

Priority Among Insurers in an Alberta Rental/Leased Vehicle Claim: Six Circles Of Hell

It is not uncommon for the driver of a rented or leased vehicle to become involved in an accident and liable to claims with respect thereto. Other potential defendants include the rental/leasing company or the driver's employer if the driver was in the course of his employer's business at the time of the accident. It is possible that the rental/leasing company and the driver's employer can be directly liable, *e.g.* if they had instructed the driver to drive in a negligent fashion or where the rental/leasing company had not maintained the vehicle in a reasonable state of repair. However, in most cases the exposure of the rental/leasing company and the driver's employer will be in vicarious liability.

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. Thus, such accidents give rise to an issue as to how the various insurance policies must respond. What is the priority ranking of these insurers?

Until 2011, determining the priority of insurers in Alberta was relatively simple. The rental/leasing company's owner's policy was the first loss insurer, responsible to indemnify up to the policy limits and thereafter any other insurers provided excess coverage to be shared ratably¹.

All of that changed in 2011 when the Alberta Legislature promulgated legislation to specify a different regime of priorities regarding rental/leased vehicles². Other provinces also enacted legislation to change the priorities among insurers in rental/leased vehicle situations³. Unfortunately, Alberta's legislation is fairly detailed and specific. Unlike that of other provinces, Alberta has chosen to enact a priority scheme that is of Byzantine complexity. Determining the priority of the various exposed insurers in a rental/leased vehicle case is no easy task. One must first identify all of the policies of all of the players that provide coverage to the rental/leasing company, the driver and other coverage such as NOA coverage carried by the driver's employer or principal. Then one must consider which of six possible layers of coverage any of these insurers falls into, based primarily upon who, as a question of law was the rentee/lessee (the driver or his/her employer or principal) and what kind of "insured" the driver is within the meaning of the legislation under any of these policies.

One can readily see how there can now be much room for disagreement and debate as to the respective priorities of the various exposed insurers in any given situation. An insurer who is ultimately found not to have lived up to its priority ranking will be liable to those insurers who did.

The purpose of this paper is to review and describe the process by which insurer priority is to be determined in any given rental/leased vehicle situation. First, I will review NOA coverage in Alberta, as

¹ What is now s. 596(1) – (3) of the *Insurance Act*, R.S.A. 2000, c. I-3.

² *Insurance Act*, R.S.A. 2000, c. I-3, s. 596(4) and *The Miscellaneous Insurance Provisions Regulation*, Alta. Reg 120/2011, s. 7.1

³ *e.g.*, Ontario *Insurance Act*, R.S.O. 1990, c. I.8, s. 277

that is not as straightforward as coverage under auto owner's policies. Then I will review the overall scheme of the Alberta legislation. Finally, I will outline how that legislation operates to determine where the exposed insurers ends up in terms of a priority ranking.

NON-OWNED AUTO COVERAGE

Non-owned auto policies ("NOA policies") are addressed in Alberta insurance legislation. Section 560 of the *Insurance Act*⁴ recognizes the concept of the NOA policy as being designed to provide coverage to claims against parties who may be vicariously or directly liable with respect to the actions of individual drivers under their control (such as employees, directors, officers and partners). A Named Insured may be vicariously liable for the vehicular negligence of such a driver who is acting in the course of the Named Insured's business⁵. Additionally, a Named Insured may have some direct liability such as he/she/it instructs or encourages the driver to do something vehicularly negligent or fails to protect the vehicle from theft and negligent entrustment⁶.

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. The general coverage clause of the SPF No. 6 falls within the concept of non-owned auto coverage within the meaning of the *Insurance Act*, s. 560. It provides coverage for "liability imposed by law upon the Insured for loss or damage arising from the use or operation or 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 Insured⁷, as opposed to all parties insured under the policy.

However, it is important to note that General Provision 1 of the SPF No. 6 extends coverage under the policy 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 [emphasis added].

The extension of coverage to "Additional Insureds" per General Provision applies in two situations⁸:

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. A driver need not be acting in the course of the Named Insured's business with respect to situation 2.

For both situations, if the "partner, officer or employee" lends the vehicle to someone else who is not a "partner, officer or employee" of the Named Insured, the extension of coverage to "Additional Insureds" does not apply to that third party⁹.

⁴ R.S.A. 2000, c. I-3

⁵ S. R. Moore, The Standard Non-Owned Automobile Policy- SPF NO. 6, 19 April 2016, *Blaney McMurtry LLP*, https://www.blaney.com/files/20156_SMoore_-_SPF_6_Paper.pdf, ("Moore"), at page 2.

⁶ Moore, page 3

⁷ Moore page 9

⁸ Moore, page 6

⁹ Moore, page 7

The SPF No. 6 contains an exclusion with respect to 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” [emphasis added]. Again, the reference to “the Insured” in Exclusion (a) is a reference only to the Named Insured¹⁰, as opposed to all parties insured under the policy. This Exclusion does not purport to exclude coverage to Additional insureds.

The SPF No. 6 does not purport to throw the individual driver who is a named Insured “under the bus” in rental/ leased vehicle situations, for a couple of reasons:

1. Those individuals would likely have coverage for the accident elsewhere (such as under the rental/leasing company owners policy or their own owners policies), whereas the Named Insured which is a business organization may not have any other coverage.
2. In addition, Exclusion (a) can be deleted by Endorsement 97.

Coverage under the SPF No. 6 is also excluded:

1. Where liability is assumed under contract (Exclusion (c)). For example, 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 claims¹¹.
 - a) This does not exclude liability that exists apart from the rental/lease agreement that is assumed under contract (e.g. personal claims by a third party)¹².
 - b) Exclusion (c) can be wholly or partly deleted by Endorsement SEF 96.
2. With respect to damage to property carried in or on the vehicle and property owned, rented or in the care/custody/control of any person insured under the SPF No. 6 (Exclusion (d)).

The SPF No. 6 can be modified by various government-approved endorsements:

1. **SEF 90: Limitation to Operation of Automobile by Partners, Officers and Employees Endorsement.** This restricts the SPF No. 6 coverage for partners, officers or employees so as to apply only to a vehicle which is personally driven by classes of specified employees set out in the Application for insurance.
2. **SEF 91: Limitation to Operation of Automobiles by Named Persons Endorsement.** This restricts SPF No.6 coverage for partners, officers or employees to apply only to vehicles personally driven by specified employees set out in the Endorsement.
3. **SEF 92: Limitation to Hired Automobiles and Automobiles Operated Under Contract Endorsement.** This restricts SPF No. 6 coverage to the use or operation of “hired automobiles” (defined under General Provision No. 3) and “automobiles operated under Contract” (defined under General Provision 4).
4. **SEF 93: Limitation to Automobile Owned by Named Insured Endorsement.** This restricts SPF No. 6 coverage to automobiles owned by or licensed in the name of a specific person, firm or Corporation listed in the Endorsement.

¹⁰ Moore page 9

¹¹ Moore, page 9

¹² Moore, page 9

5. **SEF 94: Legal Liability for Damage to Hired Automobiles Endorsement.** This provides coverage for all perils, collision or upset, comprehensive and specified perils for hired automobiles only.
6. **SEF 95: Limitation to Business Conducted at Specified Locations Endorsement.** This restricts SPF No. 6 coverage for use or operation of vehicles arising from the business of the Named Insured conducted at locations listed in the Endorsement.
7. **SEF 96: Contractual Liability Endorsement.** This limits the Application of Exclusion (c) of the SPF No. 6 (which excludes coverage for liability assumed under Contract) so as not to apply to exceptions listed in the Endorsement.
8. **SEF 97: Operation by Individual Named Insured Endorsement.** This deletes Exclusion (a) (relating to liability arising from vehicles personally operated by the Insured) only with respect to the use of the vehicle in the Insured's business listed in the application for insurance. It can also delete Exclusion 1 of any applicable SEF 94 Endorsement (which excludes coverage for liability from vehicles personally driven by the insured) only with respect of vehicles listed in the business of the Named Insured as listed in the application for insurance.
9. **SEF 98: Excluding Automobiles Personally Driven by Named Insured Person (s) Endorsement.** This restricts SPF No. 6 coverage with respect to persons listed in the Endorsement while personally driving the vehicle.
10. **SEF99: Excluding Long term Leased Vehicle Endorsement.** This changes the definition of "Hired Automobiles" in General Condition 3 with respect to some long term Lease Agreements.

THE CURRENT PRIORITIES REGIME

Overview

With respect to vehicles that are not rented or leased, the priority of insurers involved in a non-owned automobile accident situation remains unchanged from the previous regime that existed before 2011, which was as follows:

1. The owner's policy issued to the rental/leasing company was first loss insurance¹³.
2. Other policies that provided coverage for the loss shared ratably amongst each other after that¹⁴. Such policies could include:
 - a) the driver's own personal owner's policy (if the rented/leased vehicle qualifies as a temporary substitute auto (per General Provision 5 (c) of the SPF No. 1) or a private passenger or station wagon (per Provision 5 (d) of the SPF No. 1) which is not used in connection with the business, or for commercial purposes or regularly used by the driver or his/her spouse and is not owned, hired or leased by the drivers employer; and

¹³ Section 596 (1)

¹⁴ Section 596 (2)-(3)

- b) NOA coverage to a person or business in which the driver is a partner, employee or officer, such as the SPF No. 6 or LIMP Art. 2.05.

However, the priority among insurers was changed with respect to rented or leased vehicles, which came into force on 1 March 2011. What is now s. 596 (4) was added after the first three subsections of what is now s. 596. That permitted the government to change the default priority rules by regulation. The government did so by promulgating *The Miscellaneous Insurance Provisions Regulation*¹⁵ (the *Regulation*) which changed insurer priorities in situations where the vehicle in question is a leased or rented vehicle.

The overall “default” rule remains that the owner’s policy issued with respect to the rented/leased vehicle in question remains first loss insurance¹⁶ 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 insurance available under an auto policy covering the driver of the rented/leased vehicle as
 - (i) an “additional insured”;
 - (ii) “an insured named in the contract”;
 - (iii) the spouse/adult interdependent partner of, and residing with “an insured named in the contract”; or
 - (iv) an “unnamed insured”.

It appears to me that in most rental/leased vehicle situations, one or both of these exceptions will apply. Where they do, the *Regulation* specifies the priority of the various insurers involved in painfully complicated detail in s. 7(2)(c). The Alberta *Regulation* is much more complicated than the legislation for rented or leased vehicles in some other provinces¹⁷.

Unfortunately the application of the byzantine wording of the Alberta *Regulation* cannot be summarized concisely. Each situation will be unique to its own facts in terms of who the “lessee” or “rentee” is and as to what type of insured the driver is under policies of insurance which may be exposed. The only way to analyze each situation is to consider it in terms of the six layers of insurer priority detailed below.

¹⁵Alta. Reg 120/2011

¹⁶*Regulation*, section 7.1 (2)(a) – (b)

¹⁷The Ontario *Insurance Act*, R.S.O. 1990, c. I.8, s. 277 sets out three relatively straightforward rules:

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.

Layers of Insurer Priority in a Rental/Leased Vehicle Situation

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” agreement or a “lease”, the priorities set out in the *Regulation* do not apply – the owner’s auto policy is first loss coverage and any other motor vehicle policies which provide coverage share ratably after that¹⁸. The terms “lease” and “rental agreement” are not defined in Alberta’s *Traffic Safety Act*¹⁹, but their meanings can be gleaned from the definitions for “lessor” and “renter” in s. 187(0.1)(b) and (c.1):

187(0.1) In this section,

...

(b) “lessor” means a person who by agreement, in the ordinary course of the person’s business, leases or grants exclusive use of a motor vehicle to another person for a term of more than 30 days or otherwise grants exclusive use of a motor vehicle to another person for a period of more than 30 days, and who is not in possession of the motor vehicle, or a person to whom the lessor has assigned the agreement;

...

(c.1) “renter” means a person who, by agreement, in the ordinary course of the person’s business, rents a motor vehicle to another person for a term of no more than 30 days and who is not in possession of the motor vehicle, or a person to whom the renter has assigned the agreement;

In *Gharbi v. v. Summit Acceptance Corp*²⁰, the Court summarized the elements of the term “lessor” as follows:

[18] To qualify as a “lessor” pursuant to section 187 of the Traffic Safety Act, CMP must have:

- 1) by agreement,
- 2) in the ordinary course of its business,
- (3) leased or granted exclusive use of a motor vehicle to another person for a term of more than 30 days or otherwise granted exclusive use of a motor vehicle to another person for a period of more than 30 days,
- (4) and must not have been in possession of the motor vehicle.

The same considerations would apply for a “renter” where the term of exclusive use of the vehicle is 30 days or less. In that case, a dealership courtesy car lent to a customer while the dealer was repairing his vehicle was held not to qualify as a lease, considering a number of factors²¹. The dealer

¹⁸ *Insurance Act*, R.S.A. 2000, c. I-3, s. 596, *Gharbi v. v. Summit Acceptance Corp.*, 2018 ABQB 228, at para. 11 – 12

¹⁹ R.S.A. 2000, c. T-6, *Gharbi v. v. Summit Acceptance Corp.*, 2018 ABQB 228

²⁰ 2018 ABQB 228, at para. 18

²¹ at para. 41 – 45, citing *ING Halifax v. Guardian Insurance Co. of Canada*, 2002 CarswellOnt 3805 (Ont.S.C.); *Coachman Insurance Company v. Lumbar General Insurance Company*, 2011 ONSC 1655; and *Baird v. Abouibrahin*, 2012 ONSC 859.

was not the owner of the vehicle (a related company was) and the dealer's "ordinary course of business" did not include renting or leasing vehicles.

The priority of insurers involved in a rented/leased vehicle claim depends on two main 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?

The *Regulation* only involves consideration of policies for which the driver or rentee/lessee have coverage. It does not provide insurance coverage that does not exist but merely provides for a scheme whereby the respective priorities of policies where there is coverage can be determined²². There are six potential layers of insurance in a rental/lease situation set out by the *Regulation*, s. 7(2)(c).

Who Is the "Rentee"/"Lessee"?

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 rules have recently been settled in *Insurance Corp. of British Columbia v. Lloyd's Underwriters*²³, which relied on *Intact Insurance Co. of Canada v. American Home Assurance Co. of Canada*²⁴.

In *Intact Insurance Co. of Canada v. American Home Assurance Co. of Canada*²⁵, Ashrafi (an employee of Colt Engineering) was involved in an accident while driving a rental car while on company business.

The rental was paid for by Ashrafi's personal AMEX card that had been provided to him by his employer. The employer's policies were that the employee was entitled to use the card for both personal and business purposes. He was responsible for the credit card charges but entitled to subsequent reimbursement by the employer with respect to business expenses. He was encouraged to use the card for company expenses to allow the employer to track travel costs and obtain cost savings. The rental agreement was signed by Ashrafi.

American Home had issued a CGL policy to Colt Engineering which provided NOA coverage for employees involved in accidents in the course of their employment. Intact had issued an owner's policy to the employee Ashrafi. The issue was as to who was the "lessee" of the vehicle for the purposes of determining the priority of insurers under section 277 of the Ontario *Insurance Act*²⁶. Under the Ontario *Act*, the priority of insurers was: (1) the policy issued to the "lessee" of the vehicle; then (2) the policy issued to the driver of the vehicle; then finally (3) the policy issued to the owner of the vehicle (*i.e.* the rental company).

Intact argued that the employer was the "*de facto* lessee" of the vehicle because the employer set the terms of the rental, controlled the type of vehicle being rented and the place from which the vehicle was rented. American Home argued that the employee driver was the "lessee".

²² *Enterprise Rent-A-Car Canada Limited v. Intact Insurance Co.*, 2017 ONSC 7515, at para. 19 – 20

²³ 2017 ONSC 670

²⁴ 2013 ONSC 2372

²⁵ 2013 ONSC 2372

²⁶ R.S.O. 1990, c.18

The Court held that the employee was the “lessee”. It found no reason to create the concept of a “*de facto* lessee”, noting that the test comes down to who the rental/leasing company could sue to enforce the rental contract. In this case, it was the employee, as the charge went on his credit card (which he could use for personal purposes) and he was responsible for paying it. The fact that he could seek reimbursement from the employer was found to be a matter between him and his employer.

In *Insurance Corp. of British Columbia v. Lloyd’s Underwriters*²⁷, the Court dealt with a somewhat different situation. Brindley was employed by Connect Hearing. She rented a vehicle in Ontario to conduct her employer’s business and was involved in an accident with it. She paid for the rental with AMEX credit card she had been issued on a Connect Hearing corporate account where the bills were sent to and paid by Connect Hearing. The employer’s policy required employees to use the credit card only for business expenses. Connect Hearing also had an account with the rental company in question and required its employees to rent vehicles for business purposes from that rental company. On the rental form, Brindley’s name appeared in the space for “Name” but her address was listed as that of the Connect Hearing office where she was employed.

Connect Hearing had an NOA policy issued by Lloyd’s which covered Brindley in this case. Brindley also had her own owner’s policy issued by ICBC which provided coverage to her. Lloyd’s argued that Brindley was the “lessee” such that her ICBC policy was primary. ICBC argued that the “lessee” was Connect Hearing, such that Lloyd’s policy was primary.

The Court held that the “lessee” was the employer Connect Hearing. The Court held that the “lessee” is determined by the basic principles of contract law, *i.e.* who are the parties to the contract and to whom could the rental company look for payment pursuant to basic contract law principles. In this case, the “lessee” was Connect Hearing because Brindley had to rent the car for company purposes, the employer had an account with the rental company from whom the employee was to rent the vehicle, the vehicle was rented on a Connect Hearing account, billed to and paid for by Connect Hearing pursuant to its corporate credit card. The Court also noted that the employee was not allowed to use that card for personal expenses.

The bottom line is that in the individual case, the Court will not necessarily conclude that the party named in the rental/leasing contract is the “rentee”/“lessee” but will look into the circumstances to determine who the rental/leasing company was legal entitled to look to for collection of the rental charges. Even where the rental contract is in the name of the Subscriber’s employee, the Subscriber may be held to the “rentee”/“lessee”.

Layers of Insurer Priority in a Rental/Leased Vehicle Situation

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

1. Who is the “rentee”/“lessee” of the vehicle? (as discussed above); and
2. What type of “insured” the driver is under policies which cover the driver (as discussed below)?

The relative priorities of the various insurers involved in a rental/leased vehicle situation must be determined by the application of the complicated rules set out in s. 7.1(2)(c) of the *Regulation* in each case.

²⁷ 2017 ONSC 670

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 policy²⁸.

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;

It bears repeating that 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 insured²⁹.

As noted above, the fact that the rental/lease contract is in the name of the driver does not necessarily mean that he/she, as opposed to the organization to which he/she is a partner, officer, employee, etc. is the “lessee”. It depends on the circumstances. Where the driver named in the rental contract pays on a card available for personal as well as business expenses and can seek reimbursement from his/her organization afterwards, he/she is likely to be considered the lessee/rentee³⁰. However, where the driver named in the rental contract pays on a card provided by his organization only for business expenses, and the credit card charges go directly to the organization, an insurer covering the organization would be the second priority insurer³¹.

Where the lessee/rentee is held to be the 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. In our opinion that means the Named insured.

The consensus in law is that a “named insured” in an auto policy is the person (or persons) named in the Certificate of Insurance – the policyholder(s), usually the owner(s)³². The law has long been clear that the term “insured” *simpliciter* in an auto policy includes both “named” and “unnamed” insureds³³ and that the term “named insured” is a subset of the term “insured”³⁴. The “named insured” is “determined solely by looking at the people named in the Certificate of Insurance”³⁵ 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”³⁶. Thus the iteration employed in the *Regulation* “an insured named in the contract” will be seen to be the named insured.

²⁸ *Regulation*, s. 7.1(2)(c)(i) of the

²⁹ *Regulation* section 7.1(2)(c)(ii)

³⁰ *Intact Insurance Co of Canada v. American Home Assurance Co of Canada*, 2013 ONSC 2372

³¹ *Insurance Corp of British Columbia v. Lloyds Underwriters*, 2017 ONSC 670.

³² C. Brown, *Insurance Law in Canada* (Carswell, 2017)

³³ *Brown v. Northern Assurance Co.*, 1956 CarswellOnt 76 (SCC); aff,g 1955 CarswellOnt 57 (OntCA)

³⁴ *Conradi v Economical Mutual Insurance Company*, 2015 ABQB 308, at ¶¶ 28, 33 – 34

³⁵ *Francis v. Williams*, 2015 ONSC 7606, at ¶ 6

³⁶ *Conradi v Economical Mutual Insurance Company*, 2015 ABQB 308, at ¶ 26. See also: C. Brown, *Insurance Law in Canada* (Carswell, 2017); *Young v. The Canadian Union Insurance Company*, 2010 NLTD 84, at ¶17.

What about a person listed or named in the application and policy documents as a “principal” or “occasional” driver? Is that person a “named insured” or a “person named in the policy”? In such cases, the named insured expressly names a specific person (usually a family member) to be a “principal” or “occasional” driver of the vehicle (which that driver does not own) entitled to coverage in the policy documents and pays an additional premium for that. The better view is that the “principal” or “occasional” driver is not a “named insured”³⁷.

It is our opinion that where the “rentee”/“lessee” is the “insured named in the contract” (meaning the “named insured”) that insurer would not usually be a second priority insurer under the SPF No. 6. If the Named Insured is the driver, he/she is not covered by virtue of Exclusion (a) unless that Exclusion has been deleted or altered by Endorsement. If the driver is not the Named Insured, s. 7.1(2)(c)(ii) is inapplicable.

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”³⁸. As noted above, that would be where the driver is the named insured under the policy and not any “primary” or “occasional” drivers referred to therein. This could include an auto policy issued to the driver as the named insured with respect to his/her own automobile.

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”³⁹.

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

³⁷ *Phinney v. Economical Mutual Insurance Company*, (1986), 76 N.B.R. (2d) 1 (N.B.Q.B.) at ¶ 4; *Commercial Union Assurance Company of Canada v. Judgment Recovery (N.S.) Ltd.*, 1996 CanLII 5251 (N.S.C.A), at p. 10 (CanLII); *Young v. The Canadian Union Insurance Company*, 2010 NLTD 84, at ¶21; *Conradi v Economical Mutual Insurance Company*, 2015 ABQB 308, at ¶¶ 26 – 30; *Enterprise Rent-A-Car Canada Limited v. Intact Insurance Co.*, 2017 ONSC 7515, at para. 6. A case to the contrary is *Blair. v. Royal Exchange Assurance*³⁷ 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 ¶ 2

³⁸ *Regulation*, s. 7.1(2)(c)(iii)

³⁹ *Regulation*, s. 7.1(2)(c)(iv)

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 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.

The SPF No. 6 does not purport to provide coverage to anyone in his/her capacity as a spouse or interdependent partner. Accordingly, an SPF No. 6 insurer cannot be a fourth priority insurer.

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 policy⁴⁰.

An “unnamed insured” would be any person who is insured under the policy but is not “named”. The term “insured” is defined for auto policies by s. 549(e) of the *Insurance Act* to mean “a person insured by a contract whether named in the contract or not”. Accordingly, 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 Insured⁴¹. “Unnamed insureds” under the SPF No. 1 auto policy would include a person operating or possessing the vehicle with the consent of the named insured under Section A⁴². It would also include “primary” or “occasional” drivers, since they are expressly covered by the policy but are not “named insureds” thereunder⁴³.

⁴⁰ Regulation, s. 7.1(2)(c)(v)

⁴¹ **Brown v. Northern Assurance Co.**, 1956 CarswellOnt 76 (SCC); aff,g 1955 CarswellOnt 57 (OntCA); **Conradi v Economical Mutual Insurance Company**, 2015 ABQB 308; *Insurance Act*, R.S.A. 2000, c. I-3, s. 563

⁴² **Dow v. Richards**, 1999 NSCA 130, at ¶ 23

⁴³ **Phinney v. Economical Mutual Insurance Company**, (1986), 76 N.B.R. (2d) 1 (N.B.Q.B.) at ¶ 4; **Young v. The Canadian Union Insurance Company**, 2010 NLTD 84, at ¶ 21; **Conradi v Economical Mutual Insurance Company**, 2015 ABQB 308, at ¶¶ 26 – 30

I would think that the insurer of an SPF No. 1 policy issued to the driver or his spouse would be a fifth priority insurer if the vehicle qualifies as a “temporary substitute automobile” per General Provision 5(c) or the Private Passenger or Station Wagon type vehicle under General Provision 5(d).

One might also think that the insurer of the policy issued to the rental/leasing company could be a fifth priority insurer. After all, the driver would be operating the vehicle with the consent of the owner (the rental/leasing company) and would be an unnamed insured under that policy. However, the leasing/rental company’s insurer would not be considered a fifth priority insurer because it 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 company⁴⁴.

Consequences To An Insurer That Does Not Respond In Priority

So what happens if an insurer in a leased/rental vehicle situation does not respond in accordance with its priority? That insurer is liable to indemnify the other insurers which did respond for any liability, costs and expenses incurred by those other insurers⁴⁵.

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. What was once a relatively simple process has now become a complicated and time- consuming one.

⁴⁴ *Regulation*, s. 7.1(2)(c)(vi)

⁴⁵ *Regulation*, s. 7.1(2)(d) and (e)