



# Insurance Bulletin

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*“On September 29, 2007 the Financial Services Commission of Ontario issued a series of revised and new forms designed to implement aspects of Bill 18.”*

## NEW BILL 18 ENDORSEMENTS (VICARIOUS LIABILITY FOR LEASED AND RENTED VEHICLES)

Stephen R. Moore

On September 29, 2007 the Financial Services Commission of Ontario issued a series of revised and new forms designed to implement aspects of Bill 18. These forms appear to resolve a number of the problems that we have previously identified with respect to the implementation of Bill 18. For a fuller understanding of our concerns in this regard we would refer you to the following link at our website:  
[www.blaney.com/files/article\\_Lessee Liability.pdf](http://www.blaney.com/files/article_Lessee%20Liability.pdf).

The new and revised policy and endorsements are:

**O.A.P. 4** (Garage Policy) The new garage policy extends coverage to those who rent or lease automobiles for periods less than 30 days in precisely the same manner as the amendments to the O.A.P. 1 did last year. Please note that the policy does not extend any coverage to the driver of a rented or leased vehicle.

**O.E.F. 82** Liability for Damage to Non-Owned Automobiles and Drive, Rent or Lease Other

Automobiles-Named Persons Endorsement (for Ontario Garage Policy O.A.P. 4). The amendments to this endorsement provide coverage to those who rent or lease automobiles weighing less than 4500 kg for not more than 30 days. As with the O.A.P. 4, coverage is not extended to the driver of the leased or rented vehicle.

**OPCF 21A and OPCF 21B** Monthly and Blanket Reporting for Fleets. Both change forms have been amended to make it clear that vicarious liability coverage is extended under both endorsements to vehicles rented for not more than 30 days.

**O.E.F. 98A** Excluded Driver (for attachment only to the Standard Non-Owned Automobile Policy S.P.F. No. 6). This is a new endorsement that permits insurers to specify excluded drivers for non-owned policies in precisely the same manner that excluded drivers can be endorsed on an O.A.P. 1.

**O.E.F. 98B** Reduction of Coverage for Lessees or Drivers of Leased Vehicles Endorsement (for attachment only to the Standard Non-Owned Automobile Policy S.P.F. No. 6) This form provides coverage to partners, officers and employees of the insured for the vicarious liability



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Steve is certified as a specialist in civil litigation by the Law Society of Upper Canada. He has written a number of papers including papers on damage calculations under Bills 59 and 198. They include "Vicarious Liability Under Bills 59 and 198: Has the Final Chapter Been Written?", "Subrogation-What Every Lawyer Needs to Know", "Protected vs. Unprotected Defendants under Bill 59" and "Settling Auto Insurance Claims: Practical and Tactical Considerations".

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imposed upon them when they rent vehicles in their own name for not more than 30 days. No coverage is extended to the driver, however. The endorsement also provides that it is excess to any other coverage that is available to the insured, the partner, officer or employee of the insured and provides that this includes any insurance that is required to respond to the liability of the driver or lessee of the leased automobile. This is a useful endorsement and should be placed on most commercial risks that have S.P.F. No. 6 coverage. It essentially ensures that the company's S.P.F. No. 6 is excess coverage when company personnel rent vehicles in their own name. It may also extend coverage for such rentals to situations where the car is not being used for company business at the time of the accident but was initially rented for company business.

**O.E.F. 110** Reduced Coverage for Lessees or Drivers of Leased Vehicles Endorsement (for attachment only to the Standard Excess Automobile Policy S.P.F. No. 7) This endorsement permits insurers to restrict excess coverage on a leased or rented vehicle to the lessor or rental company. The endorsement provides that the coverage for lessees and drivers is capped at \$1,000,000 (or any higher amount the insurer agrees to) less any underlying coverage available to the driver or the lessee.

**O.E.F. 120** Reduction of Coverage for Lessees or Drivers of Leased Vehicles Endorsement (for attachment only to the Standard Lessor's Contingent Automobile Policy S.P.F. No. 8) This endorsement limits the coverage available

under the S.P.F. No. 8 to the named insured only. The coverage provided under the S.P.F. No. 8 is not extended to the lessee of the vehicle or to the driver. We would recommend issuing all S.P.F. No. 8 policies with this endorsement.

#### Commentary

As you will recall, Bill 18 came into force on March 1 of 2006. The primary intent of that Bill was to cap the vicarious liability of leasing and car rental companies for bodily injury and death claims at \$1 million less any insurance that the persons driving, renting or leasing the vehicle had in place. At that time, we pointed out that while the legislation had limited the liability of the car rental and leasing companies, their primary and excess insurers were still obliged to indemnify the drivers of rented or leased automobiles to the full extent of the policy limits. Accordingly, unless changes were made to the S.P.F. No. 7 (Standard Excess Automobile Policy) and S.P.F. No. 8 (Standard Lessor's Contingent Automobile Policy), Bill 18 was of no practical utility to leasing and car rental companies or their insurers.

While it was clear that the S.P.F. No. 7 provided coverage to the drivers of rented or leased vehicles there was some debate whether the S.P.F. No. 8 did. In any event, the new O.E.F. 110 and 120 endorsements assume that both policies do insure the driver and strip out parts or all of that coverage.

The O.E.F. 110 is available for endorsement on the Standard Excess Automobile Policy (S.P.F. No. 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. No. 7 are only available to the named insured (the leasing or rental company). To my surprise, FSCO has decided 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 or leasing company's insurers for any shortfall between their policy limits and \$1 million.

The O.E.F. 120, on the other hand, makes it clear that where the lessee fails to keep in force insurance required by the lease, then the lessee and any driver of the vehicle will not be entitled to any coverage under the S.P.F. No. 8.

Presumably, where an insurer is obliged to make a payment under an S.P.F. No. 7 or S.P.F. No. 8, which does not inure to the benefit of the lessee or driver, that insurer may be able to subrogate against the driver and/or renter/lessee. This argument would appear to be unassailable under the S.P.F. No. 8 as the lessee and driver are never extended any coverage under that policy. On the other hand, the lessee/renter and driver may argue that the S.P.F. No. 7 insurer cannot subrogate against them just because their limits of coverage have been exhausted. They would argue that they were insureds under the same contract and this alone precludes any subrogated action

against them. We do not find that argument particularly persuasive but we are unaware of any Canadian case that addresses this issue.

In the past, insurers have not scheduled the primary policies obtained by lessees on their S.P.F. No. 7 policies. Instead, the excess coverage for the leasing company was usually added by way of endorsement on the leasing company's CGL policy. This was done in an attempt to ensure that the excess coverage did not inure for the benefit of the lessee or a driver. We have always questioned whether such endorsements were legal on the grounds that they could be construed as automobile insurance written on an unapproved form. We would now recommend putting the O.E.F. 110 on leasing company S.P.F. No. 7 policies and specifically scheduling, as a generic class, all primary policies obtained by lessees of vehicles owned by the leasing company. When this is done, we would then recommend deleting any excess coverage for the leasing program endorsed on the CGL.

However, we have noted one potential problem with this suggestion. If the lessee insures the vehicle for less than \$1 million, then the O.E.F. 110 endorsed S.P.F. No. 7 will be obliged to top up the lessee and/or driver's coverage to \$1 million. We are not aware of a method for addressing this concern. On the other hand, if the lessee and/or driver has no insurance, then the O.E.F. 120 endorsed S.P.F. No. 8 will be obliged to respond and, as it provides no coverage to the driver or lessee, presumably the O.E.F. 110 endorsed S.P.F. No. 7 should not be obliged to respond either. However, the wording of the

O.E.F. 110 could be read as obliging the S.P.F. No. 7 to top up the lessee and/or driver's coverage to \$1 million. To get around this latter problem, we would suggest scheduling the S.P.F. No. 8 endorsed with the O.E.F. 120 on a separate S.P.F. No. 7 that is not endorsed with an O.E.F. 110. This may not work because one could still argue that coverage for the driver is automatically read into the S.P.F. No. 7. However, as the primary policy legally provides no coverage to the driver, we believe a court would be receptive to an argument that the S.P.F. No. 7 doesn't either.

These endorsements are for use for new business and renewals effective on or after January 1, 2008. FSCO, however, expects insurers to read in the expanded coverages contained in the new O.A.P. 4, OPCF 21A and the OPCF 21B immediately. It would be our recommendation to approach insureds and endorse the new OEF 98B, 110 and 120 endorsements on existing policies effective January 1, 2008. This will ensure that coverage is limited in accordance with those endorsements from the beginning of the year rather than on the renewal date.

Bill 18 became law on March 1<sup>st</sup> of last year. The appropriate endorsements to give full effect to this legislation will not be fully available until January 1<sup>st</sup>, 2008. That means it has taken some 22 months to get this scheme up and running. Unfortunately, we suspect that the story is not yet complete. We anticipate a fair bit of litigation with respect to both the legislation and the revised insurance coverages. We will keep you posted on all further developments.

The FSCO Bulletin and endorsements can be found at:

[www.ontarioinsurance.com/english/pubs/bulletins/autobulletins/2007/a-06\\_07.asp](http://www.ontarioinsurance.com/english/pubs/bulletins/autobulletins/2007/a-06_07.asp). ■

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