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INSURANCE CONSUMER COUNSEL'S COLUMN

INSURANCE, RENTAL CARS, AND THE 'COLLISION DAMAGE WAIVER'

BY PROFESSOR GREG MUNRO¹

This article deals with the insurance and other coverage available when a driver rents an automobile. It addresses the issues of whether standard personal auto policies provide coverage to the driver of the rental car. The article examines "collision damage waivers" offered by the car rental agencies, and the nature of those "CDW's" as they relate to torts and contracts. It also examines contract benefits commonly available to drivers today under major credit cards for addressing rental car damage losses. Finally, the article will identify pertinent damages or claims that may arise in the use of rental cars.

The interest of the trial lawyer reader of this article may be greatly increased by taking this simple exam:

1. What is a "Collision Damage Waiver"?
2. Should I buy the "Collision Damage Waiver" when I rent a car?
3. Is the "Collision Damage Waiver" insurance?
4. Do my personal auto insurance coverages apply if I rent a car?
5. Do I need to buy the "personal liability insurance" the rental agency is offering?
6. If I damage the rental car and Avis/Hertz/Alamo claims \$4,000 damages for "loss of use," will my own policy cover it?
7. What does my credit card contract have to do with rental car damage liability?

If you are certain you know the answers to these questions read no further. If (like the author) you are

wondering how you could be so unsure of the answers after all these years of practice, slip this issue into your briefcase to study over a glass of wine in the privacy of your home.

The fact is one hears varying advice about these issues. The car rental companies encourage the purchase of their "insurance," and some personal auto insurers tell their insureds to buy the rental insurance, while some consumer articles and lawyers will advise against it. The question is, what would be your legal opinion to a business client on the issue of whether to buy the CDW or personal liability insurance offered by the car rental agency. Closer to home, what should you, your law partners, associates, and staff do? A good place to start is by looking at coverage in the driver's personal auto policy.

A. Does the rental car driver's personal auto policy cover when he/she operates the rental car?

To answer this question, we will examine the contract language in the current policy form provided auto liability insurers by their trade organization, the Insurance Services Office (ISO) in New York City.² Auto insurers that subscribe to ISO's services use these forms and are provided loss data and actuarial data accrued under these forms. An individual company may modify, add, or delete language but runs the risk of compromising the loss and actuarial data by doing so. As a result, it is reasonable to assume that the current ISO auto policy provisions, or some variant very close to those recommended provisions, will likely be the language in most auto insurance contracts extant presently.

Generalizing in this manner violates the cardinal rule that, before one gives an opinion about auto insurance coverage, she should review the actual language of the policy involved. However, it doesn't appear financially feasible or realistic to give clients a legal opinion whether they should buy car rental "insurance" based on the language of their current personal auto policy and any given car rental contract into which they propose to enter. So, generalizing from the standard ISO personal auto policy language is likely the best we can do in these circumstances.

Unfortunately, the author's experience with auto policies over the last 37 years indicates a trend in which the insurers are increasingly playing with the ISO policy language. Consequently, the author must warn that the policy provisions of any given auto insurance policy may vary significantly from those quoted in this article. For that reason, this article should not be construed as a legal opinion regarding coverage on a specific company's auto policy. Nevertheless, it is the author's hope that the analysis included will be helpful in determining whether to buy the Collision Damage Waiver or Personal Liability Insurance when one rents a car.

We start by examining whether each of the coverages of the standard personal auto policy can be expected to apply when one is driving a rental car:

1. PART A – LIABILITY COVERAGE

The basic insuring agreement under the "Part A—Liability Coverage" provides "We will pay damages for 'bodily injury' or 'property damage' for which any

'insured' becomes legally responsible because of an auto accident." "Insured" is defined in pertinent part under Part A as "You or any family member for the ownership, maintenance or use of any auto or trailer." The "any auto" language will include a rental car. Hence, the rental car driver's personal auto liability protection should broadly cover him or her for legal responsibility for damage to person or property arising from use of the rental car just as it would any other car the insured uses with one important exception.

Note that the rental situation invokes an important exclusion in the ISO policy "For 'property damage' to property a. Rented to; b. Used by; or c. In the care of; that insured." This exclusion means that damage to the rental car itself for which the user is liable will not be covered under Part A-Liability Coverage. In one sense, this exclusion is not surprising, because the Part A-Liability Coverage also does not cover damage to the insured's personal auto by reason of another standard exclusion "2. For 'property damage' to property owned or being transported by that insured." The personal auto owned by the insured is excluded from the otherwise broad liability coverage, as the insurer's usual exclusion presupposes that coverage for property damage to the insured's personal auto requires the insured to purchase collision coverage for which a separate premium must be paid.

In the case of the rental auto, one might wonder whether the exclusion of damage to another party's auto, namely the rental, runs afoul of the Mandatory Liability Protection Act, MCA §§ 61-6-301. The act requires that any motor vehicle owned or operated in the State of Montana be covered with minimum limits of liability under the Motor Vehicle Safety Responsibility Act, MCA §§ 61-6-103 *et seq.* The act expressly provides that the insurance must cover "liability imposed by law. . . for damage to property suffered by any person by maintenance or use of a motor vehicle. . .," and nowhere does MCA § 61-6-301 make an exception for damage to a rental car. Insurance policy provisions that make exceptions where the act does not have been declared invalid as against the act's public policy of protecting persons and property from damage by autos owned and operated in Montana.³

However, the "Motor Vehicle Insurance Responsibility and Verification Act," MCA § 61-6-103(4), to which the Mandatory Liability Protection Act refers, expressly provides that a motor vehicle liability policy need not insure "any liability for damage to property owned by, rented to, in charge of, or transported by the insured." The Montana Supreme Court held in *Grimsrud v. Hagel* (2005)⁴ that "...an exclusion from

motor vehicle liability insurance coverage that meets the requirements of § 61-6-103(5), MCA (now § 61-6-103(4), MCA), is not invalid under § 61-6-301(1)(a), MCA." Also, it appears that other courts have found the provision unambiguous. Assuming the provision validly excludes liability coverage for damage to the rental car itself, the natural segue is to the collision coverage which we will examine later in this article.

2. PART B – MEDICAL PAYMENTS COVERAGE

The basic insuring agreement in the standard ISO personal auto policy Medical Pay coverage promises to pay "reasonable expenses incurred for necessary medical and funeral services because of 'bodily injury': 1. Caused by accident; and 2. Sustained by an 'insured.'" "Insured" is defined as "You or any family member": a. While "occupying"; or b. As a pedestrian when struck by; a motor vehicle designed for use mainly on public roads or a trailer of any type. No exclusion would restrict this coverage as applied to rental vehicles, so that we can conclude that the Medical Pay coverage on the driver's personal auto should fully apply during his use of a rental vehicle.

3. PART C – UNINSURED MOTORIST COVERAGE

The basic UM insuring agreement provides, "We will pay compensa-

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tory damages which an 'insured' is legally entitled to recover from the owner or operator of an 'uninsured motor vehicle' because of 'bodily injury' 1. Sustained by an 'insured'; and 2. Caused by an accident.

(Note that some policies include property damage.) The UM coverage defines "insured" in part as "1. You or any family member." 2. Any other person 'occupying' your covered auto." Note that you and any family member are covered no matter where you are because that language makes the policy personal and portable, so that we can conclude UM coverage will apply to the rental car.

Your passenger, however, must be occupying "your covered auto." Under the policy definitions, the term "Your covered auto" has been modified to include "5. A rental car." Therefore, your passenger in the rental auto should also be covered.

Review of the exclusions to the UM coverage shows no exclusion for rental vehicles. Nevertheless, the exclusions section in some policies will provide: "We do not provide Uninsured Motorist Coverage for 'bodily injury' sustained; 2. By any insured while 'occupying' any vehicle other than 'your covered auto.'" This exclusion might appear to block UM coverage while an insured is occupying a rental car. However, under *Jacobson v. Implement Dealers Mut. Ins. Co.* (Mont. 1982), the provision is likely invalid because the insurer cannot limit UM coverage to cases where the injured insured is occupying the insured auto, since that violates the public policy behind the uninsured motor vehicle statute, MCA § 33-23-201, of protecting Montanans against injury by uninsured motor vehicles.⁵ The UM statute does not require the insured to be "occupying" the insured auto. In fact, due to the personal and portable nature of UM coverage, the insured is protected from injury by an uninsured motor vehicle even while in his bathtub.

Hence, we can conclude that the UM coverage of the driver's standard personal auto policy should apply to protect the driver and his passenger while he drives a rental car.

4. UNDERINSURED MOTORIST COVERAGE ENDORSEMENT

In almost identical language, the basic UIM insuring endorsement provides "We will pay compensatory damages which an 'insured' is legally entitled to recover from the owner or operator of an 'underinsured motor vehicle' because of 'bodily injury' 1. Sustained by an 'insured'; and 2. Caused by an accident.

(Note that some policies include property damage.) The UIM coverage also defines "insured" in part as "1. You or any family member." 2. Any other person 'occupying' your covered auto." As in UM, you and any family member are covered no matter where you are because that language makes the policy personal and portable so that we can conclude UIM coverage will apply to the rental car. The passenger is covered for UIM based on the same analysis used in the UM.

Review of the exclusions to the UIM coverage shows no exclusion for rental vehicles or exclusions requiring any class of insureds to be occupying the driver's personal auto. Again, we can conclude that the UIM coverage of the driver's standard personal auto policy should apply to protect the driver and his passenger while he drives a rental car.

5. PART D—COVERAGE FOR DAMAGE TO YOUR AUTO

Recall that we concluded earlier that property damage to the rental car itself will not be covered by the Part A—Liability Coverage. Will it be covered by what we call the "collision/comprehensive" coverage? The basic insuring agreement in the ISO auto damage form provides: "A. We will pay for direct and accidental loss to 'your covered auto' or any 'non-owned auto,'

*including their equipment, minus any applicable deductible shown in the Declarations." * * * "B. 'Collision' means the upset of 'your covered auto' or a 'non-owned auto' or their impact with another vehicle or object." Recall that the policy definition of "your covered auto" includes the rental car. The ISO auto damage coverage defines a non-owned auto in pertinent part as: "C. Non-owned auto" means: 1. Any private passenger auto, pickup, van or 'trailer' not owned by or furnished or available for the regular use of you or any family member' while in the custody of or being operated by you or any family member'; or * * ** This should include any rental car.

There appear to be no relevant exclusions under Part D Collision Coverage. Therefore, we can conclude that damage to the rental vehicle itself is covered by the collision coverage of the driver's personal auto policy — so long as the insured has purchased that coverage. Note however, that covering the damage under collision coverage means that the deductible will apply, which would not be the case if the damage could be covered under liability coverage.

The uncovered deductible is often cited as a reason to buy the "rental insurance" or the "collision damage waiver." However, to do so is to buy insurance against the percentage chance that during the number of days one rents the car, he will suffer the loss of a deductible that will be somewhere from \$250 to \$1,000. If one considers the fee being charged to protect against that loss, it will likely be the equivalent of an exceptionally high premium, and the insured is better off to "self-insure" by simply planning to take the small chance of suffering the loss of the deductible.

Does the driver's personal auto insurance cover "loss of use" of the damaged rental car?

Loss of use of the damaged rental car may be the result of a claim

for damages in tort or for contract. If the driver damages the rental car so it is out of commission for a period, the company could sue in tort and assert loss of use as a compensatory damage. Alternatively, the auto rental agreement (bailment agreement) may provide that, in the event of damage to the car, the driver will pay loss of use and may specify a daily liquidated damage. Absent a contract that liquidates loss of use into a daily agreed figure, the company will have to prove its loss of use by showing not only that the car was out of use for repair for a given number of days, but that it would more likely than not have been rented for each of those days.

Two issues can arise at this point: first, given that the driver's personal auto policy excludes "*property damage to property: a. Rented to; b. Used by, or c. In the care of; that insured,*" is "loss of use" actually within the meaning of

"property damage" to the rental car? If it isn't, the Part A—Liability Coverage would cover it. The author's check of the annotations to the above provision do not show any cases answering this issue.

Second, will loss of use be covered under the collision coverage on the driver's personal auto policy? The ISO policy appears to cover the auto rental company's loss of use claim with specified limits. In the collision coverage, under "*TRANSPORTATION EXPENSES*" the policy provides:

A. In addition, we will pay, without application of a deductible, up to a maximum of \$600 for: * * * 2. Expenses for which you become legally responsible in the event of loss to a "non-owned auto. We will pay for such expenses if the loss is caused by: * * *

b. "Collision" only if the Declarations indicate that Collision Coverage is provided for any "your covered auto." However, the most we will pay for any expenses for loss of use is \$20 per day.

The coverage defines a "*non-owned auto*" as: "*Any private passenger auto, pickup, van or trailer not owned by or furnished for the regular use of you or any family member while in the custody of or being operated by you or any family member*"; * * * Because the rental car would be included in the definition of a "non-owned auto," it appears that the policy collision coverage does provide coverage within the stated limits for loss of use. Again, when considering the steep charge (premium?) for the protection the collision damage waiver provides from claims for loss of use, the driver might be wise to refuse the

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CDW and simply self-insure for the risk that the loss of use claim would exceed the personal auto collision coverage for loss of use. Nevertheless, insureds are warned of the downside to this approach:

The rental agreement may require immediate reimbursement for damages and it is not uncommon for the rental company to immediately charge your credit card. This can create a significant debt, "max" out the card's credit limit, and perhaps shorten your business trip.⁶

Ultimately, whether to purchase the CDW to avoid risk of incurring a deductible or claim for loss of use depends on the driver's risk aversion and a rough estimate of the magnitude of the risk. We should again note that the cost of the CDW is described by at least one proponent of buying it as "seemingly outrageous."⁷

B. What is a "collision damage waiver" (also known as a "loss damage waiver")?

The collision damage waiver is a contractual agreement between the driver and the auto rental company that relieves the driver from liability for damage to and loss of use of the rental vehicle. The waivers vary, some freeing the driver from all damage to the auto and any damage for loss of use, while others may limit the relief. If the driver is in an accident that causes \$4,000 damage to the auto and will result in the auto being out of service for 30 days, the CDW will protect the driver from having to pay.

If any problems arise in interpreting or enforcing the CDW against the auto rental agency, it may become important to know whether it is insurance. While the CDW looks like insurance because it transfers risk from a risk-averse party to a risk-

neutral party in return for what looks like a premium, it is debatable whether it involves risk pooling and distribution of risk. The driver wants the consumer protections of insurance law in applying the CDW and may want the help of the state insurance commissioner in enforcing it.

Courts for the most part have held that the CDW is not insurance but a change in the contract of bailment.⁸ The CDW "...is the lessor's relinquishment of its right to recover from the customer for damages to the rented vehicle."⁹ However, some courts have held the agreements do constitute insurance.¹⁰ Montana courts have not ruled on this question. Regardless of the nature of the CDW, courts almost exclusively apply insurance contract principles in construing the provisions.

C. The Role of Credit Card "Insurance" for Damage to Rental Cars

Some credit card companies are now including in their agreements a benefit that pays for damage or loss to rental cars. The fact that companies like MasterCard, Visa, and American Express offer such benefits to their customers is likely an indicator of how low the actual risk is. MasterCard, Visa, and American Express each provide such a benefit. MasterCard calls the benefit "Master Rental Insurance" and represents that "Master Rental is an insurance program."¹¹ It appears that the program is provided by USAA insurance. To receive the benefit, the driver must charge the rental car agreement to the MasterCard and decline the car rental agency's CDW. The rental must be for less than 31 consecutive days and makes Master Rental Insurance the secondary payer behind the driver's personal collision insurance. The credit card agreement covers damage to or theft of the rental vehicle, reasonable loss of use, and the driver's deductible with a limit of \$50,000

per accident. Essentially, the insurance covers that which the CDW would waive.

Visa has a similar program but noticeably does not call it "insurance," but a "collision damage waiver."¹² Technically, it cannot be a CDW, because Visa is in no position to waive any damages due in tort or contract to the car rental agency. American Express calls its plan which is provided by Amex Assurance Company "Car Rental Loss and Damage Insurance Plan."¹³ In any pertinent respect, the coverages of Visa and American Express appear to be consistent with that offered by MasterCard. The major difference in the plans is that MasterCard's and American Express's are clearly insurance subject to state insurance regulation and oversight by the Insurance Commissioner, while Visa's may not be depending on whether a Montana court would construe it as insurance.

American Express excludes coverage for several classes of rental cars such as those that are "expensive," i.e. \$50,000 or more, "exotic," i.e., Porsche, Corvette, Lamborghini, Maserati, etc., or "antique." However, the company also offers at an additional premium of \$24.95 for the entire rental period of up to 42 days, a "premium" plan with \$100,000 coverage.¹⁴

In any event, it appears that, the credit card agreements providing coverage for damages and loss to rental cars will cover the very risks of loss against which the CDW would protect. Because the credit card coverage is secondary to the driver's collision coverage, one can see that the risk covered is the deductible and whatever part of the loss of use is not covered by the driver's collision coverage.

CONCLUSION

The insurance protections provided by a driver's personal auto policy will, under the standard auto policy, extend to provide the same protection

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while driving a rental car. Therefore, if one has adequate limits of coverage, there is little if any reason to buy any personal liability insurance offered by the auto rental company.

Whether to purchase the CDW depends first, on whether the driver's credit card which is used to cover the rental car agreement provides rental car damage coverage. If it does, it covers the very risks that the CDW would cover, and purchasing the CDW would negate the credit card coverage. If the driver has no credit card coverage for damage to the rental car, whether to buy the CDW depends on the driver's level of risk aversion. The twin risks to the driver are (1) that the driver will pay a deductible generally between \$250 and \$1,000 if damage to the rental car is covered under the driver's collision coverage, and, (2) that the rental agency may claim loss of use which may be wholly or partially uncovered under the driver's policy coverages. The deductible, however, is the risk the insured already has agreed to shoulder under his personal policy when he is driving his own vehicle, so it makes little sense to buy the collision damage waiver to avoid risk of paying a deductible that the driver has already agreed to under his own policy.

The second risk is the rental agency's potential claim for loss of use of the damaged auto. Again, this is a matter of the insured's risk aversion. The CDW charge is high for the risk involved, and it is likely that the CDW is a source of profit to the rental agency for that reason.

Overall, the driver carrying appropriate levels of personal auto insurance and using a credit card providing rental car damage coverage has no reason to purchase from a car rental agency the collision damage waiver or personal liability insurance. The driver carrying inadequate personal auto insurance is taking the same risk in renting as he or she takes in their daily driving. While they may

benefit by buying the "personal liability insurance" offered by the rental agency, it is likely to be far more expensive than increasing the limits with the personal auto carrier. The driver who carries no collision coverage may be wise to buy the CDW.

ENDNOTES

- 1 The author thanks 3L research assistant, Keif Storrar, for research and footnote assistance, and Dan Buckley and Pat Sheehy for review and editing.
- 2 Miller and Lefebvre, Miller's Standard Insurance Policies Annot., Form PP 00 01 01 05, (5th ed. 2007) pp. 1-31.
- 3 See, for example, *Transamerica v. Royle*, 202 Mont. 173; 656 P.2d 920 (1983) and *Bill Atkin Volkswagen, Inc. v. McClafferty*, 213 Mont. 99, 689 P.2d 1237 (1984).
- 4 328 Mont. 142, 119 P.3d 47, 2005 MT 194.
- 5 196 Mont. 542, 640 P.2d 908.
- 6 Insurevents.com, "Collision Damage Waiver - 5 Reasons Why You Should Buy It," (Feb. 2010) available at <http://www.insurevents.com/articles/collision.htm>.
- 7 *Id.*
- 8 See, for example, *Chabraja v. Avis Rent A Car Sys., Inc.*, 549 N.E.2d 872 (Ill. App.Ct. 1989); *Hearty v. Harris*, 574 So.2d 1234 (La. 1991); and *Hertz Corp. v. Corcoran*, 520 N.Y.S. 2d 700 (Sup. Ct. 1987).
- 9 *Chabraja*, 549 N.E.2d at 875.
- 10 See, for example, *Grand Rent A Car Corp. v. 20th Century Ins. Co.*, 31 Cal. Rptr. 2d 88 (Cal.Ct. App. 1994) and *Passamone v. Travelers Indem. Co.*, 882 P.2d 1312 (Colo. 1994).
- 11 MasterCard, "Guide to Benefits, WC-USAA-GTB-08," available at https://content.usaa.com/mcontent/static_assets/Media/MCWorldGuide.pdf?cacheid=2875115392
- 12 Visa, "Auto Rental Collision Damage Waiver," available at usa.visa.com/personal/cards/benefits/bft_dmg_waiver_personal.html
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14. *Id.* at 2. ♦