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OVERLAPPING AUTO COVERAGE IN THE NEW AGE

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I. INTRODUCTION

The Alberta government, in its wisdom (or lack thereof) has recently changed the rules for situations of overlapping auto coverage. In this paper, I will summarize the changes with a particular focus on non-owned auto policies.

There are a number of scenarios where litigants associated with an automobile, against whom a liability claim is being advance, are covered multiple insurance policies that would cover the loss. This arises frequently where the defendant driver is operating a vehicle owned by someone else (eg. a leased or rented vehicle) or where the driver's vehicle is financed with the vendor or some third party financial institution hold title to the vehicle until the last payment is made. The defendant driver's employer can also be sued in vicarious liabilty pursuant to the *Traffic Safety Act*, R.S.A. 2000, c. T-6, s. 187 or even direct liability (eg. negligence for failing to reasonably train employee drivers, negligent maintenance, etc.)

In particular, parties not directly tied to the operation of the vehicle, such as a lessor or a financial institution in a conditional purchase situation, are exposed to liability pursuant to the *Traffic Safety Ac*t. If the lessee or purchaser has been irresponsible in terms of arranging for coverage on the vehicle, a lessor or bank may be forced to step up to the plate and indemnify the driver for liability claims.

A number of different types of policies may be involved, including:

1. the owner's auto policy (S.P.F. No. 1) issued to the owner of the vehicle or the lessee or conditional purchaser thereof relating to the vehicle involved in the accident;
2. where the vehicle is a leased or rental vehicle, the owner's police of the driver (where the vehicle qualifies as a "temporary subsitute automobile") thereunder;
3. a standard garage policy (S.P.F. No. 4);
4. a lessor's policy; or
5. non-owned auto coverage, often pursuant to a Comprehensive General Liability policy.

When an accident occurs, the question arises as to which of the various applicable policies is primary or, where one or more policies are not primary, what is each insurer exposed

to in terms of indemnity. The rules have been in place for some time but, effective 1 March 2011, those rules were radically changed.

II. THE GOOD OLD DAYS

A. In General

Prior to the amendments, the situation was covered by the *Insurance Act*, sections 650 and 634.

Section 650 provided as follows:

Proportioning liability of insurer

650

(1) Subject to section 633, insurance under a contract evidenced by a valid owner's policy is, in respect of liability arising from or occurring in connection with the ownership, use or operation of an automobile owned by the insured named in the contract and within the description or definition of an automobile in the policy, a first loss insurance, and insurance attaching under any other valid motor vehicle liability policy is excess insurance only.

(2) Subject to subsection (1) and to sections 633, 641 and 642, if the insured named in a contract has or places any other valid insurance, whether against liability for the ownership, use or operation of or against loss of or damage to an automobile or otherwise, of the named insured's interest in the subject matter of the contract or any part of the contract, the insurer is liable only for its rateable proportion of any liability, expense, loss or damage.

(3) In subsection (2), "rateable proportion" means,

(a) if there are 2 insurers liable and each has the same policy limits, that each of the insurers is liable to share equally in any liability, expense, loss or damage, or

(b) if there are 2 insurers liable with different policy limits, that the insurers are liable to share equally up to the limit of the smaller policy limit,

and if there are more than 2 insurers liable, clauses (a) and (b) apply with all necessary modifications.

Note that section 650(1) provides that in the event of a loss arising from the ownership, use or operation of a particular vehicle, the "first loss" insurance is defined in terms of two factors:

1. it must be an "owner's policy"; and
2. it must be the owner's policy for which the particular vehicle in question is a described automobile under the policy.

For example, if Smith owns Vehicle A and buys an owner's policy covering himself and others using Vehicle A with his consent, Vehicle A is the described vehicle under Smith's policy. Thus, in a situation where a loss is covered by his owner's policy written for the vehicle in question and also by a non-owner's policy covering the driver, the owner's policy would be first loss insurance and the non-owner's policy would be excess. The insurer under the non-owned auto policy would not be called upon to defend or indemnify the driver unless and until the limits of the actual owner's policy covering that vehicle are exhausted.

In a situation where a loss is covered by two different owner's policies, the owner's policy taken out by the actual owner of the vehicle is the first loss insurance and any other owner's policy is not triggered until the actual owner's policy limits are used up.

Subsections 650(2) and (3) only apply to situations where both policies cover the loss and neither one is first loss insurance. These provisions do not apply where 650(1) applies to make one of the policies first loss insurance. Put another way, where one policy

is not first loss insurance, and both policies are triggered before the limits of either are exhausted, subsection 650(2) and (3) dictate how the insurers under both policies are to contribute to paying the loss. See ***Musca v. Wawanesa Mutual Insurance Co.***, 2004 A.B.Q.B. 253.

In addition, section 634 provides for the mechanism by which insurers in overlapping auto coverage situations can bring the question of who has to contribute how much to a loss before a court.

The governing case in Alberta was ***Budget Rent-A-Car of Edmonton Ltd. v. Lombard Canada*** (1998) 217 A.R. 323 (Alta.Q.B.); aff'd (1998) 228 A.R. 349 (Alta.C.A.). This case illustrates the operation of the pre-amendment section 650 very well.

Yurkiw had an owner's policy issued by Lombard Insurance with respect to a Chevrolet truck that he owned. This was pursuant to the Standard Alberta Owner's Policy (SPF #1). In addition to the Chevrolet truck, the policy covered "temporary substitute automobiles" defined as follows:

(c) A Temporary Substitute Automobile - an automobile not owned by the Insured, nor by any person or persons residing in the same dwelling premises as the Insured, <u>while temporarily used as the substitute for the described automobile which is not in use by any person insured by this Policy, because of its breakdown, repair, servicing, loss, destruction or sale.</u>

(emphasis added by the Court).

While Yurkiw's truck was in the shop for repair, he rented a vehicle from Budget Rent-A-Car. Budget had taken out a standard SPF No.1 owner's policy regarding that rental car from Lloyd's. Yurkiw was involved in an accident involving a pedestrian (Belland) with the rental car. Belland sued Yurkiw and Budget for the loss, alleging that Budget was vicariously liable for Yurkiw's vehicular negligence that had allegedly caused the accident. Each of the Lombard and Lloyd's policies had limits sufficient to completely cover the Belland claim.

Budget brought an action against Lombard and applied for an order directing that Lombard had to contribute to the loss along with Budget's insurer rateably, pursuant to sections 335(2) and (3) of the *Insurance Act,* R.S.A.1980, c. I-5 (which are exactly the same as what is now sections 650(2) and (3) of the current Act). Mr. Justice Lee held that both policies were "owner's policies" which covered the loss in question. He held that what is now section 650(1) applied to dictate that the owner's policy issued by Lloyd's to Budget was first loss insurance and thus was required to respond to the loss. Since its limits were sufficient to completely pay the claim, Lombard did not have to contribute at all under Yurkiw's owner's policy. His Lordship held as follows at paragraph 38:

38 According to the law as it currently stands in Alberta (and Ontario), the Budget policy is "primary" and therefore Lloyd's as insurer thereunder is obligated to defend and indemnify Yurkiw to the Budget Policy limits before the obligation of Lombard as excess is triggered under the Yurkiw Policy. In this case as the pedestrian Belland's claimed amounts under the Statement of Claim falls within the Budget Policy limits, the effect of this decision is that Lombard has no responsibility to defend this action and will have no financial exposure as insurer pursuant to its policy of insurance with Yurkiw.

The Court expressly rejected Budget's argument that Yurkiw's own insurer had a better knowledge of Yurkiw's own loss history and the risk presented by Yurkiw than a rental company's insurer could. It was held that this was a fact of doing business

for rental companies and was taken into account in the premiums assessed by their insurers under this legislative regime. The Court of Appeal agreed and dismissed Budget's appeal, at paragraphs 4 – 7:

4 In our view, the respondent is not first loss insurer, and need not give rateable coverage either, in this case.

5 The rental contract suggests that Budget provides insurance. To subrogate against Mr. Yurkiw, whether or not he happens to have other insurance, seems contrary to the contract.

6 We heard a good deal about s. 335(1) of the *Insurance Act*. It makes one insurer first insurer. In our view, that one policy could not be the respondent's, unless one gave extremely strained constructions to two parts of that section: which car gives rise to liability, and also to which car Mr. Yurkiw "owned". When the pedestrian was hit, Mr. Yurkiw's vehicle was immobile miles away. It gave rise to no liability.

7 What is more, one defendant is Budget, and counsel for the appellant was not able to show us that the respondent's policy issued to Mr. Yurkiw covers Budget, even if Budget had no policy of its own. So the supposed first insurer would not even defend or cover half the lawsuit.

See also ***Federated Insurance Company of Canada v. ING Insurance Co. of Canada***, 2007 A.B.C.A. 235. Federated Insurance provided coverage to a car dealership that took a car to sell on consignment, owned by a vehicle wholesaler which had the vehicle covered by an owner's policy issued by ING Insurance. The car was involved in an accident while it was in the care and control of the dealership but while the title of the vehicle remained with the wholesaler. ING and Federated disputed as to who was the first loss insurer. The Court found that ING was the first loss insurer and was therefore obliged to defend and indemnify the defendants pursuant to section 650 of the *Insurance Act*. It was held that this section was established to create priority between policies and that, pursuant to that provision, the "owner's policy" was meant to provide first loss insurance. Any other liability policy was excess insurance only.

What if the rental car is not a "temporary substitute automobile" under the rentee's policy? For example, consider the situation where Smith owns a two-seater sports car for which he purchases an owner's policy. When his extended family comes out to visit from another country and he wants to drive them all out to the mountains for the weekend, he finds that that vehicle is not large enough to carry them all. Accordingly, he rents a van from a rental company. The rental van would not qualify as a "temporary substitute automobile" under the rentee's policy. Unlike the situation in the ***Budget Rent-A-Car*** case, the van is not being used by the rentee as a substitute for his own sports car while that car is unavailable due to servicing. In such a case, the rental company's policy would be all alone in covering the loss. Smith's policy does not cover it at all.

B. Non-Owned Auto Coverage

What if the person driving the vehicle was employed by an employer that has non-owned auto coverage?

Many organizations carry some form of Non-Owned Auto coverage, whereby they are insured for losses arising from the use of a vehicle not owned by the insured organization. There are two main scenarios here:

1. Where the vehicle is leased or rented for the benefit of the employer organization's operations; and
2. Where the vehicle in question belongs to the

employee driver in question.

The form of Non-Owned Auto coverage is not mandated by legislation such as is the case regarding an owner's auto policy. Often Non-Owned Auto coverage is provided by a CGL policy. A common form of such coverage is as follows:

Non-Owned Auto Liability

1. Subject to [policy limits], the Insurer shall pay all sums which the Insured shall become legally liable to pay as loss or damage for Bodily Injury and/or Property Damage arising from the use or operation of any automobile not owned by or licensed in the name of the Insured.

2. The provisions of this Article 2.05(1) shall not apply:

   (a) to liability which arises from the use or operation of any automobile while personally driven by the Insured if the Insured is an individual;

   (b) to loss of or damage to property carried in or upon any such non-owned or non-licensed automobiles;

   (c) to liability assumed by any oral contract or agreement;

   (d) to liability imposed upon any person insured by this Policy:

      (i) by any workers' compensation law; or

      (ii) for bodily injury to or the death of the Insured or any partner, officer or employee of any such person, while engaged in the business of the Insured.

   (e) if the Insured permits, suffers, allows or connives at the use of the automobile:

      (i) by any person under the influence of intoxicating liquor or drugs to such an extent as to be for the time being incapable of the proper control of the automobile,

      (ii) by any person, unless such person is for the time being authorized by law or qualified to drive or operate the automobile, or while such person is under the age of sixteen (16) years or under such other age as is prescribed by law,

      (iii) for any illicit or prohibited trade or transportation,

      (iv) in any race or speed test.

As you can see, this type of clause provides coverage for the organization but <u>not</u> the individual employee driving (per Article 2(a)). It should be noted that this does not mean that the employee is left out in the cold without insurance coverage.

The general intent of non-owned auto coverage is to provide coverage to the <u>employer</u> for an accident involving one of its employees while driving a vehicle not owned by the employer. See F.Tierney and P. Braithwaite, ***A Guide to Effective Insurance***, 2d ed. (1992, Butterworths), pp. 290 – 292. It is intended to cover the <u>employer</u> for allegations of vicarious liability (where the employee is on the employer's business) and vehicle-related allegations of direct liability against the employer. It is <u>not</u> intended to cover the <u>employee</u> himself/herself while driving his/her own vehicle. The employee will have auto coverage in one or both of two ways:

1. where the vehicle is leased or rented, the owner's policy of the lessor or rental company covers the employee; and/or
2. where the vehicle is owned by the employee,

coverage exists under the employee's owner's policy.

Where an organization's employee is the driver, the employee's owner insurance or the lessor/rental company's insurance, as the case may be, is the only insurance covering the employee (as the employer's policy does not cover the employee as an individual driver). The employer's coverage would not be triggered unless and until the owner's/lessor's/rental company's policy limits are exhausted insofar as the employer's liability and is not triggered at all with respect to the employee's exposure.

However, the recent amendments change this result.

III. AFTER THE AMENDMENTS

A. The Changes That Were Made: Overview

Recently, the lenders and sellers (who retain title to a vehicle until the purchaser makes all the payments), vehicle leasing outfits and rental car companies persuaded the government that the situation was "unfair", especially in situations where such lessors or renters are only vicariously liable pursuant to section 187 of the *Traffic Safety Act*, R.S.A. 2000, c. T-6. The government was convinced that s. 650(1), which makes the owner's policy taken out by the lessor or renter first loss insurance, was "unfair". They also persuaded the government that the liability of lessors, renters, lenders and sellers ought to be capped, quite apart from whether or not the lessee, rentee, borrower or purchaser carries any insurance that would cover the loss.

B. Vicarious Liability Cap for Renters, Lessors And Secured Lenders or Sellers

The *Traffic Safety Act*, R.S.A. 2000, c. T-6 was amended effective 1 March 2011 so as to cap the liability of lenders and sellers (who retain title to the vehicle), lessors and renters to third parties, regardless of whether or not the borrower, purchaser, lessee or rentee had any insurance covering the loss.

The *Traffic Safety Act*, subsections 187(1) and (2) provide that when a person possessing a vehicle with the vehicle owner's consent becomes involved in an accident, the vehicle owner becomes vicariously liable for the negligence of the driver:

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(1) In an action for the recovery of loss or damage sustained by a person by reason of a motor vehicle on a highway, a person who, at the time that the loss or damage occurred,

(a) was driving the motor vehicle, and

(b) was living with and as a member of the family of the owner of the motor vehicle,

is deemed, with respect to that loss or damage,

(c) to be the agent or employee of the owner of the motor vehicle,

(d) to be employed as the agent or employee of the owner of the motor vehicle, and

(e) to be driving the motor vehicle in the course of that person's employment.

(2) In an action for the recovery of loss or damage sustained by a person by reason of a motor vehicle on a highway, a person who, at the time that the loss or damage occurred,

(a) was driving the motor vehicle, and

(b) was in possession of the motor vehicle with the consent, expressed or implied, of the owner of the motor vehicle,

is deemed, with respect to that loss or damage,

(c) to be the agent or employee of the owner of the motor vehicle,

(d) to be employed as the agent or employee of the owner of the motor vehicle, and

(e) to be driving the motor vehicle in the course of that person's employment.

I emphasize that section 187 applies to render an owner, lessor, renter or vicariously liable for the driver's vehicular negligence. It should be remembered that it is possible for an owner, lessor, renter or seller to be exposed to direct liability for any given vehicular loss if he/she/it was complicit in that loss. For example, a rental company would be directly liable for negligence, quite apart from any negligence on the part of the driver in operating the vehicle where:

1. the rental company negligently allows a driver to operate one of its rental vehicles while impaired by alcohol; or
2. the rental company does not properly inspect and maintain the vehicle but rents it to an unwitting rentee with defective brakes.

Under the amended legislative regime, the vicarious liability of lessors, renters, lenders and sellers is capped at the greater of:

1. $1,000,000 (which is commonly the limit under policies issued to commercial entities);
2. the limits of their policy; or
3. an amount prescribed by regulation (*Traffic Safety Act*, subsections 2.1(4)-(5)).

Again, this does not cap the direct liability of these entities. It also does not cap liability of certain classes of lessors, renters, lenders and sellers as prescribed by regulation (*Insurance Act Miscellaneous Provisions Regulation*, Alta.Reg. 203/2010 (the *IAMPR*"), subsections 2.1(5)(b) and 7(b)).

In addressing the bill that made these changes to the Legislature, the Minister made the following comments (***Hansard***, 20 November 2007):

> ". . . Mr. Speaker, another amendment under Bill 49 would put the focus of liability for collisions on people who have day-to-day control over driving their vehicles. At present others who retain title to a vehicle they lease or sell to someone on a conditional basis can be found vicariously liable for damages and collisions where an individual who leased or bought the vehicle got into a collision or allowed someone else to drive who was in a collision. It is proposed that a cap be placed on liability by the vehicle leasing and sale industry and on the liability of lenders who retain title to vehicles as collateral for loans. The provinces of Ontario and B.C. have a similar cap on liability in place. . . ."

To the same effect, see the Minister's comments on 3 December 2007 (***Hansard***, 3 December 2007).

A potentially disturbing aspect of these changes is that the power to determine deviation from the standard rules of vicarious liability under the *Traffic Safety Act*, section 187, and the insurance priority rules under the *Insurance Act*, Section 650, can be set by Cabinet issuing regulations without debate or approval by the Legislature. In the legislative debates relating to these changes, this was something raised by the Opposition. Indeed, there was an argument that making the Cabinet supreme over the Legislature in these matters is unconstitutional. I have not considered this argument in any depth as I believe it to be outside of the scope of your request for an opinion. Suffice it to say that the current rules may be subject to challenge in addition to the possibility that the Cabinet

may amend the regulations to change the rules even further.

C. Insurance Changes: Overlapping Coverage Scenarios

1. In General

Of more direct application to insurance law, the legislation was changed so as to alter the priority of insurers involved in an overlapping automobile coverage situation, effective 1 March 2011. This was done by adding a subsection, (section 650(4)) to section 650 of the *Insurance Act*, by which the Legislature delegated the power to make the necessary changes to Cabinet. Section 650(4) provides as follows:

> 4) Despite subsection (1), the Lieutenant Governor in Council may make regulations
>
> (a) respecting the priority of payment of insurance held by a lessor as defined in section 187 of the *Traffic Safety Act* or a rental car company in respect of liability arising from or occurring in connection with the ownership, use or operation of an automobile owned by the lessor or rental car company;
>
> (b) defining terms for the purposes of this section;
>
> (c) where regulations are made under clause (a) or (b), modifying any provision of this *Act* to the extent that the Lieutenant Governor in Council considers necessary in order to carry out the purpose and intent of this section.

Pursuant to that delegated regulatory power, Cabinet promulgated section 7.1 of the *Insurance Act Miscellaneous Provisions Regulation*, Alta.Reg. 203/2010 (the *IAMPR*"). The *IAMPR* radically changes the priority of insurers in overlapping auto coverage situations to make the insurance policy of lessee and rentee first loss insurance which must be exhausted before the owner's policy issued to the lender or renter is triggered (*IAMPR*, section 7.1(2)). This reverses the impact of ***Budget Rent-A-Car of Edmonton Ltd. v. Lombard*** and ***Federated Insurance Company of Canada v. ING Insurance Co. of Canada*** for leasing and rental situations.

The general rule under the *Insurance Act*, s. 650(1) remains in effect – the owner's policy issued to any vehicle owner is first loss insurance with respect to all other policies, including another owner's policy (*IAMPR*, section 7.1(2)(a)). The general rule remains that only if neither of the two policies is rendered first loss insurance pursuant to section 650(1) do the provisions of section 650(2) and (3) come into play to dictate the respective contribution of the insurers.

Section 650(4) of the *Insurance Act* and s. 7.1(2)(b) of the *IAMPR* create an exception to the general rule under S. 650(1) for lessors and renters. Accordingly, where an non-owner insured with other coverage (such as Non-Owned Auto coverage) is involved in a motor vehicle accident with a vehicle leased or rented from another party, the non-owner's policy is now going to have to contribute to the loss in many cases where it would not have had to prior to the amendments. Where an employer has Non-Owned Auto coverage such as set out above, its insurer becomes the first loss insurer pursuant to subsection 7.1(2)(b) and (c) of the *IAMPR*.

Again, I note that the non-owner employee (or his/her employer) are not on risk with respect to the direct liability of the rental or leasing company (such as where the vehicle is provided with defective brakes). While the *IAMPR* makes the policy of the lessee or rentee first loss insurance, it does not cause the lessor or renter to become an insured under the LPIP. Non-Owned Auto policies in the form set out above only cover the insured

and not the entity from whom the insured rented or leased the vehicle and the Non-Owned Auto insurer is not obliged to pay for direct negligence on the part of the rental or leasing company.

Now, if an employee of the non-owner employer is involved in an accident while driving a leased or rented vehicle, the Non-Owned Auto insurer becomes first loss insurance (with respect to the employer's liability exposure) and the owner's insurance carried by the rental company or leasing outfit is only triggered once the limits of the Non-Owned Auto policy are exhausted. The direct liability of the rental company remains something to which the Non-Owned Auto insurer need not respond to

2. <u>Examples</u>

By way of explanation, consider the following three scenarios:

1. **Scenario 1**. A employee (Smith) employed by XYZ Co. is driving a rented or leased vehicle while on hospital business when she is involved in an accident. The vehicle was rented by XYZ Co. or by her on behalf of the company.
2. **Scenario 2.** Smith, employed by XYZ Co., is driving a rented or leased vehicle while on company business when she is involved in an accident. The vehicle was rented by Smith for her own use and not because the company instructed her to go out and rent a vehicle for its businsess. She just happened to be driving on company business when the accident happened.
3. **Scenario 3.** Smith, employed by XYZ Co., is driving her own vehicle while on company business when she is involved in an accident.

In all three scenarios, the injured party could sue:

1. Smith for direct (vehicular) negligence;
2. XYZ Co. (as her employer) for:

   (a) Vicarious liabilty for the negligence of the employee Smith; and/or

   (b) Direct liability. For example, the employer XYZ Co. would be directly liable if if it is complicit in the employee's negligence, or if the employer failed to have safe driving policies in place for employees. Another example is where the employer's policies instructions to her are alleged to have negligently contributed to the accident. (In ***Aviva insurance Company of Canada v. Pizza Pizza Limited***, 2007 CanLII 44948 (Ont.S.C.) a pizza delivery driver struck down a pedestrian while making a delivery. The pedestrian sued the pizza company for vicarious liability regarding the driver's negligence <u>and</u> alleged direct liability on the basis that the pizza company's policies of providing pizza for free if not delivered within 30 minutes contributed to the loss.); and

   (c) The owner of the vehicle. Under Scenarios 1 and 2 that would be the rental/leasing company. Under Scenario 3 that would be the employee Smith herself.

   (d) Art. 2(a) of XYZ Co's Non-Owned Auto policy excludes from coverage an individual insured while personally driving <u>any</u> automobile. This provides coverage f<u>or XYZ Co.</u> under all three scenarios. This <u>excludes</u> coverage <u>for the employee Smith</u> in <u>all three</u> Scenarios. <u>However,</u> in further explanation of our comments in our 22 October 2011 letter, that does <u>not</u> mean that the employee is personally left unprotected by insurance.

      (i) **Under Scenario 1**, she would be covered by the owner's police issued to the rental/leasing company. As far as she is concerned, this does not involve overlapping coverage by both

the rental/leasing company's police and another policy. The provisions providing for priority among insurers in overlapping coverage situations under the *Insurance Act*, R.S.A. 2000, c. I-3, s. 650 and other related statutes do not apply (before or after the 1 March 2011 amendments to the legislation).

(ii) **Under Scenario 2**, she would be covered by the renter's/lessor's auto policy.

(1) If she had rented the vehicle as a "temporary substitute automobile" within the terms of her own policy, her own policy would also cover her. This is the case where she rented the vehicle because the vehicle specified in her own policy is under repair. This is an overlapping coverage scenario and the legislation regarding priorities of the insurers applies. Before the March 2011 amendments, the renter's/lessor's policy was primary. After the amendments, the nurse's policy is primary.

(2) If the rented vehicle does not qualify as a "temporary substitute automobile" under the nurse own policy, she is only covered by the renter's/lessor's policy. There is no other, overlapping coverage and the legislation governing priority of insurers has no application, either before or after the March 2011 amendments.

(iii) **Under Scenario 3**, she would be covered under both the rental/leasing company's police and her own auto owner's policy. Prior to the 1 March 2011 legislative amendments, the rental/leasing company's policy was first loss insurance and her own auto policy would not be triggered unless and until the renter's/lessor's policy limits are exceeded. After the amendments, her own policy is first loss coverage and the renter's/lessor's policy is not triggered unless the nurse's policy limits are exceeded.

(e) The only bearing that the March 2011 amendments have on this coverage, as far as the employer XYZ Co. is concerned, is that its Non-Owned Auto coverage became first loss insurance after the amendments, whereas before that the owner's policy (of rentor/lessor under Scenario 2 or the employee's under Scenario 3) were first loss insurance.

D. What Can The Non-Owner's Insurer Do To Minimize Its Exposure Under The Amended Legislation?

Legally, an insured under a non-owned auto policy who rents or leases a vehicle or buys a vehicle on time could take steps to satisfy itself that the limits of the lessor's/renter's/lender's/seller's policy are at least as high as the non-owned auto coverage, given the cap set out in section 187(2.1)(4) of the *Traffic Safety Act*. A lessee, rentee or purchaser could insist on a clause in the lease, rental agreement or loan that obliges the other party to maintain such limits, to provide proof of same regularly (and/or on request) and for the other party to get insurance that provides notice of any changes to reduce its limits to the lessee/rentee/purchaser. That would take care of the liability cap set out in the *Traffic Safety Act.*

We can see nothing that the non-owner insured can do to minimize non-owned auto exposure, given the changes to priorities of insurers in overlapping auto coverage situations. The only thing that the non-owned insurer can do is to either eliminate the non-owned auto coverage from the policy or to build the increased risk into its premiums.

Most rental companies offer insurance

benefits under their policy when renting a vehicle for an extra charge. For corporate insureds under the Non-Owned Auto policies it made little sense to pay for such extra coverage under the pre-amendment regime with respect to potential liability to third parties. An insured might consider buying the extra coverag with respect to collision claims (with respect to damage to the rental vehicle itself).

Under the new regime, there is even less reason for a corporate insured under a Non-Owned Auto policy to purchase the extra coverage offered by rental companies. Other than for collision coverage, the insured would be paying for excess coverage to its own Non-Owned Auto coverage. Unless the limits of the insureds Non-Owned Auto policy are low, this would usually result in paying for coverage that would very rarely be necessary. ▲

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