

New York No-Fault Obligations for Long Distance Truckers Emanating from Canada.

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The question of responsibility of a Canadian insurance company under New York's statutory no-fault law (medical expense and economic loss) is one that has been the subject of considerable litigation in New York.

In addition to the responsibility of the carrier to pay benefits directly, questions arise as to the Canadian carrier's position vis-à-vis a New York State Insurance Company's right to recoup benefits paid to its insured/claimant.

Article 51 of the New York Insurance Law, officially titled the Comprehensive Motor Vehicle Insurance Reparations Act, is New York's no-fault law. The New York no-fault law was adopted by the legislature to overcome certain deficiencies that were recognized to exist under the common law tort system of compensating automobile accident victims. *Montgomery v. Daniels*, 38 N.Y.2d 41, 378 NYS2d 1 (1975).

The tort system was perceived to be unnecessarily expensive and inefficient, and in addition was believed to place an inordinate burden on the State's court system. The no-fault system, *inter alia*, attempted to limit access to the courts by providing for "first-party benefits" to compensate an injured party for basic economic loss (consisting of medical benefits, loss of earnings and other reasonable and necessary expenses up to \$50,000 per person), regardless of fault, while at the same time restricting the right to recover for noneconomic loss, i.e., pain and suffering. See *Vidra v Shoman*, 59 AD2d 714, 398 N.Y.S.2d 377 (2nd Dept., 1977). Simply put, the no-fault law is a two-pronged system with one prong dealing with compensation and the other with limitation of tort actions. *Patrello v. United States Of America*, 757 F. Supp. 216 (S.D.N.Y. 1991). To this end, §5103 requires insurers to compensate accident victims for their basic economic loss, while §5104 imposes limitations on tort recovery for personal injuries in actions between "covered" persons.

Section 5104(a) provides in pertinent part: "Notwithstanding any other law, in any action by or on behalf of a *covered person* against another *covered person* for personal injuries arising out of negligence in the use or operation of a motor vehicle *in this state*, there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss."¹ In light of §5104(a), if the plaintiff and defendant were *covered persons*, then the plaintiff's right to recover damages for basic economic loss would be unconditionally barred by the law and the right to recover for noneconomic loss would be conditionally barred (i.e., the plaintiff must first prove that she suffered a "serious injury" as defined by the statute in order to recover).

§5102(d) defines "serious injury" as a prerequisite to any claim for non economic loss (pain and suffering). This is important since the definition of serious injury is one that is the subject of extensive motion practice, and is very often a question of law decided by the court as opposed to a question of fact to be decided by a jury.

Complications arise when either plaintiff or defendant is considered a non-covered person under §5104. Other than an *insurer's* right to recover first party benefits paid, §5104 is silent on the issue of actions between covered and non-covered persons.² While one can simply infer that §5104 is

¹ "Serious injury" is defined in §5102(d).

² Section 5104(b) deals with an insurer's right to recover benefits paid to a covered person against a non-covered person. It provides in pertinent part: "In any action by or on behalf of a covered person, against a non-covered person, where

inapplicable if either plaintiff or defendant is not a covered person, and therefore plaintiff need not prove “serious injury” in order to recover for pain and suffering, the lower courts have differed on this issue, and there is limited appellate review. See *Scarpelli v. Marshall*, 92 Misc. 2d 244, 399 N.Y.S.2d 1001 (Sup. Ct., Nassau Co., 1977); *Stark v. Miller*, 95 Misc. 2d 643, 408 N.Y.S.2d 274 (Civil, Kings, 1978).

Recent cases have held that if the provisions of the no-fault law, which would entitle plaintiff to first-party benefits are inoperative, i.e., that the plaintiff is a “non-covered person,” then it would be improper to bar plaintiff’s common law tort action by the restrictions applicable to covered persons set forth in §5104. (See, *Cooper v. United States of America*, 635 F.Supp. 1169 (S.D.N.Y., 1986); *Patrello v. United States of America*, 757 F.Supp. 216 (S.D.N.Y. 1991). Therefore, it would be prudent to conclude that where a *plaintiff* is foreclosed from receiving first-party benefits, he may bring a common law action in tort and need not meet the “serious injury” threshold. If, however, a plaintiff is allowed to participate in the no-fault law’s compensation scheme, then he must be required to meet the “serious injury” threshold.

In order to determine whether a Canadian insurer needs to comply with New York’s no-fault law, we must first determine whether the owner and operator of the Canadian vehicle is a *covered person* under the statute? Pursuant to §5102(j) a “covered person”, is any owner, operator or occupant of a motor vehicle which has in effect the financial security required by Vehicle and Traffic Law (“VTL”) article 6. Proof of financial security is defined as “proof of ability to respond in damages for liability arising out of ownership, maintenance or use of a motor vehicle as evidenced by an owner’s policy of liability insurance.” VTL, §311(3).

When dealing with a *non-covered* person under the statute, §5104(b) provides that in any action by or on behalf of a covered person, an insurer, which has paid or is liable for first party benefits to a covered person, “has a lien against any recovery to the extent of benefits paid or payable by it to the covered person.”³

Although a Canadian vehicle may have a liability policy with limits equal to or in excess of the prescribed minimum (*see*, § 311(4)(a)), hence, the financial security in effect, VTL §311(4)(c) contains an additional requirement in the case of vehicles lawfully registered in another State, including any province of Canada. Said section provides that the policy must also be issued by an authorized insurer or by an unauthorized insurer, which has filed a form consenting to service of process and declaring that its policy shall be deemed to be varied to comply with the requirements of VTL, article 6. (See *Marshall v. Nationwide Ins. Co.*, 166 A.D.2d 852, 562 N.Y.S.2d 832 (3rd Dept., 1990); *Fireman’s Ins. Co., v. Compte*, 194 A.D.2d 918, 599 N.Y.S.2d 139; *Aetna Life & Casualty Co. v. Allstate*, 207 A.D.2d

damages for personal injuries arising out of the use or operation of a motor vehicle or motorcycle may be recovered, an insurer which has paid or is liable for first party benefits . . . has a lien against any recovery to the extent of benefits paid or payable by it to the covered person.”

³ In the event that the covered person does not commence an action within two years after accrual, a New York anomaly notwithstanding, the insurer can commence a cause of action for the amount of first party benefits paid or payable against any person who may be liable to the covered person for her person injuries.

984, 616 N.Y.S.2d 838 (4th Dept., 1994).

Thus, if Canadian insurance companies are unauthorized insurers and have not filed the required forms, their insured would not be considered a "covered person" under the statute and they therefore need not comply with the no-fault provisions.

The next question is whether or not an insurer who has paid no-fault benefits, can attempt to collect them directly from a Canadian insurance company. This would be in addition to any liability coverage that may be afforded to an insured.

Under New York law, if a vehicle over 6500 pounds is involved in an accident, an attempt to recover the no-fault payments may be processed. Under the statute, there is a tribunal through which it is to be done. This tribunal is called Arbitration Forums, Inc. The process is initiated by the filing of a claim form containing allegations and available evidence. A response is required within 30 days; a hearing is then set. This procedure operates independently of any underlying lawsuit and the responsibility of a carrier is in addition to the liability coverage. It is customarily handled on documentary evidence alone, but if requested, oral argument is permitted.

However, since we are of the opinion that an insured of a Canadian insurance company is not a "covered person" under the law of New York State, it therefore follows that the carrier can not be brought to the tribunal for the purpose of attempting reimbursement for medical and economic payments made.

It should be noted that the claim for the medical expenses and other economic loss can be the subject of an underlying lawsuit or claim between the claimant and the insured directly. If there is a recovery in these areas, the recovery would be within the confines of the liability limits of the Canadian insurance policy and not in addition to same.

Pursuant to New York State Statute, any sum paid by a carrier to a covered person becomes a lien against the recovery from any third person responsible for the damage sustained, which must be repaid out of the proceeds of the recovery which would prevent a claim for non-economic loss unless the statutory definition of a serious injury were met. (see §5104(b)) Therefore, claims for minor injuries that might not ordinarily meet the definition can be prosecuted.

Thus, we reach the conclusion that a Canadian Insurance Company, whose insureds travel through New York State and are involved in accidents here, is not subject to the New York State No Fault laws unless it: a) is an authorized insurer in this State or b) is an unauthorized insurer which has filed the necessary forms to submit to New York State jurisdiction and agreed to having its policy varied to comply with the requirements of New York State Vehicle & Traffic Law. Moreover, where a plaintiff is a covered person under the statute, he must meet the statutory requirement of serious injury as a threshold to the prosecution of claims for noneconomic losses against our Canadian insured defendants.