

Automobile Insurance Work Group

AUTOMOBILE INSURANCE: SELF-INSURER REQUIREMENTS

House Bill 2385

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I. Introductory Statement

The proposed legislation aims to address two existing problems with automobile insurance coverage caused by self-insured vehicles. First, this bill will require self-insured vehicle owners to provide coverage, meeting the statutory minimum Financial Responsibility Law requirements, for their permissive users. In essence, this bill will require self-insurers to mirror the coverage that ordinary automobile insurance policies must provide for permissive drivers. ORS 806.080(1)(b).

Second, this bill will allow persons who are unable to recover the full amount of their damages (i.e. their damages exceed the Financial Responsibility Law minimum requirements) to collect through their own uninsured or underinsured motorist (UM/UIM) coverage. Presently, the UM/UIM statute declares that self-insured vehicles can never be uninsured vehicles for purposes of UM/UIM coverage. ORS 742.504(2)(e)(B). Thus, if you are struck by a self-insured vehicle, you can not recover from your own UM/UIM coverage. Even if the adverse driver was uninsured, your own policy's uninsured motorist coverage will not pay. Even if the adverse driver or self-insurer did pay the required minimum of \$25,000 per person, you have higher UIM limits than \$25,000, and your damages exceed \$25,000, your own policy's UIM coverage will not pay for your underinsured damages.

The new provision will allow the injured person's own UM/UIM coverage to make up the difference where the self-insurance falls short. These two items were addressed last session in SB 922 (2005) and the current proposal nearly mirrors the previously proposed language. SB 922 (2005) passed through the Senate but never made it out of committee in the House to receive full consideration.

II. History of the Project

The project was initially discussed extensively by the Oregon Law Commission's Program Committee, which identified the auto insurance statutes as an area of law the needed reform. In 2003, the Auto Insurance Study Group considered 22 issues and determined that nine of those issues were of the highest priority. In 2004 the Law Commission approved the creation of a Work Group to generate proposals to remedy some defects in the automobile insurance statutes. The Work Group proposed to the Law Commission separate bills addressing five particular problem areas. The Law Commission approved all five bills, four of which passed during last session and were signed into law. This bill, the only remaining bill of the five, passed through the Senate, but was never given full

consideration by the House. This bill addresses two interrelated issues arising from self-insured vehicles.¹

III. Statement of the Problems

A. Liability Insurance

In 1989, the Oregon Supreme Court established principals underlying Oregon's Financial Responsibility Law, the statutes that set forth the basic requirements of automobile liability insurance. The court construed the statutes to require that insurance policies on vehicles must provide liability coverage for anyone who drives the vehicle with the owner's permission. *Viking Ins. Co. v. Perotti*, 308 Or. 623, 631 784 P.2d 1081 (1989); *Viking Ins. Co. v. Peterson*, 308 Or. 616, 621 784 P.2d 437 (1989). The legislature showed its agreement by codifying the requirement in the next session. See ORS 806.080(1)(b).

The Financial Responsibility Law does not require everyone to buy insurance on their vehicles. Another way to comply with the law is to become "self-insured." ORS 806.060. The Department of Transportation can issue certificates of self-insurance to any entity that owns 25 vehicles or more so long as the entity promises that it will "pay the same amounts" required by the Financial Responsibility Law. (\$25,000 per person / \$50,000 per accident). ORS 806.130.

The problem arose when the Oregon Court of Appeals construed the self-insurance statute narrowly, holding that it implied no requirement that a permissive driver of a self-insured vehicle be covered by the self-insurance. The court held that the requirement "to pay the same amounts" did not imply that the self-insurer must pay under the same circumstances as those required by the Financial Responsibility Law. *Farmers Ins. Co. v. Snappy Car Rental, Inc.*, 128 Or.App. 516, 876 P.2d 833 (1994) (permissive user not covered); see also *Neal v. Johnson*, 154 Or. App. 500, 962 P.2d 706 (1998) (no permission). Self-insured cars, therefore, need not provide coverage when a permissive driver drives, unlike everyday

¹ Appointed members of the work group included Commissioner Martha Walters, Walters, Romm Chanti & Dickens PC (Chair) (resigned when she was appointed to the Oregon Supreme Court); John Bachofner, Bullivant Houser Bailey PC; Joel Devore, Luvaas Cobb Richards & Fraser PC; Dean Heiling, Dean Heiling & Assoc.; Neal Jackson, Neil Jackson & Partners; Richard Lane, L. Wobbrock Trial Lawyer PC; Tom Mortland, Liberty Northwest (left Oregon during the interim); Stephen Murrell, State Farm Insurance; Justice Edwin Peterson, Willamette University, College of Law; and Senator Charlie Ringo. Several other persons participated in the process including the following: Dave Barrows, Lana Butterfield, Toni Chodrick, Paul Cosgrove, Jeff Eberhard, Al Elkins, Darrell Fuller, James Gardner, Susan Grabe, Kristin Leonard, Brian Miller, Shawn Miller, Kevin Neary, George Okulitch, Michel Morter, Jack Munro, Joyce Patton, John Powell, Greg Remensperger, and Lou Savage.

automobile insurance. Self-insurance does not, in this regard, accurately reflect the fundamental requirements of the Financial Responsibility Law.

Typically, self-insurers are corporate entities, utilities, and car rental businesses. The problem this bill addresses usually does not arise because most permissive drivers own liability coverage. The problem does arise, however, when the driver lies about coverage, has been excluded from coverage, or has had their coverage cancelled. When this occurs, there is no coverage for the permissive driver of the self-insured vehicle. In this respect, self-insured vehicles and traditionally insured vehicles are treated differently. The proposed legislation includes a specific section making it clear that a self-insurer is required to provide payment up to the Financial Responsibility Law minimum only when the motor vehicle liability insurance policy of a customer of the self-insurer, or an operator of the self-insured vehicle, does not provide the minimum required payment under the Financial Responsibility Law.

The proposed legislation also specifically clarifies that self-insured vehicle owners are not required to provide liability coverage to a secondary user if the self-insurer does not consent to that person's use of the vehicle. This does not make a substantive change to any law, but clarifies and confirms that self-insurers are only required to provide coverage to those who the self-insurer has permitted to operate the vehicle.²

B. Uninsured and Underinsured Motorist Coverage

The uninsured and underinsured motorist statute declares by definition that an "uninsured vehicle" can not be a self-insured vehicle. One possible rationale for this provision is that at the time the statute was passed it may have been thought that self-insurers would always provide enough money to pay for damages. That rationale fails for two reasons. First, self-insurers do not have to provide coverage for their permissive users. See *Snappy Car* supra. Second, self-insurers, when required to pay, are only required to pay up to the Financial Responsibility Law minimums of \$25,000 per person or \$50,000 per accident. *Thompson v. Estate of Pannell*, 176 Or.App. 90, 98, 29 P.3d 1184 (2001).

Presently, when an Oregonian is injured in an accident involving a self-insured vehicle, they can discover that not only may the driver of the self-insured vehicle have no liability coverage, but that the injured person will be denied their own uninsured motorist coverage. Though an injured person may have basic uninsured (UM) coverage, a self-insured vehicle is never an uninsured vehicle and the person will therefore be denied coverage. Likewise, when the driver of the self-

² This secondary user provision requires an amendment to the pre-session filed bill, and that amendment was approved by the Law Commission at the January 18th, 2007 meeting, but was not previously presented to the work group for consideration. This amendment was requested by Enterprise Rent-A-Car Company of Oregon.

insured vehicle does have liability coverage but the coverage fails to cover the damages, the injured person's own *underinsured* (UIM) motorist coverage will automatically fail. The injured person may have severe damages and adequate underinsured coverage, but a self-insured vehicle, by its definition, can never be an *underinsured* vehicle – thus, the injured person can not collect.

The proposed legislation further clarifies that the self-insurer's uninsured motorist coverage is excess to other available insurance (i.e. not primary or pro rata). This change is also consistent with the provision making liability coverage excess to other available insurance.³

IV. Objectives of the Proposal

The objectives of the proposal are twofold. First, assure that self-insurance complies fully with the Financial Responsibility Law. Permissive users of self-insured vehicles would be afforded the same liability coverage as they would be in vehicles covered by traditional insurance.

Second, if the self-insurer is non-complying or the self-insurance fails, or if after paying the minimum limits the self-insurance fails to cover the damages, then the injured person's own UM or UIM coverage would pay in the normal manner.

Nothing in the bill is intended to obviate the limited liability provisions of ORS 30.135. That is, ORS 30.135 is a liability statute, and not an insurance statute; it insulates a vehicle owner from automatic liability in certain circumstances. The new (6) in Section 4 is intended to make the distinction clear.⁴ In addition, the proposal is not intended to eliminate the existing requirement that a claimant must first exhaust the underlying liability limits by judgment or settlement in one of the methods provided in ORS 742.504(4)(d).⁵

V. The Proposal

The proposal is identified as House Bill 2385.

VI. Conclusion

³ This excess coverage clarification provision requires an amendment to the pre-session filed bill, and that amendment was approved by the Law Commission at the January 18, 2007, meeting, but was not previously presented to the work group for consideration. This amendment was requested by Enterprise Rent-A-Car Company of Oregon.

⁴ The Work Group agreed that some further wordsmithing could be done to better accomplish this clarification. Thus, the Work Group recommended and the Commission approved an amendment to the pre-session filed bill to accomplish this provision.

⁵ An amendment requested by Enterprise Rent-A-Car Company of Oregon, that would exempt self-insurers from providing PIP coverage was neither approved nor rejected by the Law Commission at its January 18, 2007, meeting, nor was it addressed during work group meetings.

Self-insurance was most likely envisioned to provide at least the coverage provided by the Financial Responsibility Law. Likewise, no Oregonian would imagine that their own uninsured/underinsured (UM/UIM) insurance would fail just because the wrong-doer happens to drive a self-insured vehicle. These two statutory defects warrant reform and are resolved through the proposed legislation. In addition, self-insured vehicle owners' liabilities are further clarified.

VII. Amendment Needs:

The Oregon Law Commission requests that amendments below (noted in shaded text) be made to Sections 1 and 4 of the pre-session filed bill. The amendments have not been officially requested due to Legislative Counsel's request to hold off on amendments until the bill introduction deadline (February 26, 2007) has passed. These amendments would do the following:

1. Further clarify that nothing in the bill is intended to obviate the limited liability provisions of ORS 30.135. That is, ORS 30.135 is a liability statute, and not an insurance statute.
2. Clarify that the self-insurer's uninsured motorist coverage is excess to other available insurance (i.e. not primary or pro rata).
3. Clarify that self-insured vehicle owners are not required to provide liability coverage to a secondary user if the self-insurer does not consent to that person's use of the vehicle.

SECTION 1. ORS 806.130 is amended to read:

806.130. (1) To qualify as a self-insurer for purposes of financial responsibility requirements under ORS 806.060, a person must do all of the following:

[(1)] (a) Apply to the Department of Transportation and be issued by the department a certificate

of self-insurance under ORS 806.140.

[(2)] (b) Either:

[(a)] (A) Establish to the satisfaction of the department that the person [*is possessed*] **possesses**

and will continue to [*be possessed of*] **possess** the ability to pay and discharge judgments described

under ORS 806.040 that might be obtained against the applicant; or

[(b)] (B) Be [*duly*] qualified under the laws of the State of Oregon or under an ordinance of a

city of this state to act as a self-insurer and be acting as [*such*] **a self-insurer.**

[(3)] (c) Agree to **provide the same coverage and to** pay the same amounts with respect to

an accident occurring while the certificate is in force that an insurer would be obligated to **provide and to** pay under a motor vehicle liability insurance policy,

including **providing the coverage required under ORS 806.080 (1)(b) and**

uninsured motorist coverage and liability coverage to at least the limits specified in ORS 806.070.

[(4)] (d) Have more than 25 motor vehicles including commercial buses registered in the person's name.

(2)(a) If an accident occurs while a certificate of self-insurance issued under ORS 806.140

is in force, the liability protection provided and the amounts paid under subsection (1)(c) of

this section are secondary to any motor vehicle liability insurance or uninsured motorist coverage available to a customer of the self-insurer ~~or~~, an operator of the self-insured vehicle, or occupant of the self-insured vehicle unless otherwise agreed to by the self-insurer. A self-insurer is required to provide the minimum payments established under ORS 806.070 and ORS 742.502 only when the motor vehicle liability insurance policy of a customer of the self-insurer or an operator of the self-insured vehicle does not provide the minimum required payments established in ORS 806.070 and ORS 742.502.

(b) A self-insurer may recover from a customer of the self-insurer or an operator of the self-insured vehicle the amounts paid under subsection (1)(c) of this section.

~~**(3) Nothing in this section affects the limits on liability for a self-insurer provided in ORS 30.135.**~~

(3) Nothing in this section requires a self-insurer to provide liability coverage when a person is operating the vehicle without permission of the self-insurer.

SECTION 4. ORS 30.135 is amended to read:

30.135. (1) Subject to the provisions of this section, a person that lends, rents, donates use of,

makes available for test drive or otherwise provides a motor vehicle, as defined in ORS 801.360, to

another person is not liable for any injury, death or damage that arises out of the use of that motor

vehicle by the other person, ~~above what is required under ORS 742.502 and 742.504~~, unless the

person providing the motor vehicle is negligent in maintaining the motor vehicle or in providing the

motor vehicle and the injury, death or damage results from that negligence.

(2) The limitation on liability provided by this section applies only if the person providing the

motor vehicle is engaged in the business of selling, renting, leasing or repairing motor vehicles and

the motor vehicle is provided to another person in the course of that business.

(3) The limitation on liability provided by this section applies only if there is a written agreement

between the person providing the motor vehicle and the person receiving the motor vehicle,

and the agreement specifically indicates that the person receiving the motor vehicle is liable for any injury, death or damage arising out of the use of the motor vehicle. The limitation on liability provided

by this section applies to injury, death or damage suffered during the period specified in the

written agreement, or until the return of the motor vehicle, whichever is later.

(4) The limitation on liability provided by this section applies without regard to whether the

motor vehicle is provided for consideration or is provided without charge.

(5) Nothing in this section affects the liability of a manufacturer, distributor, seller or lessor of

a product under the provisions of ORS 30.900 to 30.920.

(6) Nothing in this section enlarges, reduces, or relates to those obligations that a self-insurer may choose to undertake pursuant to ORS 806.130. Nothing in ORS 806.130 enlarges, reduces, or relates to the limitations of this section.