

February 27, 1976

SUBJECT: INSURANCE

CIRCULAR LETTER NO. 5 (1976)

TO: ALL SELF-INSURERS AND ALL INSURERS WRITING AUTOMOBILE INSURANCE IN THIS STATE *

* wherever used, insurer also refers to self-insurer.

RE: 1) SETTLEMENTS BETWEEN INSURERS UNDER INSURANCE LAW, SECTION 674 - "INTER-COMPANY LOSS TRANSFER."

2) EXTENT OF INSURERS' LIEN ON TORT RECOVERIES WHICH INCLUDE ELEMENTS OF BASIC ECONOMIC LOSS, INSURANCE LAW, SECTION 673(2).

It has come to our attention that some insurers and self-insurers are misinterpreting their obligations and rights with regard to the captioned subjects.

(1) Section 674 (settlements between insurers) recognizes that an insurer which is liable to pay first party benefits to a covered person has the right to recover the amount of those benefits from the insurer of any other covered person to the extent that such other covered person would have been liable, prior to enactment of the No-Fault Law, to pay damages in an action at law.

The obligation of an insurer under Section 674 to reimburse another insurer for payments of first party benefits is not limited by the underlying limits of the at-fault owner's liability coverage. Moreover, Section 674(3) recognizes that the obligation of an insurer to reimburse another insurer pursuant to Section 674(1) does not affect or diminish the at-fault insurer's obligation under its policy of bodily injury liability insurance.

Inter-company loss transfer is tied to the legal obligation of a covered person, generally the owner, to maintain basic economic loss protection for himself, occupants and pedestrians injured through use or operation of the motor vehicle. Section 674 provides that the obligation of the insurer of the at-fault party to settle with the insurer of the not-at-fault party is as broad as the primary obligation of the not-at-fault insurer to pay first party benefits. The obligation of the at-fault insurer to reimburse the not-at-fault insurer is not tied to the limits of the liability coverage of the at-fault party but to the liability for payment of elements of basic economic loss which the covered person would have been exposed to prior to the enactment of the no-fault law.

Under a 10/20/5 liability policy the insurer's potential exposure for personal injury liability is \$ 10,000 per person up to a maximum amount of \$ 20,000 for each accident. Its insured's potential liability, however, is unlimited. But for the provisions of the no-fault law, an insured defendant would be liable to pay as part of a judgment against him in a law suit any amounts paid out as no-fault, benefits. The no-fault law recognizes this latter fact and places the ultimate responsibility for the payment of no-fault first party benefits (" \$ 50,000 per person") on the insurer of the at-fault party.

ILLUSTRATIONS: Assume there is a two car collision involving car A, insured by Company A and car B, Car A has 10/20/5 liability coverage and mandatory personal injury protection (\$ 50,000 per individual). Car B has identical coverages. Each car has four occupants including a driver. The driver owner of car A is totally at fault in this accident.

The driver of car B and the passengers of car A and car B are not at fault. Under these facts, Company A is faced with a maximum potential loss of \$ 425,000 calculated as follows:

1) Claims for first party benefits from the passengers and driver in car A	4 at \$ 50,000 = \$ 200,000
2) Section 674 claims from Company B for the driver and passengers in car B, (the not-at-fault vehicle)	4 at \$ 50,000 = \$ 200,000
3) Personal injury liability exposure	\$ 20,000
4) Property damage liability exposure	\$ 5,000
 Insurer A's Total potential loss	 \$ 425,000

The doctrine of comparative negligence enacted by L. 1975, ch. 69, adding Article 14-A to the New York Civil Practice Law and Rules and amending Section 5-4.2 of the Estates, Powers and Trust Law must be utilized where both insureds are at fault to varying degrees.

The exposure of car A's insurer is not increased if car B is also covered by Additional Personal Injury Protection (Additional PIP). In the foregoing example, any amount of Additional PIP paid by the insurer of car B may be recouped by the insurer of car B, under the terms of the Additional Personal Injury Protection Endorsement, by subrogation to the rights of the person to whom or for whose benefit such payments were paid. If both cars were covered by Additional PIP each insurer would have subrogation rights to the extent of its payments of the Additional PIP.

(2) Insurance Law, Section 673(2) provides that "In any action by or on behalf of a covered person, against a non-covered person, where damages for personal injuries arising out of the use or operation of a motor vehicle in this state may be recovered, an insurer which paid or is liable for first party benefits on account of such injuries shall have a lien against any recovery to the extent of benefits paid or payable by it to the covered person." (emphasis added) Some insurers have sought to recover no-fault payments by imposing liens on recoveries in actions by covered persons v. covered persons. The No-Fault Law does not recognize or authorize such liens. The purpose of the lien is to avoid duplication of benefits. Section 673(1) prohibits the recovery of basic economic loss in an action by a covered person against another covered person. Since there is no possibility of recovering elements of basic economic loss in a suit between covered persons there is no duplication and hence no lien. The insurer's remedy is inter-company loss transfer.

Insurers who do not comply with the foregoing procedures shall be subject to disciplinary action by this Department.

All personnel responsible for the payment of claims should be furnished with a copy of this notice and receipt of this notice shall be acknowledged forthwith and in writing by a responsible officer of the insurer or self-insurer. Acknowledgments should be sent to John Reiersen, Associate Examiner, Automobile and Compensation Bureau, New York State Insurance Department, 2 World Trade Center, New York, New York 10047.

Very truly yours,

[SIGNATURE]

THOMAS A. HARNETT

Superintendent of Insurance