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RECENT DEVELOPMENTS & TRENDS IN CASE LAW

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Does an Insurer Have a Good Faith Duty to Advise the Insured about a Limitation Period?

There is no doubt that the parties to an insurance contract owe one another a duty of good faith. But does this include a positive duty on the insurer to advise the insured about a limitation period?

A recent decision of the Ontario Court of Appeal, *Usanovic v. Penncorp Life Insurance Company*, 2017 ONCA 395, answers this question in the negative. In *Usanovic*, the Court held that, absent a statutory requirement, the insurer has no obligation to advise the insured about the running of the limitation period as part of its duty of good faith.

Facts and Result

Usanovic involved an action by the insured against his disability insurer. The insured was an eavestrough installer who was seriously injured when he fell from a roof while working. He received disability benefits from his insurer until November, 2011, when the insurer terminated them. According to the insurer, the insured no longer suffered from a "total disability" under the policy.

The insurer's lawyer wrote to the insured on January 12, 2012, advising that since benefits had been paid for twenty-four months, the insured was not entitled to receive further benefits until he was "unable to engage in any and every occupation for which he was reasonably fit by reason of his education, training and experience". The insured's medical information did not support his conclusion that he had a total disability. The letter advised the insured that if he disagreed with the insurer's decision, he was required to submit medical records in support of his claim for total disability. The insured did not provide these records, as requested.

Moreover, the insured did not contact a lawyer until early 2015. He commenced his action in April, 2015, well beyond two years after the termination of his benefits and the date the insurer's lawyer wrote to him.

The motion judge dismissed the insured's claim as statute-barred. On appeal, the insured argued that the insurer's failure to advise him of the limitation period precluded it from relying on a limitations defence. He

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submitted that the insurer's common law duty of good faith and fair dealing should require the insurer in such circumstances to inform him of the running and existence of the limitation period.

The Ontario Court of Appeal rejected the insured's argument and dismissed his appeal.

Duty of Good Faith Does not Include Duty to Advise of Limitation Period

The Court's analysis began with the recognition that the parties in an insurance contract owe one another a duty of good faith. This does not amount to a fiduciary duty, i.e. the insurer has no obligation to treat "the insured's interests as paramount".

However, the insurer's duty of good faith includes a responsibility to "act both promptly and fairly when investigating, assessing and attempting to resolve claims made by its insureds".

Citing *70235 Ontario Inc. v. Non-Marine Underwriters* (2000), 184 D.L.R. (4th) 687 (Ont. C.A.), the Court noted that the insurer's duty of good faith may be divided in two parts: on the one hand, the duty means that the insurer must act with "reasonable promptness" in the adjudication and payment of the claim. On the other hand, the duty of good faith includes the requirement that the insurer deal with the insured fairly, i.e. the insurer must "assess the merits of the claim in a balanced and reasonable manner".

The common law duty of good faith has its limits, however:

> In this case…we are asked to do something **more** than impose a duty of good faith on insurers to disclose the contents of the insurance policy. We are asked to extend the duty of good faith to require an insurer to disclose information outside the policy—namely, the existence of a limitation period.

The Court observed that in both British Columbia and Alberta, the Legislatures have imposed a specific duty on insurers to inform the insured of the limitation period, subject to certain exceptions.

Ontario, however, has not gone that far. While the Ontario *Insurance Act*, R.S.O. 1990, c.I.8 was amended in 2012 to require that every life, disability and creditors' insurance policy include a statement that "money payable under the [insurance] contract is absolutely barred unless commenced within the time set out in the *Limitations Act*, 2002", the Legislature did not include an express statement requiring the insurer to inform the insured of the limitation period's existence.

Moreover, the Court distinguished the Supreme Court of Canada decision, *Smith v. Co-Operators*, [2002] S.C.R. 129, in which the Court held that an Ontario regulation for statutory accident benefits required the insurer to inform the insured of the statutory resolution process. Justice Gonthier held that the regulation therefore required the insurer to advise of the "relevant time limits that govern the entire process". In *Usanovic*, however, the Court of Appeal observed that there "is no statutory provision in this case similar to that considered by the Supreme Court in *Smith v. Co-Operators*".

Accordingly, in the absence of an express statutory provision, the common law duty of good faith does not impose a requirement on the insurer to inform the insured of a limitation period:

> The Ontario legislature might have gone further than it has, for example, by adopting the approach taken in Alberta or British Columbia. It presumably chose not to do so and, in my respectful view, the court should not impose consumer protection measures on insurers, outside the terms of their policies, that the legislature has not seen fit to require…
>
> The consequences of the appellant's proposed expansion of the duty of good faith are significant. The [insured's] interpretation would effectively judicially overrule the provisions of the *Limitations Act, 2002* by making notice given by an insurer to an insured the trigger for the limitation period, rather than discoverability of the underlying claim. This would defeat the purpose of the statute and bring ambiguity, rather than clarity, to the process.

Conclusion

The Court of Appeal's reasoning in *Usanovic* was guided by respect for Legislative choices. The Court was reluctant to expand the boundaries of

the good faith doctrine to what would amount, in the Court's view, to a judicial overreach. The Court declined to allow the duty of good faith to be used as a tool to enforce consumer protection principles.

At the same time, the Court was cognizant of the potential unfairness that could result where an insurer cancels benefits and is well aware of the passage of the limitation period. Absent a statutory requirement, however, the Court places the risk of an expired limitation period on the insured. Discoverability remains the insured's responsibility.