Case Summary: Tokio Marine & Nichido Insurance Company v Security National Insurance Company

Defence + Indemnity

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The Alberta Court of Appeal has interpreted and applied Alberta's legislation, which sets out the priorities of various insurers who may be involved in a leased/rented vehicle situation.

***Tokio Marine & Nichido Insurance Company v. Security National Insurance Company*, 2020 ABCA 402, per Fraser, Wakeling and Crighton, JJ.A.]**

Facts + Issues

This case involves the interpretation and application of s. 7.1(2) Alberta's *Miscellaneous Provisions Regulation* Alta. Reg. 120/2001, s. 2 (the "*Regulation*") in determining the priority of various auto insurers involved in potentially rental/leased vehicle situation.

At Gill's request, Sran drove Gill's Acura to the Northwest Acura dealership for servicing. Northwest Acura (owned by 724053 Alberta Ltd. (the "Dealership")) provided Sran with a courtesy car at no cost pursuant to a loaner agreement (the "Courtesy Care Agreement") for less than 30 days. Sran returned the vehicle within the 30 day period. Section 3.4 of the Loaner Agreement stated that the "Dealer agrees that (a) subject to availability, each Customer shall be offered free use of a Courtesy Car for the period during which the Customer's Acura automobile is with the Dealer for servicing" [emphasis added by the Court].

Honda Finance Canada Inc. ("Honda Finance") was the owner of the courtesy car, but neither Honda Finance nor the Dealership were in the business of renting vehicles to the public. Honda Finance leased the vehicle to Honda Canada Inc. ("Honda Canada"), who in turn lent the vehicle to the Dealership.

Honda Finance was insured by the Appellant Tokio Marine & Nichido Insurance Company, whose policy covered the courtesy car. Security National Insurance Company insured Gill pursuant to an Alberta Standard Automobile Policy (S.P.F. No. 1). Sran was not a named insured, additional insured, or spouse under Gill's policy. However, S.P.F. No. 1 does provide coverage for every person who drives Gill's "automobile" with his consent, and the term "automobile" includes a Temporary Substitute Automobile.

Sran collided with a skateboarder while driving the courtesy car on June 4, 2016. The skateboarder sued Sran, Honda Canada Finance Inc. and 724053 Alberta Ltd. The facts did not suggest that the skateboarder's claim exceeded the limits under either of the Tokio Marine or Security National policies.

Tokio Marine and Security National could not agree on who was the first-loss insurer in the circumstances. Tokio Marine brought an Originating Application seeking a declaration that Security National was the first loss insurer. Tokio Marine's position was that although its policy provided coverage here, so did Security National's policy:

Industries

Insurance

People

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1. The courtesy car was covered by both Tokio Marine and Security National because it was a Temporary Substitute Automobile under Security National's policy.

2. Security National's policy was the first loss policy in the circumstances under the *Regulation*, specifically on the basis that Sran was an "unnamed insured" under Security National's policy according to s. 7.2(2)(b)(ii)(D) thereof.

The issues involved were:

1. Whether or not the Security National S.P.F. No. 1 policy covered the courtesy car as a Temporary Substitute Automobile while being driven by Sran.

    a. The Master held that both policies covered the courtesy car as driven by Sran.

    b. On appeal to a justice of the Court of Queen's Bench, the Court held that Sran was not covered by the Temporary Substitute Automobile provisions of the Security National policy because "Mr. Gill cannot authorize Ms. Sran to operate a vehicle in which he has no interest under terms that he does not know".

2. Whether or not the "priority flip" under s. 7.1(2) of the *Regulation* applied to displace the default priority provision in s. 596(1) of the *Insurance Act*.

    a. The Master held that s. 7.1(2) of the *Regulation* did not apply to the courtesy car to displace the default priority rule under s. 596(1) of the *Insurance Act* because it was not a "leased" or "rented" vehicle:

        i. The Dealership had not "leased" or "rented" the courtesy car to Sran; it had lent the vehicle to Sran at no charge.

        ii. The Dealership was not in the business of leasing or renting vehicles to the public.

    b. This was upheld on appeal to a justice.

Tokio Marine appealed.

HELD: For Security National; Tokio Marine held to be first loss insurer.

The Court held that "the owner of an automobile is vicariously liable for the negligence of those who drive the owner's automobile with the owner's consent" (¶13).

The Court unanimously confirmed that where more than one auto insurer is involved in a motor vehicle claim, those insurers' relative priority is determined by what is now the *Insurance Act*, RSA 2000, c., I-3, s. 596. The Court outlined the history of how the current version of that section came to be, as follows:

a. Section 596(1) (like Ontario's s. 277(1) of the *Ontario Insurance Act*, RSO 1990, c. I.8) sets out the general statutory rule that the owner's policy relating to the vehicle in questions is the first loss insurer as against all other applicable policies.

b. Vehicle leasing and rental companies successfully lobbied Alberta (and Ontario) and persuaded these governments that this placed an unfairly onerous burden on rental and leasing companies (and their insurers) where the accident is caused by the negligence of the rentees and lessees (and their insurers). Accordingly, effective 1 March 2011, these governments amended their legislation in two ways.

c. First, a liability cap was enacted for vicarious liability of the rental/leasing companies to $1,000,000.00 in most cases (*Traffic Safety Act*, RSA 2000, c. T-6, s. 187 (4); *Ontario Insurance Act,* s. 267.12(3))

d. Second, s. 596(4) was added to s. 596 (like Ontario's s. 277(1.1.)) to allow the government (by regulation) to alter the general priority rule set out in s. 596(1) (analogous to s. 277(1) in Ontario). In Alberta, the *Regulation*, s. 7.1 was declared to create a "priority flip" where a rental/leased vehicle is involved such that the rental/leasing company's insurer is no longer the first loss insurer in these situations.

The Court was unanimous in concluding that, assuming that Gill's owner's policy (SPF No 1) issued by Security National covered Sran as the driver of the courtesy car, the "priority flip" did not apply to displace the s. 596(1) general rule that the owner's policy issued to the courtesy car's owner (Honda Finance) by Tokio Marine policy was first loss insurer.

Chief Justice Fraser described how the "priority flip" operates and four general principals relating to the legislative scheme:

186 Those rankings alter the general statutory rule in s 596(1) of the *Insurance Act*, RSA 2000, c. I-3 [*Insurance Act*] that the owner's insurance (owner in this context being the owner of the car in the accident, Honda Finance) is first loss insurance and any other insurance policy is excess. The *Miscellaneous Regulation* provides, in certain circumstances, for what is commonly described as a "priority flip". In particular, s 7.1(2) of the *Miscellaneous Regulation* provides that where the vehicle involved in the accident is leased or rented, this priority ranking is flipped. Insurance indemnifying a non-owner (i.e., a lessee or rentee or driver of the leased or rented vehicle) is first loss payable and the insurance of the owner (i.e., lessor or renter) is excess insurance.

…

227 Four points about this legislative scheme should be noted.

228 First, the difference between a lessor and lessee on the one hand and renter and rentee on the other lies in the length of time that the person has the use of the leased or rented vehicle. Up to and including 30 days, the relationship is renter and rentee. More than 30 days and the relationship is lessor and lessee.

229 Second, it is evident from the wording of s 7(2)(b)(i) and (ii) of the *Miscellaneous Regulation* that the driver of the vehicle subject to the priority flip will not always be the lessee or rentee. The importance of this lies in the fact that the priority flip potentially involves three parties: the owner (of the vehicle involved in the accident; otherwise known as a lessor/renter), the driver and the lessee or rentee.

230 Third, the Alberta priority scheme sets out under s 7.1(2)(c) of the *Miscellaneous Regulation* the order in which insurance policies are to respond to a claim when and if the priority flip provisions are engaged. Subsection (c) specifically provides that it only applies where (a) does not, and subsection (b) provides that subsection (a) does not apply where one of the conditions is met in subsection (b). Where the priority flip applies, the order of priority is as follows: driver as additional insured (s 7.1(2)(b)(ii)(A)); lessee (s 7.1(2)(b)(i)); driver as insured (s 7.1(2)(b)(ii)(B)); driver as spouse of insured (s 7.1(2)(b)(ii)(C)); driver as unnamed insured (s 7.1(2)(b)(ii)(D)) and finally, lessor (s 7.1(2)(a)).

231 Fourth, s 187(4) of the *TSA* limiting the maximum amount for which a lessor or renter of a motor vehicle is responsible applies only in the event the relevant circumstances engage a priority flip.

The Court was unanimous in concluding that the courtesy car was not a "leased" or "rented" vehicle within the meaning of the *Regulation*.

a. Fraser, C.J.A. noted that what constitutes a "leased" or "rented" vehicle is determined by the definitions of "lessor" and "renter" in the *Traffic Safety Act*, RSA 2000, c. T-6, s. 187(0.1)(b) and (c.1) (imported into the *Regulation* per s. 7.2(1)(c and (e) thereof):

224 The terms "lessor" and "renter" in the *Miscellaneous Regulation* are as defined in s 187 of the TSA: s 7.1(1)(c) and (e), *Miscellaneous Regulation*. Under s 187(0.1)(b) of the *TSA*, "lessor" is defined as "a person who by agreement, in the ordinary course of the person's business, leases or grants exclusive use of a motor vehicle to another person for a term of more than 30 days..." [emphasis added by Fraser, C.J.A.]. Section 187(0.1)(c.1) defines "renter" "as a person who, by agreement, in the ordinary course of the person's business, rents a motor vehicle to another person for a term of no more than 30 days..." [emphasis added by Fraser, C.J.A.].

b. Further, the definitions for "lessee" and "rentee" are defined in the *Regulation*:

225 The TSA does not define a "lessee" or "rentee". Instead, those terms are defined in s 7.1(1)(b) and (d) of the *Miscellaneous Regulation*. A "lessee" means "a person to whom a lessor leases or grants exclusive use of a motor vehicle", while a "rentee" means "a person to whom a renter rents a motor vehicle".

c. Fraser, C.J.A. held that the courtesy vehicle was not a "leased" or "rented" vehicle as required before the "priority flip" is engaged.

    i. She concluded that the relationship between the Dealer and Sran (with the Courtesy Car Agreement) is the focus of the analysis and the fact that further up the chain Honda Finance had leased the vehicle to Honda Canada was irrelevant. She concluded that the Courtesy Car Agreement did not qualify as a "lease" or a "rental agreement" within the meaning

of the *Regulation* because the Dealer had not lent the vehicle to Sran in the ordinary course of its business. She held as follows:

233 It essentially reasons as follows: (1) the Loaner Vehicle was owned by Honda Finance; (2) Honda Finance leased the Loaner Vehicle to Honda Canada, as found by the chambers judge; (3) Sran was driving that leased Loaner Vehicle; and (4) Sran is entitled to indemnity under Gill's SPF1 as an unnamed insured, the Loaner Vehicle being a Temporary Substitute Automobile. Accordingly, in Tokio Marine's view, the requirements in s 7.1(2)(b)(ii)(D) are met because Sran was "the driver of the leased or rented automobile" and is entitled to indemnity as an "unnamed insured". In other words, once Honda Canada leased the Loaner Vehicle from Honda Finance, it became a leased vehicle for all subsequent uses by Honda Canada and the Dealer irrespective of the basis on which the Dealer provided the Loaner Vehicle to Sran.

234 This argument cannot be sustained. It rests on an a-contextual, literal interpretation of s 7.1(2)(b)(ii)(D) of the *Miscellaneous Regulation* and TSA. The fact Honda Canada leased the Loaner Vehicle from Honda Finance and both consented to its being used by the Dealer under the Courtesy Car Agreement does not, by itself, trigger the priority flip as between Honda Finance and Sran or more to the point, as between Tokio Marine and Security National. The priority flip is not engaged so as to impose first loss on the insurer of Gill's vehicle simply because Honda Canada leased the Loaner Vehicle from Honda Finance. While the chambers judge found that Honda Canada leased the Loaner Vehicle from Honda Finance, it should be noted that the Dealer was also a party to the Courtesy Car Agreement. And its participation in the Acura courtesy car program was on the terms and conditions set forth in the Courtesy Car Agreement.

235 The core issue is what constitutes a "leased or rented automobile" when an automobile is involved in an accident so as to trigger the priority flip under s 7.1(2) of the *Miscellaneous Regulation*. The answer is this: an automobile involved in an accident (Accident Vehicle) constitutes a "leased or rented automobile" where the Accident Vehicle has been either i) leased or rented by the driver involved in the accident (Accident Driver), in which event the Accident Driver is the lessee or rentee; or ii) driven by a person (Approved Accident Driver) who has the consent of the party, whether individual, corporate or otherwise that has leased or rented the Accident Vehicle (Accident Party) and where the insurance, if any, of either or both the Accident Party or Approved Accident Driver is claimed to be payable in priority to the insurance of the lessor or renter.

236 I refer to the Accident Driver and the Accident Party collectively as the End User. If the automobile has been leased or rented by the End User, then the priority flip applies as between the insurer of the Accident Vehicle, on the one hand, and the insurer, if any, of the End User and, if applicable, Approved Accident Driver, on the other. If it has not been, then the priority flip does not apply.

ii. Chief Justice Fraser set out five reasons to support her conclusions:

238 First, this interpretation is consistent with the purpose for imposing increased liability on the lessee or rentee of an automobile for any accident they cause (and making their insurance, if any, first loss payable), namely that they have actually leased or rented the automobile involved in the accident. The purpose of the legislation is to reduce the costs to car rental and leasing businesses arising from the negligent acts of lessees or rentees of leased or rented automobiles or the person driving that automobile with their consent and, depending on the circumstances, to make the driver's, lessee's or rentee's insurance first loss payable.

239 However, where a car dealership provides a courtesy vehicle free of charge while a customer's vehicle is being serviced, this is in a different category from leasing or renting an automobile to that customer or person authorized by the customer to pick up the courtesy vehicle. Simply, the priority flip legislation is directed to car "leases" and "rentals", not to courtesy vehicles provided at no charge to customers of car dealerships. Had the Miscellaneous Regulation intended that the priority flip apply not only to leased and rented vehicles but also to courtesy vehicles, it would undoubtedly have said so. It did not.

240 This is not surprising since historically, courtesy vehicles involve a different relationship between a car dealership and its customers. Typically, car dealerships make courtesy vehicles available on loan as part of the inducement to customers to purchase vehicles from that dealership or have that dealership service the customer's vehicle or even to encourage the customer to buy a new vehicle from that dealership.

241 Second, the textual wording of s 7.1(2) also supports this interpretation. The opening words of the section provide that "if a leased or rented automobile is a motor vehicle as defined in section 1(1)(x) of the [TSA] and s 187 of the [TSA] applies", then the rules set forth in s 7.1(2)(c) determine the order in which the third party liability provisions of any available motor vehicle liability policies apply (assuming one of the scenarios in s 7.1(2)(b) is found to exist). While neither of the sections referred to in the TSA refer to a lessee or rentee of the vehicle involved in the accident, s 7.1(2) of the *Miscellaneous Regulation* does. In particular, s 7.1(2)(b)(i) provides for the priority flip where insurance is available under a motor vehicle liability policy "under which the lessee or rentee of the automobile is entitled to

indemnity as an insured named in the contract" [emphasis added by Fraser, C.J.A.]. The reference to "lessee or rentee of the automobile" makes it clear that the person in question must actually be the lessee or rentee of the subject automobile involved in the accident. In other words, that person - the lessee or rentee - must have leased or rented that automobile; it is not enough that someone higher up the possession chain leased or rented the automobile.

242 Section 7.1(2)(b)(ii)(D) in turn refers to insurance available under which the driver of the leased or rented automobile is entitled to indemnity "as an unnamed insured". While the section does not go on to add "under a policy of insurance in the name of the lessee or rentee of the automobile", it is implicit that this is so. Given its focus on the relationship between lessors/renters and lessees/rentees and drivers, the Miscellaneous Regulation contemplates an unnamed insured driver will be indemnified under a policy of the lessee or rentee. To bring this down to the specifics of this case, Sran is an unnamed insured under Gill's policy. That is the basis on which Tokio Marine is arguing for the priority flip. That she is also an unnamed insured under Tokio Marine's policy is irrelevant; it does not assist Tokio Marine's claim to a priority flip. Indeed, it illustrates that what matters is not simply being an "unnamed insured" but rather being an "unnamed insured" on a relevant insurance policy.

243 Third, whether the priority flip applies *vis-à-vis* the driver/owner of a serviced automobile (including a Temporary Substitute Automobile) ought not to be contingent on how a car dealership orders its affairs and whether it buys, leases or, for that matter, rents the vehicles it uses as courtesy vehicles. And yet that would be the result if this Court accepted Tokio Marine's literal interpretation of the Miscellaneous Regulation. On its view, as long as a dealership or related entity leased or rented the vehicles it used as courtesy vehicles, then the priority flip would apply even when the vehicle was provided to a customer as a courtesy vehicle. If, however, it owned the vehicles it used as courtesy vehicles, then the priority flip would not apply.

244 There is no principled basis for imposing the priority flip on the customer (or someone authorized to pick up the courtesy vehicle) in the first instance but not the latter. And yet, on Tokio Marine's theory, first loss liability should be imposed on the End User or Approved Accident Driver rather than the vehicle's owner even though the End User or Approved Accident Driver may not even be aware of the personal legal and financial jeopardy in which the End User and Approved Accident Driver may have been placed by reason of acquisition arrangements known only to the dealership or its related entities. I say "may have been placed" because I concede that the liability may not change if, for example, the End User's insurer for the serviced vehicle were to cover the loss. But it is not clear that this will always be so. These are strong policy reasons against Tokio Marine's interpretation of the legislation. They underscore why the Legislature did not provide for a priority flip based on how a courtesy vehicle came to be in the possession of a car dealership but rather on whether that dealership actually rented or leased the courtesy vehicle to the End User.

245 Fourth, the priority flip regime is directed to protecting those in the business of being "lessors" or "renters" as defined in s 187 of the TSA. The definitions of lessors and renters reveal that the priority flip only applies when the lessor or renter enters into a lease or rental agreement in the ordinary course of the person's business. On this record, there is no evidence that the Dealer leases or rents cars in the ordinary course of its business. But even if the Dealer did so, given s 187(0.1)(b) or s 187(0.1)(c.1) of the TSA, the Dealer would have had to enter into a lease or rental "by agreement" with "another person". Read in context, the reference to "another person" means the End User, that is the Dealer's customer or the person authorized by the customer to pick up the courtesy vehicle. However, as has been agreed by the parties, Sran did not rent or lease the Loaner Vehicle from the Dealer. Nor, on this record, did Gill.

246 Fifth, the fact the legislative regime contemplates a vehicle being subject to more than one lease means that once a vehicle is leased, it does not constitute a leased vehicle for all subsequent uses. While the Miscellaneous Regulation does not expressly refer to the existence of more than one lease of the same vehicle, s 7.1(4) clearly contemplates this possibility. It provides:

For the purposes of subsection (2),

(a) if more than one motor vehicle liability policy is required to respond and the priority between those policies is not determined by subsection (2), each insurer is liable only for its rateable proportion of any liability, expense, loss or damage, and

(b) "rateable proportion" means rateable proportion as defined in section 596(3) of the Act.

247 This subsection recognizes that just because a vehicle is leased by its owner, that does not automatically make it a leased vehicle to which the priority flip applies as between the owner and a party to whom it is provided for use as a courtesy vehicle. In other words, the very fact the subsection contemplates the possibility that a leased vehicle may then be leased (that is subleased) by the lessee to another party underscores that once a vehicle is initially "leased" to a party, it is not automatically subject to the priority flip for all purposes and as between all parties in possession of the vehicle. The possibility of more than one lease reinforces the conclusion that merely because a vehicle has been leased or rented to a lessee or rentee does not mean it is subject to the priority flip irrespective of the basis on which

the lessee or rentee then provides it to another party for that party's use. This too weighs in favour of the purposive interpretation adopted.

[emphasis ours except were designated to be the emphasis of Chief Justice Fraser].

iii. Justice Wakeling concurred (at ¶¶ 42 – 47, 54 – 56, 59, 142 – 149, 157 – 160).
iv. Justice Wakeling held that leasing and rental car companies are entitled to identical treatment (¶ 152). He also held that applying the "priority flip" should not be restricted to situations where not a lessor/rental car company is in the business of leasing/renting vehicles to members of the public as opposed to lessees/rentees at large (¶150).

Since Tokio Marine's policy limits were sufficient to cover the loss claimed by the injured skateboarder, Justices Wakeling and Crighton expressly declined to determine whether or not the Security National policy covered Sran as the driver of the courtesy car as a Temporary Substitute Automobile.

a. However, in *obiter*, Justice Crighton rejected the argument that Gill could not have consented to someone else (Sran) picking up or dropping off a Temporary Substitute Automobile under the SPF. No. 1:

259 I disagree with Security National's assertion that the owner of an automobile cannot consent to another person, as agent, dropping the insured vehicle off and picking up and driving an automobile that is provided by a dealer as a temporary substitute for the insured's automobile. A Temporary Substitute Automobile replaces, on a temporary basis, the automobile owned by the named insured. As Fraser CJA notes at para 202, the SPF1 contemplates the insured will be able to consent to someone else driving the Temporary Substitute Automobile, just as the insured can consent to someone else driving their own automobile.

260 The Loaner Agreement, in which Sran agrees that her insurer will be liable for any loss or damage caused while Sran is driving the automobile, is between Sran and the Dealer. Security National conceded Sran was driving Gill's automobile with his consent. If there was a serious argument that Sran's insurer was first loss by virtue of the Loaner Agreement, one might have expected that Sran's insurer would have been brought into the proceedings. They were not and Security National's concession forecloses further discussion on the issue beyond this record.

However, Chief Justice Fraser analyzed that issue and upheld the Courts below in concluding that Sran was covered as the driver of a Temporary Substitute Automobile under Gill's SPF No. 1 owner's policy.

a. The Chief Justice noted as follows:

194 The first ground of appeal raises the following issue: Is the owner of a vehicle taken to a dealership for servicing able to consent under the SPF1 to another person's picking up and driving a courtesy vehicle provided by that dealership such that the non-owner is owed insurance coverage under the SPF1? In my view, the answer is "yes".

195 As applied to the present case, and in light of the facts as found by the chambers judge, Security National owed coverage to Sran while she was driving the Loaner Vehicle because Gill consented to her driving it. The SPF1 required that Security National indemnify anyone whom Gill consented to have driven a "Temporary Substitute Automobile". In this case, the Loaner Vehicle constitutes a "Temporary Substitute Automobile". That term is defined in para 5 of the "General Provisions, Definitions and Exclusions" section of the SPF1 as follows:

an automobile not owned by the Insured, nor by any person or persons residing in the same dwelling premises as the Insured, 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 [emphasis added by Fraser, C.J.A.].

196 The Loaner Vehicle therefore falls squarely within the term "automobile" for which Security National must provide coverage as part of the SPF1. Gill did not own the Loaner Vehicle and it was being used as a substitute while his own vehicle could not be used because it was being serviced. The chambers judge himself recognized this, noting that had Gill been driving the Loaner Vehicle, "it would be a temporary substituted vehicle and subject to coverage" (Reasons at para 12).

b. Fraser, C.J.A. rejected the argument that Gill lacked the ability to consent to Sran operating the courtesy car:

200 Security National also implies that because the second party non-owner in ***Garrioch*** was not in a position to consent, Gill could not therefore consent to Sran's driving the Loaner Vehicle. But the question here is not whether Sran had sufficient consent from Honda Finance or its agent to drive the Loaner Vehicle. She did. Rather, it is whether Gill could validly consent to Sran's driving the Loaner Vehicle under the SPF1. In other words, the fact that consent from Gill to let Sran drive the Loaner Vehicle would be insufficient at law to

make Honda Finance, as owner, vicariously liable for Sran's actions does not mean that Gill could not provide consent to Sran to drive the Temporary Substitute Automobile for purposes of the SPF1. He could. And he did.

201 There is nothing in the SPF1 that prevents Gill's consenting to a vehicle owned by someone else from being driven as a Temporary Substitute Automobile. After all, a Temporary Substitute Automobile is, by definition, a vehicle not owned by an insured (in this case, Gill). On Security National's theory, a person in Gill's position could never consent to someone else driving a Temporary Substitute Automobile under the SPF1. This is contrary to the plain wording of the third party liability provision in Section A of the SPF1 which provides in relevant part:

The Insurer agrees to indemnify the Insured and, in the same manner and to the same extent as if named herein as the Insured, every other person who with his consent personally drives the automobile...

[emphasis added by Fraser, C.J.A.]

202 This provision means that, at least in certain instances, an insurer will be required to indemnify an unnamed insured, that is, a person to whom the insured has given consent to drive "the automobile". And since the definition of "automobile" includes a "Temporary Substitute Automobile" - which, as noted, the insured does not own - the SPF1 contemplates that the insured will be able to consent to someone else driving the Temporary Substitute Automobile not owned by the insured. That is precisely what happened here.

203 It was also suggested that Gill lacked the capacity to consent to Sran's driving the Loaner Vehicle (as the Temporary Substitute Automobile) because it was Sran who had signed for the Loaner Vehicle, not Gill. However, simply because Sran signed the Loaner Agreement in no way diminishes the fact that, on this record, Gill gave Sran permission to obtain and drive the Loaner Vehicle as his Temporary Substitute Automobile. As the chambers judge found, there was "no doubt that the understanding between Mr. Gill and Ms. Sran was that she would drop off his vehicle at the dealership and that the dealership would provide her with a courtesy car to use while Mr. Gill's vehicle was being serviced" (Reasons at para 7, emphasis added). That accords with the reality of the situation: Sran took Gill's vehicle to the Dealer on the basis that Gill had arranged for a courtesy vehicle that would be picked up and driven by Sran.

204 Nor can there be any suggestion that because Sran signed the Loaner Agreement, that means the Dealer did not consent to Gill's driving the Loaner Vehicle. First, Sran, not Gill, was driving the Loaner Vehicle when it was involved in the accident. Thus, the issue of consent to Gill's driving the Loaner Vehicle does not arise on these facts. Second, more fundamentally, since it was Gill's car that had been taken in for servicing, an undisputed fact known to the Dealer, it follows that the Dealer gave its implied consent as agent for Honda Finance to Gill's driving the Loaner Vehicle that it provided in replacement of Gill's serviced vehicle.

205 The issue is not whether Gill could demand the release of the courtesy vehicle. Clearly, Gill could not. But it was his understanding one would be provided. And it was. Therefore, scenarios under which the Dealer might not have chosen to release the Loaner Vehicle to Sran are irrelevant to the issue of whether an insured like Gill has the ability to provide consent to someone to drive what constitutes, under the SPF1, a Temporary Substitute Automobile.

206 Were Security National correct and the owner of a serviced vehicle unable to consent to someone else delivering the owner's vehicle for servicing and picking up a Temporary Substitute Automobile, owners of vehicles requiring servicing would be required to deliver their vehicles personally for servicing. They could not authorize anyone else to do so and pick up a Temporary Substitute Automobile. The practical and policy considerations of an interpretation with these impractical consequences militate against Security National's position. Owners of cars requiring servicing often have members of their family or friends assist in making the exchange at the dealership and securing and driving a courtesy car that qualifies as a Temporary Substitute Automobile. Indeed, that is presumably why standard insurance policy provisions in Alberta explicitly define a Temporary Substitute Automobile as including those temporarily used as a substitute for the insured automobile where that automobile is being serviced without requiring, for coverage to apply, that the Temporary Substitute Automobile be driven by the owner of the serviced vehicle.

207 In short, Gill could provide consent to Sran's driving the Loaner Vehicle - as he did - even if the Dealer for some reason had chosen not to do so. Had the Dealer not consented to Sran's driving the Loaner Vehicle, any consent from Gill would have been immaterial. For example, had Sran stolen the Loaner Vehicle (a prospect raised by Security National in arguing that Gill's consent was insufficient), Security National would not (given para 3 of the section of the SPF1 entitled "General Provisions, Definitions and Exclusions") have had to provide coverage to Sran. But that does not mean Gill (or others in the same position) could not provide consent under the SPF1 to a person's picking up and driving a Temporary Substitute Automobile. It simply means that, in the circumstances of this case, Security National's owing coverage to Sran necessitated consent from two sources (Gill and the Dealer) rather than one (Gill). On this record, there is no question that Sran had the consents required to ensure coverage under both the Tokio Marine policy and the Security National one.

208 Accordingly, consent from the Dealer served a dual role: it allowed for Sran to be covered under the policy of the owner (Honda Finance) as well as ensuring coverage under Gill's policy. But the basis for that coverage differed. In the case of Honda Finance, the fact the Dealer allowed Sran to drive the Loaner Vehicle created, as noted, vicarious liability under the TSA such that Tokio Marine had to indemnify third parties like Sran. In the case of Gill, conversely, the Dealer's consent was required only insofar as it brought the Loaner Vehicle within the general scope of coverage in the SPF1, thereby avoiding any dispute about the Loaner Vehicle qualifying as a Temporary Substitute Automobile. As noted, Security National would not have been required to provide coverage for the Loaner Vehicle had it been stolen by Sran - regardless of Gill's consent. That is because Security National only owes coverage to an unnamed insured like Sran "to the same extent" as it owes coverage to the insured (Gill). Had Gill stolen the Loaner Vehicle, Security National would not have owed coverage to Gill either.

COMMENTARY

There are two threshold rules which must be considered for each of the insurers potentially involved in a leased/rented car situation.

1. The first threshold issue which must be considered for each of the potentially at-risk insurance policies is whether or not the policy provides coverage to a party involved in the accident. Where a policy does not cover one of the actors, that insurer is not required to defend or indemnify and thus is not involved in setting the insurer priorities: ***Ontario Corporation Number 1009329 (Enterprise Rent-A-Car) v. Intact Insurance Company***, 2019 ONCA 916, at ¶¶ 8, 10; ***Elmi v. Choukair***, 2020 ONSC 1181, at ¶¶ 45 – 46. Accordingly, in this case, one of the issues was whether or not the Security National policy provided coverage to Sran as the driver of the loaner vehicle. Both insurance policies were found to provide coverage to one of the parties, and, accordingly, this threshold issue was not considered.

2. The second threshold issue regarding the applicability of "priority flips" is as to whether or not a particular leased/rental vehicle situation involves a "lease" or "rental" agreement. If not, then the provisions of s. 596(4) of the *Insurance Act* and s. 7.1(2) of the *Regulation* do not apply. The default rule in *Insurance Act*, s. 596(1) (rendering the rental/leasing company's owner's policy the first loss coverage) applies. This case addresses this issue.

    a. See also ***Gharbi v. Summit Acceptance Corp.***, 2018 ABQB 228 at ¶ 18 for what qualifies as a lease or rental agreement. It sets out four elements for a rental or leasing agreement (which the Court of Appeal in ***Tokio Marine*** has essentially approved):

        i. There must be an agreement between;

        ii. Renting or leasing vehicles to the public must be in the ordinary course of the lender's business;

        iii. The agreement must grant exclusive use of the vehicle to a lessee (for more than 30 days) or a rentee (for up to 30 days); and

        iv. The lender must not be in possession of the vehicle.

Once an arrangement qualifies as a lease/rental agreement, the analysis involves slotting the various insurers into one or the other of the six levels of priority under the *Regulation*. For an in-depth discussion of that analysis, see B.A. Vail, *Priority Among Insurers In An Alberta Rental/Leased Vehicle Claim: Six Circles of Hell (2020)* ***Canadian Journal of Insurance Law***, Vol. 38, No. 2, pp. 21 – 31.