• Conduct an investigation & assess if first party claimant barred from receiving benefits due to WSIB entitlement

• Advise the first party insurer of your concerns as soon as possible

• Request a copy of the executed and approved Assignment as soon as possible
Priority in Loss Transfer

• Situations involving rental vehicles, potential for coverage on driver and on vehicle

• Which insurer is liable for loss transfer?
Priority in Loss Transfer

- Overall focus of loss transfer is fault of drivers
- Bill 18 also states coverage follows the driver, rather than the vehicle
- Heavy and/or commercial exclusions in s. 2.2.4 of the OAP1 policy result in Bill 18 priority of coverage amendments being nullified
Thank You

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