



**STATE OF NEW YORK
INSURANCE DEPARTMENT**
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George E. Pataki
Governor

Howard Mills
Acting Superintendent

The Office of General Counsel issued the following opinion on March 23, 2005, representing the position of the New York State Insurance Department.

Re: No-Fault Inter-Company Loss Transfer Claims - Statutory Offsets

Question Presented:

When a Workers' Compensation insurer pays medical and lost wage benefits in excess of \$50,000 to an employee injured in a motor vehicle accident, and the insurer is entitled to recovery through loss-transfer reimbursement from the employee's No-Fault insurer, which otherwise would have been liable for payment pursuant to Section 5105(a) of the Insurance Law, is the No-Fault insurer entitled to deduct statutory lost earning offsets from the reimbursement of basic economic loss No-Fault benefits when making loss transfer reimbursement payment to the Workers' Compensation insurer?

Conclusion:

Yes. Pursuant to N.Y. Ins. Law § 5105(a) (McKinney 2000), the No-Fault insurer is obligated to pay loss-transfer benefits to the Workers' Compensation insurer in the amount that the No-Fault insurer would otherwise be liable to pay if it had been the primary insurer, which would include the deduction of statutory offsets from the \$50,000 maximum for basic economic loss.

Facts:

An employee is injured in a motor vehicle accident while in the course of his employment and subsequently receives over \$50,000 in benefits from a Workers' Compensation insurer, in lieu of the payment of No-Fault first party benefits. The other vehicle involved in the accident was 100% at fault (i.e. the tortfeasor vehicle). The Workers' Compensation carrier asserted a statutory inter-company loss transfer claim for \$50,000 in reimbursement from the No-Fault insurer of the tortfeasor vehicle. We assume herein that one of the vehicles involved in the accident is either a vehicle for hire or weighs in excess of 6,500 lbs. unloaded, which invokes the right to No-Fault loss transfer. The No-Fault insurer, invoking the statutory 20% offset for lost wages that it would have been required to pay if it had to process the claim, calculated that the \$50,000 loss transfer claim presented by the Workers' Compensation insurer should be reduced by the statutory 20% offset, thereby bringing the loss transfer amount owed to less than \$50,000.

Analysis:

N.Y. Ins. Law § 5103(a) (McKinney 2000) requires that all motor vehicle liability policies issued in New York must provide for the payment of No-Fault first party benefits. New York Insurance Law § 5102 (McKinney 2000) provides, in pertinent part:

(a) "Basic economic loss" means, up to fifty thousand dollars per person of the following combined items

(1) All necessary expenses incurred for: (i) medical, hospital . . . surgical, nursing, dental, ambulance, x-ray, prescription drug and prosthetic services

(2) Loss of earnings from work which the person would have performed had he not been injured, and reasonable and necessary expenses incurred by such person in obtaining services in lieu of those that he would have performed for income, up to two thousand dollars per month for not more than three years from the date of the accident causing the injury. . . .

(3) All other reasonable and necessary expenses incurred, up to twenty-five dollars per day for not more than one year from the date of the accident causing the injury.

. . . .

(b) "First party benefits" means payments to reimburse a person for basic economic loss on account of personal injury arising out of the use or operation of a motor vehicle, less:

(1) Twenty percent of lost earnings computed pursuant to paragraph two of subsection (a) of this section.

(2) Amounts recovered or recoverable on account of such injury under state or federal laws providing . . . workers' compensation benefits

(3) Amounts deductible under the applicable insurance policy.

N.Y. Ins. Law § 5105(a) authorizes inter-company loss transfer between insurers (including No-Fault and Workers' Compensation insurers) of vehicles involved in a motor vehicle accident when at least one of the vehicles involved is either a vehicle weighing in excess of 6,500 lbs. unloaded or a vehicle used principally for the transportation of persons or property for hire. The provision states that "a) Any insurer liable for the payment of first party benefits to or on behalf of a covered person and any compensation provider paying benefits in lieu of first party benefits which another insurer would otherwise be obligated to pay pursuant to subsection (a) of section five thousand one hundred three of this article or section five thousand two hundred twenty-one of this chapter has the right to recover the amount paid from the insurer of any other covered person to the extent that such other covered person would have been liable . . . to pay damages in an action at law." (emphasis added).

With respect to the factual circumstances presented herein, it is necessary to determine what the No-Fault insurer of the tortfeasor vehicle would have been liable to pay, if it were responsible for the payment of basic economic loss (\$50,000) in first party benefits. Since the Workers' Compensation insurer paid in excess of \$50,000 in reimbursement for medical services and lost wages (in lieu of the payment of No-Fault first party benefits) it is asserting that it is due the full amount of basic economic loss (\$50,000) through its loss transfer claim. The No-Fault insurer asserts that the \$50,000 in basic economic loss owed should be reduced by the statutory offset for the payment of lost earnings under No-Fault, so that the amount owed to the Workers' Compensation insurer would be less than \$50,000 in basic economic loss.

Pursuant to Section 5102(a), when computing lost earnings benefits, the amount reimbursable will be reduced by 20% (subject to a ceiling of \$2,000 per month). The No-Fault insurer is liable up to \$50,000 in basic economic loss which includes payment for health services rendered and lost earnings. The question of calculating the effect of the application of statutory offsets on the \$50,000 maximum for basic economic loss, was addressed by the Court of Appeals in affirming the holding in Normile v. Allstate Ins. Company, 87 App. Div. 2d 72, 448 N.Y.S. 2d 907 (3d Dept. 1982), affd. 60 N.Y. 2d 1003, (Ct. of App. 1983). In this case, the court addressed the application of statutory offsets to reimbursement for No-Fault basic economic loss, after the eligible injured person had incurred expenses for medical services and lost earnings in an amount in excess of \$50,000. The question posed by the court was whether the statutory offsets should be deducted from basic economic loss of up to the amount of \$50,000 or from the actual economic loss, which was in excess of \$50,000. The court held that it was the intent of the Legislature to create a statutory plan in which an injured person is entitled to receive first party benefits equal to basic economic loss up to \$50,000 less the statutory deductions, which intent was evidenced by the statutory language placing the \$50,000 limitation in the definition of basic economic loss. Therefore, in this type of situation, reimbursement benefits would be less than \$50,000 after the deductions. 448 N.Y.S. 2d at 908.

Applying this analysis to the statutory 20% offset for lost earnings under the facts presented, the amount of benefits that the No-Fault insurer would be liable to pay would be the \$50,000 aggregate limit less the 20% offset. This would reduce the amount of benefits that the No-Fault insurer must pay to less than \$50,000. Therefore, though the amount that the No-Fault insurer would be liable to pay is less than \$50,000, it is the proper amount that the Workers' Compensation carrier should recover based upon the loss transfer provisions established under Section 5105.

For further information please contact Supervising Attorney Lawrence M. Fuchsberg at the New York City Office.