

Case Summary: Ontario Corporation Number 1009329 (Enterprise Rent-A-Car) v Intact Insurance Company

Defence + Indemnity

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For an auto insurer to have any place in the priority list of insurers in a rental/leased car situation, its policy must provide coverage to a relevant insured.

Ontario Corporation Number 1009329 (Enterprise Rent-A-Car) v Intact Insurance Company, 2019 ONCA 916

Facts + Issues

Perets was involved in a motor vehicle accident in 2013 while driving in a vehicle she rented from Enterprise Rent-A-Car. She was sued for that accident.

At the time Perets was living with her family. Her father had an auto policy (OAP1) for his own vehicles issued by Intact Insurance. Perets was a “listed driver” under that policy but was not the named insured. The Intact policy covered the named insured when driving a rental vehicle, so Perets was not covered while driving a rental vehicle under that policy.

Intact and Enterprise entered into a reservation of rights agreement whereby Enterprise agreed to defend the action pending a later determination of the respective priorities of the Intact and Enterprise under s. 277.1 of the Ontario *Insurance Act*, R.S.O. c. I.8 (which is roughly equivalent to s. 596 of the Alberta *Insurance Act*, R.S.A. 2000, c. I-3).

The Ontario provision is as follows:

(1.1) Despite subsection (1), if an automobile is leased, the following rules apply to determine the order in which the third party liability provisions of any available motor vehicle liability policies shall respond in respect of liability arising from or occurring in connection with the ownership or, directly or indirectly, with the use or operation of the automobile on or after the day this subsection comes into force:

1. Firstly, insurance available under a contract evidenced by a motor vehicle liability policy under which the lessee of the automobile is entitled to indemnity as an insured named in the contract.
2. Secondly, insurance available under a contract evidenced by a motor vehicle liability policy under which the driver of the automobile is entitled to indemnity, either as an insured named in the contract, as the spouse of an insured named in the contract who resides with that insured or as a driver named in the contract, is excess to the insurance referred to in paragraph 1.
3. Thirdly, insurance available under a contract evidenced by a motor vehicle liability policy under which the owner of the automobile is entitled to indemnity as an insured named in the contract is excess to the insurance referred to in paragraphs 1 and 2. 2005, c. 31, Sched. 12, s. 6 (1).

Industries

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People

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[Emphasis added.] by the Court.

Ultimately the suit against Perets was settled with a payment by Enterprise to the plaintiffs. Enterprise sought payment for the settlement, plus its legal fees in defending Perets, from Intact.

Enterprise argued that Intact was the first loss insurer that the OAP1 policy was in conflict with the *Insurance Act* because, unlike the *Act*, the policy provides no coverage for a listed driver while operating a rental vehicle.

The motions' judge dismissed Enterprise's claim, as did the Divisional Court. Enterprise appealed further.

HELD: For the Defendant Intact; appeal dismissed.

The Court held that the intent of Ontario's s. 277.1 (roughly equivalent to Alberta's s. 596) was to make the rental car company's insurer the last loss insurer. (paragraph 8)

The Court held that the OAP1 auto policy was not in conflict with the provisions of s. 277.1. It held that for an insurer to have any slot in the priority list of the insurers involved in a rental vehicle situation, that the insurer's policy must provide coverage. In this case, Perets had no coverage under the Intact policy and, accordingly, Intact had no place in the respective priorities of insurers. Section 277.1 did not apply and Enterprise was the first (and only) loss insurer:

8 There is no doubt that the purpose of the amendments to the *Insurance Act*, introduced in 2005 by Bill 18, *Budget Measures Act*, 2005 (No. 2), S.O. 2005, c. 31, was to reduce the financial exposure of car rental companies by making the car rental company's insurance the policy of last resort on the priority ladder. But the short answer to this appeal is that priorities under the *Insurance Act* depend on the existence of coverage under the policy of insurance, and in this case no coverage is available to Ms. Perets under the Intact policy.

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10 As the highlighted terms emphasize, although s. 277(1.1) establishes priorities amongst insurers, it does not create insurance coverage where none is available. The operation of s. 277(1.1) depends on insurance being *Enterprise Rent-a-Car Canada Ltd. v. Meloche Monnex Financial Services Inc.*, 2010 ONCA 277, 102 O.R. (3d) 87 (Ont. C.A.), at para. 20. Put another way, the priorities of insurance coverage established in s. 277(1.1) do not come into play unless there is insurance coverage, and that is a matter that must be determined in accordance with the terms of the insurance contract.

11 Whether insurance is available to Ms. Perets depends on s. 2.2.4 of the OAP1. That section provides liability coverage for rental vehicles, but only when the vehicle is rented by "you" — the named insured — or a spouse who lives with the named insured. The named insured in this case is Adi Perets' father. Ms. Perets is neither the named insured nor his spouse, and as a result is not covered by the OAP1 when driving rental vehicles.

12 In the absence of rental vehicle coverage, it follows that the priority rules established in sections 277(1.1) (1) and 277(1.1) (2) have no relevance in this case. Consequently, as the application judge and Divisional Court concluded, responsibility to provide coverage fell to Enterprise's insurer under s. 277(1.1) (3).

Commentary

The Ontario scheme for insurer prioritization sets out a much simpler regime than Alberta's. However, both schemes operate to make the rental car company's insurer last loss insurer. For the respective priorities of the insurers in Alberta, there are six priority levels per *The Miscellaneous Insurance Provisions Regulation*, Alta. Reg 120/2011.

For a more in-depth discussion of the priorities in Alberta see B.A. Vail, [Six Circles of Hell: Priority Among Insurers in an Alberta Rental/Leased Vehicle Claim](#), 8 August 2018.