

The recent decision of the Ontario Court of Appeal, *Dundas v. Zurich Canada* [2012, ONCA 181], has found that where an insured sues its insurer for a breach of duty of utmost good faith, the contractual limitation period set out in the policy does not apply to that particular claim. The Court found that the insured's action against the insurer was not an action under the terms of the policy at all, but rather was a claim for breach of the insurer's independent duty of good faith. As such, the applicable limitation period arose not from the date of loss, or date of discovery of the loss, but rather from some other date such as when the insurer breached its duty of utmost good faith.

The facts in this case are straight-forward. A deadly motor vehicle accident occurred on November 1, 1988. Zurich insured the driver Reid and provided \$1.0 million of coverage. The families of the dead passengers sued Reid's estate. Clearly, liability was not an issue but Zurich held off in paying the policy limits into an interest-bearing account until December 23, 1993, more than five years later. Pre-judgment interest (PJI) rates were very high at the time so that by the time Zurich paid its limits, the accumulated PJI had created a loss that was significantly in excess of the policy limits.

These limits were paid to the plaintiff's families on March 29, 1994. On November 25, 1994, Justice Kennedy issued an endorsement that was critical of the manner in which Zurich had adjusted the loss and had failed to pay the policy limits into an interest-bearing account at an early date. On August 21, 1995, a consent judgment was issued against the Reid Estate for in excess of \$2.0 million.

On August 19, 1996, the Reid Estate sued Zurich, claiming that Zurich had breached its duty of utmost good faith, failed to pay the policy limits on a timely basis and had wrongly exposed the insured to an over-limits claim.

The statutory conditions provided for a one year limitation period for a claim "to recover the amount of a claim under this contract." No one suggested that this limitation period would have begun on the date of the accident since in this context, it was a first party claim. Zurich moved to dismiss the Estate's claim on the basis that this one year limitation period started once Justice Kennedy had made his harsh comments in his endorsement of November 25, 1994 (or shortly thereafter, once the Estate received a copy of the endorsement) so that the limitation period would have expired in December 1995. Zurich's position was that the question of whether there had been bad faith was "discoverable" as at that time. The Estate defended on the basis that the exact amount of the loss had not been ascertained until the consent judgment of August 21, 1995 so that the cause of action did not arise until that date.

The Court found that the cause of action did not arise until Zurich had a liability to indemnify the Reid Estate under the policy and that this occurred only once the liability of the Estate had been finally ascertained by virtue of the consent judgment (i.e. August 21, 1995). However, the Court found in any event that the Estate's action was not "an action to recover the amount of a claim under the policy." Rather it was a claim for breach of the independent duty of utmost good faith, which an insurer owes to its insured. As such, the applicable limitation period was not the contractual one set out in the policy or in the statutory conditions applicable to the policy. Instead, the applicable limitation period was the general one of six years, as set out in *The Limitations Act* which was in place at that time.

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