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CASE SUMMARY: NO PRIORITY OF COVERAGE IF THERE IS NO COVERAGE

A rental car insurer was the first loss insurer despite the rental car driver being a listed driver, but not a named insured, under a separate standard Ontario Automobile Policy for two other vehicles.

Insurance law – Automobile insurance – First party insured – Named insured, definition – Lessors and lessees – Third parties – Statutory provisions – Duty to defend – Practice – Appeals

Ontario Corp. No. 1009329 (c.o.b. Enterprise Rent-A-Car) v. Intact Insurance Co., [2019] O.J. No. 5851, 2019 ONCA 916, Ontario Court of Appeal, November 21, 2019, P.S. Rouleau, G. Huscroft and I.V.B. Nordheimer JJ.A.

This claim arose out of a motor vehicle accident in which the at-fault motorist was driving a car rented from Enterprise Rental Car. The driver lived with her parents at the time of the accident, and was a listed driver under a standard Ontario Automobile Policy (OAP1) issued to her father by Intact Insurance. However, the driver was not a named insured under the OAP1 policy, which covered two vehicles that she used regularly.

Enterprise's insurer defended the at-fault driver against a third party claim arising from the accident. The defence was provided under a reservation of rights agreement with Intact. Enterprise's insurer and Intact disputed who between them was responsible for indemnifying and defending the at-fault driver.

In issue was the application of section 277(1.1) of the Insurance Act, R.S.O. 1990, c. I.8. Enterprise argued that section 277(1.1) created a priority of insurance that applied in the circumstances. As the owner of the rental car, Enterprise argued that it was last in priority, and Intact had priority. This statutory priority was in conflict with the terms of the OAP1, which provided for no coverage for a listed driver when driving a rental car, unless the rental vehicle was driven by the named insured on the policy or a spouse who lives with the named insured. The at-fault motorist was neither a named insured nor a spouse of the named insured, and therefore there was no coverage under the wording of the OAP1. Given the conflict between the statutory priority scheme created by section 277(1.1) and the apparent lack of coverage under the OAP1, Enterprise argued that the statutory scheme should prevail to require Intact to have first priority.

Enterprise lost in front of the application judge, lost again on appeal to the Divisional Court, and its appeal to the Ontario Court of Appeal was dismissed. The Court of Appeal agreed that the purpose of the statutory priority contained in section 277(1.1) was to reduce the financial exposure of car rental companies by making their insurance the policy of last resort. However, priority of insurance under section 277(1.1) depends on the existence of coverage. The statutory scheme did not create coverage when there was none. In this case, the OAP1 policy issued by Intact provided no coverage, as the at-fault driver was driving a rental car and was not the named insured or a spouse living with the named insured.

The Court of Appeal found further support for its conclusion by the existence of a separate optional endorsement for rental vehicle coverage, which was not purchased but would have covered the at-fault driver. The endorsement would have been redundant if Enterprise was correct that listed drivers were already covered for rental vehicles under the OAP1.

This case was digested by [Joe Antifaev](#), and first published in the LexisNexis® Harper Grey Insurance Law Netletter and the Harper Grey Insurance Law Newsletter. If you would like to discuss this case further, please contact Joe Antifaev at jantifaev@harpergrey.com.