

# **The Standard Non- Owned Automobile Policy- SPF 6**

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# The Standard Non-Owned Automobile Policy-SPF 6

## Introduction

The standard non-owned automobile policy (the SPF 6<sup>1</sup>) is an independent stand-alone commercial coverage. It is usually part of a package of liability coverages. In fact, some insurers issue the SPF 6 as an endorsement to their CGL (Comprehensive General Liability) policy<sup>2</sup>. It is rarely issued separately as a stand-alone policy.

In a nutshell, the SPF 6 provides liability coverage for accidents involving so-called non-owned vehicles. The most common situation where this policy would respond involves claims against employers for the negligent operation of vehicles the employer does not own by employees. The named insured is liable for the employee's negligence through the doctrine of *respondeat superior* (vicarious liability) and it is the SPF 6 policy which provides the named insured with coverage for this common law liability. However, as we will see later the coverage grant in the SPF 6 is broad enough to provide coverage in other situations as well. In addition to providing coverage for the named insured the policy provides coverage to drivers and lessees of such vehicles in some situations.

In this paper I will comment on the issues that can arise with respect to the application of the SPF 6 to a number of commonly encountered situations. I will discuss the various endorsements that can be added to the SPF 6 and how they may restrict or augment coverage. Finally, I will comment on the priority of this policy in relation to other automobile liability policies.

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<sup>1</sup> Standard Policy Form 6. This is actually a very old form and thus its SPF designation. Policy forms that have been drafted specifically for the Ontario market and approved by the Financial Services Commission of Ontario are designated as OAP (Ontario Automobile Policy) forms.

<sup>2</sup> In my opinion, this is inappropriate as this can create conflicts between the definitions in the CGL and SPF 6 policies. This, in turn, can lead to coverage being extended in unintended situations.

## The Coverage Grant

The basic coverage grant is set out in Section A of the Policy. It reads:

*The Insurer agrees to indemnify the Insured against the 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 the property of others not in the care, custody or control of the insured.*

This is a very broad grant of coverage. As previously mentioned, it would cover the named insured's vicarious liability for the negligence of an employee. It would also provide coverage for the failure of the named insured to properly secure a non-owned vehicle from theft or the negligent entrustment of a non-owned vehicle to any person.

I have also seen it used to provide coverage to entities that do not anticipate being held liable for the negligent operation of a non-owned vehicle. A good example would be a taxi dispatch service. Taxi dispatch services argue that they are not liable for the negligent operation of a taxi owned by another. However, a plaintiff may allege that the taxi service was the employer of the driver or the owner of the taxi, that it failed to implement appropriate training for drivers and owners, that it failed to properly supervise the owners and drivers or that it failed to ensure that the taxis were safe. Since the name of the dispatch service is usually emblazoned on the taxi, the plaintiff may contend that the owner and/or driver were agents of the taxi dispatch service. There may be arguments regarding whether any of these allegations are excluded from coverage under the CGL due to the operation of the "motor vehicle" exclusion contained in almost every CGL policy. The addition of a SPF 6 Policy to the liability package almost ensures that all such allegations are covered.

This is a very old coverage. It predates the introduction of liability for lessees for the negligent operation of leased automobiles which was introduced on March 1, 2006 in Ontario. Up until that date if a company rented a vehicle it was not vicariously liable under the *Highway Traffic Act* for its negligent operation<sup>3</sup>. Prior to March 1, 2006 the named insured was usually only liable for the negligent

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<sup>3</sup> Vicarious liability under the *Highway Traffic Act* is imposed on owners and lessees for the negligent operation of vehicles they own or lease which are operated with their consent. This must be contrasted to the vicarious liability

operation of a non-owned automobile when it was operated by an employee in the course of their employment. Since March 1, 2006 the named insured is liable under the *Highway Traffic Act* for the negligent operation of a rented or leased vehicle whenever it is operated with lessee's consent. It does not matter whether it is being used by an employee in the course of his or her employment. Accordingly, this coverage is even more essential than it used to be.

### Owned or Licensed

This coverage is non-owned coverage but the policy contains no definitions for "owned" or "licensed". The term owned would likely encompass legal ownership and/or equitable ownership. Generally, legal ownership would cover situations where the vehicle is registered with the MTO to the named Insured. It would also cover a situation where the vehicle had been purchased in the name of the named Insured but had not yet been registered with the MTO.

The concept of equitable ownership is more often encountered when considering coverage under the standard owners' policy (OAP 1) and is less likely to be a critical issue under the SPF 6. However, an example may assist in understanding this concept. Let us suppose that I wanted to buy a vehicle for my sister but I did not want to register it in her name because there was a risk that she might go bankrupt and would lose the car in the bankruptcy. We might agree to purchase the car, register myself as the owner but make her responsible for all repairs, maintenance and insuring the vehicle. A court might well find that she was the equitable owner of the car and I was the legal owner. If she had a business with SPF 6 coverage that coverage would not respond to a claim arising out of an accident involving that vehicle because my sister is an owner of the vehicle. However, that vehicle would probably be insured under an OAP 1 either by me or by my sister and therefore coverage under the SPF 6 would not be an issue<sup>4</sup>.

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imposed by the common law on employers under the doctrine of *respondeat superior* for the negligence of their employees. It is unfortunate that both types of liability are referred to as "vicarious" as this creates confusion.

<sup>4</sup> If the injury was catastrophic the plaintiff might attempt to look to the SPF 6 for additional coverage but as my sister owned the car the SPF 6 would not be obliged to respond.

That takes us to licensing. One must remember that there are several types of registration that apply to vehicles. There is registered ownership which we have already discussed. There is also the question of vehicle plates. Normally, the owner of the vehicle is also the owner of the plate. However, for leased vehicles the plate portion of the registration is in the name of the lessee rather than the owner. Therefore, if a business leased vehicles those vehicles would not be covered under the SPF 6. Short term rentals are normally plated under the name of the owner of the vehicle. Therefore, if an employee rented a vehicle for a week for work purposes in the employee's name the SPF 6 would provide coverage to the named insured if the vehicle was involved in an accident<sup>5</sup>.

There is another type of licensing under the Ontario *Highway Traffic Act*. This is CVOR (Commercial Vehicle Operator's Registration) licensing. For many commercial trucking businesses the trucks can only be operated on highways if there is a CVOR registration. It is possible for vehicles not owned or leased by the owner of the CVOR plates to bear those plates. If the named insured under a SPF 6 had its CVOR plate on a vehicle, then that vehicle would not be insured under the SPF 6 even if it was not owned by the named insured. This is not usually an issue because the named insured would likely have the vehicle insured under its owner's policy (OAP 1). However, if for some reason the insured or the broker had failed to insure the vehicle under the OAP 1, it might look to the SPF 6 for coverage. If the vehicle's CVOR plate was attached to the vehicle, then there would likely be no coverage under the SPF 6 for this vehicle<sup>6</sup>.

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<sup>5</sup> As we will see if the SPF 6 was endorsed with an OEF 98B the policy would also probably afford coverage to the employee in his or her capacity as the lessee of the vehicle. It would also provide coverage to the employee as the driver of the vehicle.

<sup>6</sup> There is no reported case which has indicated that CVOR licensing is considered licensing for the purposes of this or other auto policies but it is anticipated that CVOR licensing would disentitle a vehicle to coverage under the SPF 6.

## Additional Insureds

In addition to providing coverage to the named insured the SPF 6 provides coverage to drivers in certain situations<sup>7</sup>. This extension, which is set forth in section 1 of the General Provisions and Definitions, is complex and deserves some comment. The provision reads:

*The Insurer agrees to Indemnify 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 (a) in the business of the Insured stated in Item 3 of the application any automobile not owned in whole or in part by or licensed in the name of (i) the Insured, or (ii) such additional Insured person, or (iii) any person or persons residing the same dwelling premises as the Insured or such additional Insured person, or (b) any automobile hired or leased in the name of the Insured except an automobile owned in whole or in part or licensed in the name of such additional insured person.*

This provision provides insurance for specific individuals in two situations. The people entitled to coverage must partners, officers or employees of the Insured and must be personally driving the vehicle with the consent of its owner. An example may assist in understanding this point. If an employee, who is feeling unwell, allows his 15 year old unlicensed son to drive him to a jobsite and becomes involved in an accident, the court might well find the employee negligent for allowing his son to drive the vehicle. The named insured would be entitled to coverage for the negligence of its employee. However, the son, not being a partner, officer or employee of the named Insured is not entitled to coverage under the SPF 6. The employee would also not be entitled to coverage for his negligence because he was not personally driving the vehicle at the time of the accident.

Partners, officers and employees are entitled to coverage in two situations. In the first situation they are entitled to coverage if the following conditions are met:

1. The driver is a partner, officer or employee of the named insured;
2. The driver is personally operating the vehicle with the consent of its owner;
3. The vehicle is being operated in the business of the named insured as indicated in the application;

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<sup>7</sup> And lessees in limited circumstances under the OEF 98B.

4. The vehicle cannot be owned, even in part, or licensed in the name of the Insured, the driver or by anyone residing in the same dwelling premises as the named insured or the driver.

In the second situation coverage would be available if the following conditions are met:

1. The driver is a partner, officer or employee of the named insured;
2. The driver is personally operating the vehicle with the consent of its owner;
3. The vehicle is rented or leased in the name of the named Insured provided that the vehicle is not owned in part or licensed in the name of the driver.

The first situation is the classic situation where the SPF 6 has responded to claims. That is in situations where the insured could be held vicariously liable for the negligent operation of a vehicle it did not own by one of its partners, officers or employees.

The second situation requires some additional comment. It is intended to extend coverage to drivers even in situations where the named insured would have no liability. As previously noted, prior to March 1, 2006 there was no vicarious liability under the *Highway Traffic Act* for the lessee of an automobile. So unless the employee was driving the automobile in the course of business the employer would not be legally liable for the negligence of the employee. Nevertheless, employers wanted to ensure that their employees (who might not even own their own vehicles) had coverage when they rented a vehicle in the name of the employer regardless of whether the vehicle was being used for business purposes at the time of the accident. The employee would have access to the SPF 6 coverage if the owner's (lessor's) limits were insufficient.

As of March 1, 2006, anyone who rents an automobile is vicariously liable under the *Highway Traffic Act* for the negligence of any driver who was operating the vehicle with the lessee's consent. The liability of the named insured as lessee is covered by the main coverage grant under Section A of the SPF 6. Prior to March 1, 2006, the named insured would have had no legal liability as the lessee of the vehicle but now it does. This provision ensures that the driver also has insurance in such circumstances. It should be noted that this extension of coverage only extends to partners, officers and employees. If someone rents a vehicle in the name of their employer and lends the car to another person, who is not an employee of the named insured (such as a spouse), the other person would not be covered under the SPF 6.

When reviewing coverage one should keep in mind that there will be situations where the named insured is covered for a claim against it but that the driver may not be covered. If the driver does not own a vehicle situations will arise where the employer has coverage but the driver does not. However, such situations should be rare.

## Hired Automobiles and Automobiles Operated Under Contract

If you look at items 5 and 6 in the application you will find the phrases “hired automobiles” and “automobiles operated under contract”. These terms are defined under sections 3 and 4 of the General Provisions and Definitions. However, you should be aware that these definitions are irrelevant to the coverage provisions under the Policy itself. These definitions are utilized mostly by underwriters to determine the premium for this Policy. It should be noted that there are automobiles which are covered by the SPF 6 which fall outside of both definitions. For example, a vehicle rented or leased but not used in the business would be covered but not fall within either definition. A good example of this would be if the insured rented or leased a vehicle which was going to be used by the spouse of an employee for his or her personal use.

Notwithstanding that these definitions do not appear in the coverage grant or exclusions, I often see underwriters use these sections of the policy in attempts to restrict coverage. For example, I often see section 5 completed in a manner which excludes coverage for vehicles weighing over 4500 kg. I do not believe that this is an appropriate method for excluding coverage for heavy commercial vehicles. At the current time there is no endorsement which permits an insurer to restrict coverage under the SPF 6 to vehicles weighing 4500 kg or less.

However, there are a couple of endorsements that utilize these definitions to restrict coverage. For example, the SEF 92 restricts coverage under the policy only to “Hired Automobiles” and “Automobiles Operated under Contract”. The spouse’s personal use vehicle referred to in the previous paragraph would not be covered under an SPF 6 endorsed with an SEF 92. The SEF 94 provides what is essentially collision coverage to “Hired Automobiles” only.

## Exclusions

There are 5 exclusions specifically mentioned in Section A but exclusion (b) does not apply in the Province of Ontario.

The first exclusion only applies if the named insured is an individual. It excludes coverage if the named insured is personally driving the non-owned automobile. Therefore, if the insured is a sole proprietor and that sole proprietor is involved in an accident while operating a vehicle he or she did not own there would be no coverage under the Policy. Normally, the sole proprietor would be covered under their own automobile policy for such exposures. However, if the sole proprietor did not own a vehicle and used someone else's vehicle for "company business", then the sole proprietor would have no coverage under the SPF 6. He or she would only have coverage under the policy of the person who owned the vehicle. The SEF 97 can be used to delete this exclusion from the Policy.

The second exclusion excludes coverage for "any liability assumed by any insured person by this policy voluntarily under any contract or agreement". This provision would exclude liability under any indemnity agreement under an automobile lease or rental agreement. However, it would not exclude the liability of the lessee that attaches apart from the agreement. Let us suppose that an employee rented a vehicle in the named insured's name and that the rental agreement obliged the named insured to indemnify the rental company for any damages it suffered. The vehicle is damaged in a collision with a pedestrian caused by the employee's negligence. The rental company might seek indemnification for the damage to its car<sup>8</sup>. Unless the SPF 6 was endorsed with an SEF 94, the damage to the vehicle would not be covered in any event<sup>9</sup>. However, the claim by the pedestrian would be covered as that liability is independent of the contractual indemnity. A claim by the rental company for indemnity for the costs of defending the personal injury claim likely would not be covered by the SPF 6. The SEF 96 can be used to partially or totally delete this exclusion. In practice, this exclusion rarely comes into play.

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<sup>8</sup> Since the direct compensation provisions would not be engaged, there would be nothing preventing the car rental company from suing the named insured and the employee for the damage to the vehicle.

<sup>9</sup> Actually, the main insuring agreement does not provide coverage for property in the care, custody or control of the insured. This would include the rental car. Technically, the contractual liability exclusion would not be needed to deny this claim but would provide an additional reason to deny coverage.

Exclusion (d) excludes claims for damage to property carried in or upon the automobile. Additionally, the exclusion goes on to exclude coverage for damage to property owned or rented, or in the care, custody or control of any person insured under this policy. This latter provision would presumably exclude coverage if the employee drove the rental vehicle into his or her own car or garage door.

The last exclusion makes it clear that the insurer is not liable for any sum in excess of the third party liability limits plus the amounts payable under the additional agreements of the insurer. It also makes it clear that the nuclear energy hazard provisions in the *Insurance Act* apply to this policy.

## Additional Agreements of Insured and Insurer

These agreements are essentially identical to those set forth in the standard owner's policy (OAP 1). They really do not require any additional comment. However, it should be noted that the cost of defending the insureds and the plaintiff's costs are payable by the insurer and that such sums are in addition to the third party liability limits.

## Other General Provision and Definitions

General provision 5 makes it clear that there are separate limits if two automobiles are insured under the policy but that a motor vehicle with a trailer or trailers shall be considered to be one automobile only.

The premium adjustment provision in section 6 is rarely of any concern to claims examiners and I will not touch on it here.

It should be noted that the Statutory Conditions promulgated by the Superintendent of Insurance for automobile policies apply to this policy.

## Additional Endorsements

There are a total of 13 endorsements approved for use with the SPF 6 in Ontario. Several of them have already been discussed but what follows is a brief precis of the balance<sup>10</sup>.

### SEF 90-Limitation to Operation of Automobiles by Partners, Officers and Employees Endorsement

This endorsement is designed to limit the applicability of the SPF 6 to vehicles which are driven by specific partners, officers or employees. These employees are described by class in item 4 of the application.

### SEF 91-Limitation to Operation of Automobiles by Named Persons Endorsement

This is really a very restrictive endorsement that limits the application of the SPF 6 to specified drivers. If any other person is driving the automobile, there would be no coverage under the SPF 6.

### SEF 93-Limitation to Automobiles Owned by Named Insured Endorsement

This endorsement restricts coverage under the SPF 6 to vehicles that owned by or licensed in the name of specified persons.

### SEF 95-Limitation to Business Conducted at Specified Locations Endorsement

An insured may have multiple locations. This endorsement restricts the application of the SPF 6 coverage to operations arising from business at specific locations only.

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<sup>10</sup> I won't discuss the SEF 100 which is an alteration endorsement.

## SEF 98 and 98A-Excluding Automobiles Personally Driven by Named Person(s) and Excluded Driver Endorsement

I do not usually see the SEF 98 endorsement on Ontario policies. I usually see the OEF 98B which is specifically approved for Ontario and mimics the Excluded Driver Endorsement used on the OAP 1. This endorsement specifically excludes coverage under the SPF 6 if a vehicle is operated by an excluded driver. That leaves the named insured and the driver without insurance. However, they may still be liable for any injuries caused by the accident. When an excluded driver operates that vehicle, the insurer is not obliged to respond to the claim at all and the insureds run the risk of judgments for which they have no insurance coverage.

The courts hate this endorsement and look for ways to avoid enforcing it. A discussion of those cases is beyond the scope of this paper.

## OEF 98B-Reduction of Coverage for Lessees or Drivers of Leased Vehicles Endorsement

This endorsement is rather confusing and came into effect in response to the introduction of liability for lessees of automobiles.

Under the SPF 6 the partner, officer or employee has coverage in two circumstances. The first is where it is using the non-owned vehicle for company business and the second is where it is using a vehicle rented in the name of the named insured for any reason. This endorsement adds a third situation when the partner, officer or employee may have coverage. When the partner, officer or employee rents a vehicle in the business of the insured for a period of not more than 30 days, then he or she has coverage for any liability he or she may have for the negligence of the driver. This provision apparently is intended to complement changes to the OAP 1 which provide coverage for the named insured and their spouse when they rent vehicles. This endorsement provides coverage to the partner, officer or employee in respect of their vicarious liability under the *Highway Traffic Act* for the negligence of the driver. Even though the renter has coverage for their liability as the lessee the driver of the vehicle may or may not have coverage in their capacity as driver under the SPF 6. An example will explain the potential problem.

Let us suppose I rent a vehicle in my name to go out of town for discoveries. I would have clearly rented it for the business of Blaney McMurtry LLP. Let us assume that after the first day of discoveries I go out to dinner and let my junior drive. My junior gets into an accident on the way back to my hotel. That fact that I am arguably involved in non-business activities does not change the fact that I rented the vehicle for business purposes. Therefore, I would still qualify for coverage for my vicarious liability for my junior's negligence under the OEF 98B as I had rented the vehicle for business purposes. However, given that my junior was not driving in the business of the insured at the time of the accident my junior would not be covered for the negligent operation of the automobile<sup>11</sup>. Similarly, if I was driving the vehicle I would not be covered for my negligence as a driver because I was not driving for business purposes<sup>12</sup>.

The endorsement does something else that is very important. The endorsement provides as follows: "The insurance provided under this policy with respect to leased vehicles is in excess of the underlying coverage available to the Insured or to the partner, officer or employee of the Insured." It then goes on to define underlying coverage available to the Insured or the partner, officer or employee of the Insured to include any motor vehicle liability insurance that is required to respond to the liability of the driver or lessee of the leased automobile. This provision is intended to reverse the new priorities for insurance coverage for leased vehicles and re-establish the SPF 6 policy as excess coverage in leasing situations. As we will see in the next section it is far from clear whether this provision has actually reversed the statutory priorities.

### [SEF 99-Excluding Long Term Leased Vehicles Endorsement](#)

This is a very common endorsement and purports to exclude coverage for vehicles rented without drivers for periods exceeding 30 days. It purports to accomplish this by altering the definition of "Hired Automobiles". However, and as indicated above, altering the definition of "Hired Automobiles" does not actually restrict coverage under the SPF 6 because that coverage grant is not tied to that definition.

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<sup>11</sup> Whether a court would stretch the definition of "in the business of the Insured" to catch going out to dinner after the work day is concluded is unclear.

<sup>12</sup> This may not matter as I would arguably be entitled to indemnity as the lessee of the vehicle for my negligent driving.

It would restrict coverage to short term rentals if this endorsement was added to a SPF 6 which already had an SEF 92 Endorsement.

This endorsement is often used to attempt to restrict coverage to short term rentals. It is far from clear that it actually accomplishes this purpose in most situations.

## Priorities

For the most part Canadian automobile policies and, in particular, Ontario automobile policies did not contain priority provisions prior to March 1, 2006<sup>13</sup>. The reason these policies did not contain priority provisions was that they were governed by the priority provisions in section 277 of the *Insurance Act*. Therefore, putting priority provisions in the policies themselves was unnecessary. In the past this has not generally caused any problems when the accident has occurred in Canada. There is case law which stands for the proposition that insurers cannot generally contract out of the priority regime mandated by section 277<sup>14</sup>. Therefore, to determine priorities one only needed to refer to the legislative provisions.

However, it did and continues to cause problems when accidents occur in the United States. Almost all U.S. policies contain other insurance provisions which are designed to make them excess to any other insurance which must respond to the loss. Since the Canadian policies contain no priority provisions they tend to lose these priority battles with U.S. policies which do.

Up until March 1, 2006 SPF 6 policies were almost always excess to any other automobile insurance that were obliged to respond to a claim. That was a direct result of subsection 277(1) which provides:

*Subject to section 255, insurance under a contract evidenced by a valid owner's policy of the kind mentioned in the definition of "owner's policy" in section 1 is, in respect of liability arising from or occurring in connection with the ownership, or directly or indirectly with the use or operation of an automobile owned by the insured named in*

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<sup>13</sup> The standard Garage Policy (OAP 4) does contain a priority provision which makes the garage policy primary to the customer's policy in some situations.

<sup>14</sup> See *Avis Rent A Car System Inc. v Certas Direct Insurance Co.* 2005 CarswellOnt 1926 (C.A.)

*the contract and within the description or definition thereof in the policy, a first loss insurance, and insurance attaching under any other valid motor vehicle liability policy is excess insurance only.*

This provision essentially states that the policy, which insures the owner of the vehicle, is first loss insurance and any other valid motor vehicle liability policy is excess. Therefore, prior to March 1, 2006 if I rented a vehicle in the company name, then the rental company's policy would be primary and the SPF 6 Policy would be excess. In almost all situations where an SPF 6 would be obliged to respond it would provide excess coverage. The most likely exception was if the owner had not insured the vehicle that the employee had rented or borrowed.

In 2006 when the government imposed vicarious liability on lessees of vehicles it re-ordered the priority of coverages for rental vehicles. I will quote the relevant provision here as we will be discussing them in some detail in this section. Subsection 277(1.1) provides:

*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. 2005, c. 31, Sched. 12, s. 6 (1).*

In essence, what this new subsection provides is that for rented and leased cars the primary policy will be the one that insures the renter, the second policy in priority will be the policy that insures the driver and the policy in third priority is that of the owner. For rented vehicles the owner's policy is now excess rather than primary.

If nothing else changed and a company with SPF 6 coverage rented a vehicle in its own name now, then its SPF 6 policy would provide primary coverage. However, the SPF 6 has always been a rather inexpensive coverage that was intended to provide excess coverage only when the owner's policy either did not exist or had insufficient limits to respond to the claim. If SPF 6 policies were now going to be primary policies in most rental situations, then their cost would need to jump dramatically and the underwriting of such policies was going to be much more complex. The Financial Services Commission decided that putting the SPF 6 policies at the front of the line was not a good idea and crafted the OEF 98B Endorsement to address the situation.

It attempted to amend the priority rules for leased cars insured under SPF 6 Policies<sup>15</sup>. I have previously quoted the relevant provisions but, in essence, it purported to make the SPF 6 policy excess to any other policy that must respond on behalf of the driver or lessee. Unfortunately, the standard OPCF 5C which is endorsed on policies that ensure short term rental vehicles also has a provision which purports to make that policy excess to any other policy that insures the driver or lessee. That endorsement is appended to this paper.

The OPCF 5C is a very strange animal. It provides coverage for the owner of the vehicle but it also provides coverage for the driver and lessee. However, that coverage is a sort of contingent coverage. It will provide, in most cases, up to \$1 million of coverage to the driver and lessees if they have no coverage or insufficient coverage. If they have their own coverage, then no coverage is provided under the owner's policy.

How does this fit with the SPF 6 endorsed with an OEF 98B? Not very well it turns out. The best way to understand this is by going through a number of examples which will enable us to understand how the

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<sup>15</sup> Although insurers cannot contract out of the priority provisions the Superintendent of Insurance can approve policies that are inconsistent with the provisions of Part VI of the *Insurance Act*. The courts have said that there must be evidence that this was the Superintendent's intention when approving the policy or endorsement. What qualifies as evidence is unclear from the cases. This paper assumes that the priority provisions in the OPCF 5C and the OEF 98B would satisfy this evidence requirement and are capable of re-ordering the priority of these policies.

policies and endorsements work<sup>16</sup>. I will start with the more straightforward examples which actually do not trigger the OEF 98B.

In the first example an employee is driving their own car for business. The employee would clearly have coverage for his negligence under his own OAP 1. Since this is not a situation involving a rental vehicle, the OEF 98B would have no effect and priorities would be determined under subsection 277(1). The employee's policy would be first loss insurance and the SPF 6 would provide excess coverage to the named insured only. The driver would not be covered under the SPF 6 because he owns the car. The SPF 6 would only be obliged to respond if the named insured (employer) was sued because the SPF 6 would only insure the company in this situation.

In the second example, the employee borrows his brother's car to do some company business. His brother does not live with him. Again this is not a rental situation so the OEF 98B is irrelevant and priorities are governed by subsection 277(1). The owner's policy (the brother's policy) would respond as primary coverage for both the employee and the owner. The SPF 6 would respond as excess insurance on behalf of the employee and on behalf of the employer if it was sued for vicarious liability under the *respondeat superior* doctrine. It responds for the employee because he does not own the car.

Let us assume that the employee leased its vehicle on a long term lease and the employee's policy was endorsed with the usual OPCF 5 endorsement<sup>17</sup>. This situation would appear to trigger the OEF 98B and priorities would be governed by subsection 277(1.1) and not 277(1). The employee's policy provides insurance to both the owner and the employee (in this case the lessee). Under subsection 277(1.1) the employee's own policy would appear to be primary insurance. The SPF6 does not insure the employee because the vehicle is licensed in his name but it does insure the employer if it is sued for vicarious liability. This coverage would appear to be excess to the employee's coverage due to the priority provision in the OEF 98B.

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<sup>16</sup> I should note that these provisions are very complicated and there is no consensus that the approach I have taken to interpreting these provisions is correct.

<sup>17</sup> This is the endorsement used on long term rentals and it does not contain any priority provisions like the OPCF 5C.

The third example is a little more complicated. In this case the employer rents a vehicle for his employee for a week because the employee's vehicle is in the shop for repairs. In this example there are potentially 3 policies in play. The car rental company's OAP 1 endorsed with an OPCF 5C, the employer's SPF 6 with an OEF 98B endorsement and the employee's OAP 1. This vehicle will be covered by the SPF 6 and will provide coverage to the employer and to the employee because he does not own the vehicle and it is not licensed in his name. It would appear that this is also a vehicle that would be insured under the employee's own policy as a temporary substitute automobile. It would not be considered to be an "other automobile" in the employee's OAP 1 because it is rented by the employer. It would not be considered to be another "automobile that are rented or leased" under the employee's policy because it was not rented by the employee or his or her spouse. Unfortunately, when this vicarious liability provisions for lessees came into force no one contemplated that a temporary substitute automobile could be leased or rented. The original temporary substitute automobile provision clearly assumed that the employee's policy would be excess insurance only. Finally, the vehicle would be insured under the car rental company's OAP 1 with OPCF 5C endorsed. As explained earlier this policy provides contingent coverage to the renter and to the employee (driver).

This is clearly a situation involving a rental vehicle and therefore subsection 277(1.1) should apply. The SPF 6 clearly insures the lessee (the employer) in the manner prescribed by clause 1 to subsection 277(1.1)<sup>18</sup>. Therefore, under this provision the SPF 6 should normally be the first policy to respond. The employee's policy would be expected to respond "secondly" according to clause 2 in subsection 277(1.1). The car rental's policy would be expected to respond 3<sup>rd</sup>. It does not have to respond under clauses 1 and 2 because the employer and employee are not insureds (or spouses of insureds). However, the OEF 98B suggests that the SPF 6 is excess to any underlying coverage available to the driver or lessee which the employee's OAP 1 is. Since there is no similar other insurance provision in the employee's policy it would appear that the employee's policy would respond first and the SPF 6 second.

What about the car rental company's policy? The SPF 6 might argue that it should be excess to this policy as well. However, it could probably be argued that the effect of what are, in essence, mutually inconsistent "other insurance" clauses in both endorsements (the OPCF 5C and the OEF 98B), should

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<sup>18</sup> Specifically the employer is entitled to indemnity under the SPF 6 as an insured named in the contract.

cancel each other out. As between these two policies you would be back to the priorities established under subsection 277(1.1). That would suggest that the priorities would be employees policy in first priority, SPF 6 in second spot and the car rental company's policy should respond third<sup>19</sup>.

Of course, if you did not know that the vehicle was rented to replace the employee's disabled vehicle, then you would not even think to look to the employee's policy for primary coverage.

Let us change the facts a little for the fourth example. In this example, the employee rents the car when he is out of town on business for his employer in his own name. In this example neither the employee nor their spouse own a vehicle. This means that there are only two policies in play—the employer's and the rental company's. The employer's SPF 6 provides coverage to both the employer and employee. However, this policy does not insure the lessee or the driver of the automobile (the employee) as the named insured under the contract. Therefore, it is not the type of policy contemplated by clauses 1 or 2 of subsection 277(1.1). Similarly, the car rental company's policy does not insure the lessee or the driver (the employee) as an insured named in the contract.

What we have are two contracts that provide insurance but not in the manner anticipated by subsection 277(1.1). In addition, both policies contain provisions designed to make them excess to all other policies that might be obliged to respond. It is very difficult to resolve these types of priority contests. On the one hand subsection 277(1.1) purports to provide a comprehensive list of rules for resolving coverage priorities in leasing situations. On the other, it is clear from the above examples that this simply is not true. It does not appear that one should resort to subsection 277(1) or 277(2) as they appear to apply only to non-leasing situations. In this example, we have two policies that will respond for the employee and the lessee (employee), neither policy is described in subsection 277(1.1) and both contain mutually repugnant other insurance clauses. Our best guess is that the courts will conclude that the two policies should respond rateably to this loss.

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<sup>19</sup> Given the cap on lessor's liability under section 267.12 of \$1 million this policy will likely not be obliged to respond regardless of how serious the injury is.

Please note that if the employer rents the car in its own name, then its policy appears to be first loss insurance and the lessor's (owner's) appears to be excess. However, if the car is rented by the employee, then the two policies appear to share rateably.

## Closing Comments

The SPF 6 Policy has not been considered very often by the Courts. This makes it difficult to predict what the courts will do when faced with questions about its proper interpretation. Unfortunately, this situation has been made even more confusing by the introduction of revised priority rules for leased and rented vehicles and the introduction of the OEF 98B. This latter endorsement is added to almost every SPF 6 that insurers issue in Ontario. However, this should be checked because the failure to endorse it on the policy can alter order in which automobile insurance policies may be obliged to respond to a claim.

Hopefully, this paper will provide you with an introduction to the issues that need to be considered when reviewing coverages under the SPF 6.

The most important tip I can give everyone is to try and make sure you find out about the existence of any SPF 6 policies that may respond to a claim. I cannot count the number of times that I have received files and no investigation has been conducted to determine whether any of the drivers were in the course of their employment at the time of the accident. Unless you know the answer to that question you will not even consider trying to discover the existence of any SPF 6 coverage. The situation has now become even more complicated. You now need to determine whether any of the vehicles were rented and, if so, whether they were rented by an employer or by an employee for company business. Armed with this information you can pursue the existence of SPF 6 coverage that may be obliged to respond to the claim. This is even more important than it used to be as the SPF 6 may actually be the first loss insurance.

**S.P.F. No. 6 – STANDARD NON-OWNED AUTOMOBILE POLICY**

**AGENT:**

WHEREAS AN APPLICATION HAS BEEN MADE BY THE APPLICANT (HEREINAFTER CALLED THE INSURED) TO THE INSURER FOR A CONTRACT OF AUTOMOBILE INSURANCE AND THE SAID APPLICATION FORMS PART OF THIS CONTRACT OF INSURANCE AND IS AS FOLLOWS: –

ITEMS APPLICATION

1. FULL NAME OF THE APPLICANT \_\_\_\_\_  
 POSTAL ADDRESS \_\_\_\_\_  
 (INCLUDING COUNTY OR DISTRICT)  
 APPLICANT IS \_\_\_\_\_  
 (STATE WHETHER INDIVIDUAL, PARTNERSHIP, CORPORATION, MUNICIPALITY OR ESTATE)

2. POLICY PERIOD FROM \_\_\_\_\_ A.M. \_\_\_\_\_ P.M. \_\_\_\_\_ TO \_\_\_\_\_ 12:01 A.M. \_\_\_\_\_  
ALL TIMES ARE LOCAL TIMES AT THE APPLICANT'S ADDRESS STATED HEREIN

3. THE AUTOMOBILES IN RESPECT OF WHICH INSURANCE IS TO BE PROVIDED ARE THOSE NOT OWNED IN WHOLE OR IN PART BY, NOR LICENSED IN THE NAME OF THE APPLICANT, USED IN THE APPLICANT'S BUSINESS OF:

4. THE APPLICANT'S PARTNERS, OFFICERS, EMPLOYEES AND AGENTS AS OF THE DATE OF THIS APPLICATION ARE AS FOLLOWS:

LOCATION	PARTNERS, OFFICERS AND EMPLOYEES WHO REGULARLY USE AUTOMOBILES NOT OWNED BY THE APPLICANT IN HIS BUSINESS						ALL OTHER PARTNERS, OFFICERS AND EMPLOYEES			ALL APPLICANT'S AGENTS		
	CLASS "A1" PRIVATE PASSENGER			CLASS "A2" COMMERCIAL			CLASS "B"			CLASS "C"		
	NUMBER	RATE	PREMIUM	NUMBER	RATE	PREMIUM	NUMBER	RATE	PREMIUM	NUMBER	RATE	PREMIUM
			\$			\$			\$			\$

5. "HIRED AUTOMOBILES" — THE AUTOMOBILES HIRED BY THE APPLICANT ARE AS FOLLOWS:

TYPE OF AUTOMOBILE	ESTIMATED COST OF HIRE	RATES PER \$100 OF COST OF HIRE	ADVANCE PREMIUM
			\$

THE ADVANCE PREMIUM IS SUBJECT TO ADJUSTMENT AT THE END OF THE POLICY PERIOD AS PROVIDED IN THE POLICY

6. "AUTOMOBILES OPERATED UNDER CONTRACT" — ON BEHALF OF THE APPLICANT ARE AS FOLLOWS:

TYPE OF AUTOMOBILE AND DESCRIPTION OF USE	ESTIMATED CONTRACT COST	RATES PER \$100 OF CONTRACT COST	ADVANCE PREMIUM
			\$

THE ADVANCE PREMIUM IS SUBJECT TO ADJUSTMENT AT THE END OF THE POLICY PERIOD AS PROVIDED IN THE POLICY

7. THIS APPLICATION IS MADE FOR INSURANCE AGAINST THE PERILS MENTIONED IN THIS ITEM AND UPON THE TERMS AND CONDITIONS OF THE INSURER'S CORRESPONDING STANDARD POLICY FORM AND FOR THE FOLLOWING SPECIFIED LIMIT.

INSURING AGREEMENT	PERILS	LIMIT	COMBINED PREMIUMS
SECTION A THIRD PARTY LIABILITY	LEGAL LIABILITY FOR BODILY INJURY TO OR DEATH OF ANY PERSON OR DAMAGE TO PROPERTY OF OTHERS NOT IN THE CARE, CUSTODY OR CONTROL OF THE APPLICANT.	\$	(EXCLUSIVE OF INTEREST AND COSTS) FOR LOSS OR DAMAGE RESULTING FROM BODILY INJURY TO OR THE DEATH OF ONE OR MORE PERSONS, AND FOR LOSS OR DAMAGE TO PROPERTY, REGARDLESS OF THE NUMBER OF CLAIMS ARISING FROM ANY ONE ACCIDENT. \$
ENDORSEMENTS			\$

MINIMUM RETAINED PREMIUM \$ TOTAL PREMIUM \$

8. HAS ANY INSURER CANCELLED, DECLINED OR REFUSED TO RENEW OR ISSUE, AUTOMOBILE INSURANCE TO THE APPLICANT WITHIN THREE YEARS PRECEDING THIS APPLICATION? IF SO, STATE NAME OF INSURER.

9. STATE PARTICULARS OF ALL ACCIDENTS OR CLAIMS ARISING OUT OF THE USE OR OPERATION IN HIS BUSINESS OF NON-OWNED AUTOMOBILES BY THE APPLICANT WITHIN THE THREE YEARS PRECEDING THIS APPLICATION.

INJURY TO PERSONS	DAMAGE TO PROPERTY OF OTHERS

10. ALL THE STATEMENTS IN THIS APPLICATION ARE TRUE AND THE APPLICANT HEREBY APPLIES FOR A CONTRACT OF AUTOMOBILE INSURANCE TO BE BASED ON THE TRUTH OF THE SAID STATEMENTS

11. Where, (a) an applicant for a contract gives false particulars of the described automobile to be insured to the prejudice of the insurer, or knowingly misrepresents or fails to disclose in the application any fact required to be stated therein; or (b) the insured contravenes a term of the contract or commits a fraud; or (c) the insured wilfully makes a false statement in respect of a claim under the contract, a claim by the insured is invalid and the right of the insured to recover indemnity is forfeited.

COUNTERSIGNED

## INSURING AGREEMENT

Now, Therefore, in Consideration of the payment of the premium specified and of the statements contained in the application and subject to the limits, terms, conditions, provisions, definitions and exclusions herein stated

### SECTION A – THIRD PARTY LIABILITY

The Insurer agrees to indemnify the Insured against the 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:

Provided always the Insurer shall not be liable under this policy:

(a) 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; or

\* (b) for any liability imposed upon any person insured by this policy:

(1) by any workmens' compensation law; or

(2) by any law for bodily injury to or the death of the Insured or any partner, officer or employee of the Insured while engaged in the business of the Insured; or

\* Not applicable in the Province of Ontario

(c) for any liability assumed by any person insured by this policy voluntarily under any contract or agreement; or

(d) for loss or damage to property carried in or upon an automobile personally driven by any person insured by this policy or to any property owned or rented by, or in the care, custody or control of any such person; or

(e) for any amount in excess of the limit stated in Item 7 of the application, and expenditures provided for in the Additional Agreements of this policy; subject always to the provisions of the section of the Insurance Act (Automobile Insurance Part) relating to the nuclear energy hazard.

#### ADDITIONAL AGREEMENTS OF INSURER

Where indemnity is provided by this policy, the Insurer further agrees:

(1) upon receipt of notice of loss or damage caused to persons or property to serve any person insured by this policy by such investigation thereof, or by such negotiations with the claimant, or by such settlement or any resulting claims, as may be deemed expedient by the Insurer; and

(2) to defend in the name and on behalf of any person insured by this policy and at the cost of the Insurer any civil action which may at any time be brought against such person on account of such loss or damage to persons or property; and

(3) to pay all costs taxed against any person insured by this policy in any civil action defended by the Insurer and any interest accruing after entry of

judgment upon that part of the judgment which is within the limits of the Insurer's liability; and

(4) in case the injury be to a person, reimburse any person insured by this policy for outlay for such medical aid as may be immediately necessary at the time of such injury; and

(5) be liable up to the minimum limit(s) prescribed for that province or territory of Canada in which the accident occurred, if that limit(s) is higher than the limit stated in section A of Item 7 of the application; and

(6) not set up any defense to a claim that might not be set up if the policy were a motor vehicle liability policy issued in the province or territory of Canada in which the accident occurred.

#### AGREEMENTS OF INSURED

Where indemnity is provided by this section, every person insured by this policy

(a) by the acceptance of this policy, constitutes and appoints the Insurer his irrevocable attorney to appear and defend in any province or territory of Canada in which action is brought against the Insured arising out of the use or operation of an automobile with respect to which insurance is provided hereunder;

(b) shall reimburse the Insurer, upon demand, in the amount which the Insurer has paid by reason of the provisions of any statute relating to automobile insurance and which the Insurer would not otherwise be liable to pay under this policy.

#### GENERAL PROVISIONS AND DEFINITIONS

##### 1. ADDITIONAL INSURED

The Insurer agrees to indemnify 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 (a) in the business of the Insured stated in Item 3 of the application, any automobile not owned in whole or in part by or licensed in the name of (i) the Insured, or (ii) such additional Insured person, or (iii) any person or persons residing in the same dwelling premises as the Insured or such additional Insured person, or (b) any automobile hired or leased in the name of the Insured except an automobile owned in whole or in part or licensed in the name of such additional Insured person.

##### 2. TERRITORY

This policy applies only to the use or operation of automobiles within Canada or the United States of America or upon a vessel plying between ports of those countries.

##### 3. HIRED AUTOMOBILES DEFINED

The term "Hired Automobiles" as used in this policy means automobiles hired or leased from others with or without drivers, used under the control of the Insured in the business stated in Item 3 of the application but shall not include any automobile owned in whole or in part by or licensed in the name of the Insured or any partner, officer or employee of the Insured.

##### 4. AUTOMOBILES OPERATED UNDER CONTRACT DEFINED

The term "Automobiles Operated under Contract" as used in this policy shall mean automobiles operated in the business of the Insured stated in Item 3 of the application where the complete supervision, direction and control of such automobiles remain with the owner thereof, but shall not include any automobile owned in whole or in part by or licensed in the name of the Insured or any partner, officer or employee of the Insured.

##### 5. TWO OR MORE AUTOMOBILES

When two or more automobiles are insured hereunder the terms of this policy shall apply separately to each, but a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile as respects limits of liability under Section A.

##### 6. PREMIUM ADJUSTMENT

The Advance Premium stated in Item 5 of the application is computed on the estimated total "cost of hire" for the Policy Period. The words "cost of hire" as used herein mean the entire amount incurred for "Hired Automobiles" and drivers when such automobiles are hired with drivers or the amount incurred for hired automobiles and the wages paid to drivers when such drivers are employees of the Insured.

The Advance Premium stated in Item 6 of the application is computed on the estimated total "contract cost" for the Policy Period. The words "contract cost" as used herein mean the entire amount paid by the Insured for "Automobiles Operated under Contract" to the owners thereof.

The Advance Premiums are subject to adjustment at the end of the Policy Period when the Insured shall deliver to the Insurer a written statement of the total amounts expended for cost of hire during the Policy Period. If such amounts exceed the estimates stated in the application, the Insured shall immediately pay additional premium at the rates stated therein; if less, the Insurer shall return to the Insured the unearned premium when determined but the Insurer shall, in any event, receive or retain not less than the Minimum Retained Premium stated therein.

The Insurer shall have the right and opportunity, whenever the Insurer so desires, to examine the books and records of the Insured to the extent they relate to the premium bases or the subject matter of this policy.

#### STATUTORY CONDITIONS

The insurance provided under this Coverage is subject to the "Automobile Statutory Conditions" approved by the Superintendent of Insurance for the Province in which this policy is issued and upon request the Company will make available a complete copy of same.

**O.E.F. 98B  
REDUCTION OF COVERAGE FOR LESSEES OR  
DRIVERS OF LEASED VEHICLES ENDORSEMENT  
(for attachment only to the Standard Non-Owned Automobile Policy S.P.F. No. 6)**

Insured	Effective Date of Change Year      Month      Day	Policy Number
Broker		

**1. Purpose of this endorsement:**

This endorsement alters the coverage provided by this policy with respect to claims in Ontario for loss or damage arising directly or indirectly from the use or operation of a motor vehicle that is leased.

**2. How the policy coverage is changed:**

- The Insurer also agrees to pay on behalf of every partner, officer or employee of the Insured who, in the business of the Insured stated in Item 3 of the application, leases an automobile for a period of not more than 30 days in their own name, all sums which such partner, officer or employee is legally obligated to pay as a result of liability imposed by law arising from the negligence of the driver of such leased automobile(s).
- The insurance provided under this policy with respect to leased automobiles is in excess of the underlying coverage available to the Insured or to the partner, officer or employee of the Insured.
- Underlying coverage available to the Insured or to the partner, officer or employee of the Insured includes any motor vehicle liability insurance that is required to respond to the liability of the driver or lessee of the leased automobile.

The terms leased, lease and lessee are used as equivalent to rented, rent and renter.

Except as otherwise provided in this endorsement, all limits, terms, conditions, provisions, definitions and exclusions of the policy shall have full force and effect.

DATE ____/____/____	_____ Signature of Insured
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Appendix C-OPCF 5C

**OPCF 5C  
PERMISSION TO RENT OR LEASE  
(unspecified lessees – short term leases only)**

This change form forms part of Policy #	Issued to
and shall be effective from _____ AM <input type="checkbox"/> PM <input type="checkbox"/> Local Time or as stated in the Certificate of Automobile Insurance	

In consideration of a premium of \$ \_\_\_\_\_ or as stated in the Certificate of Automobile Insurance, permission is given for the automobile to be rented or leased, provided any period of any such renting or leasing to any one person does not exceed thirty (30) consecutive days.

It is agreed that while the automobile is rented or leased,

(a) Section 3.2 of the Policy ("Who is Covered") is amended to read as follows:

"You are covered when you, or anyone else in possession of a described automobile with your consent, uses or operates it or rents or leases it from you. We will consider the other people insured persons but

- a. the coverage provided by this policy is excess to any third party liability coverage available to the other people under any other motor vehicle liability policy,
- b. the coverage under this policy for the liability of the renter or lessee or the driver for bodily injury or death of others arising out of an accident while the vehicle was rented or leased is limited to the amount by which the sub-limit specified below exceeds the aggregate limits of coverage of the motor vehicle liability policies available to the renter or lessee and the driver with respect to the loss,
- c. this policy does not provide any defence for the other people if they are entitled to a defence under any other motor vehicle liability policy."

(b) Section 3.5.1 of the Policy ("Property Not Covered") is amended to read as follows:

Under this Section, we won't cover claims for damage to property carried in or upon the automobile, or claims for damage to other property owned or rented by, or in the care, custody or control of the renter or lessee or other insured persons.

(c) The sub-limit of coverage for liability of the renter or lessee or driver is the lesser of:

- a. the lessor's primary policy liability limit, or
- b. \$1,000,000 or such greater amount agreed upon and indicated here: \_\_\_\_\_.

(d) For the purposes of s. 267.12 (1) (a) of the *Insurance Act* (Ontario), this policy shall be deemed to have been issued only to the lessee or renter of the automobile, and not to the lessor.

Except as otherwise provided in this change form, all limits, terms, conditions, provisions, definitions and exclusions of the Policy shall have full force and effect.