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SPECIAL PROBLEMS POSED BY LEASED OR RENTED VEHICLES

COMMON PITFALLS FOR LAWYERS AND HOW TO AVOID THEM

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SPECIAL PROBLEMS POSED BY LEASED OR RENTED VEHICLES¹

INTRODUCTION

Prior to March 1, 2006, the rules for vicarious liability for automobile accidents in Ontario were relatively straight forward. As the result of legislative changes that took effect on March 1, 2006 (Bill 18) and changes to standard policy wordings that have taken effect between March 1, 2006 and December 31, 2008, the rules are now very complex, highly confusing and, in some cases, ineffective.

This paper will begin with a discussion of the rules as they existed prior to March 1, 2006. I will then run through the import of the legislative changes. The changes made by the Superintendent of Insurance to a number of policies and endorsements are best understood within the context of the three major areas that they effect, namely, automobile rentals, vehicle leasing and the liability insured under non-owned automobile policies. Each of these topics will be discussed separately after a general overview of the policy changes has been provided. I will also spend a little time commenting on several issues that a careful practitioner should consider when handling a serious personal injury claim. At the end of this paper are a number of problems and answers which may assist in understanding the new regime.

This paper attempts to focus on the issues arising under Bill 18 from both a plaintiff and defence perspective. The casual reader may be inclined to skip those portions of the paper that appear to be of limited relevance based on whether they do plaintiff or defence work. I would admonish you not to do so. I believe that that both the defence and plaintiffs' bars need to be more familiar with the insurance coverages that may be obliged to respond to serious personal injury claims. This new scheme increases the risk that a lawyer, who does not understand the intricacies of automobile insurance, will fail to involve all of the appropriate parties and insurers in a serious personal injury claim.

¹ This slightly modified version of this paper was first presented at the Osgoode Hall Professional Development CLE Program entitled **Managing and Litigating Motor Vehicle Accident Claims**

Those who fail to understand this new regime will not be able to properly represent their clients. The errors they make could expose them to serious professional liability claims.

VICARIOUS LIABILITY PRIOR TO MARCH 1, 2006

At common law the owner of an automobile was not liable for the negligent operation of an automobile by someone the owner had entrusted the vehicle to. Decades ago this rule was legislatively changed through an amendment to the *Highway Traffic Act*. That rule was carried forward in what is now section 192 of the *HTA*. That provision made both the driver and the owner liable to any person who suffered loss or damage due to the driver's negligent operation of the vehicle.² The owner's liability did not depend on any negligence of the owner. The liability was simply imposed on the owner by statute. This liability is commonly referred to the "vicarious" liability of the owner.

Section 192 also provided that if a lessee consented to the operation or possession of the motor vehicle by some other person, then that other person would be deemed to be in possession of the vehicle with the consent of the owner.³

Up until March 1, 2006, no vicarious liability was imposed on either the lessee or renter of a motor vehicle. If an individual lent a leased vehicle to their spouse, the lessee was not vicariously liable for the negligent operation of the leased vehicle. The spouse would be liable both at common law and under section 192 of the *HTA* and the leasing company would be vicariously liable for the spouse's negligence under section 192 of the *HTA*. To succeed against the lessee, however, the plaintiff would need to demonstrate negligence; for example, by proving that the lessee lent the car to the spouse when he or she knew that the spouse was intoxicated.

As the lessee or renter of a vehicle had no vicarious liability the standard motor vehicle accident report in this province has no place to gather information regarding who rented or leased a vehicle involved in a collision. This presents problems for both the plaintiff

² The owner's liability depended on the owner have granted the driver permission to possess the motor vehicle.

³ This liability applies to motor vehicles and street cars.

and defence bars given that vicarious liability has been imposed on lessees in respect of accidents occurring on or after March 1, 2006.

Prior to March 1, 2006 both the plaintiff and defence bars rarely had any reason to care who rented or leased a vehicle involved in a collision. Generally, one sued persons who were known or suspected to have been negligent such as the drivers of the involved vehicles, a road authority or a drinking establishment. Additionally, one sued those who were known to be vicariously liable for the actions of the negligent entities. In most cases, this was limited to the owners of the involved motor vehicles and employers.

Until recently, those involved in personal injury litigation tended to limit their enquiries to the question of who was legally responsible for the plaintiff's damages. Plaintiff's counsel, in particular, often failed to appreciate that it is critical to not only identify who caused the accident but who insured the entities who caused the accident.

Often, it is not obvious who those insurers are. Sometimes the liable parties are insured under policies owned by persons who may not even be responsible for the collision. It is often difficult to obtain information about or from the entities which may own policies that insure the liable parties.

The defence bar is usually familiar with the types of insurance available to the various defendants to a personal injury lawsuit and defence lawyers have an innate understanding of who usually insures what. In my opinion, many members of the plaintiffs' bar and, in particular, junior members of that bar see very few insurance policies and really have no idea how the various parties to the lawsuit are insured or potentially might be insured. The following comment is directed primarily to the plaintiff's bar. When you are trying to figure out who to sue you have only done half the job. Once you identify the potential defendants, you then need to identify the various insurance policies which might insure them. This admonition applies to lawsuits arising out of accidents both before and after March 1, 2006.

Where Do You Look for Insurance?

In this section I will briefly set out the likely sources of insurance for the owners, lessees and drivers of motor vehicles. When you are dealing with a serious claim you need to carefully explore all potential sources of insurance. You will need to use your imagination to track down all of the potential sources of insurance coverage.

Let's start with a simple example involving an accident where a car owned by A is lent to B. If a plaintiff simply sued A and B, in most cases A's insurer would defend the action. If the amount claimed exceeded A's primary limits, then A's insurer should be asking both A and B if they have any other insurance which can respond to the claim. By the time that matter proceeded to discoveries all of the potential insurance should have been identified. This is how it is supposed to work but, in my experience, all of the potential insurance is rarely identified before discoveries. The plaintiff may not recover his or her full proven damages unless all of the insurance is found. Therefore, it is imperative that plaintiff's counsel identify all of the policies which may insure those who are responsible for the plaintiff's injuries.

Let us start with the owner A. Hopefully, the car is insured and the insurer is the one identified on the police report. A may have taken out excess insurance. If A is an individual this was probably accomplished using an umbrella policy which sits on top of the individual's auto and homeowner's policies. A may not even remember that he had an umbrella at the time of the collision. I would suggest asking who the broker or agent is at discovery. Defence counsel should be asked to make specific written enquiries of the broker regarding insurance and, in particular, umbrella coverages. Although rare, I have seen situations where a vehicle is insured under two different primary policies. Always ask if A or A's spouse own other vehicles and request that the relevant policies be produced.

If A is a corporation it may also have excess coverage. This coverage may be found in some unusual places. For example, if A is part of a conglomerate of companies, one of the related or parent companies may have excess or umbrella coverage that insures the entire group of companies. If A is doing work for another company, it is possible that A

is insured under the other company's policy. It is important to review all contracts between A and the other company to determine if they obliged the other company to provide insurance for A. Specific enquiries regarding potential insurance coverages should be directed to the company's insurance broker and risk manager.

That takes us to B. If B or B's spouse owns a car, then there is a very good chance that B is insured under the policy on that car while operating A's car. There may be excess or umbrella coverage available as well. If B was in the course of his or her employment, then the employer's S.P.F. 6 coverage (standard non-owned automobile policy) may be obliged to respond to the claim.

Let us assume that B does not own a car but has been provided with a company car by his or her employer. It is quite possible that B has insurance coverage under his employer's insurance on the company car while driving A's car.

Enquiries must be made at discoveries, or sooner, regarding how the vehicle was being used at the time of the collision. If the vehicle was being used for any work or business related purpose, then it is possible that the employer of A or B may be insured for its vicarious liability at common law under an S.P.F. 6. That policy may also insure the operator of the involved vehicle.

One thing I should point out about S.P.F. 6 policies is that they often provide broader coverage to the named insured than they do to the person who owned and operated the involved vehicle. For example, let's assume that Company C employed A. A owns the car involved in the collision. At the time of the collision A was making a sales call. The SPF 6 would provide no coverage to A, but would provide coverage to Company C. To access Company C's policy it would be necessary to sue Company C alleging that it was vicariously liable for A's negligence. Simply suing A would not provide access to Company C's S.P.F. 6. Just to demonstrate how counter-intuitive this area is, if A had rented a car to make the sales call, then it A would probably be insured under the S.P.F. 6 and you would not actually need to sue Company C to access its S.P.F. 6 coverage.

Let us assume for the moment that A is driving a car which he or she rented or leased. It is possible that the leasing or rental company's insurance will be obliged to respond to claims against A. As we will discover shortly, after March 1, 2006 in many cases the rental or leasing company's exposure is capped at \$1 million. However, the insurer of the rental or leasing company may also insure the driver for an amount in excess of the rental or leasing company's liability. If that insurer insures A, then depending what endorsements are on its policies, it may provide coverage to A considerably in excess of the exposure of its named insured, the car rental or leasing company.

Hopefully, this small section will impress on those who handle large personal injury claims that they need to understand automobile insurance intimately if they hope to be able to find all of the insurance policies that may be obliged to respond to a claim. You should never forget that the insurance possessed by an entity with limited exposure may provide significant coverage to another entity with unlimited exposure.

In closing, I should point out that the foregoing are just examples of potential sources of insurance. It is by no means an exhaustive list.

THE NEW REGIME

Some Background

On a warm summer night in 1997 a woman in her early twenties and her friend accepted a ride from two young men they had been drinking with in a bar. Unfortunately, the young man who drove was drunk. He lost control of his leased car while attempting to negotiate a curve on a dark country road. His car careened off the road and rolled over as it passed through the ditch beside the road. The young woman, who was probably not wearing a seatbelt, was ejected from the car and sustained devastating injuries.

The young woman sued the young man driving the car and the leasing company. The young man carried \$1 million of third party liability coverage, as required by his lease. His insurer paid out that \$1 million early on in the litigation. Our firm was retained to represent the leasing company shortly before trial and we settled the claim in the Fall of

2004 for just under \$10 million plus costs.⁴ This settlement received significant exposure in the press. It was reported that it was the largest motor vehicle settlement ever paid in Canada.

Shortly after this settlement was announced meetings were arranged between representatives of the leasing and car rental industries and the Ontario Government. The purpose of those meetings was to convince the government to change the vicarious liability rules for leasing and car rental companies.

What the industry hoped would happen was that vicarious liability for leasing and rental companies would be abolished. This result had been achieved in the U.S. through the intervention of the federal government. The leasing industry argued that a lease was simply one of a number of methods of financing the acquisition of a vehicle. It contended that leasing companies should not be exposed to unlimited liability simply because a vehicle continues to be owned by the leasing company under this form of financing.

The government listened and on March 1, 2006 the rules for vicarious liability for leasing and rental companies changed significantly. However, for this new regime to take full effect the Financial Services Commission of Ontario (“FSCO”) would need to make significant revisions to a number of motor vehicle liability policies and endorsements. Ideally, these revised policies and endorsements would have been approved by FSCO before the legislation took effect. Unfortunately, because of the rapid passage of the legislation FSCO did not have an opportunity to promulgate the first of the revised policies and endorsements until October 16th, 2006 and the second set were only announced on September 29, 2007. Some provisions contained in the first set of revised policies and endorsements took effect, retroactively, commencing March 1, 2006 while some of the provisions could only be used commencing on January 1, 2007 for new and renewal business. The second set of policies and endorsements could only be used for new and renewal business effective on or after January 1, 2008.

⁴ When the accident benefit settlement is taken into account, the settlement was in excess of \$12 million plus costs.

This piecemeal approach to the vicarious liability issue has left us with a bewildering set of rules. Due to the fact that most of the revised policies and endorsements come into force upon the renewal dates of individual policies, there are no hard dates that can be used to demarcate the changes in these rules. This yields three different but overlapping sets of rules, the second and third of which have variable inception dates. In this paper, I intend to outline the changes that have been effected through Bill 18, a regulatory amendment and the two sets of new and revised insurance policies and endorsements. The three different sets of rules are in force during the following periods for individual vehicles as follows:

Commencing March 1, 2006 for a limited number of changes;

From the vehicle's automobile insurance renewal date in calendar 2007;

From the vehicle's automobile insurance renewal date in calendar 2008 onwards.

Since the new and revised policies did not automatically take effect on January 1, 2007 and January 1, 2008, the rules for individual collisions will depend on which policies and endorsements were in place on each involved vehicle at the time of the collision. In some cases, different vehicles in the same collision may be governed by different rules and, it is possible, that the renewal dates for the primary and excess coverages on the same vehicle will be different. This is a very unsatisfactory situation. Counsel on files governed by these new rules must be very careful doing their fact gathering to ensure that their analysis of the applicability of the vicarious liability rules is correct.

One other tip. Do not assume that all insurers are using the proper forms even now. Some insurers have not revised their underwriting practises and continue to provide excess coverage to leasing and car rental companies pursuant to manuscript endorsements and old forms of policies and endorsements. You need to make sure all the policies and endorsements are actually produced and reviewed.

The Legislative Changes

This section is intended to give an overview of how the Bill 18 changes were intended to work. As we will see, the legislation may not always work as advertised. I will address each of the problems with the legislation and forms that I have identified in the succeeding sections.

One would have thought that the government would have made a choice between two alternative models to address the industry's concerns. It could have made the lessee solely liable for the negligence of those who operated the leased vehicle and relieve the lessor of any liability. Alternatively, it could make both the lessor and lessee liable but cap the lessor's exposure. The Ontario government, however, chose a much more complex solution to this problem. The first thing it did was to impose vicarious liability on those who rented or leased vehicles. This liability was joint and several. This change applies to both bodily injury⁵ and property damage claims.

The balance of the reforms applies to bodily injury claims only. The first reform involved capping the lessor's liability at \$1 million in most cases. Incidentally, the lessor's liability had been capped in a number of U.S. jurisdictions before the federal legislation abolishing vicarious liability for car rental and leasing companies was passed in 2005. In addition, the Ontario reforms altered the priority of insurance policies making the leasing or rental company's policy excess to any insurance available to the lessee or driver. Again, this reform only applies to bodily injury claims.⁶ In respect of property damage claims the lessor's policy continues to provide the primary coverage.⁷

The Ontario government chose to make this new regime applicable to both long term leases and short term rentals. The U.S. reforms also apply to both short and long term rentals. Given that these reforms apply to both situations, for ease of reference, I will

⁵ The legislation refers to bodily injury and death but I have simply referred to such claims as bodily injury claims.

⁶ This is not immediately apparent. Subsection 277(1.3) indicates that the new priorities provision [subsection 277(1.1)] does not apply unless section 267.12(1) is applicable. This latter provision only applies to bodily injury and death claims. Therefore, the old priority provision, subsection 277(1), continues to apply to property damage claims.

⁷ As will be seen below at pages 14 and 20, there is an issue regarding priorities created by the new O.A.P. 1 and the O.P.C.F. 5C.

refer to both leasing and rental companies as lessors and to persons who lease or rent cars as lessees, unless the context militates against doing so.⁸

The scheme is contained in a series of amendments to the *Compulsory Automobile Insurance Act*, *Highway Traffic Act* and the *Insurance Act*. The Bill containing these amendments was passed in December of 2005 and was proclaimed in force March 1, 2006.⁹

The basic scheme of the new regime is fairly easy to understand.

The definition of “lessee”, in section 192 of the *Highway Traffic Act*, has been amended. A lessee is now defined as “a person who leases or rents a motor vehicle or street car for *any period of time*” (emphasis added).¹⁰ Another amendment makes a lessee liable, in the same manner as an owner of such vehicles, for any loss or damage caused by the negligent operation of the vehicle. This lessee liability is new in Ontario. The liability of the owner, operator and lessee is explicitly stated to be joint and several. It appears that they are jointly and severally liable to plaintiffs but it is unclear whether contractual terms can alter the liability *inter se*. The above referred to provisions apply to all types of damages (i.e., bodily injury and property) that might be caused by the operator of a leased or rented automobile.

The details of the limited liability scheme are set forth in the amendments to the *Insurance Act*.¹¹ The provisions which limit the liability of lessors apply only to bodily

⁸ You should know that the situation in B.C. changed in the spring of 2006. Previously, the B.C. courts had concluded that the lessor was not to be considered an owner under a lease with an option to purchase but rather the lessee should be considered to be the owner. The Court of Appeal re-interpreted several older cases and concluded that lessors were owners and, therefore, vicariously liable for the negligence of persons who operated their vehicles with consent. Although some provinces do not impose vicarious liability on leasing companies, generally speaking, rental companies in those provinces are vicariously liable for the negligent operation of their vehicles. Finally, B.C. adopted a scheme which is similar to Ontario’s in 2007. A similar approach is to be taken in Alberta.

⁹ *Budget Measures Act 2005 (No. 2)*, S.O. 2005, c. 31, Bill 18

¹⁰ Whether an arrangement is a lease or something else can be important. It is not unusual for garages to loan vehicles to their customers while they are in for repairs. If that is done, then the garage’s policy may be primary but if the loaner is actually leased to the customer, then the customer’s policy may be primary although the customer’s policy may not provide any coverage to the garage’s employee who was driving at the time of the collision. At least one reported case has concluded that a loaner may be a lease. See *ING Halifax v Guardian Insurance Co. of Canada* [2002] O.J. No. 4302

¹¹ See sections 267.12 and 277 of the *Insurance Act*.

injury claims. Lessors are still fully liable for property damage claims. The liability of lessors is essentially limited to \$1 million less any insurance that the lessee or operator of the vehicle has available to respond to the claim. If such other policies exist, then the lessee's policy responds first, the operator's policy responds second and the lessor's policy responds third.¹² This scheme does not apply to motor vehicles that are used as taxicabs, livery vehicles¹³ or limousines for hire. The \$1 million maximum liability of the lessor can be modified by regulation (there are currently no such regulations) or by a provision in another act or regulation obliging that vehicle to carry higher minimum limits of liability (for example, the liability of the lessor of a public bus which carries 13 or more passengers would be \$8 million as required by the *Public Vehicles Act*). These amendments only apply to the vicarious liability of the lessor under the *Highway Traffic Act*. If the lessor was itself negligent, then these provisions do not reduce the lessor's liability for such negligence.¹⁴

I would remind you that if you are dealing with a property damage claim these provisions are inapplicable.¹⁵ Accordingly, if a rental vehicle takes out a bridge, the rental company's insurer is obliged to respond to such a claim as the primary insurer. Any insurance that the renter or driver has would be excess.¹⁶

¹² See subsection 277(1.1). It is unclear whether this subsection is supposed to partially or completely replace subsection 277(1) for bodily injury and death claims. It could be argued that the subsection (1.1) rules only replace the first part of subsection (1) and not the portion after the word "and". The reference in rule 2 in subsection 277(1.1) to "a driver named in the contract" raises the question of whether some policies insure drivers that are not named in the contract. If that can occur, then some policies may not fall within the rules set forth in this subsection. Examples of this appear to be rare.

¹³ Livery vehicle is defined in section 7 of O.Reg. 461/96 as amended. The provision reads:
7.(1) For the purposes of clause 267.12 (4) (c) of the Act, a livery vehicle is a motor vehicle,
(a) that is designed for transporting not more than nine passengers; and
(b) that is not a taxicab or limousine. O. Reg. 296/07, s. 1.

(2) Subsection 267.12 (1) of the Act does not apply in respect of a livery vehicle during any period in which it is used to transport passengers for a fee.

¹⁴ See clause 267.12(4)(b).

¹⁵ The re-ordering or priorities is only supposed to apply to bodily injury claims. However, some will question whether these changes will have an impact on loss transfers. If a rented car injures a motorcyclist, the SAB insurer of the cyclist is entitled to a loss transfer from the insurer of the rented car. Is the insurer of the rented car the renter's insurer or the rental company's insurer? I believe that it is the rental company's insurer but there is an argument that it is the renter's insurer.

¹⁶ However, as will be discussed later some of the new policies purport to apply these priority rules to property damage as well.

After March 1, 2006 the following would be a typical situation involving the negligent operation of a leased vehicle. The leased vehicle is owned by Leaseco, leased by John Lessee and operated at the time of the accident by Tom Driver. John Lessee has insurance of \$1 million which names Leaseco as the lessor of the vehicle. Tom also has insurance on his own vehicle with limits of \$1 million. If the plaintiff's damages are assessed at \$2.5 million, then \$1 million will be paid out under the John Lessee policy. That payment will reduce Leaseco's exposure to zero. Tom Driver's policy will then pay the next \$1 million of the judgment. That will leave a shortfall of \$500,000.00 for which John Lessee and Tom Driver are jointly and severally liable to the plaintiff. It is unclear whether John Lessee would have any right to indemnity from Tom Driver in respect of this personal liability.¹⁷

This is how the legislation is supposed to work. However, as will be seen below, the insurers of Leaseco may discover that the regime does not work as advertised and that how it works is dependent on when the accident occurred.

Finally, amendments to the *Compulsory Automobile Insurance Act* require persons renting or leasing vehicles for periods in excess of 30 days to be able to demonstrate that the leased or rented vehicles are insured under automobile insurance policies.

What Vehicles are Subject to the Legislation

The amendments to the *Highway Traffic Act* change the definition of lessee as outlined above. These changes apply to any vehicle that falls within the definition of "motor vehicle" in the *Act* and to street cars. "Motor vehicle" under the *Act* is defined as follows:

includes an automobile, motorcycle, motor assisted bicycle unless otherwise indicated in this Act, and any other vehicle propelled or driven otherwise than by muscular power, but does not include a street car, or other motor vehicles running only upon rails, or a motorized snow vehicle, traction engine, farm tractor, self-propelled implement of husbandry or road-building machine within the meaning of this Act.

¹⁷ This discussion ignores the possibility that John Driver may be insured under Leaseco's excess auto policy. This issue is discussed below beginning at page 17.

The *Compulsory Automobile Insurance Act* applies to motor vehicles as that term is defined under the *Highway Traffic Act* together with trailers, accessories and equipment of a motor vehicle and deems streetcars to be motor vehicles. Accordingly, the amendments under both acts apply to essentially the same vehicles.

The same does not appear to be true for the amendments to the *Insurance Act*. The provisions that deal with the liability of the lessor specifically adopt the *HTA* definition of “motor vehicle” and the provisions that deal with insurance priorities specifically limit their application to motor vehicles as that term is defined in the *HTA*. Therefore, neither of these provisions appears to apply to streetcars. The result is that the liability of lessors of streetcars (if there are any) is not capped and, in most cases, their policies will be primary.

It is also clear that these provisions do not apply to any vehicle that does not fall within the definition of “motor vehicle” in the *HTA*. This would include leased snowmobiles, leased farm tractors, road-building machinery etc.

As previously indicated the liability caps and re-ordering of insurance policy priorities for bodily injury claims do not apply to taxicabs, livery vehicles or limousines for hire. The term livery vehicle has been defined in the regulations.¹⁸

THE INSURANCE ISSUES

The basic problem with the Bill 18 scheme is that it was enacted before appropriate changes had been made to the various automobile insurance policies and endorsements. All of the new policies and endorsements were finally available as of January 1, 2008. This is some 22 months after the scheme came into force. However, not all of the problems have been resolved by the new and revised policies and endorsements.

Coverage for the Lessee’s Liability

The standard auto policies did not provide coverage to for a lessee’s vicarious liability.¹⁹ Previously, it had been unnecessary to do so as “lessees” had no vicarious liability.

¹⁸ See footnote 13 above.

On October 16, 2006 FSCO issued a revised O.A.P. 1 (Standard Ontario Automobile Policy). The coverage grant (see section 3.3 of the O.A.P. 1) now makes specific reference to leasing and renting. Section 3.3.5 of the O.A.P. 1 purports to set out the priority of those policies which must respond to claims involving rented or leased automobiles. The order is that specified in section 277(1.1) of the *Insurance Act*. Of course, the re-ordering of the priority of policies under that subsection is only supposed to apply to bodily injury claims. Section 3.3 appears to mandate this re-ordering for all claims. While it is possible for the Superintendent to approve policies that do not comply with Part VI of the *Insurance Act*, the Courts have demanded clear evidence of that intention.²⁰ In my view, no such clear intention is evident from the Bulletin approving the new O.A.P. 1. Therefore, I believe that the priorities established in subsection 277(1) rather than subsection 277(1.1) of the *Insurance Act* would apply to property damage claims. Unfortunately, it will likely take one or more court cases to confirm this.

The new O.A.P. 1 specifically covers the named insured and his or her spouse for their vicarious liability arising out of the rental of certain vehicles for periods of not more than 30 days.²¹ However, no such coverage is extended to other insureds such as a child who rents a vehicle and lends it to someone else. Additionally, several commentators have suggested that the person who was actually driving obtains no coverage under the revised O.A.P. 1. If this suggestion is correct, for example if a named insured rents a vehicle and lends it to their child, then the named insured only would have coverage for their liability as the lessee of the vehicle. However, the child would not have any coverage under his parents' policy. This would mean that the child would have to pay for her or her own defence of the claim. Additionally, there would be a question whether the parent's

¹⁹ The vicarious liability of an employer, which is a different type of vicarious liability, was covered under the S.P.F. 6.

²⁰ See section 227(2) of the *Insurance Act* and see *McNaughten Automotive Ltd. v. Co-operators General Insurance Co.* (2001), 54 O.R. (3d) 704 (C.A.) citing *Prasad v. GAN Canada Insurance Co.* (1997), 33 O.R. (3d) 481 (C.A.).

²¹ See FSCO Bulletin A-07-06 Property and Casualty-Auto which can be obtained at <http://www.ontarioinsurance.com>. Please note that the listing of persons covered by this amendment is somewhat more complex than suggested in the text of the paper. See section 2.2.4 of the new O.A.P. 1.

insurer could subrogate against the child or the child's insurer, if any. Whether this suggestion is correct is a complex question.²²

It should be noted that the maximum weight of a vehicle covered by this change is 4500 kg. Accordingly, this change alone is not sufficient to deal with situations where a commercial insured intends to rent heavy vehicles and wants coverage for its vicarious liability as the renter. It appears that the new O.P.C.F. 27 can be modified to provide coverage for heavy vehicles.²³ It is important to ensure that the coverage is provided under the O.A.P. 1 or some other policy that is scheduled on the S.P.F. 7 or the renter will not have any excess coverage.

For vehicles weighing more than 4500 kg, it is also possible to provide coverage for the liability as lessee using an S.P.F. 6. However, this approach has potential problems. There is no vehicle weight limit but the vehicle cannot be licensed in the insured's name nor can the insured have assumed liability voluntarily under a contract or agreement.

On September 29, 2007, FSCO issued a new Bulletin²⁴ which contains a new O.A.P. 4 (Ontario Garage Policy) and two revised Fleet Reporting Endorsements (O.P.C.F. 21A and 12B).

The O.A.P. 4 now provides third party liability coverage to the insured in respect of its liability as a lessee for vehicles rented for periods not exceeding 30 days which are rented for the business conducted by the insured. It does not appear that there are any weight limitations under the O.A.P. 4 on such vehicles.

²² In a previous version of this paper I suggested that section 239 would extend coverage to the child. A close reading of that section indicates that I was wrong and that it does not apply. However, a close reading of section 3.3.5 of the Policy raises some ambiguity regarding coverage for the child under the O.A.P. 1. Both it and section 2.2.4 suggest that this coverage only extends to the person who rents the automobile. However, it later provides that the insurer has no obligation to defend the driver. If the driver does not receive an indemnity for liability it is curious that the section would need to exclude defence obligations. Section 3.3 of the O.A.P. 1 appears to only extend coverage to the driver when operating a described automobile. However, coverage is routinely extended to drivers when a temporary substitute automobile is being operated. Possibly it should not be. It is unclear why the O.A.P. 1 insurer would not want to indemnify and defend the driver whose actions it is vicariously liable for.

²³ This revised endorsement was included in the October 16th, 2006 package from FSCO.

²⁴ Bulletin 06-07 Property and Casualty-Auto.

On the other hand the revised O.E.F. 82 (Liability for Damage to Non-Owned Automobiles and Drive, Rent or Lease Other Automobiles-Named Persons Endorsement), which is for use with the O.A.P. 4, does have weight restrictions. This amended endorsement now includes vicarious liability coverage for certain rented or leased vehicles. This endorsement is usually used to add vehicles not owned by the insured but which are owned by someone who is related to the insured. Therefore, this endorsement has the same restrictions that are contained in the O.A.P. 1.

The new O.P.C.F.s 21A and 21B (Monthly Reporting Basis Fleet and Blanket Fleet Coverage for Ontario Licensed Automobiles) provide lessee coverage. Both endorsements provide coverage for vehicles leased for more than 30 days from specified lessors and for periods not exceeding 30 days from any lessor. It would appear that the endorsement provides coverage for long term leased vehicles regardless of weight. However, short term leased vehicles cannot exceed 4500 kg in weight.

The first FSCO Bulletin which announced the new O.A.P 1 and the O.P.C.F. 2, 5, 5C and 27 endorsements indicated that they were effective for new business and renewals effective on or after January 1, 2007. The following paragraph from that Bulletin, however, confuses the situation:

It is expected that changes to the OAP 1 and the endorsements will also be read-in to all policies in force on or after March 1, 2006, the date that the vicarious liability amendments in the Budget Measures Act, 2005 (No. 2) became effective.

I believe that the intent of this paragraph was to oblige insurers to read into all policies effective as of March 1, 2006 all increases in coverage (for example, coverage for vicarious liability as a lessee). It is unclear how the Superintendent can make policy changes retroactive. Having said this, I do not anticipate that any insurer will refuse to follow this "directive". The O.P.C.F. 5C, in particular, restricts some coverages and I suspect that the Courts will only read in those changes to new policies and renewals effected on or after January 1, 2007.

The second Bulletin, issued on September 29, 2007, contains similar language. It provides that the new and revised policy and endorsements are effective for new business and renewals on or after January 1, 2008. In addition it states:

Insurance companies are encouraged to read-in the changes that expand coverage (i.e. O.A.P. 4, OPCF 21A, OPCF 21B) to policies and endorsements in force on or after March 1, 2006, the effective date of the vicarious liability amendments in the Budget Measurers Act, 2005 (No.2).

I expect this provision to be interpreted in the same way notwithstanding the change of language from “expected ...[to] read-in” to “encouraged to read-in”.

COVERAGE FOR DRIVERS OF LEASED AND RENTED VEHICLES

Background

Before discussing the O.P.C.F. 5 and O.E.F. 98B, 110 and 120 endorsements, I would like to spend a moment discussing how car leasing and rental companies handled their insurance prior to March 1, 2006.

I will start with leasing companies. The standard long term automobile lease obliges the lessee to obtain insurance on the vehicle which shows the lessor as an insured. The policy must be endorsed with an O.P.C.F. 5 (Permission to Lease Endorsement). This latter endorsement permits the leasing of the vehicle, which the standard O.A.P 1 prohibits. Most leases require the lessee to obtain \$1 million or more of third party liability coverage. Insurers of leasing programs have been aware for years that there was a risk that if they simply scheduled all of the policies of the various lessees on the leasing company’s S.P.F. 7 (Standard Excess Automobile Policy) that it would not only provide insurance coverage to the leasing company but also to the driver. To avoid this result, many leasing programs provided the excess coverage pursuant to a manuscript leasing endorsement attached to the leasing company’s C.G.L. or umbrella policies. This routinely provided that the endorsement afforded no coverage to anyone but the lessor.²⁵

²⁵ This explanation is a little facile. Leasing companies had other concerns as well. For example, the standard SPF 7 lapses if the underlying primary coverage lapses. Some leasing companies were concerned

I have previously expressed concerns regarding this approach to writing excess coverage for leasing companies. My concern was that this was really automobile insurance and, as such, should have been underwritten using a form of policy or endorsement approved by the Superintendent of Insurance.²⁶ In making this comment in the past I had assumed that any policy which actually provides coverage for automobile liability must be underwritten on an approved form. However, section 277(2) of the *Act* appears to contemplate policies that provide coverage for automobile liability that may not require such approval.²⁷ In any event, if a manuscript leasing endorsement does violate section 227 of the *Act*, then there is a real risk that the courts will conclude that the coverage should have been written on an S.P.F. 7 which would provide coverage to the driver.²⁸

The Court of Appeal, in a recent decision, more than hinted that my concerns had merit. In the *Avis v. Certas*²⁹ decision the Court of Appeal strongly suggested that these manuscript endorsements may be considered to be automobile insurance policies and coverage for drivers will be read into them.³⁰

There is one other underwriting issue I would like to mention at this juncture. Leasing companies also purchase S.P.F. 8 (Standard Lessor's Contingent Automobile Policy) coverage. This coverage is designed to provide coverage to the lessor if the lessee either fails to obtain any or all of the coverage required by the lease. Most leasing companies specifically schedule this coverage on their S.P.F. 7 policy. As we will see shortly, this may create double insurance where a vehicle is insured for an inadequate (but for some) amount by the lessee.

I next want to outline how a drafting problem with the legislation has apparently been "fixed" in several of the new endorsements.

that if one lessee allowed its underlying primary coverage to lapse that the leasing company's entire excess program might be jeopardized.

²⁶ See section 227 of the *Insurance Act*.

²⁷ I believe that it may be possible to issue policies which provide generic coverage that would include automobile coverages without violating the *Act*. However, policies that explicitly provide automobile coverages and are not written on approved forms probably do violate section 227.

²⁸ Section 239 of the *Insurance Act* provides that all owners' policies insure consensual drivers and occupants. The *Avis* case referred to below indicates that excess policies are caught by this provision.

²⁹ (2005), 75 O.R. (3rd) 21 (C.A.).

³⁰ See also *ING Insurance Company of Canada v. Lombard General Insurance Company* 2009 CarswellOnt 333. This decision is currently under appeal.

The actual method utilized by the legislation to cap the lessor's liability at \$1 million or less is to reduce the lessor's *prima facie* liability of \$1 million by subtracting from that amount any amounts available under any other policy that insures the vehicle other than policies issued to the *lessor* (emphasis added).³¹ Of course, in the typical lease situation the policy is issued to the lessee and the lessor. Since the lessee's policy is also issued to the lessor, the limits under that policy probably cannot be subtracted from the lessor's \$1 million exposure under section 267.12. When this was pointed out to the IBC a provision was incorporated into the several of the new and revised policies and endorsements, including the revised O.P.C.F. 5 and 5C and the new O.E.F. 110 and 120 endorsements, which provides that any policies that such endorsements are attached to are deemed not to be issued to the lessor for the purposes of section 267.12 of the *Insurance Act*. Hopefully, this change will permit the policy limits under such policies to be subtracted from the lessor's limited exposure under section 267.12 of the *Insurance Act*. The result will be that for leased vehicles, the existence of \$1 million of coverage contracted for by the lessee will be sufficient to discharge all of the lessor's vicarious liability under the legislation.

Car Rental Companies

It is now contemplated that car rental companies (i.e., those renting vehicles for not more than 30 days) will likely have in place an O.A.P. 1 with limits of \$1 million endorsed with an O.P.C.F. 5C. Their excess coverage will be provided by an S.P.F. 7 endorsed with an O.E.F. 110 endorsement.³²

I will start by discussing the O.P.C.F. 5C.

The O.P.C.F. 5C or "Permission to Lease Endorsement" applies to short term (30 days or less) rentals. It purports to provide coverage for the lessee and the driver which coverage

³¹ Section 267.12.

³² I expect that the *Avis* case would be decided differently under this regime notwithstanding the failure of the foreign insurer to use our specialized endorsements. The foreign insurance policy was simply attempting to do what the S.P.F. 7 combined with the O.E.F. 110 does now. In this situation the car rental company is probably only exposed to a judgment capped at \$1 million but the renter's policy would actually be obliged to pay that \$1 million. There would likely not be a judgment in excess of \$1 million if the rental company was not negligent. The renter would be solely liable for the excess damages and his insurance would have been spent.

is reduced by the amount of insurance available to the driver and lessee from their own policies. It is awkwardly worded and difficult to interpret. It accomplishes its goals, in part, by creating sub-limits of coverage. Although this was not intended, some will conclude that this implies that the policy has multiple independent limits of coverage available to each of the lessor, lessee and the driver. I have little doubt that some ingenious lawyer will attempt to convince the court to “stack” those limits as was done with the old S.E.F. 42.

There is also an argument that by reducing limits to the driver and the lessee, this endorsement contravenes the minimum liability provisions set forth in section 252 of the *Insurance Act*. I do not think that such an argument is correct, but if it is applied by the courts it could increase the coverage under a rental company’s policy.

The O.P.C.F. 5C also purports to re-order the priority of insurance policies, not just for bodily injury claims but also for property damage claims. It is unclear whether this was intended or not. As was discussed with respect to the O.A.P. 1, it is unclear whether the priorities established by the policy wording or those established by section 277(1) of the *Insurance Act* will take precedence.³³ For the reasons previously expressed in respect of the O.A.P. 1, it is my view that for property damage claims the lessor’s insurance is primary notwithstanding the provisions of the O.P.C.F. 5C. In any event, this discrepancy will almost certainly lead to litigation.

Before discussing the O.E.F. 110, I want to recap where we are with car rental companies. If they obtain their primary coverage through an O.A.P. 1 with limits of \$1 million endorsed with an O.P.C.F. 5C, then that policy alone should be sufficient to discharge their vicarious liability obligations under section 267.12 of the *Insurance Act*. It may not be sufficient to discharge their obligations for property damage claims or if the car rental company itself has been negligent. If the driver or renter has their own insurance, then the rental company’s vicarious liability exposure will be reduced from \$1 million to whatever sum, if any, is left after subtracting the total amount of insurance available to the driver and renter.

³³ See the discussion at footnote 20 and in the text associated with that footnote at page 14 above.

That takes us to the new O.E.F. 110 endorsement which became available on or after January 1, 2008. The O.E.F. 110 is available for endorsement on the Standard Excess Automobile Policy (S.P.F. 7). It provides that the maximum amount of insurance available under the excess policy is capped at \$1 million (or any other *larger* figure that the insurer might specify) less any insurance available to the lessee/renter or the driver. Once that figure is reached any remaining limits under the S.P.F. 7 are only available to the named insured (the leasing or rental company). It should be noted that the O.E.F. 110 is specifically limited to bodily injury claims. It does not apply if the claim is a property damage claim. This suggests that the insurer of the lessor continues to insure the operator and probably the lessee for excess property damage claims.

I was pleasantly surprised by FSCO's decision as it ensures that those who rent or lease vehicles are entitled to access to at least \$1 million of insurance either from their own insurers or the car rental or leasing company's insurers. If the car rental company's primary insurance is less than \$1 million, then the lessee/renter or driver is entitled to look to the car rental company's insurers for any shortfall between their policy limits and \$1 million.

This endorsement, in the context of short term car rentals, appears to have fixed the problem that the S.P.F. 7 insures drivers and lessees. If a car rental company is insured pursuant to an O.A.P. 1 with limits of \$1 million endorsed with an O.P.C.F. 5C and an S.P.F. 7 endorsed with an O.E.F. 110, then the car rental company's insurers will be able to take full advantage of the cap on the rental company's vicarious liability for bodily injury claims. In other words, the maximum amount that these insurers will be obliged to indemnify the renters or drivers for is \$1 million.

However, unless this endorsement is added to the S.P.F. 7, the insurer of the car rental company may be obliged to cover the liability of the car rental company, the driver and possibly the renter to the full limits of the S.P.F. 7. This effectively means that the benefits of Bill 18 will not be fully available to the insurers of car rental companies until they begin using the S.P.F. 7 and endorsing it with the O.E.F. 110.

Where does that leave us for bodily injury claims involving short term car rentals? It is clear that the driver and renter must have available to them through some insurance policy \$1 million in total coverage for all claims involving such vehicles.³⁴ It would not appear that the renter and driver are entitled to avail themselves of the limits that are available to the car rental company in excess of \$1 million.

The remaining question is whether the car rental company and its insurers are entitled to indemnity (or to subrogate) against the renter and driver for any amounts they are obliged to pay to a third party in excess of \$1 million.

If the claim is a bodily injury claim and the only liability of the car rental company is vicarious, then the car rental company's exposure and that of its insurer is only \$1 million. In such a case, the question of subrogation would not arise.

For bodily injury claims, where the car rental company is itself negligent, the situation is somewhat different. Since the car rental company will still be vicariously liable for the driver's negligence as will the renter, the insurers of the renter and the driver will be obliged to respond to that liability in priority to the insurers of the car rental company. The renter and driver policies will likely be tapped out before the car rental company's policies are obliged to respond. Once those policies are tapped out the liability of the car rental company, the driver and the renter is joint and several to the plaintiff. The indemnities in the rental agreement could give the car rental company a right to indemnity to the extent that it has paid more than its proportionate share based on its own negligence. However, if those amounts are paid by the car rental company's excess insurer, then the indemnity may be lost. As the S.P.F. 7 endorsed with the O.E.F. 110 may be construed as a policy which insures the driver and the renter (even where it actually does not), this may result in the court refusing to permit the car rental company's insurer to enforce the indemnity. There are arguments to the contrary, but it is probably

³⁴ If the renter and/or driver do not have such insurance coverage themselves, then the rental company's insurance must provide such coverage.

safer to assume that the insurer of the car rental company cannot subrogate against the driver and, possibly, the renter in such circumstances.³⁵

Finally, I need to address property damage claims. We need to address claims under both the primary and excess policies. The legislation indicates that in respect of property damage claims, the rental company's policy of insurance is primary. The O.P.C.F. 5C, which applies to the car rental company's primary O.A.P. 1 coverage, provides for the opposite result but it is my belief that the legislated priority will prevail. This means that the car rental company's O.A.P. 1 insures both the driver and the renter. In light of the *Avis*³⁶ case it would appear that the primary insurer of the car rental company will not be permitted to subrogate against the renter, the driver or their insurers.

That takes us to the excess coverage. Since the O.E.F. 110 only applies to bodily injury claims, the *Avis* case would seem to indicate that the operator and possibly the renter is insured under the S.P.F. 7. This probably strips the excess insurer of any rights of subrogation against the driver or renter for any excess property damage claim.

Car Leasing Companies

It is now contemplated that car leasing companies will ensure that all policies obtained by lessees will be endorsed with the new O.P.C.F. 5 (Permission to Lease) endorsement. They will obtain their excess coverage on the leased vehicles pursuant to an S.P.F. 7 endorsed with an O.E.F. 110 endorsement. They will also have, in place, an S.P.F. 8 endorsed with the new O.E.F. 120. It is somewhat unclear how the excess coverage on the S.P.F. 8 should be provided.

We have not discussed the S.P.F. 8 (Standard Lessors' Contingent Automobile Policy) in any detail. This policy is intended to provide coverage to a leasing company in the event that the lessee fails to obtain any coverage or coverage with inadequate limits. In other words, it is the policy that protects the leasing company in the event that the lessee fails to abide by the insurance undertaking in the lease. Such a policy and any policy excess to

³⁵ Where there is vicarious liability and negligence by the car rental company, it is unclear what the priorities are. I believe that it would make sense for the car rental company's insurer to be considered the primary insurer for that portion of the judgment attributable to the car rental company's negligence.

³⁶ See footnote 29 and accompanying text at page 18 above.

it should not logically insure the lessee or, I would argue, the driver. There has been a debate for the last few years regarding whether this policy insures the driver of a vehicle or not. The new O.E.F. 120 endorsement is premised on the assumption that it does.³⁷ The purpose of this endorsement is to ensure that any S.P.F. 8 it is endorsed upon only provides coverage to the leasing company.³⁸

Unfortunately, the various policies that insure leased vehicles do not mesh as well as I would have hoped.

It would appear that FSCO contemplated that leasing companies would generically schedule the primary policies arranged for by their lessees on an S.P.F. 7 endorsed with an O.E.F. 110. Normally, this would work well and the leasing company's S.P.F. 7 would never be obliged to provide coverage for the driver or the lessee. However, if the lessee arranged insurance with inadequate limits (for example, \$500,000 rather than the \$1 million required by most leases) the O.E.F. 110 endorsed S.P.F. 7 would insure the lessee and owner for an additional \$500,000. The fact that the lessee or driver is insured under this policy could defeat that insurer's right to subrogate against the lessee or driver. However, where the lessee arranged no insurance, the S.P.F. 7 would likely not be engaged and the S.P.F. 8 insurer may be entitled to subrogate.³⁹

There is also a problem deciding how to provide excess coverage over the S.P.F. 8. The S.P.F. 8 endorsed with an O.E.F. 120 provides no coverage to the lessee or the driver. However, there may be a problem if one simply schedules an O.E.F. 120 endorsed S.P.F. 8 on an O.E.F. 110 endorsed S.P.F. 7. The S.P.F. 8 with O.E.F. 120 endorsement only provides coverage to the leasing company. However, the S.P.F. 7 endorsed with an O.E.F. 110 specifically provides a minimum of \$1,000,000 of coverage to the lessee and the driver. It may also provide excess coverage for property damage claims. Frankly, the two endorsements are inconsistent. The O.E.F. 110 may well strip the leasing company's insurer of any rights of subrogation it might have expected to have under the O.E.F. 120 endorsed S.P.F. 8.

³⁷ If the S.P.F. 8 did not ensure the operator, then the O.E.F. 120 Endorsement would be unnecessary.

³⁸ This endorsement appears to apply to both bodily injury and property damage claims.

³⁹ This is based on the assumption that the S.P.F. 7 cannot attach where no policy was arranged or the policy terminated. See section 253 of the *Act*.

One possible way around this is to schedule the S.P.F. 8 on a separate S.P.F. 7 policy which is not endorsed with the O.E.F. 110. However, it might still be argued that the S.P.F. 7, pursuant to section 239 of the *Insurance Act*, insures the driver. However, given that the underlying insurance (the S.P.F. 8 with an O.E.F. 120 endorsement) does not, there is a reasonable chance of convincing the courts that, in these circumstances, the S.P.F. 8 insurer retains its rights of subrogation.

However, there is a drawback to this approach. If a lessee is insured, but for an inadequate amount, both S.P.F. 7s may be triggered (i.e., the one containing the O.E.F. 110 sitting above the lessee's policy and the one without the O.E.F. 110 sitting over the S.P.F. 8).

In light of these problems I would recommend scheduling all of the leasing company's policies on the one S.P.F. 7 endorsed with an O.E.F. 110. There is a distinct possibility, if not a likelihood, that the leasing company's insurer will lose its rights of subrogation against the lessee. However, this approach significantly reduces the risk that the leasing company's insurer might be obliged to provide coverage to the lessee or the driver for amounts in excess of \$1 million for bodily injury claims. It may still provide excess coverage to the lessee and/or driver for property damage claims.

To summarize, where the claim is a bodily injury one and the leasing company's liability is vicarious only, the leasing company's liability is capped at \$1 million as likely is its insurers. Where the lessee has inadequate or no insurance, the method I have suggested for providing coverage may strip the insurer of any rights of subrogation it may have against the lessee or driver.

Where the claim is a bodily injury one and the leasing company is also negligent or the claim is for property damage, the comments made under the heading "Car Rental Company" apply.

Before leaving this topic, I want to point out a little wrinkle that Sloan Mandel brought to my attention. Suppose we are dealing with a rental car that is leased by the car rental company. In such a situation the car rental company is both a lessor and a lessee of the

same vehicle. There is a good argument that if the company leasing the cars to the car rental company is sued as the owner, the car rental company is sued as both a lessor and lessee and the renter of the car is sued as a lessee, that the car rental company will not be able to take advantage of section 267.12 of the *Insurance Act*. Its liability as the person which rented out the car would be capped at \$1 million but in its capacity as the lessee of the leased rental car, it would be exposed to unlimited liability. The lesson is probably that car rental companies should not lease their rental fleets.

NON-OWNED AUTOMOBILE INSURANCE

That brings us to the S.P.F. 6. This is the standard non-owned automobile policy. This coverage will now be much more important than it has been in the past. Non-owned coverage was almost always excess coverage as the policy of the owner of the automobile was obliged to respond as the primary insurer. These endorsements were routinely placed on C.G.L. policies without any real concern about the exposure they may create for the insurer. Now, where an automobile is rented in the name of the company, these policies will probably provide the primary coverage. Accordingly, the exposure that this policy creates needs to be re-evaluated by insurers. Prudent insurers are now asking commercial insureds to provide full particulars of how often employees, partners etc are renting automobiles as well as how often they drive their own cars on company business. This information can then be used to properly rate the risk attaching to the S.F.P. 6.

As part of the September 29th, 2007 package of new and revised endorsements FSCO advised the industry of two new endorsements that are relevant to S.P.F. 6 coverage.

The new O.E.F. 98A (Excluded Driver Endorsement) permits insureds to have excluded drivers for S.P.F. 6 policies just as they currently do for O.A.P. 1s.

The new O.E.F. 98B (Reduction of Coverage for Lessees or Drivers of Leased Vehicles Endorsement) arguably extends the coverage previously available under the S.P.F. 6 in some situations where partners, officers or employees rent vehicles for company business. It is possible that under this endorsement there is coverage where the rental

vehicle is rented for company business even if it is not actually being used for company business at the time of the collision. For example, if I rented a car to go to discoveries in London but became involved in an accident driving from hotel to a restaurant for dinner, there is an argument that an S.P.F. 6 endorsed with an O.E.F. 98B would respond to this claim on my behalf even though my partners may not be vicariously liable for the collision I am involved in on the way back from dinner.⁴⁰

Of more importance, however, is the provision in the endorsement that provides that this coverage is excess to any coverage the named insured or renter has available to respond to the claim.⁴¹ This endorsement essentially makes the S.P.F. 6 excess coverage only where a partner, officer or employee rents a vehicle for company business. I would anticipate that most brokers would recommend placing this endorsement on any S.P.F. 6 coverage they write.

One broker has raised a concern regarding the restriction contained in this endorsement (the O.E.F. 98B) limiting its application for additional insureds to short term rentals (30 days or less) only. The following question and example outline the concern. If an employee was doing company work using a long term leased vehicle would there be coverage? In such a situation, I do not believe that this endorsement would extend any coverage to the employee. However, I believe that the named insured would continue to be insured for any liability attaching to the employee's conduct under the under the S.P.F. 6 endorsement. This endorsement only extends coverage in certain situations to employees, partners and officers of the named insured. It does not appear to affect the coverage available to the named insured itself under the S.P.F. 6.

I should also mention that there may be situations where an both an employer's O.A.P. 1 and S.P.F. 6 endorsed with an O.E.F. 98B may be obliged to respond to the same loss.

⁴⁰ See, however, the decision of Lederer J. in *Collings v. Jew* 2008 CarwellOnt 4530 which finds the employer vicariously liable in almost identical circumstances.

⁴¹ It appears that the endorsement makes the S.P.F. 6 excess to any insurance that the renter has. However, if the driver is not the renter, then it would appear that the renter's policies respond first, the S.P.F. 6 with OEF 98B responds second, the driver's policies respond third and the owner's respond last (if they are obliged to respond at all). Some commentators have suggested that the re-ordering of priorities applies to all situations where the O.E.F. 98B endorsed S.P.F. 6 is obliged to respond. It is my view that the re-ordering of priorities only applies to situations where the O.E.F. 98B endorsement extends coverage to the driver and/or renter.

For example, if the employee had a company car and rented a vehicle while out of town for a couple of days, the O.A.P. 1 is probably going to be obliged to respond as the rental vehicle is an “Other Automobile” under the O.A.P. 1. However, the employee and the company will also have coverage under the O.E.F. 98B endorsed S.P.F. 6. In most cases, I would anticipate that the O.A.P. 1 would be obliged to respond in priority to the S.P.F. 6 endorsed with O.E.F. 98B.⁴²

PRACTICE TIPS

In the first part of this paper I spent some time discussing how to find everyone’s insurer. I now want to spend just a couple of minutes discussing how to find the proper defendants and comment on a couple of other practice issues.

Now that lessees have their own liability, it is critical that they be sued. They represent another source of funds for a seriously injured plaintiff. This funding may be provided by their insurer or through their personal assets.

The critical question then is how do you figure out if a car is leased or rented? The standard motor vehicle accident report traditionally has no information on this issue. It is critical that you conduct both ownership and plate searches on all vehicles involved in the collision. Those searches will often provide you with insight into whether a vehicle was leased or not. Sometimes the searches will actually indicate that the plate is attached to a leased vehicle. If the plate is owned by one entity and the vehicle by another, then there is a good chance the vehicle is leased. Sometimes the name of the owner will provide you with a clue. If the owner’s name has the word “lease” in it, then there is a good chance the vehicle is leased.

It can be more difficult to find out if a vehicle was rented. Often the name of the owner provides some insight. However, the name may not disclose whether the vehicle was rented.

⁴² This represents a change from the position I previously espoused. I previously suggested that the policies would share rateably in accordance with subsection 277(2).

Now that the special circumstances rule for extending limitation periods has been abolished, it is important for plaintiff's counsel to demonstrate that they have taken steps to identify the potentially liable parties within the applicable limitation period. If you ask the proper questions of the identifiable parties within the limitation period but get answers after it has *prima facie* expired, then you may be able to rely on the discoverability rules to prevent the limitation period from expiring.

I would suggest that it is now incumbent on all plaintiffs' counsel to pen letters to the drivers and owners of all involved vehicles and to their known insurers asking appropriate questions. The letters to the owners and operators should specifically ask if the vehicle was leased or rented, to whom it was leased or rented and for production of a copy of the lease or rental contract. Enquiries should also be made of the drivers regarding whether they were or were not in the course of their employment at the time of the accident and what the name and address of their employer is.

If these letters are ignored, then you will be able to argue that you could not discover the identity of some of these parties until discovery. However, I feel that the prudent course of conduct is to ensure, wherever possible, that the owner and driver are discovered before the limitation period has expired. This permits appropriate amendments to pleadings to be made without any fear of missing a limitation period.

Frankly, defence counsel should not be assuming that plaintiff's counsel have made the appropriate enquiries. They should be obtaining plate and ownership searches and making appropriate enquiries before the two year limitation period for advancing contribution claims has expired.

From the defence perspective there are a couple of additional issues I wish to address. If you are defending an action where your insured's vehicle was leased or rented, you need to carefully consider how the action is to be defended and whether there is a conflict of interest in defending both the lessee and owner. This is more of a problem where the vehicle is rented.

Let us assume that you act for D Rental Cars and that your renter does not have any insurance that would be obliged to respond to the claim. Assuming that D Rental Cars has the appropriate O.A.P 1 policy in place with an O.P.C.F. 5C endorsement and an S.P.F. 7 with an O.E.F. 110 endorsement, then D Rental Cars maximum exposure for its vicarious liability is \$1 million. However, there are two potential problems. The first is that that plaintiff may well allege that D Rental Cars did something negligent such as fail to properly service the brakes. Second, regardless of a claim in negligence against D Rental Cars, if the plaintiff has sued for more than \$1 million there is a conflict of interest between the position of D Rental Cars and the renter. If negligence is alleged against D Rental Cars, this conflict is exacerbated. You will need to carefully consider how you can practically deal with such conflicts in a cost effective manner.

The other situation I am seeing quite regularly involves the insurers of renters refusing to defend the rental company. Technically, the rental company is not insured under the renter's policy and is not owed a defence under that policy. However, most rental agreements have indemnity provisions in them. It strikes me that if the renter's insurer does not defend the car rental company, then it may be liable to indemnify the car rental company for its cost of defending the action. There may well be arguments that the car rental company cannot look to the renter for indemnity as the car rental company's policy potentially provided coverage to the renter and seeking indemnity is inappropriate. However, unless there is a clear conflict of interest in defending both, then I would, as the lawyer for the renter's insurer, recommend that we defend the car rental company.

If allegations of negligence are made against the car rental company, then a conflict of interest may preclude defending both the car rental company and the renter. This is particularly true if the amount claimed exceeds \$1 million.

If you are acting for the car rental company, you need to be a little careful in accepting an offer to be defended by the insurer of the renter. Again, if there are allegations that the car rental company was negligent and particularly if the amounts claimed exceed \$1 million, then it may make sense for the insurer of the car rental company to defend it.

Additionally, if the plaintiff or one of the defendants is alleging that the renter is entitled to access to the car rental company's excess insurance, then it may well make sense for the car rental company's insurer to defend the action separately.

CLOSING COMMENTS

In my view, it would have been preferable if these reforms had been handled differently. First, the entire package of new and revised policies and endorsements should have been approved before the legislation took effect.

I also believe that FSCO has failed to understand that there are real distinctions between the interests of leasing and car rental companies. These are not adequately recognized in the policies and endorsements that have been issued. Part of the problem, in my opinion, stems from the fact that the changes were made at two different times and the new policies and endorsements do not mesh well.

For example, if FSCO felt that car rental companies should provide renters and drivers with a minimum of \$1 million of coverage, then this should have been mandated in the O.P.C.F. 5C. This approach would have allowed FSCO to issue an endorsement amending the S.P.F 7 policy such that for leasing and car rental companies no coverage would have been available for the driver or the owner. This would have preserved the ability of excess insurers to subrogate against lessees and drivers in appropriate circumstances. The current O.E.F. 110 may be appropriate for car rental companies but not for car leasing companies. There should be no circumstance where a lessee in default of its lease insurance obligations can obtain coverage under the car leasing company's insurance.

LEASING AND CAR RENTAL LIABILITY SCENARIOS

The Pre-March 1, 2006 Bodily Injury Car Rental Scenario (Example 1)

Jack Pedestrian is struck by a vehicle owned by ABC Car Rental Company, rented by Suzy Renter for the weekend and driven by Bobby Operator.

ABC Car Rental Company has \$2 million of coverage under a standard Ontario Owner's Policy (O.A.P. 1) and an additional \$8 million of coverage under a standard Excess Automobile Insurance Policy (S.P.F. 7). Suzy owns a car which is insured for third party liability limits of \$1 million under an O.A.P. 1. Bobby doesn't own a car and has no access to any other automobile insurance.

The plaintiff's damages are assessed at \$7 million.

Questions

How would one go about finding out what insurance would be available to respond to this claim?

A. *The motor vehicle accident report should tell you who insured the owner of the vehicle. You may need to conduct a search with MTO which will provide you with a copy of the application to renew the plates. That search should disclose who the owner indicated the insurer was at the time of renewal. If you are able to identify the renter (which may be impossible with just the MVA report) and driver, then you can write to them and request particulars of their insurance coverage. Unfortunately, section 259 of the Insurance Act does not oblige them to advise their insurer until they are sued. Additionally, that same section does not oblige them to advise the plaintiff or co-defendant of the identity of their insurer until after judgment (although this information is also discoverable in the lawsuit).*

Who would pay what in this situation?

A. Pursuant to section 277 of the Insurance Act, the car rental company's policies are primary and the liability of the car rental company, as owner of the automobile, is unlimited. This means that the entire \$7 million judgment is paid by the insurers of ABC Car Rental Company. ABC's insurers almost certainly have no right of subrogation against Bobby

Suzy, as the renter of the automobile, has no liability under section 192 of the Highway Traffic Act. She may have liability contractually under the car rental agreement but that liability is probably not insured under an OAP 1.

It is unclear if ABC's insurer could subrogate against Suzy Renter. As the renter it was intended that she be insured while driving the rental car. It might be argued that she was therefore an insured under ABC's policy and it cannot subrogate against her. ABC's insurer would probably argue that it only insured ABC and Bobby Operator and never insured the Suzy Renter. Therefore it is entitled to subrogate against her and rely on the indemnity in the rental agreement. That liability is probably not covered in Suzy's OAP 1, however.

Who would pay what if the damages assessed at \$12 million?

A. If damages had been assessed at \$12 million (i.e. an amount in excess of the available insurance limits), Bobby and ABC Car Rental Company would be personally liable for the \$2 million awarded in excess of the insurance limits, on a joint and several basis. Suzy would have no vicarious liability and her insurer would have no obligation to contribute to the judgment.

The Pre-March 1, 2006 Bodily Injury Car Rental Scenario With Vicarious Liability (Example 2)

The facts are the same as the first example with the following changes:

Bobby Operator is making a sales call for his employer DEF Industries at the time of the accident. DEF Industries has S.P.F. 6 coverage with limits of \$2 million.

The excess insurance of ABC Car Rental Company is not pursuant to an S.P.F. 7 but rather is provided by an endorsement on their C.G.L. or Umbrella Policy which purports to provide coverage for their car rental business but only for the car rental company and not for the renter or the driver.

Questions?

How would you determine that Bobby was working at the time of the loss?

A. *You could write to him and ask him that question. If that approach was not taken or the letter was not responded to, then you would probably need to wait until discoveries to obtain an answer to that question.*

Who would pay what in this situation?

A. *from the perspective of the ABC Car Rental Company's insurers the result is the same (i.e., it they must pay out \$7 million). The umbrella insurer might argue that it has rights of subrogation against the driver and the renter. After the Avis case it is unlikely that the umbrella insurer is entitled to subrogate against the driver's insurer. If the driver and renter were the same person ABC's insurer probably has no rights of subrogation at all. It is unclear whether the car rental company's insurer can subrogate against Suzy Renter for the reasons provided in the answers to for example 1.*

What if the damages were assessed at \$12 million?

A. *In the event that damages had been assessed at \$12 million, ABC Car Rental Company's insurers would be responsible for paying the first \$10 million, and the insurer of DEF Industries would be responsible for the final \$2 million.*

If there was not enough insurance who would be personally liable to pay the excess judgment?

A. *If damages were in excess of the available insurance, ABC Car Rental Company, Bobby Operator and DEF Industries would be jointly and severally liable for the excess amounts. Suzy would not have any vicarious liability.*

The Pre-March 1, 2006 Property Damage Car Rental Scenario (Example 3)

The facts are the same as example 1 but Bobby hits a bridge and causes \$7 million damage to the bridge.

Questions

Who would pay the judgment?

A. *The result is the same as in example 1. However, when the legislation changed on March 1, 2006, the result for this example may change and that is why it is included. See example 7 below*

The Post-March 1, 2006 Bodily Injury Car Rental Scenario (Example 4)

The facts are the same as example 1 with the following changes:

- ABC Car Rental Company is insuring its excess liability pursuant to a S.P.F. 7 with an O.E.F. 110 endorsement and its O.A.P. 1 is endorsed with the new O.P.C.F. 5C.

Questions

Who is liable for the judgment and which insurers pay what portion of it?

A. *Section 192 of the Highway Traffic Act has been amended such that the renter is jointly and severally liable (along with the owner and driver). Assuming that the accident occurs after the new OEF 110 is in place, Section 267.12 of the Insurance Act caps ABC Car Rental Company's exposure at \$1,000,000.00 less any insurance on the vehicle that was not issued to ABC Car Rental Company. Due to a provision in the new OPCF 5C, ABC Car Rental Company's policy is not considered to have been issued to ABC Car Rental Company, and as such, Suzy's insurance is primary and that insurer will pay the first \$1,000,000.00 of the Judgment. This exhausts ABC Car Rental Company's obligations under the legislation, and no Judgment issues against ABC Car Rental Company. Due to the operation of the OPCF 5C and OEF 110, ABC Car Rental*

Company's insurer does not insure Suzy nor Bobby. Suzy and Bobby are jointly and severally liable for the \$6,000,000.00 shortfall.

The Post-March 1, 2006 Bodily Injury Car Rental Scenario (Example 5)

The facts are the same as example 4, with the following change:

- ABC Car Rental Company is not using the O.E.F. 110 endorsement on its S.P.F. 7.

Questions

Which parties are liable and what will the insurers have to pay?

A. *ABC Car Rental Company, Suzy Renter and Bobby Operator are jointly and severally liable for the Jack Pedestrian's damages.*

Suzy Renter's policy would be primary. There is an argument that the SPF 7 of ABC Car Rental Company continues to insure Bobby Operator as a result of the provisions of Section 239 of the Insurance Act. If that argument has merit, then there would be an additional \$8,000,000.00 of coverage to respond to the claims of Jack Pedestrian from ABC Car Rental Company's insurer.

The Post-March 1, 2006 Bodily Injury Car Rental Scenario With Vicarious Liability (Example 6)

The facts are the same as example 2; however, ABC Car Rental Company is insuring its excess liability pursuant to a S.P.F. 7 with an O.E.F. 110 endorsement and its O.A.P. 1 is endorsed with the new O.P.C.F. 5C.

Questions

Which insurers are liable to contribute and how much will they each contribute?

A. *Suzy's insurer pays the first \$1,000,000.00. DEF Industries pays the next \$2,000,000.00.*

If there is an uninsured portion of the judgment how much is it and who is liable?

A. *There is a \$4,000,000.00 shortfall for which Suzy, Bobby and DEF Industries are jointly and severally liable.*

The Post-March 1, 2006 Property Damage Car Rental Scenario (Example 7)

Facts same as example 3; however, the applicable O.A.P. 1 is endorsed with the new O.P.C.F. 5C.

Questions

Who pays what based on the legislation?

A. *Based on the legislation, the ABC Car Rental Company, Suzy Renter and Bobby Operator are jointly and severally liable for the damages. Under the legislation the changes in priorities and caps on damages for the lessor do not apply to property damage claims. Therefore, ABC Car Rental Company's insurer is obliged to pay the entire \$7 million Judgment as its coverage is primary under section 277(1) of the Insurance Act.*

Based on the policy wordings?

A. *The policy wordings purport to re-arrange priorities for both bodily injury and personal injury claims. If those priorities apply, then Suzy Renter's insurer will be obliged to pay the \$1 million of the judgment and ABC Car Rental Company's insurer will pay the next \$6 million.*

What is likely to happen if such a situation arises?

A. *Litigation*

Will the legislation or policy wordings determine the priorities and why?

A. *While the Superintendent has the ability to approve policies of insurance that derogate from the provision of Part VI of the Insurance Act, the Court of Appeal has*

indicated that it requires evidence from the Superintendent that he intended to approve policies that altered the results dictated by the legislation. It is my belief that there is no clear signal from the Superintendent in this regard with respect to the OPCF 5 or 5C. Therefore, I would anticipate that the legislative scheme would prevail. That is, ABC Car Rental Company's insurer will be required to pay the entire loss.