# Warning: Insurers can "contract out"

## of the *Limitations Act, 2002* in "non-consumer" policies

The law of limitations applicable to insurance claims has entered a period of uncertainty, arising in part from insurers' ability to "contract out" of the *Limitations Act, 2002 (LA 2002)* where the insured is not a "consumer." Claims on group long-term disability policies may prove especially hazardous. This article discusses this new development, and touches on why certain attempts by insurers to contract out of the *LA 2002* are impermissible, and how this knowledge might save your client's claim, and your deductible.

This discussion is technical, which cannot be helped. Please bear with me.

### The specific exemptions

The *LA 2002* applies to all court proceedings not specifically exempted in section 2 of the *Act* or in the Schedule referred to in section 19. Of the many limitation periods which existed in the *Insurance Act* prior to January 1, 2004, only three were preserved in the *LA 2002*:

1. Fire insurance claims (*Insurance Act* s. 148, condition 24 (one year from the date of the fire));
2. Claims for damage to automobiles and their contents (*Insurance Act* s. 259.1 (one year from the happening of the loss or damage));
3. Accident benefit claims: s. 281.1 of the *Insurance Act* provides that court proceedings shall be commenced within two years after the insurer's refusal to pay the accident benefits claimed.

### The "business agreement" vs. "consumer" distinction

Do you think that if you remember these three exceptions, you are home free, and can blithely apply the *LA 2002* to any other insurance claim?

Think again! Sections 22(5) and 22(6) of the *LA 2002* allow insurers to contract out of the *Act* where the insurance contract can be characterized as a "business agreement," which in effect means that the insured is not a "consumer." "Consumer" is defined as "an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes."[1]

Consider this situation: a police association obtains a long-term disability policy for the benefit of its members. The police association is named as policyholder. Would this policy be a "business agreement" or a "consumer agreement?"

According to a recent Superior Court decision, it is a business agreement.[2] This case did not involve a LawPRO claim, but it is a warning to practitioners that disability insurers are free to contract out of the *LA 2002* where a company or an association is a policyholder, even though the policy is for the benefit of the company's or association's employees or members. Such an insurance contract is a "business agreement."

M.G. Ellies, J. held that the plaintiff's claim for long-term disability benefits was NOT statute barred, because the insurer had failed to properly contract out of the *LA 2002*. The insurer was free to contract out of the statute, because the subject police association as policyholder was not an "individual acting for personal, family or household purposes." Luckily for the plaintiff, the insurer failed to properly contract out, because the limitation period it sought to enforce was not written in clear language. The policy tied the limitation

[1] For a brief period of time – January 1, 2004 through October 19, 2006 – no contracting out was allowed.

[2] 2014 ONSC 1523

period to one year from the date proof of claim forms were required, but the booklet accompanying the policy tied the limitation period to receipt of forms. Plus, the policy provided for "appeals." Because of the potential confusion these conflicting statements created, the insurer's attempt to contract out of the *LA 2002* failed. The two-year limitation period under the *Act* did not begin to run until the appeals process was exhausted.

The court relied on an Ontario Court of Appeal decision[3] where the Court of Appeal held that the insurer was entitled to contract out of the *LA 2002* in an "all risks" policy given to a corporation. In that case, the claim was for damage to corporate property.

LawPRO has learned that at least one large disability insurer is amending and simplifying its policy wording to provide for a one-year limitation period computed:

1. where the insurer has made no payments, within one year of the time at which the initial submission of proof of claim is required by the terms of the policy, or
2. where the insurer has paid disability benefits, no more than one year after the last date for which disability benefits were paid.

## Implications for unwary lawyers

The effect of s. 22(5) and (6) is troublesome because:

1. many practitioners would assume the two year limitation period under the *LA 2002* is available, because disability contracts are not "exempted" under the Schedule to s. 19 of the *Act*;
2. many would not think that an insurance contract providing benefits to flesh-and-blood employees is a "business agreement" rather than a "consumer agreement;"
3. many practitioners would believe that a clear denial by the insurer is necessary to start the limitation period running for disability claims; or
4. many would expect that limitation periods for disability benefits "roll." It is, in fact, unlikely that these limitation periods will "roll" in the sense that each monthly failure to pay gives rise to a fresh cause of action.

There is nothing to prevent insurers from contracting out in every insurance contract where the insured is not a "consumer." Therefore, when bringing an insurance claim, practitioners must consider whether the insured is or is not a consumer. If the contract is a "business agreement," the limitation provisions must be very carefully scrutinized and complied with.

## Not all attempts to contract out are valid

Conversely, where the insured is a consumer, or where the insurance contract was entered into between January 1, 2004 and October 19, 2006, lawyers should beware of insurers' impermissible attempts to contract out of the legislation. The Superior Court held,[4] and the insurer did not dispute on appeal, that the Ontario Policy Change Form (OPCF) 44R insurer could not enforce the limitation period in s. 17 of the OPCF 44R endorsement. Section 17 provides that an action against the OPCF 44R insurer must be commenced within one year from the time the insured ought reasonably to have known that his or her claim exceeded the $200,000 statutory minimum. The insurer argued that although s. 4 of the *LA 2002* applies, "discoverability" should be interpreted in light of s. 17 of the OPCF 44R endorsement, not in accordance with s. 5 of the *LA 2002*. The Court of Appeal rejected that argument, and held that the two-year limitation period ran from the day after the insured requested payment from the OPCF 44R insurer. The insurer is currently seeking leave to appeal to the Supreme Court of Canada.

## What's next?

The next area ripe for "contracting out" litigation may be uninsured motorist coverage. Regulation 676, s. 8(3) under the Ontario *Insurance Act* provides that the limitation period for a claim under uninsured motorist coverage is two years from when the cause of action arises. This Regulation was not repealed when the *LA 2002* came into force, but neither was it exempted from the application of that *Act*. There is no good reason why the reasoning in the above-noted case on OPCF 44R should not apply in uninsured motorist cases where there is no permissible and effectual "contracting out" by the insurer.

## Lessons for lawyers

When considering the timeliness of an insurance claim, ask yourself:

1. Is this claim governed by one of the three provisions of the *Insurance Act* listed in the Schedule to the *LA 2002* (and therefore exempt from the statute's general application)? If so, carefully adhere to the relevant limitation periods.
2. If not, was the insurance contract entered into between January 1, 2004 and October 19, 2006? If "yes," the *LA 2002* governs, and no contracting out is permitted.
3. If the contract was entered into after October 19, 2006:
   a) Is the contract a "consumer contract"? If so, no contracting out of the *LA 2002* is permitted;
   b) Is the contract a "business contract"? If so, the insurer may vary the *LA 2002*, provided the substituted limitation period is stated clearly and unequivocally. Examine the contractual terms very carefully. When in doubt, issue the claim at the earliest possible moment. ■

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[3] (2013) 116 O.R. (3d) 56; 2013 ONCA 298

[4] 2014 ONCA; (2014) 118 O.R. (3d) 694