

## Ont. C.A. Determines Limitation Period for Underinsured Motorist Coverage

### A Commentary on *Schmitz v. Lombard*

On Feb. 4, 2014, in [Schmitz v. Lombard General Insurance Company of Canada, 2014 ONCA 88](#), The Ontario Court of Appeal decided the issue of when the limitation period begins to run on a claim for underinsured motorist coverage under [form OPCF-44R](#).

An Application for Leave to Appeal to the Supreme Court of Canada was [dismissed](#) on Aug. 14, 2014.

Lombard had argued before a motions court judge on a motion for summary judgment that:

- a) The one-year limitation period in s.17 of OPCF-44R was the applicable limitation period, not the two-year limitation period under [Limitations Act, 2002, S.O. 2002, c. 24, Sched. B](#).
- b) In any case, the limitation period began to run “when a claimant ‘accumulate[s] a body of evidence’ that would permit the claimant ‘a reasonable chance’ of persuading a judge that his or her claims will exceed the limits of their policy” [para. 22 of the judgment].

The motions court judge rejected both arguments. On appeal, Lombard conceded the first issue, that is, Lombard conceded that the two-year limitation period in the *Limitations Act, 2002* overrode the one-year limitation in the form. Since this was not an issue in the appeal, it is presumably still an open issue for courts to decide, although the Court of Appeal appeared to tacitly agree with this proposition.

On appeal, Lombard argued that, although s.4 of the *Limitations Act, 2002* which reads:

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

overrode the provisions in the OPCF-44R as to the *length* of the limitation period, it did not override the provisions in the form as to *when* the limitation period commenced.

In particular, Lombard relied on the wording of s. 15 of OPCF-44R which reads:

17. Every action or proceeding against the insurer for recovery under this change form shall be commenced *within 12 months of the date that the eligible claimant or his or her representative knew or ought to have known that the quantum of claims with respect to an insured person exceeded the minimum limits for motor vehicle liability insurance in the jurisdiction in which the accident occurred*, but this requirement is not a bar to an action which is commenced within 2 years of the date of the accident. [emphasis added]

Lombard took the position that the date on which the limitation period began to run was therefore still governed by s. 17 of OPCF-44R rather than the discoverability wording found at s. 5 of *The Limitations Act, 2012*. The Court of Appeal rejected Lombard's reliance on s. 15 stating [para. 16] "As a matter of statutory interpretation, once it is acknowledged that s. 4 of the Act applies, so too does s. 5. The two provisions must be read together to determine the commencement date of the limitation period provided for under s.4."

S.5 of *The Limitations Act, 2002* reads:

### **Discovery**

5. (1) A claim is discovered on the earlier of,
  - (a) the day on which the person with the claim first knew,
    - (i) that the injury, loss or damage had occurred,
    - (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
    - (iii) that the act or omission was that of the person against whom the claim is made, and
    - (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
  - (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). 2002, c. 24, Sched. B, s. 5 (1).

The Court followed its earlier reasoning in a loss transfer case, [Markel Insurance Co. of Canada v. ING Insurance Co. of Canada, 2012 ONCA 218](#) and held that “the claimant suffers a loss ‘caused by’ the underinsured coverage insurer’s omission in failing to satisfy the claim for indemnity the day after the demand for indemnification is made.” [para. 20].

In other words, the limitation period does not begin to run until the day after the claimant actually makes a claim on the policy.

Lombard argued that this basically amounted to no limitation period at all as the claimant could delay the running of the limitation period indefinitely by refusing to file a claim. This would prejudice the insurer who would be unable to participate in the underlying tort litigation (and might in fact be unaware of it).

The Court rejected this argument and stated that the insurer was adequately protected by sections 15 and 16 of OPCF-44R which read:

14. For the purposes of this change form the findings of a court with respect to issues of quantum or liability are not binding on the insurer unless the insurer was provided with a reasonable opportunity to participate in those proceedings as a party.

15. The following requirements are conditions precedent to the liability of the insurer to an eligible claimant under this change form:

(a) the eligible claimant shall promptly give written notice, with all available particulars, of any accident involving injury to or death of an insured person and of any claim made on account of the accident;

(b) the eligible claimant shall, upon request, provide details of any policies of insurance other than life insurance to which the eligible claimant may have recourse;

(c) the eligible claimant and the insured person shall submit to examination under oath, and shall produce for examination at such reasonable place and time as is designated by the insurer or its representative, all relevant documents in their possession or control, and shall permit extracts and copies of them to be made.

Of course, unlike failure to comply with a limitation period, failure to comply with these provisions could potentially be relieved against by the Relief from Forfeiture provisions found in the [Insurance Act, R.S.O. 1990, C.I.8, s. 129](#) .

The Court did not comment on whether the obtaining of a settlement or judgment in excess of the policy limits would trigger the running of the limitation period, or

whether a nulla bona return from the sheriff would. One would hope that a claimant could not delay the running of the limitation period beyond those events by simply refusing to file a claim.

Subject to the above caveats then, the date upon which the limitation period begins to run is the day after a formal claim on the policy is made by the plaintiff.

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