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• CORONAVIRUS (COVID-19) INSURANCE POLICY ISSUES •

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Mark Frederick



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INTRODUCTION

Coronavirus Disease 2019 (COVID-19) has profoundly and swiftly changed the landscape of the world. The transmission of a virus causing respiratory illness was first reported to the World Health Organization on December 31, 2019 in

Wuhan, China.¹ Events escalated quickly as the coronavirus was declared a global pandemic as of March 11, 2020.² As of March 21, 2020, the World Health Organization reports that there are a total of 292,142 confirmed cases resulting in 12,784 deaths.³

Given the seriousness of this pandemic, there has been a dramatic negative impact on the global economy. The stock market is declining and business activity seems to be coming to a halt. Some of the decline in the Canadian economy is directly linked to government action such as: recommending that Canadians no longer engage in recreational travel, restricting access through our borders, and mandating that restaurants and bars close. In the end, businesses are left to tackle the plethora of issues arising from the fallout of COVID-19 including contemplating shutdown and risking critical income loss.

CORONAVIRUS AND CANADA

The Federal and Provincial Crowns across Canada and some municipal governments have ordered some businesses to temporarily close, if not shut down completely. In some provinces and cities, states of emergency are being declared, prohibiting public assembly and shutting schools and business. Most governmental, educational and transportation operations have been suspended for at least two

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weeks, or, restricted severely. Hospitals are gradually filling to capacity. Senior homes are in lockdown. Our borders are closed to international travel.

As a result, most public commerce has effectively ceased to function, while remaining professional and other service and retail businesses operate on reduced scale. Construction sites with over 25 workers are closed. Museums, galleries, cinemas, theatres and restaurants all sit idle as hundreds of thousands of workers are sent home indefinitely.

Given the grim reality, business owners are turning to their insurance policies to cover losses and potential future claims arising from the spread of COVID-19. This article will discuss the various policies that may apply.

OTHER JURISDICTIONS

In the United Kingdom, the Association of British Insurers clarified on Monday, March 16th that only a handful of companies had insurance that covered closures due to infectious diseases. Moreover, an even smaller number of those companies had insurance policies under which they could potentially claim for losses caused by the coronavirus pandemic.⁴ However, Chancellor of Exchequer Rishi Sunak recently claimed that the UK had struck a deal with British insurers to ensure that the small number of pandemic policies in place are triggered by the government's recommendation that citizens socially distance themselves.

In the United States, senators have written to four US insurance trade bodies to request that insurers cover financial losses due to COVID-19 under business interruption policies. However, there has been significant pushback on this front. This was following an attempt in New Jersey to introduce a bill that would mandate insurance providers to cover COVID-19 business interruption claims. Currently, the bill has been pulled with the expectation that insurance providers engage in good-faith practices to assist clients.⁵ Additionally, the US government is in talks with insurers about using their infrastructure to funnel large amounts of aid to distressed businesses.

COMMERCIAL GENERAL LIABILITY

Commercial general liability (CGL) provides legal compensation to businesses in the event that a third party brings a claim against them. For example, a customer could commence a claim that they contracted COVID-19 on a business premise. These types of policies typically cover bodily harm and property damage that is caused by an occurrence, meaning an accident, including continuous or repeated exposure to substantially the same general harmful conditions, in a specified coverage territory.

The typical CGL policy must be carefully scrutinized to gauge whether common exclusions null the insurance coverage.

Many policies contain specific pathogen exclusions, such as:

ORGANIC PATHOGENS

- (a) All liability or expense arising out of any actual, alleged or threatened infectious, pathogenic, toxic or other harmful properties of any **Organic Pathogen**, including exposure to any **Organic Pathogen**; and
- (b) Any loss, cost or expense arising out of any:
 - (i) request, demand, order or statutory or regulatory requirement that any **Insured** or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of any **Organic Pathogen**,
 - (ii) **Claim** or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of any **Organic Pathogen**, or
- (c) All liability or expense arising out of any actual or alleged failure by an **Insured** to properly quarantine those affected by an **Organic Pathogen**.

This exclusion does not apply to **Bodily Injury** caused by any **Organic Pathogen** in or on

any food or beverages sold, distributed, served or handled by the Insured.

DEFINITION: ORGANIC PATHOGEN

Organic Pathogen” means any:

- (d) Bacteria; mildew, mold or other fungi; other microorganisms; or mycotoxins, spores or other by-products of any of the foregoing;
- (e) Viruses or other pathogens (whether or not a microorganism); or
- (f) Colony or group of any of the foregoing.

Other policies do not have such exclusions, though they may have exclusions that speak to pollutants or moulds.

Discussion

The issues with the application of this type of exclusion will be whether the pathogen has caused the loss, or whether the threat of the pathogen has caused the loss. Case law on the subject is not entirely clear given the few occasions in which these circumstances have arisen.

Underwriters and claims managers should carefully review policy language to ensure that reference to viruses are clear and concise.

Many insurers are now inserting specific Coronavirus exclusions or are clarifying language within their policies to make it clear that virus exposure is excluded. Such efforts will be successful only if the intention was always to exclude pathogens.

Nonetheless, on a go-forward basis, underwriters may very well wish to improve their exclusionary language on this subject.

Even if coverage is found to exist, a policy may not apply in circumstances where a business owner kept operating the business despite governmental mandate to shut down or where the operation was high risk such that bodily harm was expected.

The policy would also have to be reviewed to see if coverage is excluded where the harm is caused by pollutants and whether COVID-19 qualifies as a pollutant.⁶ Disinfecting measures themselves often

involve a certain amount of pollutant or toxicity. The requirement of using sterilising hand gels may cause other health problems that may trigger other exclusions. This would include the disposal of such materials or materials said to be contaminated with the virus.

Different industries will have differing exposures. The common issue will be to see that insureds are all advised to take prudent measures to establish a virus response and protocol to ensure that premises, employees and customers are kept safe.

The most difficult areas for exposure will be hospitals and other medical facilities. Most of these will have detailed plans in place to contain the spread of virus.

COMMERCIAL PROPERTY AND BUSINESS INTERRUPTION POLICIES

Commercial property insurance, which can also include business interruption insurance, may cover loss of income, employee wages and clean-up expenses during a suspension of operations due to COVID-19. A commercial property insurance policy protects and compensates the insured in the event that there is direct physical loss or damage to covered property. These policies can also include coverage to protect owners from income loss due to direct physical loss or damage to covered property.

It is unclear that a COVID-19 related contamination would qualify as direct physical loss or damage to covered property. Typically these provisions operate to protect owners in the event a natural disaster, such as a flood, earthquake or fire, occurs and causes physical property damage.⁷ However, insurance policies can be negotiated to include infectious disease extensions to capture non-physical damage where government authorities mandate closures in order to control notable infections.⁸ It is unlikely that, without negotiation, a commercial property policy will cover this type of claim given that coverages have been restricted following previous infectious outbreaks such as SARS, H1N1 and Ebola. If the policy is ambiguous, local law may shed light on

how courts have interpreted physical loss or damage clauses and whether non-physical damage arising from infectious outbreaks qualify.

Business income loss and expenses can also be potentially covered through ordinance or law provisions that indemnify businesses in the event that government action interferes with operations. This may include enactments of laws that mandatorily force closure. However, typically, such provisions tend to limit coverage to when government actions lead to the direct seizure or destruction of covered property.

Our concern rests with policies that are unclear or may be broad enough to cover situations beyond underwriters' intentions. For example, many policies contain this type of endorsement:

CIVIL AUTHORITY

This Policy insures loss, as covered herein, which is sustained by the Insured as a result of damage caused by order of civil authority to retard or prevent a conflagration or other catastrophe.

Discussion

If a municipality or province orders one to stay home and effectively shut one's business on account of a virus, the argument will be whether the virus qualifies as a conflagration (usually a fire) or "other catastrophe", which has usually been taken as some sort of physical disaster. Pressures are already being exerted by the US government on American insurers to treat such interpretations as including viral threats.

CONTINGENT BUSINESS INTERRUPTION COVERAGE

Contingent business interruption coverage compensates a business owner in the circumstance where a vendor fails to meet supply obligations leading to business income loss. However, this type of policy typically requires that the vendor or supplier have suffered direct physical loss or damage that rendered them unable to meet their supply

obligations. The insurance policy would have to be interpreted and analyzed through local law. The insurance policy may cover a circumstance where COVID-19 leads to a supplier failing to meet its obligations to a business owner.

DISCUSSION

Insurers who insure in this area are well-advised to determine positions in advance of claims so that they may consistently respond to insureds and put the onus on insureds to take immediate measures as a prudent uninsured rather than await a determination allowing losses to pile up.

DIRECTOR AND OFFICER LIABILITY INSURANCE

Director and Officer Liability insurance (D&O) compensates a corporation for certain loss stemming from actions taken by directors and officers. With stock markets experiencing a steep decline with seemingly no immediate bottom out, shareholder lawsuits will follow alleging that corporations did not follow disclosure guidelines or were not prepared for the impact of the coronavirus. Director and Officer Liability insurance will cover decisions that leaders made in managing the company in their capacity as directors and officers. However, this type of insurance does not often cover claims citing bodily injury or harm. Overall, the situation will call for careful analysis of both the shareholder claim and the insurance policy to see if any management related decisions during the coronavirus pandemic are indemnified.

D&O or other management liability may also flow from failing to make businesses or premises safe or seeing that measures are taken to implement a safe environment for the business.

DISCUSSION

D&O will present a significant challenge for the market as the debate will rage about how well boards took efforts to plan out disaster scenarios and what

effective steps they employed to deal with the crisis while keeping operations and company value intact. For some the answer will be how they coped, for others it may be how well they positioned themselves for the inevitable recovery, while for others it will be both.

EVENT CANCELLATION

Event cancellation insurance coverage protects organizers where scheduled events had to be cancelled due to circumstances beyond their control. This will be relevant in the context of Coronavirus as calls for social distancing have forced numerous event and conference cancellations, postponements or shifts to online platforms. Each policy will have to be reviewed to assess whether infectious illness claims are excluded under the terms. In the event that it is applicable, it will be prudent to determine when the policy is triggered. It may be the case that only a government mandated cancellation of events and conferences triggers the policy coverage.⁹

DISCUSSION

We see this as a perfect storm for insurers underwriting in this area. While there will be losses, there will also be savings of expenses which need to be quantified in approaching any claim. There will also be opportunities for make-up events or other replacement activities that will take the sting out of some of the losses. These claims, if coverage exists, may involve significant accounting exercises to determine an accurate scope of damages.

PROFESSIONAL INDEMNITY – NON-MEDICAL

Most exposures involving professional indemnity arise from either design, advice or organisation. Bodily injury is generally excluded. Liability may result from various grounds, including the inability to supply staff for crucial meetings causing delay, failure to see that appropriate measures are put in place to avoid infection in the carrying out of one's

practice, which may again lead to delay or other issues.

A significant exposure may result from missed deadlines and statutory filings where staff are not available. Insureds must be reminded to take reasonable measures to see their professional obligations are fulfilled.

On the personal injury side, where coverage is endorsed, saying that someone has the virus when they do not may lead to defamatory claims, with damages determined from resulting missed business or other impairment.

Insurance brokers may particularly be at risk if pandemic coverage was available in the marketplace but not sold to clients. The issues will likely include whether the event or business was too large to be accepted as a risk, or too small, and whether limits available were sufficient.

DISCUSSION

There are a plethora of risks for professionals in the Coronavirus scenario in almost all aspects of their business in giving advice, not only involving general liability, but professional liability, particularly where their opinion as to issues such as timing and safety are raised.

CYBER LIABILITY

Business disruption brought on by the virus may make computer systems more susceptible to attack and theft. With more and more employees working from home, networks and systems become stretched to capacity leading to greater exposure to data theft and other social frauds where verification and policing of systems is impaired due to staff shortages and the need for remote monitoring.

DISCUSSION

Cyber liability is a complex topic, even without consideration of the intricacies created by a global pandemic. The Coronavirus makes this area seem like it is on steroids. For the first time, major service

businesses have employees at all levels operating remotely from home. Some workers are already familiar with this type of environment and the systems that support it. Others are not, and their function may be impacted as they get up to speed in an environment where help may not be forthcoming. Businesses who wish to “stay open” should take even greater care in circumstances where they operate with reduced staff at the office or with most staff functioning remotely to ensure they are not compromised by operation and needs created absent the discipline usually imposed within an office.

DISCUSSION

We recommend frequent calls and checks of the computer system to ensure that it is functioning optimally. Assistance should be given and all employees checked out to ensure that they can operate for prolonged periods of time in a remote environment.

EDUCATIONAL INSTITUTIONS

Many post-secondary institutions have heeded the government’s advice regarding social distancing and have proactively shutdown campuses. This has included the closure of residences that house students on campus. In many instances, classes and exams have been moved to online platforms.

Universities and colleges are undoubtedly turning their attention to the current and potential future losses of revenue that they will experience due to this pandemic. These institutions will be looking closely at their insurance policies to see if they can file claims under existing coverage policies to curb their losses. However, it is not clear whether current property and business interruption coverages will cover costs associated with closures due to this pandemic.

DISCUSSION

Property and business interruption policies typically require that property be physically damaged in order for claims to be successful. It is not clear that proactive

closure due to a government's recommendation of social distancing would qualify. Generally, even if the contamination is covered under an insurance policy, the building would need to be uninhabitable or unusable due to the contamination. Some policies further require that a civil authority deem that access to the building is prohibited in order for coverage to apply.

It is foreseeable as well that buildings and facilities with large rooms may be requisitioned for emergency space, further compounding losses.

Although the vast majority of post-secondary institutions do not have policies that would cover pandemic related revenue losses and incurred expenses, there are few unique policies that exist. For example, the University of Illinois Urbana-Champaign in the United States has an insurance policy with a subsidiary of Lloyd's of London that covers losses due to decrease in enrollment of Chinese students. The policy is triggered when two things happens: first, enrollment of Chinese students drops by at least 18.5% and second, the drop-off in enrollment is due to a specified list of reasons, such as a pandemic.¹⁰

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• PRIORITY AMONG INSURERS IN AN ALBERTA RENTAL/LEASED VEHICLE CLAIM: SIX CIRCLES OF HELL •

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Brian A. Vail

INTRODUCTION

Accidents involving rental/leased vehicles give rise to overlapping insurance coverage situations. The rental/leasing company will have an owner's policy covering it and anyone driving with its consent. The driver may have an owner's policy of his/her own relating to his/her own vehicles that may provide the driver with coverage in some cases. The driver's employer may have non-owned auto (“NOA”) coverage providing coverage to it and possibly the driver. What is the priority ranking of these insurers?

In 2011 the Alberta Legislature promulgated legislation specifying a new priority regime regarding rental/leased vehicles.¹ Other provinces

also enacted legislation to change the priorities among insurers in rental/leased vehicle situations.² Unlike that of other provinces, Alberta enacted a priority scheme that is of Byzantine complexity. Determining the priority of the various exposed insurers in a rental/leased vehicle case may not be an easy task. An insurer who is ultimately found not to have lived up to its priority ranking will be liable to those insurers who did.

NON-OWNED AUTO COVERAGE

The *Insurance Act*³ recognizes the concept of the NOA policy as being designed to provide coverage to claims against parties who may be liable for the actions of individual drivers under their control (employees, directors, officers, *etc.*). A Named Insured may be vicariously liable for the vehicular negligence of a driver who is acting in the course of the Named Insured's business.⁴ Additionally, a Named Insured may be directly liable such if as he/she/it instructs or encourages the driver to do something vehicularly negligent or fails to protect the vehicle from theft and negligent entrustment.⁵

THE SPF NO. 6 – ALBERTA STANDARD NON-OWNED AUTOMOBILE POLICY

The SPF No. 6 is the Standard Non-Owned Automobile Policy which has been approved for general use by the Alberta Superintendent of Insurance. It provides coverage for “liability imposed by law upon the Insured for loss or damage arising from the use or operation of any automobile not owned in whole or in part by or licensed in the name of the Insured, and resulting from bodily injury to or the death of any person or damage to property of others not in the care, custody or control of the Insured”. The reference to “the Insured” is a reference only to the Named Insured,⁶ as opposed to all parties insured under the policy.

However, General Provision 1 of the SPF No. 6 extends coverage to “Additional Insureds” which are defined to include “in the same manner and to the same extent as if named herein as the Insured, every partner, officer or employee of the Insured who, with the consent of the owner thereof, personally drives” the non-owned automobile. This extension of coverage to “Additional Insureds” applies in two situations:⁷

1. Situation 1 (the classic) is where the driver is a “partner, officer or employee” of the Named Insured and is operating the vehicle in the course of the Named Insured’s business.
2. Situation 2 is where the driver is a “partner, officer or employee” of the Named Insured and the vehicle is rented or leased in the name of the Named Insured. The driver need not be acting in the course of the Named Insured’s business.

If the Additional Insured lends the vehicle to someone else who is not a “partner, officer or employee” of the Named Insured, the “Additional Insured” coverage extension does not apply to that third party.⁸

The SPF No. 6 excludes coverage for some individual drivers. Under Exclusion (a), coverage is excluded “for any liability which arises from the

use or operation of any automobile while personally driven by the Insured if the Insured is an individual”. This “Insured” refers only to the Named Insured⁹ and does not purport to exclude coverage to Additional Insureds. I note that the SPF No. 6 does not throw the Named Insured individual drivers “under the bus”. They will have coverage elsewhere (e.g. the rental/leasing company owner policy or their own owner policies).

SPF No. 6 coverage is also excluded where liability is assumed under contract (Exclusion (c)) (e.g. where liability is assumed under the indemnity provisions under the rental/lease agreement with respect to damage to the vehicle or expenses in defending third party claims). Exclusion (c) can be deleted by Endorsement SEF 96. Coverage is also excluded for damage to property carried in or on the vehicle and property owned, rented or in the care/custody/control of any insured under the SPF No. 6 (Exclusion (d)). The SPF No. 6 can be modified by various other endorsements.

THE CURRENT PRIORITIES REGIME

OVERVIEW

Where a vehicle is not rented/leased, the priority of insurers involved in a non-owned automobile accident remains unchanged from the pre- 2011 regime. The owner’s policy issued to the rental/leasing company was first loss insurance. Other policies providing coverage shared ratably after that.¹⁰

Effective 1 March 2011 what is now s. 596(4) was added to s. 596, permitting the government to change the default priority rules by regulation. The government amended *The Miscellaneous Insurance Provisions Regulation*¹¹ (the *Regulation*) which changed insurer priorities for leased/rented vehicles. The “default” rule remains that the owner’s policy issued with respect to the rented/leased vehicle remains first loss insurance¹² unless:

1. There is insurance available under a motor vehicle policy where the rentee/lessee of the vehicle is covered as a Named Insured; or

2. There is coverage available under an auto policy covering the driver of the rented/leased vehicle as an “additional insured”; an “insured named in the contract”; the spouse/adult interdependent partner of, and residing with “an insured named in the contract”; or an “unnamed insured”.

In most rental/leased vehicle situations, one or both of these exceptions will apply and the *Regulation* specifies the priority of the various insurers involved in complicated detail in s. 7(2)(c). Alberta is not the only province which has amended the priority of insurers in a rental/leased vehicle situation. The *Regulation* is much more complicated than the legislation for rented or leased vehicles in Ontario which sets out only three relatively straightforward rules:¹³

277(1.1) Order in which policies are to respond

Despite subsection (1), if an automobile is leased, the following rules apply to determine the order in which the third party liability provisions of any available motor vehicle liability policies shall respond in respect of liability arising from or occurring in connection with the ownership or, directly or indirectly, with the use or operation of the automobile on or after the day this subsection comes into force:

1. Firstly, insurance available under a contract evidenced by a motor vehicle liability policy under which the lessee of the automobile is entitled to indemnity as an insured named in the contract.
2. Secondly, insurance available under a contract evidenced by a motor vehicle liability policy under which the driver of the automobile is entitled to indemnity, either as an insured named in the contract, as the spouse of an insured named in the contract who resides with that insured or as a driver named in the contract, is excess to the insurance referred to in paragraph 1.
3. Thirdly, insurance available under a contract evidenced by a motor vehicle liability policy under which the owner of the automobile is entitled to indemnity as an insured named in the contract is excess to the insurance referred to in paragraphs 1 and 2.

The application of the Byzantine wording of the Alberta *Regulation* cannot be summarized concisely. Each situation will be unique to its own facts. The only way to analyze each situation is to consider it in terms of six layers of insurer priority.

LAYERS OF INSURER PRIORITY IN A RENTAL/LEASED VEHICLE SITUATION

Introduction

The insurer priority scheme in the *Regulation* determines the respective priorities of policies where there is coverage to the driver or the lessee/rentee. There are six potential layers of insurance established by the *Regulation*, s. 7(2)(c).

It is important for all insurers potentially involved in a rental/leased vehicle priority situation to determine their respective priorities. Where the insurer which has priority over other insurers does not respond to the claim, it can be liable to indemnify those other insurers which did respond for any liability, costs and expenses incurred by them.¹⁴

A threshold issue is as to whether or not an agreement by which someone who acquires temporary use of a vehicle from its owner qualifies as a lease or rental agreement. If such an agreement does not qualify as a “rental” or “lease” the priorities set out in the *Regulation* do not apply and the default rule governs.

The terms “lease” and “rental agreement” are not defined, but their meanings can be gleaned from the definitions for “lessor” and “renter” in the *Traffic Safety Act*.¹⁵ To qualify as a “lessor” or a “renter”, there must:

1. be an agreement;
2. in the ordinary course of the owner’s business;
3. granting exclusive use of the vehicle to a lessee (for more than 30 days) or a rentee (for up to 30 days); and
4. the owner must not be in possession of the vehicle.

In *Gharbi v. v. Summit Acceptance Corp.*,¹⁶ an auto dealership’s loan of a courtesy vehicle

to a customer was held not to qualify because the dealership did not own the vehicle (a related company did) and it was not in the dealership's ordinary course of business to lease or rent vehicles.

The priority of insurers involved in a rented/leased vehicle claim depends on two variables:

1. Who is the "rentee"/"lessee" of the vehicle?; and
2. What type of "insured" is the driver (within the meaning of the *Regulation*, s. 7(2) (b) (ii)) under policies which cover the driver?

In any given rental/leased vehicle situation, either the individual driver or his/her employer or business may be the "rentee" or "lessee". Since insurance issued to the "rentee"/"lessee" is the second layer of insurance (as detailed below) it becomes necessary in these situations to determine who the "rentee"/"lessee" is. The name appearing in the rental/lease contract (be it the driver or the organization) is not determinative. The Court will not necessarily conclude that the party named in the rental/leasing contract is the "lessee"/"rentee" but will look into the circumstances to determine who the contracting parties actually are. The number of other possible scenarios is limited only by the human imagination and can be factually complex.

Two Ontario trial level decisions have held that the test is as to whom the rental/leasing company can look to or sue for payment:

1. In *Insurance Corp. of British Columbia v. Lloyd's Underwriters*¹⁷ held that where the driver (or the driver's credit card) is billed but the driver can seek reimbursement afterwards from his/her employer that driver will be the "lessee"/"rentee"; and
2. In *Intact Insurance Co. of Canada v. American Home Assurance Co. of Canada*¹⁸ Where the driver's employer (or its credit card) is to be billed, that employer will be the "lessee"/"rentee".

This law was refined or clarified somewhat in the Ontario Court of Appeal decision in *Aviva v. Wawanessa*.¹⁹ That Court held that the *Insurance Corp. of British Columbia* and *Intact Insurance Co.*

of Canada decisions are not in conflict but restated the principle in question, holding that "at their core, both decisions correctly focus upon identifying the lessee by determining the identities of the actual contracting parties".²⁰ The Court held that the parties to the rental agreement will often be the parties named in the agreement itself, in some situations the court must go beyond the four corners of the rental agreement to identify the actual "lessee"/"rentee", especially where an agency relationship is involved.

In the *Aviva* case, Mahamood contracted with Fine Furnishings to deliver its furniture. However, he did not have insurance or a credit card of his own. The owner of Fine Furnishings allowed Mahamood to use his personal credit card to rent trucks with which to make deliveries. Fines Furnishings instructed Mahamood to rent delivery vehicles only from New Horizons Car Truck Rentals. Fines Furnishings paid for the fuel. New Horizons was told that he would be picking up the rental vehicle for Fines Furnishings. When Mahamood rented the vehicle he presented no credit card. New Horizons charged the rental fees to an open account it maintained in the name of Fines Furnishings with its owner's credit card listed for payment. The rental agreement referred only to Mahamood on its face – Fine Furnishing's name did not appear anywhere in document.

The application judge determined that he need not look further than the rental agreement itself and held that Mahamood was the lessee of the vehicle. The Court of Appeal held that the motions judge erred in not looking beyond the rental agreement in this case, where there was an agency agreement between Mahamood and Fines Furnishings:

³⁰ In my view, it was an error of law to simply rely upon the face of the two-page rental agreement to determine the lessee status in this case. By doing so, the application judge failed to grapple with the fact that Mr. Mahamood was acting as Fine Furnishings' agent when he rented the truck. Mr. Mehta impliedly authorized him to do so by telling him that he could rent a vehicle from New Horizons and have that vehicle billed to the credit card on file for Fine Furnishings. New Horizons was aware of this grant of authority and dealt with Mr. Mahamood on that basis.

It is important to note that where there are several insurers potentially involved in a rental/leased vehicle situation, only those insurers whose policy provides coverage to their insured in the circumstances are in the running for a priority slot. The *Regulation* describes the insurers in each of the six levels of priority in terms their insurance being “available”.²¹ This seems trite; however it was recently made clear in *Ontario Corporation Number 1009329 (Enterprise Rent-A-Car) v. Intact Insurance Company*.²² Ms. Perets was involved in an accident while driving a rental car. She was a “listed driver” but not the Named Insured under her father’s personal auto policy issued by Intact Insurance. Intact’s policy provided coverage only to the Named Insured or the Named Insured’s spouse. The Ontario priority legislation provided that the rental vehicle’s insurer is the last loss insurer,²³ as is the case in Alberta.²⁴ The rental car company argued that the Intact insurance policy had priority. The Court rejected this, holding that Intact had no priority, since coverage was not available to Ms. Perets under that policy:²⁵

8 There is no doubt that the purpose of the amendments to the Insurance Act, introduced in 2005 by Bill 18, *Budget Measures Act*, 2005 (No. 2), S.O. 2005, c. 31, was to reduce the financial exposure of car rental companies by making the car rental company’s insurance the policy of last resort on the priority ladder. But the short answer to this appeal is that priorities under the Insurance Act depend on the existence of coverage under the policy of insurance, and in this case no coverage is available to Ms. Perets under the Intact policy.

...

10 As the highlighted terms emphasize, although s. 277(1.1) establishes priorities amongst insurers, it does not create insurance coverage where none is available. The operation of s. 277(1.1) depends on insurance being Enterprise Rent-a-Car Canada Ltd. v. Meloche Monnex Financial Services Inc., 2010 ONCA 277, 102 O.R. (3d) 87 (Ont. C.A.), at para. 20. Put another way, the priorities of insurance coverage established in s. 277(1.1) do not come into play unless there is insurance coverage, and that is a matter that must be determined in accordance with the terms of the insurance contract.

This conclusion was more recently adopted in *Elmi v. Choukair*.²⁶

First Priority: The Policy Covering the Driver as an “Additional Insured”

Where there is a policy covering the driver of the leased/rented vehicle in his/her capacity as an “additional insured” that policy is the first loss policy.²⁷

The *Regulation* defines, for the purposes of insurer priorities under s. 596 of the *Insurance Act*, only the term “additional insured” in section 7.1(1) (a), which provides as follows:

7.1(1) In this section and for the purposes of section 596 of the Act,

(a) “additional insured” means a partner, officer or employee of an insured named in a SPF No. 6 — Standard Non Owned Automobile Policy;

The SPF No. 6 defines “Additional Insured” for the purposes of that coverage under General Provision No. 1 to be “every partner, officer, or employee of the [Named] Insured in the two situations, as set out above.

Second Priority: The Policy Covering the Lessee/ Rentee of the Vehicle as a Named Insured

The second priority policy is one where the “rentee” or lessee” of the vehicle is covered as a Named Insured.²⁸

Where the lessee/rentee is an organization, only policies that cover the organization for auto liability as “an insured named in the contract” would be exposed as possible second priority insurers, *i.e.* the Named insured. The term “insured” *simpliciter* includes both “named” and “unnamed” insureds;²⁹ the term “Named Insured” is a subset of the term “insured”.³⁰ The “Named Insured” is “determined solely by looking at the people named in the Certificate of Insurance” (the policyholder(s), usually the owner(s))³¹ and “the use of the phrase ‘Named Insured’ in its various iteration suggests but

one interpretation” which is “the person given that title on the certificate”.³²

In some cases, the Named Insured expressly names a specific person (usually a family member) to be a “principal” or “occasional” or “listed” driver of the vehicle who is entitled to coverage under the policy documents and pays an additional premium for that. The “principal” or “occasional” driver does not qualify as a “Named Insured”.³³

Where the “rentee”/“lessee” is the “Named Insured”) the insurer would not usually be a second priority insurer under the SPF No. 6. He/she is not covered by virtue of Exclusion (a) unless that Exclusion has been deleted or altered by Endorsement.

Third Priority: The Policy Covering the Driver as an “Insured Named in the Contract”

The third priority insurer under the *Regulation* is one which has issued a policy where the driver is covered in his/her capacity as an “insured named in the contract”.³⁴ Again, that would be where the driver is the Named Insured under the policy and could include an auto policy issued to the driver as the Named Insured with respect to his/her own automobile.

The SPF No. 1 Alberta Standard Automobile Policy provides coverage to insureds that is extended to cover insureds while driving non-owned automobiles in some situations. Section A provides Public Liability & Property Damage coverage to the insured or any person driving with the insured’s consent with respect to the “automobile”. Section C provides coverage for loss of or damage to an insured “automobile”. The term “automobile” is defined under General Provision 5 to include the automobile described in the policy and a “Newly Acquired Automobile”. The SPF No. 1 also extends Section A and C coverage to two other types of “automobile” that are not owned by the insured by including them in the definition of “automobile” for those coverages:

1. “Temporary Substitute Automobile” per General Provision 5(c) which is a vehicle not owned by

the insured or a person living with the insured as a substitute for the vehicle described in the policy while that vehicle is unavailable because of breakdown, repair, servicing, loss, destruction or sale.

2. A Private Passenger or Station Wagon type vehicle other than the vehicle described in the policy, “while personally driven by the Insured, or by his or her spouse if residing in the same dwelling premises as the Insured”, per General Provision 5(d) under certain conditions, including
 - (a) that the Insured is an individual or are husband and wife,
 - (b) neither the Insured or his/her spouse is driving it in connection with the business of selling, repairing, maintaining, servicing, storing or parking automobiles
 - (c) the automobile is not owned or regularly or frequently used by the insured or others living in the same dwelling
 - (d) the automobile “is not owned, hired or leased by an employer of the Insured or by an employer of any person or persons residing in the same dwelling premises as the Insured” and
 - (e) the automobile is not used for carrying passengers for compensation or for commercial delivery.

The third priority insurer would not usually be the SPF No. 6 because if the driver is the Named Insured he/she is excluded by Exclusion (a) unless that is waived by Endorsement.

Fourth Priority: The Policy Covering the Driver as the Spouse/Interdependent Partner of, and Residing with, an “Insured Named in the Contract”

The fourth priority insurer is one whose auto policy insures the driver in his/her capacity as the spouse or interdependent partner of, and residing with the “insured named in the contract”.³⁵

The Private Passenger or Station Wagon type situation under GP 5(d) is a situation where the

spouse of the Named Insured would be covered with respect to a non-owned automobile. It would appear that in such a case where the driver of the leased/rented vehicle is the spouse of the Named Insured under a personal SPF No. 1 auto policy, that insurer would be a fourth priority insurer.

An SPF No. 6 insurer cannot be a fourth priority insurer as that policy form does not purport to provide coverage to anyone in his/her capacity as a spouse or interdependent partner.

Fifth Priority: The Policy Covering the Driver as an “Unnamed Insured”

The fifth priority insurer is one whose auto policy insures the driver in his/her capacity as an “unnamed insured” under that policy.³⁶

An “unnamed insured” would be any person who is insured under the policy but is not “named”. There can be people covered as insureds under an auto policy who are not “named” in the policy but who are entitled to indemnity to the same extent as the Named Insured.³⁷ “Unnamed insureds” under the SPF No. 1 auto policy include a person operating or possessing the vehicle with the consent of the Named Insured under Section A,³⁸ especially “primary”, “occasional” or “listed” drivers, since they are expressly covered by the policy but are not “Named Insureds” thereunder.³⁹

One might think that the insurer of the policy issued to the rental/leasing company could be a fifth priority insurer as the driver would be operating the vehicle with the owner’s consent and would be an unnamed insured under that policy. However, that cannot be the case because that insurer is expressly considered a sixth (and last) priority insurer by the more specific provision of s. 7.1(2) (c) (vi) of the *Regulation*.

Sixth Priority: The Leasing/Rental Company’s Owner’s Policy

The sixth and last priority for insurers in a leased/rental vehicle situation is the one which issued the owner’s auto policy to the lease/rental company.⁴⁰

CONCLUSION

Accordingly, when faced with such a case, one must identify all of the insurance policies issued to each of the rental/leasing company, the driver and that driver’s related organization as a first step. Gathering of that information can be time consuming, especially if any one or more of the various parties involved are resistant to disclosing that information. Next one must determine which entity (the driver or his/her organization) is the “rentee”/“lessee” of the vehicle, keeping in mind that the name on the rental/leasing contract is not determinative. Finally, all the levels of priority for the various insurers must be considered, as set out above. It will not necessarily be a quick and easy process in any given case.

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¹ *Insurance Act*, R.S.A. 2000, c. I-3, s. 596(4) and *The Miscellaneous Insurance Provisions Regulation*, Alta. Reg 120/2001, s. 7.1.

² e.g., *Ontario Insurance Act*, R.S.O. 1990, c. I.8, s. 277.

³ R.S.A. 2000, c. I-3, s. 560.

⁴ S. R. Moore, *The Standard Non-Owned Automobile Policy - SPF NO. 6*, 19 April 2016, Blaney McMurtry LLP, online: https://www.blaney.com/files/20156_SMoore_-_SPF_6_Paper.pdf, (“Moore”), at page 2.

⁵ Moore, page 3.

⁶ Moore, page 9.

⁷ Moore, page 6.

⁸ Moore, page 7.

⁹ Moore, page 9.

¹⁰ R.S.A. 2000, c. I-3, s. 596 (2)-(3).

¹¹ Alta. Reg 120/2001. Section 10 of the *Regulation* mandated periodic legislative review of the *Regulation* but was repealed per Alta. Reg. 142/2018, s. 2.

¹² *Regulation*, section 7.1 (2)(a) – (b).

- ¹³ The Ontario *Insurance Act*, R.S.O. 1990, c. I.8, s. 277(1.1).
- ¹⁴ *Regulation*, s. 7.1(2)(d) and (e).
- ¹⁵ R.S.A. 2000, c. T-6, s. 1(b) and (c.1); *Gharbi v. v. Summit Acceptance Corp.*, [2018] A.J. No. 374, 2018 ABQB 228, at para. 18; *Tokio Marine & Nichido Insurance Company v. Security National Insurance Company*, [2019] A.J. No. 396, 2019 ABQB 205, at para 16.
- ¹⁶ *Gharbi v. v. Summit Acceptance Corp.*, [2018] A.J. No. 374, 2018 ABQB 228; *Tokio Marine & Nichido Insurance Company v. Security National Insurance Company*, [2019] A.J. No. 396, 2019 ABQB 205.
- ¹⁷ *Insurance Corp. of British Columbia v. Lloyd's Underwriters*, [2017] O.J. No. 843, 2017 ONSC 670.
- ¹⁸ *Intact Insurance Co. of Canada v. American Home Assurance Co. of Canada*, [2013] O.J. No. 1864, 115 O.R. (3d) 708, 2013 ONSC 2372.
- ¹⁹ 2020 ONCA 704; rev'g [2018] O.J. No. 5018, 2018 ONSC 5778.
- ²⁰ 2020 ONCA 704, at para. 27.
- ²¹ *Regulation*, s. 7.1(2)(b).
- ²² [2019] O.J. No. 5851, 2019 ONCA 916.
- ²³ *Insurance Act*, R.S.O. 1990, c. I-8, s. 277(1.1).
- ²⁴ *Regulation*, s. 7.1(2)(vi).
- ²⁵ *Ontario Corporation Number 1009329 (Enterprise Rent-A-Car) v. Intact Insurance Company*, [2019] O.J. No. 5851, 2019 ONCA 916, at paras. 8, 10.
- ²⁶ [2020] O.J. No. 835, 2020 ONSC 1181, at para. 45 – 46.
- ²⁷ *Regulation*, s. 7.1(2)(c)(i).
- ²⁸ *Regulation* s. 7.1(2)(c)(ii).
- ²⁹ *Brown v. Northern Assurance Co.*, 1956 CarswellOnt 76 (SCC); aff'g 1955 CarswellOnt 57 (Ont. C.A.).
- ³⁰ *Conradi v Economical Mutual Insurance Company*, [2015] A.J. No. 532, 2015 ABQB 308, at paras. 28, 33 – 34.
- ³¹ *Francis v. Williams*, [2015] O.J. No. 6399, 2015 ONSC 7606, at para. 6; *Traffic Safety Act*.
- ³² *Conradi v Economical Mutual Insurance Company*, [2015] A.J. No. 532, 2015 ABQB 308, at para. 26. See also: C. Brown, *Insurance Law in Canada* (Carswell, 2017); *Young v. The Canadian Union Insurance Company*, [2010] N.J. No. 156, 2010 NLTD 84, at para. 17.
- ³³ *Phinney v. Economical Mutual Insurance Company*, [1986] N.B.J. No. 517, 76 N.B.R. (2d) 1 (Q.B.) at para. 4; *Commercial Union Assurance Company of Canada v. Judgment Recovery (N.S.) Ltd.*, 1996 CanLII 5251 (N.S.C.A.), at para. 10; *Young v. The Canadian Union Insurance Company*, [2010] N.J. No. 156, 2010 NLTD 84, at para. 21; *Conradi v Economical Mutual Insurance Company*, [2015] A.J. No. 532, 2015 ABQB 308, at paras. 26–30; *Enterprise Rent-A-Car Canada Limited v. Intact Insurance Co.*, [2017] O.J. No. 6534, 2017 ONSC 7515, at para. 6; *Ontario Corporation Number 1009329 (Enterprise Rent-A-Car) v. Intact Insurance Company*, [2019] O.J. No. 5851, 2019 ONCA 916. A case to the contrary is *Blair v. Royal Exchange Assurance* but it is against the weight of authority, especially the Alberta case of *Conradi* and was expressly disagreed with by the Ontario Court of Appeal in *Collins v. Wright*, 1989 CarswellOnt 4957 (Ont. C.A.), at para. 2.
- ³⁴ *Regulation*, s. 7.1(2)(c)(iii).
- ³⁵ *Regulation*, s. 7.1(2)(c)(iv).
- ³⁶ *Regulation*, s. 7.1(2)(c)(v).
- ³⁷ See the *Insurance Act*, R.S.A. 2000, c. I-3, ss. 549(e) and 563; *Brown v. Northern Assurance Co.*, 1956 CarswellOnt 76 (S.C.C.); aff'g 1955 CarswellOnt 57 (Ont. C.A.); *Conradi v Economical Mutual Insurance Company*, [2015] A.J. No. 532, 2015 ABQB 308.
- ³⁸ *Dow v. Richards*, [1999] N.S.J. No. 371, 1999 NSCA 130, at para. 23.
- ³⁹ *Phinney v. Economical Mutual Insurance Company*, [1986] N.B.J. No. 517, 76 N.B.R. (2d) 1 (Q.B.) at para. 4; *Young v. The Canadian Union Insurance Company*, [2010] N.J. No. 156, 2010 NLTD 84, at para. 21; *Conradi v Economical Mutual Insurance Company*, [2015] A.J. No. 532, 2015 ABQB 308, at paras. 26–30; *Ontario Corporation Number 1009329 (Enterprise Rent-A-Car) v. Intact Insurance Company*, [2019] O.J. No. 5851, 2019 ONCA 916.
- ⁴⁰ *Regulation*, s. 7.1(2)(c)(vi).

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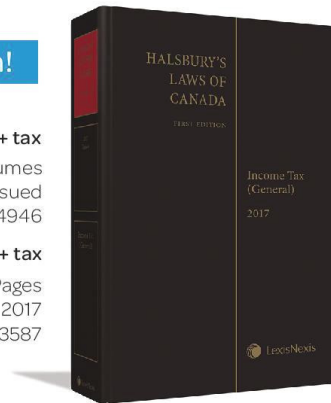
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