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Technical Advisory

TA 298

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Subject: Who Rented This Car – Employer or Employee?

Background. Business travel has long been a necessary part of operations for businesses of all types and sizes. One significant component of business travel includes rental cars. In fact, overall revenue from rental cars in the US in 2011 was over \$22 billion (from an industry fleet of over 1.7 million vehicles), according to the Auto Rental News “Fact Book 2012.” While no statistics are available which break down car rentals between business and leisure travel, the business segment is certainly substantial. From an insurance standpoint, one key issue is determining who has actually rented the auto – the employer or the employee.

Main Point #1: Liability.

The unendorsed Business Auto Policy (BAP) provides liability coverage for not only the named insured (the business itself), but to certain permissive users, as follows.

SECTION II – LIABILITY COVERAGE

A. Coverage

1. Who Is An Insured

The following are "insureds":

- a. You for any covered "auto".*
- b. Anyone else while using with your permission a covered "auto" you own, hire or borrow...*

Assume Jack rents an auto while on a business trip for his employer – Smithco, Inc. While trying to find his hotel by using the map on his iPhone, he runs a red light and causes an accident. Plaintiff sues both Smithco, Inc. and Jack. Are they both covered under Smithco's BAP? In the excerpt above (A.1.a.), Smithco is an insured as long as the rental car is a “covered auto,” which would require either symbol 1, or symbols 8 or 9 for liability on the BAP. (Symbol 8 would apply if Smithco was deemed to have rented the car. For insurers who take the view that an auto rented in by an employee (Jack) in his/her own name has not been rented by the employer (“you” – Smithco), then Symbol

9 would otherwise apply to non-owned autos that are used in connection with Smithco's business.)

For Jack to be an insured, he must be deemed to be a permissive user of a covered auto which Smithco owns, hires or borrows (see A.1.b. in the excerpt above). Herein lies the \$64,000 question: Did Smithco rent the car, or did Jack rent the car?

Opinions vary. Many experts (probably the majority) argue that a primary reason Smithco did not hire the auto is that the rental agreement (RA) is between the rental company and Jack. And even if Jack uses his Smithco credit card, and adds "Rented on behalf of Smithco, Inc." to the RA, he has no legal authority to commit Smithco to a legal contract. Thus while Smithco is clearly deriving benefit from Jack's use of the rental car on their behalf, (and reimburses him for the cost of the rental), the majority view is that this is not the same as Smithco, itself, actually renting the car. Therefore, under the prevailing view, since Smithco did not hire the rental car, Jack does not meet the requirements of the BAP that would cause him to be an insured under Smithco's BAP. Where insurers hold the view that Smithco in effect has rented the auto that Jack is using, then Jack is an automatic insured under Smithco's BAP.

Solution for Jack. In 1999, ISO released endorsement CA 20 54 – Employee Hired Autos, to address this issue. (A slightly different version is used in Louisiana, filed as CA 20 98 – Employee Hired Autos – Louisiana. The Louisiana change added the phrase "*express or implied*" to modify the word "*permission*" regarding an employer giving permission to the employee to operate a rented auto on the employer's behalf. It reads "...with your *express or implied* permission." See excerpt below.)

Here is the liability coverage afforded Jack under the CA 20 98 02 04:

A. Changes In Liability Coverage

The following is added to the Who Is An Insured Provision:

An "employee" of yours is an "insured" while operating an "auto" hired or rented under a contract or agreement in that "employee's" name, with your express or implied permission, while performing duties related to the conduct of your business.

Comment: Jack is now an insured under Smithco's BAP. Note, however, that coverage for Jack only applies while he is "*performing duties related to the conduct of your [Smithco's] business.*" This raises issues similar to those in workers compensation, about when an employee is acting within the scope of his/her duties, or, in this case, "performing duties" for Smithco.

For example, assume Jack flies to Ft. Lauderdale and rents a car to meet with customers in south Florida. His last appointment is midday on Friday. But rather than take an afternoon flight home, he can get a cheaper flight by staying over until Saturday. So he spends Friday night with his parents in Vero Beach. His parents offer to take Jack to dinner, and Jack drives so that he can show them the neat voice-activated electronics in the rental car. However, while demonstrating all the gee-whiz gadgets, he runs a stop sign and causes an accident. Is Jack still an insured under Smithco's BAP? Yes, if it is determined that he is still "performing duties" for Smithco. And a strong argument could be made that because he stayed over on Friday night in order to get a lower airfare for Smithco on Saturday, he is still on business until he returns to his point of origin.

On the other hand, if Jack had elected to take the following week as official vacation days, and stayed in Vero to visit family and friends, he would likely not be considered "performing duties" for Smithco during the days he took vacation time, even while continuing to drive the rental car. Therefore, he would have no coverage in Smithco's BAP, and would have to rely on his Personal Auto Policy.

Coverage Gap. Suppose that Jack's sales manager Jill also went on the trip to Ft. Lauderdale, because one of Smithco's largest customers is located in Naples, on Florida's lower west coast. On the long drive from Ft. Lauderdale to Naples on I-75's "Alligator Alley," Jill drives while Jack makes some calls to straighten out a problem with a supplier. Jill swerves to avoid an alligator sunning in the roadway, and causes an accident.

Is Jill an insured under Smithco's BAP? No, based on a literal reading of the endorsement language. The coverage provided in the CA 20 98 seems to only apply to Jack. Excerpt [emphasis added]:

A. Changes In Liability Coverage

The following is added to the Who Is An Insured Provision:

An "employee" of yours is an "insured" while operating an "auto" hired or rented under a contract or agreement in that "employee's" name, with your express or implied permission, while performing duties related to the conduct of your business.

Comment: Since the RA is in Jack's name, it appears that only Jack is an insured in the BAP, and only while he is *operating* the rental car. Under this interpretation of the language, Jill is not covered, and it's possible that Jack is covered only for his negligent operation of the rental car, but not other torts, such as his negligent entrustment of the car to Jill.

Solution for Jill. Where an insurer interprets the CA 20 98 as applying only to the employee who signed the RA (Jack), Endorsement CA 99 33 02 99 – Employee As Insureds, should be attached to the BAP, in order to provide coverage for Jill. Coverage in this endorsement is not dependent on who rented the car. Excerpt:

The following is added to the Section II – Liability Coverage, Paragraph A.1. Who Is An Insured Provision:

Any "employee" of yours is an "insured" while using a covered "auto" you don't own, hire or borrow in your business or your personal affairs.

Alternative Solution for Jack and Jill. If an insurer will not add CA 20 98 to the BAP, the agency should request that the CA 99 33 be added as a partial solution. This endorsement would cover any of Smithco's employees while using an auto Smithco does not own, hire or borrow. However, the endorsement only amends Section II – Liability. It does not address physical damage to the rental car, whereas the CA 20 98 does. And if the insurer holds the view that an auto rented by an employee is not considered to be rented by Smithco, the BAP would not provide physical damage coverage, even if Symbol 8 is shown on the Declarations for Section III – Physical Damage Coverage. See following.

Main Point #2: Physical Damage.

The unendorsed BAP provides physical damage coverage as follows:

SECTION III – PHYSICAL DAMAGE COVERAGE

A. Coverage

1. We will pay for "loss" to a covered "auto" or its equipment under:

- a. Comprehensive Coverage*
- b. Specified Causes Of Loss Coverage*
- c. Collision Coverage*

The definitions for the various categories of “covered autos” are found in Section I – Covered Autos. For rented autos, Symbol 8 is applicable. Excerpt [emphasis added.]:

SECTION I – COVERED AUTOS

A. Description Of Covered Auto Designation Symbols

*Symbol 8 – Hired Autos Only: Only those "autos" **you** lease, hire, rent or borrow.*

Whether or not the rental car Jack is driving falls under the scope of coverage provided in Symbol 8 for physical damage is the same issue as it was under the previous discussion of Liability coverage: Who rented the car – Jack or Smithco? Where insurers take the view that an employer (“you” – Smithco) did not rent the auto which an employee (Jack) has rented in his/her own name, then there is no physical damage coverage for the rental car, despite the BAP having Symbol 8 under Section III –

Physical Damage Coverage. Symbol 8 for physical damage would only apply to autos rented by “you” (Smithco). Also, under the view that Smithco did not rent the car Jack is driving, this would be a Symbol 1 or Symbol 9 exposure – neither of which can be afforded physical damage coverage under standard ISO rules.

Solution. The CA 20 54 – Employee Hired Autos (CA 20 98 in Louisiana), amends the BAP coverage for physical damage to rental cars, in addition to the changes in liability coverage discussed above. Excerpt from CA 20 98 02 04:

B. Changes In General Conditions

For Hired Auto Physical Damage Coverage, the following are deemed to be covered "autos" you own:

- 1. Any covered "auto" you lease, hire, rent or borrow; and*
- 2. Any covered "auto" hired or rented by your "employee" under a contract in that individual "employee's" name, with your permission, while performing duties related to the conduct of your business.*

However, any "auto" that is leased, hired, rented or borrowed with a driver is not a covered "auto".

Comment: Under B.2., the car that Jack rented in his own name, while on a business trip for Smithco, is now considered a “covered auto” in Smithco’s BAP, and will have physical damage coverage if Symbol 8 is included for under Section III – Physical Damage Coverage.

In addition, under part “*B. Changes In General Conditions*” of the CA 20 98 (above), autos covered by this endorsement will be “*deemed to be covered autos you own.*” This addresses the issue of primary/excess for the BAP. Excerpt from the unendorsed BAP:

SECTION IV – BUSINESS AUTO CONDITIONS

B. General Conditions

5. Other Insurance

a. For any covered "auto" you own, this coverage form provides primary insurance. For any covered "auto" you don't own, the insurance provided by this coverage form is excess over any other collectible insurance.

b. For Hired Auto Physical Damage Coverage, any covered "auto" you lease, hire, rent or borrow is deemed to be a covered "auto" you own. However, any "auto" that is leased, hired, rented or borrowed with a driver is not a covered "auto".

Comment: The CA 20 98 provides that autos covered by the endorsement are considered owned by Smithco. The unendorsed BAP, in Section IV, General Conditions 5a. and 5.b. (above), thus confers coverage for these autos on a primary basis.

Also, in the situation where Jill is driving the car Jack rented in his name, physical damage coverage is not impaired, although it appears she would not be an insured for

liability under the language in the CA 20 98 – see discussion in the liability section above.

Necessary Action. Agencies should survey each business auto market, to determine their interpretation of the two main issues discussed in this Technical Advisory.

Q.1. When an employee such as Jack is traveling on his employer's business, and rents an auto in his personal name, has that auto been hired by the employer, or only by the employee? For insurers who hold the view that the employer has not rented the auto, CA 20 98 should be attached to the BAP, in order to cover the employee for liability, and the rental car for physical damage. An alternative would be to automatically attach the CA 20 98 to every BAP account where there are employees who rent autos. (One clue would be all BAP accounts which have Symbol 8 for Section III – Physical Damage Coverage.) Some insurers will add the endorsement for no additional premium.

Q.2. Where another employee might be driving the rental car (Jill), but is not the employee who signed the rental agreement (Jack), is the other employee covered under the CA 20 98? If not, CA 99 33 should be added, in order to cover them for liability under the BAP.

After the survey of the agency's business auto markets is completed, circulate the responses to each appropriate agency staff, along with this Technical Advisory.

Postscript: The interpretive issues and potential coverage gaps in the CA 20 54 and CA 20 98 have been discussed at length in other forums for the last year or two. It is generally believed that the industry is reviewing the current language in the endorsement(s), to clarify intent.