

January 27, 1992

SUBJECT: INSURANCE

WITHDRAWN

Supplement No. 2 to Circular Letter No. 16 (1991)

TO: MOTOR VEHICLE INSURERS AND SELF-INSURERS, WORKERS' COMPENSATION INSURERS, and INSURANCE PRODUCER ORGANIZATIONS

RE: (1) PRELIMINARY INJUNCTION, AGAINST IMPLEMENTATION OR ENFORCEMENT OF THE STATUTORY INCREASE IN NO-FAULT WAGE LOSS BENEFITS, PURSUANT TO CHAPTER 320 OF THE LAWS OF 1991 AND THE 22ND AMENDMENT TO REGULATION 68 (11 NYCRR 65), IN REGARD TO POLICIES ISSUED PRIOR TO NOVEMBER 12, 1991; and

(2) READOPTION OF THE 22nd AMENDMENT TO REGULATION 68

The purpose of this Circular Letter is 'to inform the insurance community about, recent developments affecting enforcement of Chapter 320 and the 22nd Amendment.

A. Preliminary Injunction Issued

On January 10, 1992, in an action against the Superintendent of Insurance in State Supreme Court, Albany County (Index No. 6972-91), Justice Harris issued a Preliminary Injunction and vacated the Temporary Restraining Order previously issued. The Preliminary Injunction enjoins the Superintendent from implementing Chapter 320, insofar as it purports to increase the maximum mandatory benefit payable for loss of earnings from work under policies entered into prior to November 12, 1991. The Preliminary Injunction does not apply to wage loss claims arising out of accidents covered under policies issued or renewed on and after November 12, 1991.

In the preliminary injunction ruling, Justice Harris found the statutory provision problematic, However, his decision did not find that the emergency regulation misconstrued Chapter 320.

B. Handling of Claims Arising From Policies Issued Prior to November 12, 1991

While the Preliminary Injunction remains in effect and pending the outcome of the litigation, each insurer must determine for itself whether to provide the increased wage loss benefits on claims arising out of accidents covered under policies issued prior to November 12, 1991.

C. Enforcement of Portions of Law not Affected by Preliminary Injunction

The Preliminary Injunction is narrower in scope than the vacated Temporary Restraining Order, in that enforcement, of Chapter 320 and the 22nd Amendment as to "mandatorily renewed" policies is no longer enjoined. Therefore, the 22nd Amendment, including those parts pertaining to the increased wage loss benefits, will be enforced as to policies -- both new and renewal -- issued on and after November 12, 1991. Of course, the parts of the 22nd Amendment that deal with Optional Basic Economic Loss (OBEL) coverage, along with all other parts which are also

not subject to the litigation, will continue to be enforced.

The Department, by the First Supplement to this Circular Letter, advised insurers that as to policies which were "mandatorily renewed" on and after November 12, 1991, they must utilize the letter contained in section 65.8(f) of the 22nd Amendment to explain and offer OBEL coverage but that, in light of the Temporary Restraining Order then in effect, each insurer should exercise its own judgment as to whether to delete references in the letter to the increase in wage loss benefits from \$ 1,000 to \$ 2,000 per month. Insurers are reminded that they must continue to utilize the letter contained in section 65.8(f) of the 22nd Amendment to explain and offer OBEL coverage but that, in light of the Preliminary Injunction currently in effect and the pendency of the lawsuit, each insurer should exercise its own judgment whether or not to modify the references therein to the increase in wage loss benefits. These references in the letter are to the increased benefit applying to lost wages incurred on and after November 12, 1991, and do not specify upon which policies the increase applies.

D. Readoption of the 22nd Amendment as Emergency Measure

On January 16, 1992, the Superintendent promulgated the 22nd Amendment to Regulation 68 as an emergency measure for the second time, without amendment, thereby extending the emergency regulation for an additional sixty days. The second emergency measure was filed with the Secretary of State on January 17, 1992. Before it expires, companion Amendment 22-A to Regulation 68 will also be readopted as an emergency measure. The Superintendent will not enforce those portions of the regulation regarding increased wage loss benefits as to claims arising out of accidents covered under policies issued prior to November 12, 1991, in light of the Preliminary Injunction.

The Department intends to continue to readopt both amendments as emergency measures until such time as the litigation is resolved and a consolidated final amendment to the regulation can be adopted. Whether or not there will be changes in the final amendment adopted depends upon the outcome of the litigation. In any event, the Department will file a Notice of Revised Rule Making in accordance with the State Administrative Procedure Act before adopting Amendments 22 and 22-A as a permanent amendment to the regulation.

E. Form Filings

With the Temporary Restraining Order vacated, the Department is now free to process policy form and rate filings submitted to the Department as a result of Chapter 320, including those endorsements prescribed in Amendments .22 and 22-A to Regulation 68. The Department is proceeding expeditiously on those filings. Any insurer which has not yet filed such forms and rates is reminded that, pursuant to Article 23 of the Insurance Law, all policy forms and rates -- even though prescribed or "deemed approved" in the 22nd Amendment -- must be filed with the Department before they can be issued or used.

F. Acknowledgement

Receipt of this Second Supplement to Circular Letter No. 16 (1991) should be acknowledged, in writing, by a motor vehicle insurer's underwriting officer, and a workers' compensation insurer's claims officer, no later than February 14, 1992. The acknowledgement should be sent to Joseph Smeragliuolo, Associate Examiner, Property & Casualty Insurance Bureau, at the above address. All rate and form filings arising from the implementation of Chapter 320 should be directed to the questions concerning this Second Supplement to Mr. Smeragliuolo at (212) 602-0338.

Very truly yours, [SIGNATURE]

SALVATORE R. CURIALE

SUPERINTENDENT OF INSURANCE