

*Schmitz v. Lombard General Insurance Company
of Canada:*
Two endorsements

Two separate endorsements by the Honourable Mr. Justice Martin James in *Schmitz v. Lombard General Insurance Company of Canada*, 2014 ONCA 88 (CanLII), one made January 18, 2013 and one made June 21, 2013, follow below.

CITATION: Schmitz and Lombard General Insurance, 2013 ONSC 7140
COURT FILE NO.: Ottawa File 10-48631
DATE HEARD: January 18, 2013

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Schmitz and Lombard General Insurance

BETWEEN: ECKHART SCHMITZ, LOUISE DARLING and ERIKA SCHMITZ and
KRISTIAN SCHMITZ by their litigation guardian, LOUISE DARLING and
LOMBARD GENERAL INSURANCE COMPANY OF CANADA

BEFORE: Honourable Mr Justice Martin James

COUNSEL: William Zener, Counsel for the Plaintiff

Richard Horak, Counsel for the Defendant

ENDORSEMENT

- [1] The issue raised by this motion is whether the limitation period contained in OPCF 44R continues in force or whether this contractual limitation is displaced by the provisions of section 4 of the *Limitations Act*, 2002.
- [2] OPCF 44R is an optional endorsement available to an insured person under his or her automobile policy. This endorsement insures against the risk that the monetary limit of the tortfeasor's insurance may not be sufficient to indemnify the insured for his or her losses ("underinsured motorist coverage").
- [3] The plaintiff says that the limitation of actions contained in OPCF 44R, being contractual in nature, is governed by section 22. Section 22 provides that the applicable statutory

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limitation period applies despite any agreement to vary or exclude it if the agreement was made after January 1, 2004.

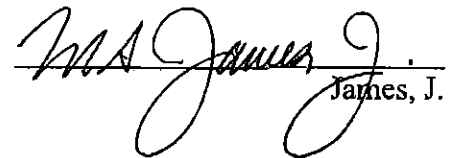
- [4] The defendant says the endorsement in its present form was made before January 1, 2004 and is unaffected by section 22.
- [5] The plaintiffs' rely on *Patterson v. Gallant* [1994] 3 S.C.R. 1080 as authority for the proposition that automobile insurance contracts renew annually and therefore section 22 applies. In my view, the fact that the terms of OPCF 44R are the result of a consultative process and predate the *Act* does not determine the issue. I prefer to view the underinsured motorist coverage endorsement as a component or part of the larger, comprehensive agreement between the insurer and the insured that renews annually. It appears to me that the contractual limitation period in this case is caught by section 22.
- [6] The defendant says that the interpretation suggested by the plaintiff may have the effect of compromising the ability of the insurer to participate in the timely assessment of the insured's claims, thereby creating potential prejudice to the underinsured motorist coverage insurer. Counsel for the plaintiff says that there are means available to the insurer to address this concern. One example is that the insurer has access to information by way of its participation as the accident benefits provider. Also, there are various provisions contained in OPCF 44R (see paras. 9, 11 and 14 for example) that ameliorate potential prejudice.
- [7] I would distinguish the decision in *Roque v. Pilot Insurance Co.* 2012 ONCA 311 on the basis that the precise point raised by this motion was not addressed.
- [8] The enactment of the *Limitations Act*, 2002 marks an important point of departure from the past practice of using the accrual of causes of action as the point of commencement for the calculation of limitation periods. The notion of discoverability is an overarching policy

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consideration implicit in the legislation even though its application may occasionally be awkward in particular circumstances.

[9] Therefore an order will issue that paragraph 17 of OPCF 44R cannot operate as a limitation defence and that the limitation period applicable to a claim pursuant to OPCF 44R is to be determined in accordance with section 4 of the *Limitations Act*, 2002.

[10] Respecting costs, my preliminary view is that the issue is sufficiently novel that there should be no order as to costs. However, if the plaintiffs seek a costs order, they may deliver a costs outline and bill of costs within 10 days of the date hereof and the defendants shall have 10 days to respond.


James, J.

DATE: January 23, 2013

CITATION: Schmitz and Lombard General Insurance, 2013 ONSC 7140
COURT FILE NO.: Ottawa File 10-48631
DATE HEARD: January 18, 2013

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Schmitz and Lombard General Insurance

BETWEEN: ECKHART SCHMITZ, LOUISE DARLING and ERIKA SCHMITZ and KRISTIAN SCHMITZ by their litigation guardian, LOUISE DARLING and LOMBARD GENERAL INSURANCE COMPANY OF CANADA

BEFORE: Honourable Mr Justice Martin James

COUNSEL: William Zener, Counsel for the Plaintiff

Richard Horak, Counsel for the Defendant

ENDORSEMENT

James, J.

DATE: January 23, 2013

CITATION: Schmitz and Lombard General Insurance, 2013 ONSC 4298
COURT FILE NO.: Ottawa File 10-48631
DATE: June 21, 2013

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Schmitz and Lombard General Insurance

BETWEEN: ECKHART SCHMITZ, LOUISE DARLING and ERIKA SCHMITZ and
KRISTIAN SCHMITZ by their litigation guardian, LOUISE DARLING and
LOMBARD GENERAL INSURANCE COMPANY OF CANADA

BEFORE: Honourable Mr Justice Martin James

COUNSEL: William Zener, Counsel for the PlaintiffS, Moving Parties

Richard Horak, Counsel for the Defendant, Respondent

**SUPPLEMENTARY ENDORSEMENT TO
SCHMITZ AND LOMBARD GENERAL INSURANCE, 2013 ONSC 7140**

- [1] The parties have requested supplementary reasons to address the second question contained in the Notice of Motion, namely, when does the limitation period for a claim pursuant to the automobile policy change form known as OPCF 44R begin to run against a claimant for underinsured coverage having regard to the provisions of the *Limitations Act*, 2002.
- [2] These supplementary reasons should be read in conjunction with my earlier endorsement cited as 2013 ONSC 7140 wherein I held that the contractual limitation period contained in paragraph 17 of the OPCF 44R was rendered inoperative by the terms of the *Limitation Act*, 2002 and that the limitation of actions for payment of the uninsured portion of the claimant's losses ought to be governed by the application of sections 4 and 5 of the *Act*.

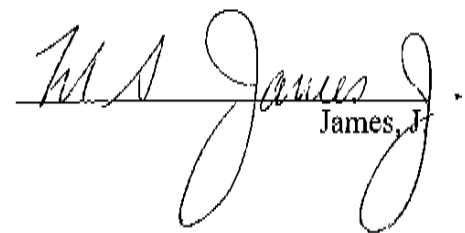
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- [3] The determination of the date of commencement of the applicable limitation period is aided by the analysis provided in the recent decision of *Markel Insurance Co. of Canada v. ING Insurance Co. of Canada*, 2012 ONCA 218.
- [4] There the court considered two arbitration decisions that came to different conclusions respecting the date of commencement of the limitation period in a somewhat different context. In *Markel*, the court was asked to consider the limitation applicable to “lost transfer claims” that arise when the first party insurer requests indemnification from the second party insurer pursuant to procedures established by the Financial Services Commission of Ontario. It was common ground that the *Act* applied to loss transfer claims.
- [5] Sharpe, J.A. noted the fundamental changes flowing from the enactment of the *Limitations Act*, 2002. He said that the date the claim was “discovered” by the first party insurer was to be determined by the application of the criteria contained in section 5 and concluded that the limitation period began to run the day after the first party insurer requested lost transfer. There had to be a “request” in order to trigger the requirement that the loss was “caused” by the “omission” of the second party insurer as required by subparagraphs (ii) and (iii) of section 5(1)(a).
- [6] The competing proposition was that the limitation period did not begin to run until a later point in time when the second party insurer could be said to have unequivocally denied the claim. This approach was rejected by the Court of Appeal.
- [7] In its submissions on the present motion, the respondent focused on the potential mischief arising from the ability of the claimant to essentially pick the date when the limitation period commences to run. Both scenarios considered in *Markel* implicitly accepted this reality.
- [8] The respondent emphasized the importance of timely notice so that the insurer can participate in the defense of claims for which it may ultimately be liable. However, the

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respondent did not address why the contractual notice requirement contained in paragraph 15 of OPCF 44R failed to provide adequate protection. I note as well that paragraph 14 of the policy change form provides that 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. In addition, the respondent did not offer a competing analysis that respects the section 5 factors governing discoverability.

- [9] Applying the analytical framework set out in *Markel*, it is my view that the limitation period commences to run when a claimant makes a request for the compensation provided by OPCF 44R.
- [10] Regarding the costs of this motion, neither party made submissions following the release of the previous decision but this may be due to the request for supplementary reasons. If the moving parties intend to pursue their costs, a costs outline and bill of costs may be submitted within 10 days and the respondent shall have 10 days to respond.



James, J.

DATE: June 21, 2013

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COURT FILE NO.: Ottawa File 10-48631

DATE: June 21, 2013

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Schmitz and Lombard General
Insurance

BETWEEN: ECKHART SCHMITZ, LOUISE
DARLING and ERIKA SCHMITZ
and KRISTIAN SCHMITZ by their
litigation guardian, LOUISE
DARLING and LOMBARD
GENERAL INSURANCE
COMPANY OF CANADA

BEFORE: Honourable Mr Justice Martin James

COUNSEL: William Zener, Counsel for the
Plaintiff

Richard Horak, Counsel for the
Defendant

SUPPLEMENTARY ENDORSEMENT

James, J.

DATE: June 21, 2013