

## Loss Transfer and the Effect of Side Agreements

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In *St. Paul Fire & Marine Insurance Company v. Intact Insurance* (2014 ONSC 6039), a Mississauga transit bus collided with a heavy commercial vehicle insured by Intact. The bus was insured by St. Paul and accident benefits were paid to the injured claimants. In turn, St. Paul sought indemnification from Intact pursuant to the loss transfer provisions in the *Insurance Act* and Ontario Regulation 664.

The parties agreed that the Intact insured vehicle was 100% at fault for the accident. However, what should have been a relatively straightforward loss transfer matter was complicated by the fact that the City paid benefits to the claimants pursuant to a side agreement with St. Paul. As such, the central issue before the arbitrator was whether the City's insurer, St. Paul, could seek loss transfer from Intact for benefits that were actually paid for by the City.

The Arbitrator found that Intact was not obligated to indemnify St. Paul as St. Paul had not paid SABs to the claimants and, therefore, had sustained no loss requiring indemnification from Intact. As such, the arbitrator held that St. Paul had not satisfied the requirements to advance a loss transfer claim pursuant to s.275 (1) of the *Insurance Act*.

The question is what would happen in a reverse scenario wherein Intact paid accident benefits and then sought indemnification from St. Paul, which insured the City's heavy commercial vehicle?

This was precisely the case in the recently released decisions of *Certas Direct Insurance v. ACE INA and City of Toronto* (CV-17-568519, unreported, dated February 14, 2018) and *Wawanesa Mutual Insurance v. ACE INA Insurance* (CV-17-00-5677838, unreported, dated February 14, 2018).

In those cases, a heavy commercial vehicle owned by the City and insured by ACE INA was involved in an accident with vehicles insured by Wawanesa/Certas Direct. Wawanesa and Certas paid accident benefits to their insureds and then claimed loss transfer indemnification from ACE INA for the amounts paid.

ACE INA denied loss transfer in both cases on the grounds that there was “Deductible and Claims Handling Side Agreement”, which provided for a \$5 million deductible for claims under its insurance policy with the City. ACE INA argued that the Side Agreement essentially deflected the claims for loss transfer. Nevertheless, in both cases, the arbitrators held that loss transfer applied in accordance with the legislative provisions despite the Side Agreement.

On appeal, Justice Monahan outlined that counsel for the City/ACE INA conceded that all of the preconditions to pursue loss transfer were met (*Wawanesa /Certas* were first party insurers; ACE INA was a second party insurer and *Wawanesa/Certas* paid SABs under policies that did not also insure heavy commercial vehicles).

Nevertheless, counsel argued that applying loss transfer to this case would be unfair, since ACE INA would not be permitted to seek loss transfer from a second party insurer if the City paid benefits directly, which is what occurred in *St. Paul v. Intact*. In effect, ACE INA argued that since ACE INA/the City cannot recover in loss transfer for benefits paid by the City directly, then ACE INA/the City should not be subject to loss transfer when a side agreement is in place.

In his decision, Justice Monahan ultimately held that the problem with ACE INA and the City's argument is that it is "inconsistent with the plain and obvious meaning of the legislative scheme."

Further, he highlighted that any restrictions on a first party insurer's ability to recover in loss transfer solely based on a second party insurer's Side Agreement is "manifestly unfair". He stated that the loss transfer provisions apply as between insurers and not insureds, and it falls to the parties of the Side Agreement to address any unfairness through their contract rather than through loss transfer.

This is a well-reasoned decision with a unique fact scenario. We understand that this decision is not being appealed (and would seemingly be upheld in any event, in the opinion of this writer) so it is important for insurer's and self-insured entities to understand the implications of Side Agreements.

In particular, a Side Agreement similar to that in these cases would preclude the insurer/self-insured entity from seeking loss transfer (due to no SABs being directly paid by the insurer) but would allow for loss transfer indemnification to be sought by a first party insurer.