

RENTAL CAR COMPANYS' LIABILITY INSURANCE PRIMARY OR EXCESS IN ALL 50 STATES

Claims and subrogation professionals must be familiar with the law in a particular state which affects whether a rental car company's liability policy or the renter's personal auto liability policy will be primary when the renter causes an accident resulting in personal injury or property damage. This area of the law creates a great deal of confusion because many consumers are unsure what is covered by their own personal policy when they rent a car and are asked if they want to buy insurance or the collision damage waiver.

Four Types of Insurance Offered by Car Rental Companies

Collision Damage Waiver (CDW). This isn't insurance. Rather, CDW is an agreement with the car rental company by which it gives up or waives its right to recover damages or to the rental vehicle or repair costs from the renter. Without the waiver, the car rental company would have the right under the rental agreement to recover any damages to the rented vehicle from you, even if you were not at fault in the accident. A vehicle owner (including a car rental company) has the right to recover the value of the vehicle or repair costs, together with loss of use, diminished value, administrative fees, towing charges, and even pro-rated license and registration fees. See [HERE](#) for a chart detailing the law in all 50 states regarding the recovery of sales tax by a vehicle owner when a vehicle is totaled, and click [HERE](#) for a chart detailing the law in all 50 states regarding the recovery of diminution in value by a vehicle owner when a vehicle has been in an accident. If a CDW is purchased, the car rental company's right to recover these damage items from the renter under the terms of the car rental agreement is waived. These damages would then be covered under the car rental company's own auto fleet insurance policy if the renter is involved in a collision. In short, the CDW prevents the renter from being contractually liable for damage to the car in the event of a collision. This coverage can cost as much as \$30 per day, or 25% to 40% of the base rental price. Some states have limited the amount a car rental company can charge, but most do not. A CDW does not necessarily protect the renter from having to pay. Note that the CDW does not protect the renter if he or she has violated the Rental Agreement's Terms and Conditions, and it does not protect the renter from a lawsuit by third parties involved in collisions with the renter. See SLI below.

Loss Damage Waiver (LDW). LDW is the same as CDW, above.

Supplemental Liability Insurance (SLI). While CDW protects the renter from first-party contractual claims for damages by the car rental company, it does not protect the renter from third-party liability when the renter is involved in a collision with a third party. SLI provides you with additional liability insurance while driving the rental car. It pays for property damage and medical expenses incurred by other individuals in a car accident you cause while driving the rental vehicle. While you may have liability coverage which applies under your personal auto insurance policy, the limits may be low. This coverage provides an umbrella policy over and above your own liability limits and may protect you in certain circumstances. It should be noted that many auto policies often do not provide liability coverage while in other countries so this coverage may be necessary under those circumstances. This coverage provides liability insurance which protects or covers other people's property damage and injuries in an accident.

Personal Accident Insurance (PAI). Unlike SLI, this insurance covers medical, ambulance, and death benefits for the renter and his/her passengers. A renter's personal health insurance coverage will likely provide greater benefits and coverage than PAI.

Personal Effects Coverage. This is coverage provided by the car rental company which covers the theft of possessions from the rental car. It usually provides a limit of liability.

Liability Insurance Primary or Excess

The following chart concerns itself only with liability insurance provided by the car rental company. Car rental companies do not require a renter to have liability insurance, but liability coverage is still necessary in order to operate a vehicle in every state except New Hampshire. (Note: In Virginia, a vehicle owner is not required to carry liability insurance on a vehicle if he pays a \$500 Uninsured Motor Vehicle fee to the Virginia Department of Motor Vehicles). Car rental companies have no obligation to advise you of this or check to see if a renter has liability insurance coverage, and they cannot mandate that a driver purchase same. Car Rental companies are required by law (in every state except California) to provide the state-mandated liability limits for the rental car. However, in many cases this liability coverage may be considered secondary to the primary coverage provided by your personal auto policy.

Liability Shifting, Vicarious Liability, and the Graves Amendment

Several states have vicarious liability statutes which make the owner of a motor vehicle automatically liable for the actions and negligence of permissive users of the owner's vehicle. Under common law, the owner of a motor vehicle is not liable for injuries caused by the negligence of another person driving the owner's vehicle (*i.e.*, vicariously liable) unless the driver was acting as an employee or agent of the owner, or there is a vicarious liability statute at play. California, Connecticut, Florida, Idaho, Iowa, Maine, Michigan, Minnesota, Nevada, New York, Rhode Island and the District of Columbia all have forms of vicarious liability statutes. Under these statutes, an owner who gives authority to another to operate the owner's vehicle, by either express or implied consent, has a non-delegable obligation to ensure that the vehicle is operated safely. For instance, New York has a typical vicarious liability statute in § 388 of the New York Vehicle and Traffic Law, which reads as follows:

Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner.

These vicarious liability statutes had become very expensive for car rental companies during the 1990's and the major car rental companies began changing their rental contracts to make the renter's own insurance policy primary. Effective August 10, 2005, however, Congress passed the Graves Amendment to the Federal Highway Bill, H.R. 3, codified at 49 U.S.C. § 30106. It provides as follows:

An owner of a motor vehicle that rents or leases the vehicle to a person shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle, for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if: (1) the owner is engaged in the trade or business of renting or leasing motor vehicles; and, (2) there is no negligence or criminal wrongdoing on the part of the owner.

The Graves Amendment preempted any state law to the contrary and provided relief to car rental companies. Whether or not the company's liability policy was considered primary or excess when a rented vehicle was involved in a collision once again was determined by the rental agreement and applicable state law.

Challenges to state laws requiring that a car rental company provide liability insurance arose following the Graves Amendment. In *Subrogation Division, Inc. v. Brown*, 2020 WL 211260 (D. S.D. 2020), a federal court discussed the impact of the Graves Amendment's saving clause on the issue of whether the car rental company's liability policy was primary or excess. That clause provides:

Nothing in this section supersedes the law of any State or political subdivision thereof--

(1) imposing financial responsibility or insurance standards on the owner of a motor vehicle for the privilege of registering and operating a motor vehicle; or

(2) imposing liability on business entities engaged in the trade or business of renting or leasing motor vehicles for failure to meet the financial responsibility or liability insurance requirements under State law.

In *Brown*, Overland West, Inc. rented a vehicle to Brown, who was involved in a crash with a vehicle owned by Dan Claymore and insured for the minimum liability limits by Farmers (21st Century Indemnity Insurance Company). Brown's rental agreement stated that he agreed to indemnify Overland for "any and all loss, liability, claim, demand, cause of action, and attorneys' fees..." It also stated that Brown's liability insurance would be "primary" in the event of an accident. Overland's liability carrier paid damages to Claymore and sought to recover those damages from its renter, Brown, and

21st Century. Overland brought a Motion for Summary Judgment arguing that the Graves Amendment preempted South Dakota's Supreme Court decision in *Auto-Owners Ins. Co. v. Enterprise Rent-A-Car Co.*, 663 N.W.2d 208 (S.D. 2003), which held that the state's omnibus statute placed the duty to provide primary coverage on the car rental company up to the state's minimum limits, and § 32-35-70, which required the owner of a vehicle had the responsibility to provide liability coverage. The federal judge in *Brown* issued a decision stating that the Graves Amendment, which states that no commercial rental vehicle owner can be held liable under the law of any State by reason of being the owner of the vehicle, for damages arising out of the use, operation, or possession of the vehicle during the period of the rental, preempted South Dakota law. The court addressed the Graves Amendment's savings clause but noted that the state's rental insurance laws did not fit within its preemptive powers. It neither imposed financial responsibility on the owner of a motor vehicle nor imposed liability on a car rental company. The judge ruled that the Graves Amendment states that rental companies like Overland "shall not be liable" under state law for damages incurred by renters. While states may require rental companies to carry insurance, the judge held they "may not require rental companies to be vicariously liable for damages incurred solely by renters through insurance law or otherwise." Consequently, the state law requirement that Overland pay the Claymore damages was preempted by the Graves Amendment and Overland could seek reimbursement from Brown. The court observed that the intent of the Amendment was to relieve rental car companies of just this type of liability, regardless of what state law says.

The following chart deals with whether the liability insurance policy provided by the car rental company is considered primary or secondary to the renter's personal auto policy and the liability coverage it provides.

ALABAMA: No case or statutory law. Terms of rental agreement and renter's liability policy should be compared to determine which is primary.

ALASKA: No case or statutory law requiring a car rental company's policy to be primary. Terms of rental agreement and renter's liability policy should be compared to determine which is primary. Usually, the owner's insurance provisions will be compared with the driver's insurance provisions and both will be responsible for a policy limits pro rata share of the limits when conflicting excess clauses are involved, as opposed to equal shares. *Columbia Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 905 P.2d 474 (Alaska 1995).

ARIZONA: Car rental company's liability policy is primary up to the state's minimum financial responsibility limits. Ariz. State. § 28-2166C. Exception exists if the rental agreement states otherwise in 10-pt. font, it is acknowledged by the renter, and this is revealed to the renter at the time a reservation is made online by the renter.

ARKANSAS: Arkansas requires the liability policies of car rental companies to be excess. Ark. Code § 27-19-713(l). Every auto liability policy must "extend" primary liability coverage to temporary substitute vehicles rented or leased from a rental company as defined in § 23-64-202(d)(2)(C).

CALIFORNIA: California is the only state in which car rental companies do not automatically provide liability coverage as part of its car rental agreement. Some companies may provide the minimum primary liability protection to international renters with driver's licenses that show an address outside the U.S. A renter may need to provide their own liability coverage when renting in California. In general, U.S. residents are usually covered by their own personal auto coverage, but renters must be sure they have the minimum level of liability insurance required in California from their own insurance company. If not, they may have to purchase liability insurance through the car rental company.

If the car rental company obtains liability insurance that describes or rates the rental vehicle and the rental agreement provides for coverage, its coverage is primary. Cal. Ins. Code § 11580.9(d); *Enterprise Rent-A-Car Co. v. Workman's Auto Ins. Co.*, 58 Cal.App.4th 1543, 68 Cal.Rptr.2d 725 (1997). If the car rental company obtains liability coverage (or self-insured certificate) which does not describe or rate the rented vehicle, then the coverage is excess to the renter's policy. *Mercury Casualty v. Hertz Corp.*, 59 Cal.App.4th 414, 69 Cal.Rptr.2d 9 (1997).

If the car rental company is self-insured, that self-insurance is excess to the renter's personal auto coverage. Cal. Ins. Code § 11580.9; *Enterprise Rent-A-Car v. Workmen's Auto Ins.*, 68 Cal.Rptr.2d 725 (Cal. 1997); *Mercury Casualty v. Hertz*, 69 Cal.Rptr.2d 9 (Cal. 1997); *Interinsurance Exchange v. Spectrum Investment Corp.*, 258 Cal.Rptr. 43 (Cal. 1989). However, if

the car rental agreement agrees to provide liability coverage, even a self-insured car rental company will be primary. *United Services Auto. Assn. v. Snappy Car Rental, Inc.*, 74 Cal.App.4th 461 (Cal. App. 1999).

COLORADO: The auto policies of the renter and car rental company must be compared to see which provides primary as opposed to secondary liability coverage. When the car rental company's policy promises primary coverage, it must provide at least up to the minimum limits of financial responsibility. *Allstate Ins. Co. v. Frank B. Hall & Co. of California*, 770 P.2d 1342 (Colo. App. 1989). If both policies contain "excess insurance" clauses, they will share equally in a loss on a co-primary basis until the policy with the lower limits is exhausted. *Allstate v. Avis Rent-A-Car*, 947 P.2d 341 (Colo. 1997). If the renter's policy provides "excess" insurance but the car rental policy provides "umbrella" coverage, the personal policy will be considered primary. *Frank B. Hall, supra*. A rental car company's liability policy will be primary unless the rental agreement states that the coverage is excess to all other coverage. *U.S.F. & G. v. Budget Rent-A-Car Systems, Inc.*, 842 P.2d 208 (Colo. 1992).

CONNECTICUT: Each policy issued to an individual covering an auto shall contain a conspicuous statement specifying whether the policy provides liability, collision or comprehensive coverage for damage to a rented private passenger motor vehicle and, where the policy provides such coverage, the limit of the coverage and whether any deductible amount applies. Conn. Stat. § 38a-335(b).

The car rental agreement can shift primary liability to the renter. Where the rental agreement says that if SLI is not purchased, this effectively makes the renter's personal liability coverage primary. Self-insurance can be "other insurance." *Hertz Corp. v. Federal Ins. Co.*, 713 A.2d 820 (Conn. 1998); *Farmers Texas County Mutual v. Hertz*, 923 A.2d 673 (Conn. 2007).

DELAWARE: Car rental companies are required to carry the minimum limits of liability insurance. If the owner fails to do so, it is jointly and severally liable with the renter for any damages caused by the renter's negligence. A judge will allow a hearing and if the car rental company has these minimum limits, it will be dismissed from the suit. Del. Stat. § 6101(a)(d). When a car rental company maintains the required minimum liability coverage, primary liability will be shifted to the renter's personal auto policy. Del. Stat. § 6102; *Stewart v. Selner and Agency Rent-A-Car*, 1989 WL 5186 (Del. Super. 1989). This is true even when the car rental company is self-insured. *United Service Auto. Ass'n v. Avis Rent-A-Car, Inc.*, 2005 WL 3416299 (Del. Super. 2005).

DISTRICT OF COLUMBIA: The District's Compulsory/No-Fault Motor Vehicle Insurance Act, requires that the actual owner of a vehicle provide primary liability coverage for any vehicle operated in the District of Columbia. *Sharp v. Ward*, 2004 WL 1835102 (D.C. Super. 2004); D.C. Stat. § 50-1301.08.

FLORIDA: A car rental company's liability coverage is primary unless the rental agreement sets forth the following in 10-pt. font: "The valid and collectible liability insurance and personal injury protection insurance of any authorized rental or leasing driver is primary for the limits of liability and personal injury protection coverage required by §§324.021(7) and 627.736, Florida Statutes." This shifting provision operates only when there is coverage to which liability can be shifted. *Shivers. v. Enterprise Leasing Co.*, 950 So.2d 494 (Fla. App. 2007); *Rosati v. Vaillancourt*, 848 So.2d 467 (Fla. App. 2003).

GEORGIA: The car rental company is excess to the liability coverage of the renter. Ga. Code § 40-9-102; *A. Atlanta Autosave v. Generali*, 498 S.E.2d 278 (Ga. App. 1999). Under § 40-9-102, the renter's liability coverage is primary in the case of liability arising from the use of the rental car. *Jordan v. Spirit Rent-A-Car*, 555 SE.2d 734 (Ga. App. 2001). Where an accident is the fault of an additional renter authorized to drive the vehicle, but not a signatory to the rental contract, the court held that the carrier for the additional driver was not obligated to cover the loss. *Thompson v. Enterprise Leasing Company of Georgia*, 522 S.E.2d 670 (Ga. App. 1999); *Zurich American Ins. Co. v. General Car & Truck Leasing System, Inc.*, 574 S.E.2d 914 (Ga. App. 2002).

HAWAII: The car rental company's (referred to as "U-drive rental business" and requires less than six-month lease/rental period) liability policy will be excess to a renter's liability policy only if all of the following are satisfied: (1) the car rental company provides any person injured in the accident with the name and address of the operator or renter, along with any information available to the rental company as to the name and address of any insurer under any liability policies applicable to the operator or renter; (2) a suit may be filed and service upon the responsible operator or renter can be

made; and, (3) an insurer responds on behalf of the operator or renter to the suit. Haw. Stat. § 431:10C-305.5. In cases where the rental company's liability insurance is primary because any of the above three circumstances have not been satisfied, a rental company may nevertheless recover from the renter or operator, or their insurers, any amounts the rental company paid out as a result of the accident, including reasonable attorney's fees.

IDAHO: If the owner of the motor vehicle receives compensation from or on behalf of the operator for the temporary use of the vehicle, the owner's insurance shall be primary, and the operator's insurance shall be secondary or excess. Idaho Stat. § 49-1212(11)(b).

ILLINOIS: Owners of rental vehicles must demonstrate financial responsibility by obtaining insurance coverage for these vehicles. 625 I.L.C.S. § 5/9-101; 215 I.L.C.S. § 5/143a. However, compulsory insurance does not mean primary insurance. Illinois' financial responsibility requirements of its Vehicle Code and the financial responsibility statutes applicable to owners of rental vehicles for hire do not prevent car rental companies from including rental contract terms that shift primary liability under insurance policies covering the lessee. Neither the Vehicle Code nor public policy requires car rental companies' insurers to provide primary liability coverage. *State Farm Mut. Auto. Ins. Co. v. Hertz Claim*, 789 N.E.2d 407 (Ill. App. 2003).

INDIANA: The renter's policy is primary. Ind. Stat. § 27-8-9-9. In a case where the renter agreed to have his insurance be primary by consenting to a rental contract which provided that lessor's liability insurance was excess over any other liability insurance coverage available from the lessee, applicable after coverage under such other available insurance. However, if the renter's personal policy excludes coverage for rented cars, the rental company's liability policy may be primary. *Safe Auto Insurance v. Enterprise*, 889 N.E.2d 392 (Ind. App. 2008).

IOWA: No case or statutory law. Terms of rental agreement and renter's liability policy should be compared to determine which is primary.

KANSAS: A car rental company can exclude liability coverage from rental vehicles. Kan. Stat. § 40-3107(h). The car rental company's liability coverage is primary where the renter's personal policy excludes coverage for vehicles rented from a "car business." *State Farm v. Winney*, 923 P.2d 517 (Kan. 1996). If both policies provide "excess" coverage, the loss will be prorated equally up to the limit of the lower policy. *Western Cas. & Sur. v. Universal Underwriters Ins. Co.*, 657 P.2d 576 (Kan. 1983). Also, a car rental company which self-insures will not be considered primary if the renter's policy is an excess policy. *Farm Bureau v. Enterprise Leasing*, 58 P.3d 751 (Kan. App. 2002).

KENTUCKY: The car rental company's policy is primary up to \$10,000 for economic loss suffered by a driver or occupant of a rented vehicle. For all other liability, it is not primary. Ky. Stat. §§ 304.39-030, 040, and 050. If the car rental company's policy has an escape clause stating that its coverage is non-existent when other coverage is in place, and where the renter's policy contained an excess clause, the escape clause of the car rental company's policy is determinative and the renter's policy is primary. The renter's insurance company was also to a duty to defend its insured. *Empire Fire and Marine v. Everett Haddix*, 927 S.W.2d 843 (Ky. App. 1996).

LOUISIANA: A car rental company is required to maintain the minimum financial responsibility amounts of liability coverage on all rental vehicles. The car rental company's liability insurance is secondary when the renter has other valid and collectible coverage. Auto insurers are also required to extend personal auto liability coverage to rental or temporary substitute vehicles. La. R.S. § 1296. If a renter opts to purchase supplemental insurance for a rental vehicle, such as a policy typically offered by rental car companies, the supplemental coverage is the primary insurer in the event of an accident.

MAINE: A car rental company and the renter are both jointly and severally liable for any damage or injuries caused by the negligence of the renter or a permissive driver. Me. Stat. 29-A § 1652. However, this statute is preempted by the Graves Amendment. 49 U.S.C. § 30106(b). A personal auto policy must provide coverage for damage to a covered rental vehicle. Me. Stat. 24-A § 2927.

In *Enterprise Rent-A-Car Co. of Boston, LLC v. Maynard*, 2012 WL 1681970 (D. Me.2012), Maynard rented car from Enterprise, declined supplemental liability insurance, and agreed in the rental contract to indemnify Enterprise from all

losses. Maynard allowed Scotty Beausejour to drive the vehicle and Beausejour struck and injured Thomas Webster. Webster sued Beausejour and also demanded payment from Enterprise, who assumed the defense of the case. Enterprise demanded a defense and indemnity from Maynard, who had no other valid and collectible insurance. Enterprise settled with Webster for \$260,000, after incurring \$17,401.67 in attorneys' fees. Enterprise then sought indemnity from Maynard and filed a Motion for Summary Judgment arguing that the simple rental contract required Maynard to indemnify it. Maynard claimed Enterprises' settlement was made as a "volunteer" because they were not liable to Webster, but Enterprise claimed it was liable because under § 1611 it was self-insured. Maynard also argues that the rental contract was unconscionable. The federal judge ruled that even though the contract required Maynard to reimburse Enterprise, Enterprise must have "incurred" the loss in order to be reimbursed. Section 1652 doesn't do that because it is preempted by the Graves Amendment.

MARYLAND: As of January 1, 2020, a car renter's personal auto insurance is primary. Md. Transp. Code § 18-102; Code of Md. Reg. § 11.18.01.03; *Rentals Unlimited Inc. v. Aetna Casualty & Surety Ins. Co.*, 647 A.2d 1278 (Md. App. 1994). The only exception is if the rental vehicle is a "replacement vehicle", defined in § 18-102(a)(2)(i) as:

...a vehicle that is loaned by an auto repair facility or a dealer, or that an individual rents temporarily, to use while a vehicle owned by the individual is not in use because of loss, as "loss" is defined in that individual's applicable private passenger automobile insurance policy, or because of breakdown, repair, service, or damage.

Another exception is if the renter's insurance is provided by the Maryland Automobile Insurance Fund. Md. Transp. Code § 18-102(a)(2)(ii). A person in the business of renting or leasing motor vehicles, trailers, or semitrailers must file with the Financial Responsibility Division of the Administration, for each vehicle rented or leased, a copy of the liability insurance policy or proof of Maryland self-insurance certification. Code of Md. Reg. § 11.18.01.03(A).

MASSACHUSETTS: Car rental companies must maintain liability insurance on their rented vehicles in the amount of the minimum financial responsibility limits required. Mass. Stat. 90 § 32E. The liability insurance provided by a car rental company is primary. *Alamo Rent-A-Car, Inc. v. Matchem*, 2000 WL 16763 (Mass. Super. 1999). Escape clauses or "super-escape clauses" are not favored in Massachusetts. *Premier Ins. Co. of Massachusetts v. Empire Fiore and Marine Ins. Co.*, 2002 WL 58465 (Mass. Super.2002).

MICHIGAN: Under Michigan No-Fault Act, a car rental company must provide primary liability coverage to renters. Mich. Stat. § 500.3101; *State Farm Mutual Automobile Ins. Co. v. Enterprise Leasing Co.*, 549 N.W.2d 345 (Mich. 1996). A rental contract may lower the liability limit requirement of the owner's insurer, as long as the owner's insurer remains primary and provides coverage equal to or above the minimum amounts required by the No-Fault Act. *Ryder Truck Rental, Inc. v. Auto-Owners Ins. Co., Inc.*, 597 N.W.2d 560 (Mich. App. 1999). Any coverage provided by the car rental company above the minimum limits it was required by statute to provide was not primary because it was not "valid and collectable insurance" available to the insured. *Church Mutual Ins. Co., v. Save-a-Buck Car Rental. Co.*, 151 F.Supp.2d 905 (W.D. Mich. 2000). Under No-Fault Law, a person suffering damage must first claim benefits from the vehicle owner, and then from the vehicle operator. Mich. Stat. § 500.3125.

MINNESOTA: As of August 1, 2007, a car rental company's liability coverage is excess to the renter's personal auto policy. Minn. Stat. § 65B.49(5a). This law requires any auto policy to extend its benefits to the operation of rented vehicles. The policy must also cover loss of use.

MISSISSIPPI: No case or statutory law dealing specifically with car rental companies. Terms of rental agreement and renter's liability policy should be compared to determine which is primary. Although *State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co.*, 797 So.2d 981 (Miss. 2001) said that a customer driving an auto dealer's car during repair work was not an insured under the liability coverage of the dealer's garage policy, this case appears to have been superseded by statute in 2004 when Mississippi passed § 63-15-4 and first made insurance on motor vehicles mandatory. Section 63-15-4(2) provides that "insured parties shall be responsible for maintaining the insurance on each motor vehicle." This provision vests the responsibility of providing insurance on the person with an insurable interest in the property. The general rule that anyone who derives a benefit from property or would suffer loss from its destruction has an insurable interest in the property has been applied to motor vehicle insurance. *Universal Underwriters Gr. v. State*

Farm, 931 So.2d 617 (Miss. App. 2006). This would seem to support the argument that the car rental company's insurance should be primary.

MISSOURI: A car rental company's policy is secondary to the coverage provided by the renter's policy. Escape clauses in rental agreements are enforceable, and the renter's insurance is primary. *Irvin v. Rhodes*, 929 S.W.2d (Mo. 1996). Every liability policy must extend coverage to vehicles loaned as demonstration vehicles or while the insured's vehicle is out of use due to repair. Mo. Stat. § 379.201. A car rental company's liability carrier is primary if the renter's policy excludes from vehicles owned by a car business. *Geisner v. Budget Rent-A-Car*, 967 S.W.2d 95 (Mo. 1998).

MONTANA: No case or statutory law dealing specifically with car rental companies. Terms of rental agreement and renter's liability policy should be compared to determine which is primary.

NEBRASKA: No case or statutory law dealing specifically with car rental companies. Terms of rental agreement and renter's liability policy should be compared to determine which is primary. Where both policies are "excess", the car rental company's policy will be considered "primary." *Bituminous Cas. Corp. v. Andersen*, 171 N.W.2d 175 (Neb. 1969).

NEVADA: No case or statutory law dealing specifically with car rental companies. Terms of rental agreement and renter's liability policy should be compared to determine which is primary. The car rental company's policy will be primary when both it and the renter's policy contain "other insurance" clauses. *Alamo Rent-A-Car v. State Farm*, 953 P.2d 1074 (Nev. 1998). There is nothing in Nevada's statutory scheme governing short-term vehicle lessors that establishes priority of coverage between a rental agency and the renter's own auto liability insurer. A short-term car rental company is jointly and severally liable with the renter and his permissive drivers, if the car rental company does not provide the required minimum liability coverage. Nev. Stat. § 482.305. If a plaintiff accepts a settlement from the renter's policy, he cannot then also recover the limits of the car rental company's policy. *Hall v. Enterprise Leasing Company-West*, 122 Nev. 685 (Nev. 2006).

NEW HAMPSHIRE: No case or statutory law dealing specifically with car rental companies. Terms of rental agreement and renter's liability policy should be compared to determine which is primary. Mandatory liability coverage provided by the car rental company does not have to be primary. *Progressive Northern Ins. Co. v. Enterprise Rent-A-Car Co. of Boston, Inc.*, 149 N.H. 489 (N.H. 2003).

NEW JERSEY: No case or statutory law dealing specifically with car rental companies. Terms of rental agreement and renter's liability policy should be compared to determine which is primary. New Jersey law requires the car rental company to have liability coverage. N.J. Stat. § 45:21-2. If both policies contain excess insurance clauses, they will share the loss equally up to the statutory minimums, and then pro-rata thereafter. *Ambrosio v. Affordable Auto Rental*, 704 A.2d 572 (N.J. 1998).

NEW MEXICO: No case or statutory law dealing specifically with car rental companies. Terms of rental agreement and renter's liability policy should be compared to determine which is primary. When a vehicle owned by a licensed auto dealer is loaned without a fee to a person for demonstration purposes, as a temporary substitute for that person's vehicle while it is being serviced or repaired, the driver's insurance is primary, and the dealer's policy is excess. N.M. § 59A-32-23. However, if a car rental company is self-insured, it can shift primary liability for at least the minimum limits to the renter by prominently disclosing this in the rental contract. N.M. Admin. Code § 12.4.16.

NEW YORK: A car rental company's liability insurance is primary up to the minimum limits. N.Y. Comp. Codes, Rules and Reg. Tit. 11 § 60-1.1. The Vehicle and Traffic Law also requires car rental companies to provide primary insurance. N.Y. Veh. & Traf. § 370; *ELRAC v. Ward*, 96 N.Y.2d 58, 748 N.E.2d 1, 724 N.Y.S.2d 692 (N.Y., 2001). A car rental company can also require indemnification from a renter for that portion of damages which exceeds the minimum liability limits. *Morris v. Snappy Car Rental*, 637 N.E.2d 253 (N.Y. 1994).

NORTH CAROLINA: Two North Carolina statutes require a car rental company to provide liability coverage for the renters of its vehicles. The first obligates vehicle owners to secure liability insurance that insures permissive users. N.C. Stat. § 20-279.21(b)(2). The second requires car rental companies to obtain liability insurance that insures the owner and renters of vehicles from any liability imposed by law. N.C. Stat. § 20-281. The minimum limits of insurance required by these statutes

are identical. An insurance policy complies with § 20-281 if it provides the coverage described in § 20-281, subject to the condition that no coverage is provided if other liability insurance, in the amount required by statute, is provided by a different policy. It then becomes a process of comparing other insurance clauses. When both policies contain clauses stating that each will cover minimum financial limits and a pro rata share of any excess damages, both insurers will share the loss on a pro rata basis. *Jeffreys v. Snappy Car Rental, Inc.*, 493 S.E.2d 767 (N.C. App.1997). Where self-insured car rental company's liability coverage is subject to condition that no coverage is provided if other insurance is provided by different policy, this complies with the statute requiring lessors in business of renting vehicles to provide liability coverage for lessee. *Hertz Corp. v. New South Ins. Co.*, 497 S.E.2d 448 (N.C. App. 1998).

NORTH DAKOTA: A car rental company's liability coverage is secondary to the insurance of the renter. N.D. Stat. § 26.1-40-17(2). A federal case to the contrary suggests that the state applies only to garagekeepers' policies and not car rental companies. *Travelers Indem. Co. v. American Motorist Ins. Co.*, 766 F.Supp. 804 (N.D. 1991).

OHIO: A car rental company is allowed to enter into a contract with a renter whereby the renter agrees to be solely responsible for maintaining proof of financial responsibility or use of the motor vehicle during the rental period. Ohio Stat. § 4509.101. An excess clause in the car rental agreement versus an excess clause in the driver's policy means a pro rata sharing of liability coverage. *Progressive Max Ins. Co. v. Empire Fire & Marine Ins.*, 2001 WL 881306 (Ohio 2001).

OKLAHOMA: A car rental company which purchases liability coverage is not liable for the renter's negligence. Okla. Stat. tit. 47 § 8-101. If the car rental company is self-insured, however, it is jointly and severally liable with the renter for damage to third parties. Okla. Stat. tit. 47 § 8-101. When a vehicle is loaned by a dealer, the customer's policy is primary. 47 Okla. Stat. § 580.2. The vehicle owner may enter into a rental/lease agreement by which the renter assumes responsibility for loss for any liability.

OREGON: The personal policy of the renter is primary, and the policy of the car rental company is secondary. Or. Stat. § 30.135. A self-insured car rental company is also excess. Or. Stat. § 806.130; 30.135 (test drivers and car rental companies).

PENNSYLVANIA: Every policy must state whether it covers rental vehicles. Pa. Stat. 75 P.S. § 1725. No case or statutory law dealing specifically with car rental companies. Terms of rental agreement and renter's liability policy should be compared to determine which is primary. If both policies are excess, the loss will be shared equally by the insurers. *Continental Casualty v. Aetna Casualty*, 33 Pa. D. & C.2d 293 (Pa. Common Pleas 1963).

RHODE ISLAND: The renter's policy is primary unless otherwise stated in the rental agreement in 10-pt. type on the face of the rental agreement. R.I. Stat. § 31-34-4(b).

SOUTH CAROLINA: Car rental company's policies are primary, including those who are self-insured. *Southern Home Ins. Co. v. Burdette's Leasing*, 234 S.E.2d 870 (S.C. 1977). The same is true for dealer's garage liability coverage. *Travelers Indem. Co. v. Dees*, 235 F. Supp. 515 (S.C. 1964).

SOUTH DAKOTA: With regard to "automobile service agencies" (businesses engaged in selling, repairing, servicing, storing, or parking motor vehicles), § 58-23-4 provides:

§ 58-23-4. Primary and excess coverage on vehicle loaned by automobile service agency.

When an automobile insurance policy is in force for anyone engaged in the business of selling, repairing, servicing, storing, or parking motor vehicles and the person or organization allows the use of a vehicle with or without consideration to any other person or organization and the vehicle is involved in an accident out of which bodily injury or property damage to third persons or damage to the insured vehicle arises, the following automobile insurance policies shall be applicable:

- (1) In the event no other automobile insurance policy is in force at the time of the accident for the person or organization using the vehicle, the coverage provided by the motor vehicle owner's automobile policy shall extend to the borrower in the event the owner's automobile insurance policy extends coverage to said borrower.*
- (2) In the event that another automobile insurance policy is in force for the person or organization using the vehicle, any coverage provided by the motor vehicle owner's automobile insurance policy shall be excess coverage*

only but limited by the terms of the owner's applicable automobile insurance policy. The coverages in the policy afforded the person or organization using the vehicle shall be primary.

If the renter does not have insurance, then the car rental company's policy is primary. However, one decision seems to question this. In *Auto-Owners Ins. Co. v. Enterprise*, 663 N.W.2d 208 (S.D. 2003), the court held that the policy of a self-insured car rental company was primary, and the renter's personal auto policy was excess. The decision seemed to suggest that because the state has an omnibus statute, the car rental company was primarily liable.

In *Subrogation Division, Inc. v. Brown*, 446 F.Supp.3d 542 (D.S.D. 2020), the court discussed primary vs. secondary coverage considerations concerning rental cars and federal preemption under the Graves Amendment. No commercial rental vehicle owner can be held "liable under the law of any State ... by reason of being the owner of the vehicle" for damages "arising out of the use, operation, or possession of the vehicle during the period of the rental." 49 U.S.C. § 30106(a). Overland (Hertz) rented a vehicle to Brown. The rental agreement provided that Brown would indemnify Overland and Brown's "valid and collectible automobile liability insurance" "will be primary" in the event of an accident. Brown's negligence caused an accident with Claymore resulting in \$2,271.75 in damages to Claymore's vehicle. Overland's carrier paid the damages and Overland reimbursed its carrier because it was within the deductible. The court's reasoning is essentially that "vicarious liability" becomes implicit whenever a renter's insurance company seeks to avoid primary coverage using a "shift" in financial responsibility imposed under state law. The renter's insurer (21st Century Insurance) has not appealed this published decision. Brown had the state's minimum insurance with 21st Century, which assigned its right to Subrogation Division, Inc.(SDI), which sued Brown seeking to recover the \$2,271.75. SDI raised the Graves Amendment as the central theme of its complaint and the parties vigorously dispute its application to this case. In South Dakota, "[a]n owner's policy of liability insurance ... shall insure the person named therein and any other person as insured, using any insured vehicle or vehicles with the express or implied permission of the named insured[.]" S.D.C.L. § 32-35-70. "This statute clearly requires that an automobile owner provide coverage for those who use the vehicle with either express or implied permission." The court held that "vicarious liability" becomes implicit whenever a renter's insurance company seeks to avoid primary coverage using a "shift" in financial responsibility imposed under state law. By requiring Overland's insurance—and ultimately Overland—to primarily cover the Claymore damages, *Auto-Owners* forces Overland to be vicariously liable for Mr. Brown's torts. This is the precise result barred by the Graves Amendment. The Amendment states rental companies like Overland "shall not be liable" under state law for damages incurred by renters.

TENNESSEE: When the car rental agreement provides that coverage for the vehicle must be provided by the renter, the agreement controls. Tenn. Stat. § 56-7-1101(c).

TEXAS: No case or statutory law dealing specifically with car rental companies. Terms of rental agreement and renter's liability policy should be compared to determine which is primary. However, a self-insured car rental company is not considered to be "other valid and collectible insurance" unless, and then to the extent that, the policy does not provide the minimum liability limits. *Hertz Corp. v. Robineau*, 6 S.W.3d 332, 333 (Tex. App.--Austin 1999).

A car rental company may provide its renters with optional damage waivers, relinquishing liability for all or a part of any damage to a rented vehicle from authorized drivers. Rental agreement must contain a required disclosure notice (language provided in statute) in at least a 10-pt. font regarding mandatory charge notice, prohibitions, and stating that the damage waiver is not insurance.

UTAH: The renter's policy is primary if it is valid and collectible. Utah Code § 31A-22-314. Compare this statute, however, with a case in which the court said that because of the use of the word "primary" in subsection (2) of 31A-22-344, (which was removed with a 2007 amendment) it would be inconsistent to permit Enterprise to provide no insurance. *Li v. Zhang*, 120 P.3d 30 (Utah App. 2005). The 2007 amendment made it clear that rental companies must maintain minimum liability limits on each rental vehicle, but if the renter has valid and collectible liability coverage, that coverage will be primary.

VERMONT: A car rental company is required to have liability insurance covering its rental vehicles. Vt. Stat. 23 § 800(a). A self-insured car rental company is not primary where the rental contract says it is secondary to other insurance. *Champlain Casualty Co. v. Agency Rent-A-Car, Inc.*, 716 A.2d 820 (Vt. 1998).

VIRGINIA: Car rental companies are required to provide primary liability coverage to renters. *USAA Cas. Ins. Co. v. Hertz Corp.*, 578 S.E.2d 775 (Va. 2003).

WASHINGTON: No case or statutory law dealing specifically with car rental companies. Terms of rental agreement and renter's liability policy should be compared to determine which is primary. If the driver is intoxicated, the renter's insurance is primary. *PEMCO v. Hertz*, 800 P.2d 831 (Wash. 1990). A "super-escape clause" in a rental contract making liability coverage provided by a self-insured car rental company inapplicable until after exhaustion of all auto liability insurance and/or any other protection or indemnification, whether primary, excess, or contingent, was enforceable and made the liability coverage of the lessee's policy primary despite its "excess clause" making its coverage excess over any other valid and collectible insurance with respect to non-owned auto. *N.H. Indem. Co. v. Budget Rent-A-Car Sys., Inc.*, 64 P.3d 1239 (Wash. 2003).

WEST VIRGINIA: The renter's personal auto policy is primary. However, any liability insurance purchased for additional consideration from the car rental company is primary to other available insurance. W.V. Stat. § 33-6-29.

WISCONSIN: Section 344.52 (vehicle rented in Wisconsin) and § 344.52 (vehicle rented outside of Wisconsin) state that while car rental company liability coverage for rented vehicles is mandatory, it is not primary. The Wisconsin Supreme Court has said that even with Wisconsin's omnibus statute, the policy provided by a car rental company is secondary to the insurance purchased by the renter. *Buckett v. State Farm Mut. Auto. Ins. Co.*, 1988 WL 23174 (Wis. App. 1988). Persons who rent autos for compensation are required to file a bond or policy of insurance with the Department of Transportation. The bond or policy provides that the insurer shall be liable for damages caused by negligent operation of the motor vehicle. Any person who fails to comply with § 344.51 is liable to the extent that they would have been liable had this section been complied with. However, this policy is secondary. A self-insured car rental company's insurance might be considered primary if the renter's policy provides excess coverage only. *Boatright v. Enterprise Rent-A-Car*, 570 N.W.2d 897 (Wis. App. 1997).

WYOMING: No case or statutory law dealing specifically with car rental companies. Terms of rental agreement and renter's liability policy should be compared to determine which is primary.

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