OPCF 44R
FAMILY PROTECTION COVERAGE

DEFINITIONS

1. Subject to section 2, in this change form,

1.1 "automobile" means a vehicle for which motor vehicle liability insurance would be required if it were subject to the law of Ontario.

1.2 "dependent relative" means

(a) a person who is principally dependent for financial support upon the named insured or his or her spouse, and who is

(i) under the age of 18 years;

(ii) 18 years or over and is mentally or physically incapacitated;

(iii) 18 years or over and in full time attendance at a school, college or university;

(b) a relative of the named insured or of his or her spouse, who is principally dependent on the named insured or his or her spouse for financial support;

(c) a relative of the named insured or of his or her spouse, who resides in the same dwelling premises as the named insured; and

(d) a relative of the named insured or of his or her spouse, while an occupant of the described automobile, a newly acquired automobile, or a temporary substitute automobile, as defined in the Policy.

BUT subsections 1.2(c) and 1.2(d) apply only where the person injured or killed is not an insured person as defined in the family protection coverage of any other policy of insurance or does not own, or lease for more than 30 days, an automobile which is licensed in any jurisdiction of Canada where family protection coverage is available.

1.3 "eligible claimant" means

(a) the insured person who sustains bodily injury; and

(b) any other person who, in the jurisdiction in which an accident occurs, is entitled to maintain an action against the inadequately insured motorist for damages because of bodily injury to or death of an insured person.

1.4 "family protection coverage" means the insurance provided by this change form and any similar indemnity provided under any other contract of insurance.

1.5 "inadequately insured motorist" means

(a) the identified owner or identified driver of an automobile for which the total motor vehicle liability insurance or bonds, cash deposits or other financial guarantees as required by law in lieu of insurance, obtained by the owner or driver is less than the limit of family protection coverage; or

(b) the driver or owner of an uninsured automobile or unidentified automobile as defined in Section 5, "Uninsured Automobile Coverage" of the Policy.

PROVIDED THAT

(A) where an eligible claimant is entitled to recover damages from an inadequately insured motorist and the owner or operator of any other automobile, for the purpose of

(i) (a) above, and

(ii) determining the insurer's limit of liability under section 4 of this change form,

the limit of motor vehicle liability insurance shall be deemed to be the aggregate of all limits of motor vehicle liability insurance and all bonds, cash deposits or other financial guarantees as required by law in lieu of such insurance, for all of the automobiles;

(B) where an eligible claimant is entitled to recover damages from the identified owner or identified driver of an uninsured automobile as defined in Section 5 of the Policy, for the purpose of

(i) (a) and (b) above; and

(ii) determining the limit of coverage under section 4 of this change form;

other uninsured automobile coverage available to the eligible claimant shall be taken into account as if it were motor vehicle liability insurance with the same limits as the uninsured automobile coverage;

(C) where an eligible claimant alleges that both the owner and driver of an automobile referred to in clause 1.5(b) cannot be determined, the eligible claimant's own evidence of the involvement of such automobile must be corroborated by other material evidence; and

(D) "other material evidence" for the purposes of this section means

(i) independent witness evidence, other than evidence of a spouse as defined in section 1.10 of this change form or a dependent relative as defined in section 1.2 of this change form; or

(ii) physical evidence indicating the involvement of an unidentified automobile.

1.6 "insured person" means

(a) the named insured and his or her spouse and any dependent relative of the name insured and his or her spouse, while

(i) an occupant of the described automobile, a newly acquired automobile or a temporary substitute automobile as defined in the Policy;

(ii) an occupant of any other automobile except where the person leases the other automobile for a period in excess of 30 days or owns the other automobile, unless family protection coverage is in force in respect of the other automobile; or

(iii) not an occupant of an automobile who is struck by an automobile; and

(b) if the named insured is a corporation, an unincorporated association, partnership, sole proprietorship or other entity, any officer, employee or partner of the named insured for whose regular use the described automobile is provided and his or her spouse and any dependent relative of either, while

(i) an occupant of the described automobile, a newly acquired automobile or a temporary substitute automobile as defined in the Policy;

(ii) an occupant of an automobile other than

(a) the automobile referred to in (i) above;

(b) an automobile leased by the named insured for a period in excess of 30 days; or

(c) an automobile owned by the named insured,

PROVIDED family protection coverage is in force in respect of the other automobile, or

(iii) not an occupant of an automobile, who is struck by an automobile;

EXCEPT THAT

where the Policy has been changed to grant permission to rent or lease the described automobile for a period in excess of 30 days, any reference to the named insured shall be construed as a reference to the lessee specified in that change form.

1.7 "limit of family protection coverage" means the amount set out in the Certificate of Automobile Insurance with respect to this change form, but if no amount is set out in the Certificate, the limit for liability coverage set out in the Certificate with respect to the automobile to which this change form applies is the limit of family protection coverage.

1.8 "limit of motor vehicle liability insurance" means the amount stated in the Certificate of Automobile Insurance as the limit of liability of the insurer with respect to liability claims, regardless of whether the limit is reduced by the payment of claims or otherwise;

PROVIDED THAT in the event that an insurer's liability under a policy is reduced by operation of law to the statutory minimum limits in a jurisdiction because of a breach of the Policy, the statutory minimum limits are the limits of motor vehicle liability insurance in the Policy.

1.9 "Policy" means the Policy to which this change form is attached.

1.10 Spouse means either of two persons who:

(a) are married to each other;

(b) have together entered into a marriage that is voidable or void, in good faith on the part of the person making a claim under this policy; or

(c) have lived together in a conjugal relationship outside marriage,

(i) continuously for a period of not less than three years, or

(ii) in a relationship of some permanence, if they are the natural or adoptive parents of a child.

1.11 "uninsured automobile" means an automobile with respect to which neither the owner nor driver thereof has applicable and collectible bodily injury liability and property damage liability insurance for its ownership, use or operation, but does not include an automobile owned by or registered in the name of the insured or his or her spouse.

2. The definitions in section 1 apply as of the time of the happening of an accident for which indemnity is provided under this change form.

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INSURING AGREEMENT

3. In consideration of a premium of $ ..... or as stated in the Certificate of Automobile Insurance to which this change form is attached, the insurer shall indemnify an eligible claimant for the amount that he or she is legally entitled to recover from an inadequately insured motorist as compensatory damages in respect of bodily injury to or death of an insured person arising directly or indirectly from the use or operation of an automobile.

LIMIT OF COVERAGE UNDER THIS CHANGE FORM

4. The insurer's maximum liability under this change form, regardless of the number of eligible claimants or insured persons injured or killed or the number of automobiles insured under the Policy, is the amount by which the limit of family protection coverage exceeds the total of all limits of motor vehicle liability insurance, or bonds, or cash deposits, or other financial guarantees as required by law in lieu of such insurance, of the inadequately insured motorist and of any person jointly liable with that motorist.

5. Where this change form applies as excess, the insurer's maximum liability under this change form is the amount calculated under section 4 of this change form, less the amounts available to eligible claimants under any first loss insurance referred to in Section 18 of this change form.

AMOUNT PAYABLE PER ELIGIBLE CLAIMANT

6. The amount payable to an eligible claimant under this change form shall be calculated by determining the amount of damages the eligible claimant is legally entitled to recover from the inadequately insured motorist, and deducting from that amount the aggregate of the amounts referred to in Section 7 of this change form, but in no event shall the insurer be obliged to pay an amount in excess of the limit of coverage as determined under Sections 4 and 5 of this change form.

7. The amount payable under this change form to an eligible claimant is excess to an amount received by the eligible claimant from any source, other than money payable on death under a policy of insurance, and is excess to amounts that were available to the eligible claimant from

   (a) the insurers of the inadequately insured motorist, and from bonds, cash deposits or other financial guarantees given on behalf of the inadequately insured motorist;

   (b) the insurers of a person jointly liable with the inadequately insured motorist for the damages sustained by an insured person;

   (c) the Société de l'assurance automobile du Québec;

   (d) an unsatisfied judgment fund or similar plan in a jurisdiction other than Ontario, or which would have been payable by such fund or plan had this change form not been in effect;

   (e) the uninsured automobile coverage of a motor vehicle liability policy;

   (f) an automobile accident benefits plan applicable in the jurisdiction in which the accident occurred;

   (g) a law or policy of insurance providing disability benefits or loss of income benefits or medical expense or rehabilitation benefits;

   (h) any applicable Workers' Compensation Act or similar law of the jurisdiction in which the accident occurred;

   (i) the family protection coverage of another motor vehicle liability policy.

8. If the insurer is presented with claims by more than one eligible claimant and the total amount payable to the eligible claimants exceeds the limit of the insurer's liability under sections 4 and 5 of this change form, the insurer shall pay to each eligible claimant a pro rata portion of the amount otherwise payable to each eligible claimant; and if payments are made to eligible claimants prior to the receipt of actual notice of any additional claim, the limits in sections 4 and 5 shall be the amount calculated under those sections less the amounts paid to the prior eligible claimants.

DETERMINATION OF THE AMOUNT RECOVERABLE

9. The amount that an eligible claimant is entitled to recover shall be determined in accordance with the procedures set forth for determination of the issues of quantum and liability under Section 5 of the Policy "Uninsured Automobile Coverage".

10. In determining the amount that an eligible claimant is entitled to recover from the inadequately insured motorist, issues of quantum shall be decided in accordance with the law of Ontario, and issues of liability shall be decided in accordance with the law of the place where the accident occurred.

11. In determining any amounts that an eligible claimant is entitled to recover, no amount shall be included with respect to prejudgment interest which accumulated prior to notice as required by section 15 of this change form.

12. In determining any amount that an eligible claimant is entitled to recover, no amount shall be included with respect to punitive, exemplary, aggravated or other damages awarded in whole or in part because of the conduct of the inadequately insured motorist or the person jointly liable with him or her, unless these damages are for the purpose of compensating the eligible claimant for losses actually incurred.

13. In determining any amounts an eligible claimant is entitled to recover from an inadequately insured motorist, no amount shall be included with respect to costs.

14. For the purposes of this change form the findings of a court with respect to issues of quantum or liability are not binding on the insurer unless the insurer was provided with a reasonable opportunity to participate in those proceedings as a party.

PROCEDURES

15. The following requirements are conditions precedent to the liability of the insurer to an eligible claimant under this change form:

   (a) the eligible claimant shall promptly give written notice, with all available particulars, of any accident involving injury to or death of an insured person and of any claim made on account of the accident;

   (b) the eligible claimant shall, upon request, provide details of any policies of insurance other than life insurance to which the eligible claimant may have recourse;

   (c) the eligible claimant and the insured person shall submit to examination under oath, and shall produce for examination at such reasonable place and time as is designated by the insurer or its representative, all relevant documents in their possession or control, and shall permit extracts and copies of them to be made.

16. Where an eligible claimant commences a legal action for damages for bodily injury or death against any other person owning or operating an automobile involved in the accident, a copy of the initiating process shall be delivered or sent by registered mail immediately to the chief agent or head office of the insurer in Ontario together with particulars of the insurance and loss.

17. Every action or proceeding against the insurer for recovery under this change form shall be commenced within 12 months of the date that the eligible claimant or his or her representative knew or ought to have known that the quantum of claims with respect to an insured person exceeded the minimum limits for motor vehicle liability insurance in the jurisdiction in which the accident occurred, but this requirement is not a bar to an action which is commenced within 2 years of the date of the accident.

MULTIPLE COVERAGES

18. The following rules apply where an eligible claimant is entitled to payment under family protection coverage under more than one policy:

   (a) (i) if he or she is an occupant of an automobile, such insurance on the automobile in which the eligible claimant is an occupant is first loss insurance and any other such insurance is excess;

   (ii) if he or she is not an occupant of an automobile, such insurance in any policy in the name of the eligible claimant is first loss insurance and any other such insurance is excess.

   (b) all applicable first loss family protection coverage shall be apportioned on a pro rata basis, but in no event shall the aggregate payment under all such insurances exceed the highest limit of coverage provided by any one of such first loss insurances,

   (c) the applicable first loss insurance shall be exhausted before recourse is made to excess insurances,

   (d) all applicable excess family protection coverage shall be similarly apportioned on a pro rata basis, but in no event shall the aggregate payment under all such insurances exceed the highest limit of coverage as defined in section 5 of this change form, which is provided by any one of such excess insurances.

ACCIDENTS IN THE PROVINCE OF QUEBEC

19. This change form does not apply to an accident occurring in the Province of Quebec for which compensation is payable under the ***Automobile Insurance Act*** (Quebec) or under an agreement referred to in that Act.

SUBROGATION

20. Where a claim is made under this change form, the insurer is subrogated to the rights of the eligible claimant by whom a claim is made, and may maintain an action in the name of that person against the inadequately insured motorist and the persons referred to in section 7 of this change form.

ASSIGNMENT OF RIGHTS OF ACTION

21. Where a payment is made under this change form, the insurer is entitled to receive from the eligible claimant an assignment of all rights of action, whether judgment is obtained or not, and the eligible claimant undertakes to cooperate with the insurer, except in a pecuniary way, in the pursuit of any subrogated action or any right of action so assigned.

MISCELLANEOUS

22. If more than one automobile is insured under this Policy, this change form shall apply only to the automobile(s) described as automobile(s) number ..... in the schedule of automobiles attached to and forming part of this Policy, or as stated in the Certificate of Automobile Insurance. If this change form is designated with respect to more than one automobile, coverages shall be construed as if provided by separate policies of insurance with respect to each automobile to which this change form applies, subject to the provisions of section 18 of this change form.

Except as otherwise provided in this change form, all limits, terms, conditions, provisions, definitions and exclusions of the Policy shall have full force and effect.

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