ONTARIO BAR ASSOCIATION

WHAT IN THE WORLD IS A PLUP?

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In Ontario, a person injured in a motor vehicle collision may commence an action against the at fault driver, subject to certain statutory restrictions. In the normal course, the at-fault driver's insurer will appoint defence counsel and defend the claim up to the policy's third party liability limits. But what happens when the at fault driver is either uninsured, underinsured or unidentified?

The purpose of this paper is to provide an overview of the layers of protection available to motorists in the *Insurance Act*[1] and the various types of insurance policies followed by a summary of how our Courts have addressed this very issue.

The Insurance Act

Where the at-fault driver is either uninsured or unidentified, section 265 of the *Act* compels an automobile insurer to provide coverage up to $200,000, which is Ontario's statutory minimum limit for third party bodily liability[2].

This coverage is extended to any person who is an occupant of the insured automobile, the insured, his or her spouse, and any dependent relative of either while they are an occupant of an uninsured automobile. This coverage does not include a person who is injured while the automobile is being operated by an excluded driver[3].

Assuming the injured party meets the class of persons covered under section 265, he or she will commence the action against his or her own insurer specifically claiming coverage under this section. In response, their insurer essentially assumes the role of the uninsured or unidentified driver. The injured party is still required to meet all of the legislative and evidentiary requirements that normally exist when the at-fault driver is properly identified and insured.

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[1] Insurance Act, R.S.O. c.I 8.
[2] It is important to note that this section does not apply where the at fault driver is under insured.
[3] Supra IA note 1, at section 249. An excluded driver is defined as a person who is named by endorsement to the insurance contract as an excluded driver.

Part VI of the *Insurance Act* governs automobile insurance. For the purposes of this paper, the relevant sections are sections 1, 277(1) and (2) are set out below:

> *1. "owner's policy" means a motor vehicle liability policy insuring a person in respect of the ownership, use or operation of an automobile owned by that person and within the description or definition thereof in the policy and, if the contract so provides, in respect of the use or operation of any other automobile [Emphasis added.]*
>
> ***Other insurance***
>
> *277. (1) Subject to section 255, insurance under a contract evidenced by a valid owner's policy of the kind mentioned in the definition of "owner's policy" in section 1 is, in respect of liability arising from or occurring in connection with the ownership, or directly or indirectly with the use or operation of an automobile owned by the insured named in the contract and within the description or definition thereof in the policy, a first loss insurance, and insurance attaching under any other valid motor vehicle liability policy is excess insurance only. R.S.O. 1990, c. I.8, s. 277 (1).*
>
> ***Insurer liable only for its rateable proportion of liability, etc.***
>
> *277. (2) Subject to sections 255 and 268 and to subsection (1) of this section, if the insured named in a contract has or places any other valid insurance, whether against liability for the ownership, use or operation of or against loss of or damage to an automobile or otherwise, of the insured's interest in the subject-matter of the contract or any part thereof, the insurer is liable only for its rateable proportion of any liability, expense, loss or damage. R.S.O. 1990, c. I.8, s. 277 (2).*

The OPCF-44R Family Protection Coverage Endorsement

The OPCF-44R Family Protection Coverage Endorsement (the Endorsement) is not mandatory coverage. However, in practice, most insurers include this Endorsement as part of their standard policy. The Endorsement forms part of the Ontario Automobile Policy -1 and typically provides up to $1 million in liability coverage. Not only does the Endorsement provide increased coverage compared to section 265, it also applies where the at-fault driver is underinsured.

Section 1.5 of the Endorsement defines an uninsured / underinsured motorist as follows:

> *"inadequately insured motorist" means*
>
> *(a) the identified owner or identified driver of an automobile for which the total motor vehicle liability insurance or bonds, cash deposits or other financial guarantees as required by law in lieu of insurance, obtained by the owner or driver is less than the limit of family protection coverage; or*
>
> *(b) the driver or owner of an uninsured automobile or unidentified automobile as defined in Section 5, "Uninsured Automobile Coverage" of the Policy.*
>
> ***PROVIDED THAT***
>
> *(A) where an eligible claimant is entitled to recover damages from an inadequately insured motorist and the owner or operator of any other automobile, for the purpose of*
>
> *(i) (a) above, and*
>
> *(ii) determining the insurer's limit of liability under section 4 of this change form,*
>
> *the limit of motor vehicle liability insurance shall be deemed to be the aggregate of all limits of motor vehicle liability insurance and all bonds, cash deposits or other financial guarantees as required by law in lieu of such insurance, for all of the automobiles;*
>
> *(B) where an eligible claimant is entitled to recover damages from the identified owner or identified driver of an uninsured automobile as defined in Section 5 of the Policy, for the purpose of*
>
> *(i) (a) and (b) above; and*
> *(ii) determining the limit of coverage under section 4 of this change form;*
>
> *other uninsured automobile coverage available to the eligible claimant shall be taken into account as if it were motor vehicle liability insurance with the same limits as the uninsured automobile coverage*

Where the at-fault driver is unidentified, section 1.5(c) requires the following:

> *(C) where an eligible claimant alleges that both the owner and driver of an automobile referred to in clause 1.5(b) cannot be determined, the eligible claimant's own evidence of the involvement of such automobile must be corroborated by other material evidence; and*

> *(D) "other material evidence" for the purposes of this section means:*
>
> > *(i) independent witness evidence, other than evidence of a spouse as defined in section 1.10 of this change form or a dependent relative as defined in section 1.2 of this change form; or*
> >
> > *(ii) physical evidence indicating the involvement of an unidentified automobile*

Similar to section 265 of the *Act,* the OPCF-44R insurer steps into the shoes of the at fault driver. The level of coverage available under the Endorsement is set out in section 4 and 6 of the Endorsement which state:

> *4. The insurer's maximum liability under this [endorsement]… is the amount by which the limit of family protection coverage exceeds the total of all limits of motor vehicle liability insurance…. of the inadequately insured motorist.*
>
> *6. The amount payable to an eligible claimant under this change form shall be calculated by determining the amount of damages the eligible claimant is legally entitled to recover from the inadequately insured motorist, and deducting from that amount the aggregate of the amounts referred to in Section 7 of this change form, but in no event shall the insurer be obliged to pay an amount in excess of the limit of coverage as determined under Sections 4 and 5 of this change form.*

Section 1.8 defines "limits of all motor vehicle liability insurance" as:

> *Limit of motor vehicle liability insurance" means the amount stated in the Certificate of Automobile Insurance as the limit of liability of the insurer with respect to liability claims, regardless of whether the limit is reduced by the payment of claims or otherwise.*

Counsel should pay particular attention to the wording of Endorsement section 7 when contemplating which parties should be named as Defendants. This section expands the calculation set out in section 6 to include the excess amounts that were available to the eligible claimant from, in part, insurers of a person jointly liable with the inadequately insured motorist.

The Personal Liability Umbrella Policy

The Personal Liability Umbrella Policy (PLUP) is another optional level of protection available to motorists. The PLUP is a type of excess liability insurance that offers a broader range of coverage that is available in certain required underlying policies such as home, auto or marine insurance.

When considering priority of coverage, it is important to understand the distinction between a PLUP and a pure excess liability policy. A pure excess policy provides coverage above and beyond the limits that may be available under the primary insurance and requires the limits of the primary insurance to be exhausted before the excess carrier will contribute to the settlement[4]. A PLUP offers broader protection than what has already been provided in the underlying policy such as automobile, marine and home owners coverage. In effect, a PLUP is a hybrid primary/excess policy[5].

As confusing as this may seem, one thing is certain. The PLUP is **NOT** a motor vehicle liability insurance policy[6].

Who pays what and when?

Understanding how the standard OAP, the OPCF-44R endorsement and a PLUP work together can be a challenging. In the recent decision *Benson*[7], Justice Shaughnessy provides a roadmap for prioritizing coverage in cases where there are multiple motor vehicle liability policies and a PLUP available to respond to the Plaintiff's claims.

[4] *Trenton Cold Storage Ltd. v St. Paul Fire and Marine Insurance Co*., 2001 CanLII 20561 (ON CA), at para 24 [Trenton].
[5] *Ibid* at para 23.
[6] *McKenzie v Dominion of Canada General Insurance*, 2007 ONCA 480; *Trenton* supra; *Keelty v Bernique* 2002 CanLII 22040 (ON CA) [Keelty].
[7] *Benson v Walt,* 2017 ONSC 3612; aff'd 2018 ONCA 172

In *Benson,* there were 3 policies available to respond to the Plaintiff's claims. A State Farm owner's policy with $300,000 limits, a State Farm PLUP issued to the owner with $1,000,000 limits and an Economical driver's policy also with $1,000,000 limits.

There was no dispute the $300,000 owner's policy was a first loss policy and neither the driver's policy or the PLUP were triggered until after the limits under the owner's policy was exhausted. The core issue at the motion was the point at which the PLUP was required to respond to the loss and to what extent.

At the motion, State Farm argued that its PLUP limits were not triggered until after the owner and driver's policy limits were exhausted. Economical argued that the State Farm owner's policy and it's PLUP were in effect "owner's policies" as defined by section 1 of the *Insurance Act* and therefore were "first loss" insurers policies pursuant to section 277(1) of the *Act.* Alternatively, Economical argued that if the PLUP was not an "owner's policy" then both the driver's policy and the PLUP were excess insurance policies that should respond equally to the Plaintiff's claims once the $300,000 limits were exhausted.

Justice Shaughnessy ruled against Economical on its first argument and found that the State Farm PLUP did not meet the definition of an "owner's policy" under section 1 of the *Act* and does not trigger the application of section 277(1) for three reasons:

- *the coverages provided under the PLUP compared to the owner's policy are different;*
- *the PLUP required the existence of an underlying primary policy with minimum limits as a condition of its coverage; and*
- *the wording contained in the PLUP coverage endorsement made it clear this policy responded after the total limits of the underlying primary policy is exhausted*[8]*.*

[8] *Benson* supra note 4 at para 31-33

Justice Shaughnessy found support for this ruling in the 2002 Court of Appeal decision *Keelty v Bernique*[9]. In *Keetly,* the at fault driver was uninsured. The driver of the Plaintiff's vehicle died and his passenger suffered serious injuries. The deceased driver was insured under a PLUP. The passenger was insured under an OPCF-44R. A dispute arose between these two insurers over priority of payment.

In *Keelty*, Justice Rosenberg ruled that the basic characteristics of a PLUP set it apart from a first loss automobile insurance policy. In particular, he stated as follows:

> *[25] In my view, the coverage provided by Option W [contained in the PLUP] does not come within either [the uninsured coverage of a motor vehicle liability policy or the family protection coverage of another motor vehicle liability policy]. Option W provides uninsured/underinsured coverage but it is not part of a motor vehicle liability policy. Motor vehicle insurance is highly regulated in this province under Part VI of the Insurance Act, R.S.O. 1990, c. I.8. Under s. 227, the Commissioner must approve the form of policy, endorsement or renewal of automobile insurance. The umbrella policy and Option W are not part of that scheme. Sections 239 and following in Part VI under the heading "Motor Vehicle Liability Policies" set out the requirements of a motor vehicle liability policy. The State Farm Fire umbrella policy and Option W do not comply with those requirements. For example, it does not provide liability coverage to the limits required by s. 251 or coverage with respect to the benefits set out in the No Fault Benefits Schedule.*
>
> *…*
>
> *[27] In my view, s. 18 [of the OEF 44 endorsement] has no application to this case because the State Farm Fire umbrella policy and Option W is not family protection coverage "on the automobile" in which Keelty was an occupant. The umbrella policy purchased by McDonald/ Armitage was a personal liability umbrella policy. It did not attach to any named automobile. By contrast, the Keelty Royal Insurance policy to which the O.E.F. 44 endorsement was attached described the insured automobile as a "1988 Ford Escort LX 2 door.*

With respect to the alternative argument put forward by Economical in *Benson,* Justice Shaughnessy rejected the proposition that the State Farm PLUP was on equal footing with the Economical driver's policy and therefore was required to share equally in payment of any excess award pursuant to section 277(2).

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[9] *Keelty* supra note 6,

Again Justice Shaughnessy returned to the specific wording of each of the policies. He placed particular weight on the fact that the Economical driver's policy is a "personal auto" policy that is attached to a named vehicle, provides for third party liability coverage, and access to *Statutory Accident Benefits.* In other words, it has all of the characteristics of a primary first loss policy. The fact that it has limits in excess of the State Farm owner's policy was insufficient to trigger the application of section 277(2).

Economical appealed this decision. The Court of Appeal agreed with Justice Shaughnessy and upheld his ruling. Justice Sharpe, on behalf of the panel, confirmed that while a PLUP provides coverage in certain circumstances for a motor vehicle collision, it does not meet the definition under section 1. In rejecting the notion that a PLUP provides the type of primary insurance contemplated by section 277(1), Justice Sharpe stated:

> *Subsection 277(1) deals with the **priorities as between primary motor vehicle insurance policies** and its reach **does not extend to any and every other type of policy that might have to respond** once the policy limits of applicable motor vehicle policies are exhausted.*

With respect to Economical's alternative argument, Justice Sharpe went on to conclude as follows:

> *In my view, ss. 277(2) does not apply to the Economical Auto Policy. Subsection 277(2) addresses the situation **where there are overlapping non-primary policies**. It does not refer to "excess insurance" in the sense of that term in ss. 277(1) but rather **applies to "any other valid insurance" the insured "named in a contract" has or places**. …….. In my view, "any other valid insurance" **must refer to insurance other than that described in ss. 277(1).** The language of ss. 277(2) – "any other valid insurance, whether against liability for … or damage to an automobile or otherwise" – is distinguished from the language of ss. 277(1) which uses the term "any other valid motor vehicle liability policy" when determining the priority in which those primary policies are to respond.*
>
> *[21] As the motion judge correctly held, liability of the insurers turns on the wording of the policies as well as on the provisions of the Act. The Economical Auto Policy remains, by its terms, primary insurance even though ss. 277(1) makes it "excess" in relation to the State Farm Auto Policy. The State Farm*

> ***PLUP only provides coverage after any other valid and collectible first loss insurance has responded*** *in the priority established by ss. 277(1). The two policies provide very different coverage and they* ***are not required to respond rateably as if they provided the same type of coverage.***

It is safe to say that where there are competing owner policies and a PLUP, the PLUP pays last and only after the policy limits available under the owner policies are exhausted.

How does the OCPF-44R factor in?

As discussed above, the OPCF-44R is an additional layer of insurance protection available where the at-fault driver is unidentified, uninsured or underinsured. This additional layer of coverage is factored into the priority scheme in a unique way. The 2004 Court of Appeal decision in *Heuvelman*[10] sets out how this Endorsement is treated where there is a driver's policy and a PLUP in place.

In *Heuvelman,* the plaintiff sustained catastrophic injuries when her vehicle was struck by an automobile being driven by Bruce White. Her damages were settled for $2,500,000. The at fault driver's vehicle was insured with limits of $300,000 together with a PLUP with $1,000,000 limits. Ms. Heuvelman was insured under a CGU auto policy with an OPCF-44R Endorsement of $500,000.

The parties agreed that the Defendant's driver policy and PLUP were responsible to pay $1,300,000 inclusive of interest towards Ms. Heuvelman's settlement after which the OPCF-44R Endorsement would be triggered. The parties also agreed that the limits under the Endorsement would be reduced by the driver's policy limits of $300,000.

[10] *Heuvelman et al v White,* 2004 CanLII 34619 (ON CA) [Heuvelman].

The issue in dispute was how the limits under the PLUP should be factored in having regard to the fact that the Endorsement indemnified Ms. Heuvelman where the total amount by which its limits exceeded the total amount of all available limits of motor vehicle liability insurance. CGU argued that the limits available under the PLUP were, by nature of the triggering event, a source of motor vehicle liability insurance and as such there would be no exposure under the Endorsement.

Justice Laskin, on behalf of the Court of Appeal, focused on the specific wording of sections 1.8 and 4 of the Endorsement. As noted on page 4 of this paper, section 4 provides that Aviva's maximum liability under the policy to be the amount its coverage exceeds the total limits of the inadequately insured's motor vehicle liability insurance.

Justice Laskin looked to section 1.8 of the Endorsement to define the phrase "limits of all motor vehicle liability insurance" as found in section 1. Again, as noted on page 4 of my paper, section 1.8 specifically states that the limit of motor vehicle liability insurance is the amount stated in the Certificate of Automobile Insurance.

Justice Laskin went on to conclude that "*on a plain reading of s. 4 and s. 1.8 of the OPCF 44R, coverage under White's umbrella policy does not reduce the appellant insurer's obligation to Heuvelman under her Family Protection Endorsement*[11]. The key distinction was the fact that a Certificate of Automobile Insurance is unique to the standard Ontario Automobile Policy and does not form part of a PLUP.

In conclusion, Justice Laskin confirmed that a PLUP is not a motor vehicle insurance policy and therefore any available limits cannot be characterized as motor vehicle insurance event though the triggering event is a motor vehicle collision. He went on to uphold the lower court's ruling that Aviva was required to respond to the extent that Ms. Heuvelman's damages exceeded $1,300,000 and up to a maximum of $200,000[12].

[11] *Ibid* at paras 5-7.
[12] *Heuvelman v White and CGU* 2004 CanLII 12941 (ONSC)

Summary

In summary, the key factor in determining the priority of payment where a combination of motor vehicle insurance policies, endorsements and personal liability insurance policies are involved is ensuring you have a complete understanding of the true nature of each type of policy. While these products are similar in that they all respond to a motor vehicle accident claim, there are also distinct differences that are unique to each policy.

Prudent Plaintiff's counsel is encouraged to always confirm whether there are any umbrella policies available to respond. This should be done prior to issuing the Statement of Claim. If one exists, you must obtain a complete copy of the policy, including endorsements and written confirmation that there are no coverage issues[13]. This one simple request could make a significant impact in your ability to ensure seriously injured Plaintiffs are adequately compensated.

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[13] Depending on the quantum of your client's damages, you have no right to take any steps to deal with coverage under the PLUP as this contract is between the Defendant and the insurer. You may want to consider taking an assignment from the Defendant and deal with the coverage issues once the Plaintiff's matter is complete.