

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
Lynn Schroeder)
)
) Plaintiff) *Colin Empke and Kathleen Lefebvre,*
) for the plaintiff
– and –)
)
)
)
Co-operators General Insurance Company)
and Coseco Insurance Company) *Tina Jian, for the defendant*
) Coseco Insurance Company
Defendants)

Heard on October 20, 2022, at Peterborough,
by video conference

S.T. BALE J.:

Overview

[1] The plaintiff was injured in an automobile accident in Seattle, Washington. She settled her claim against the U.S. at-fault driver for the amount of his policy limits. In this action, she claims the balance of her damages from her underinsured motorist protection insurer, the defendant Coseco Insurance Company.

[2] On this motion, Coseco moves for summary judgment dismissing the action. Coseco’s position is that the plaintiff is barred from proceeding with the action by s. 4 of the *Limitations Act, 2002*.

[3] The issue to be determined is whether, and if so when, Coseco failed to honour a demand for payment thereby triggering commencement of the limitation period.

[4] For the reasons that follow, the motion will be dismissed.

Background facts

[5] This proceeding arises out of a motor vehicle accident that occurred on December 12, 2014. The plaintiff’s vehicle was rear-ended by a vehicle operated by Kelly Yoshida, causing her vehicle to collide with the vehicle in front of her.

[6] Mr. Yoshida was insured under an automobile policy with Progressive Insurance Company, with a third-party liability limit of \$25,000.

[7] The plaintiff is insured by Coseco as an additional insured to her wife’s standard automobile policy which includes underinsured motorist protection, pursuant to standard form endorsement OPCF 44R. That policy was in force on the date of the accident.

[8] On January 20, 2015, the plaintiff's then counsel informed Coseco of the accident and of the potential tort recovery from Progressive. On February 27, 2015, Progressive made an offer to settle for the full policy limit of \$25,000.

[9] On June 18, 2015, plaintiff's counsel wrote to Coseco's adjuster advising that he was assisting the plaintiff with her underinsured motorist claim with Coseco. He said that they were awaiting Coseco's consent to the plaintiff's acceptance of Progressive's offer and proceed with an underinsured motorist claim. He said that he would be happy to discuss the plaintiff's ongoing injury and treatment, but "would not expect to make a demand for some time."

[10] On June 27, 2015, plaintiff's counsel wrote to Coseco's adjuster following up his request that Coseco consent to the plaintiff's acceptance of Progressive's tender of Yoshida's policy limits, and asking whether the adjuster had authority to provide such consent, "given the serious nature of [the plaintiff's] injuries and the minimal third party limits involved."

[11] On March 2, 2016, plaintiff's counsel wrote to Tammy Sitko, a Coseco claims representative enquiring whether "we can accept [the] limits tender and proceed with an underinsured claim pursuant to our client's policy with Coseco."

[12] On April 15, 2016, Ms. Sitko, wrote to plaintiff's counsel. Her email included the following statement: "I understand that Progressive has offered their limits of \$25,000 and that you will be accepting the limits and proceeding with an underinsured motorist claim for Ms. Schroeder under her auto policy with Coseco." In her evidence, Ms. Sitko said that the email was a follow-up to a telephone conversation in which plaintiff's counsel confirmed that he would be accepting Progressive's tender of Yoshida's policy limits "and that he would be dealing with the underinsured motorist claim."

[13] Ms. Sitko also says that she left two voice mail messages for plaintiff's counsel in December 2016. She says that on December 6, she left a voice mail message requesting documents to support the plaintiff's underinsured motorist claim and advising of the limitation period for issuing a statement of claim. She says that on December 29, she left a second message inquiring as to the status of the statement of claim. Plaintiff's counsel's evidence was that he had no recollection or record of receiving either of the messages Ms. Sitko says she left.

[14] On February 13, 2019, plaintiff's counsel submitted a request for indemnification to Coseco containing full particulars of her claim on the underinsured motorist policy. The letter concluded with an offer to settle for a total of \$1,921,220.21 (inclusive of non-pecuniary damages, loss of competitive advantage and future care costs), together with special damages and costs.

[15] On February 10, 2020, following a number of unsuccessful attempts to settle the claim, the plaintiff issued her statement of claim.

Analysis

[16] Section 4 of the *Limitations Act, 2002* provides: "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."

[17] Section 5(1) of the Act provides that 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 remedy 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).

[18] Applying ss. 4 and 5 in the context of an underinsured motorist claim, the court said the following in *Schmitz v. Lombard General Insurance Company of Canada*, 2014 ONCA 88, at para. 20:

Once a legally valid claim for indemnification under the OPCF 44R is asserted, the underinsured coverage insurer is under a legal obligation to respond to it. To paraphrase and adapt Sharpe J.A.'s observations, at para. 27 of *Markel*, the claimant for indemnity under the OPCF 44R "suffers a loss from the moment [the insurer] can be said to have failed to satisfy its legal obligation [under the OPCF 44R]". Thus, 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.

[19] Coseco argues that the email messages from plaintiff's counsel to Coseco representatives between June 18, 2015 and April 15, 2016 amount to a demand for indemnification. I disagree. In the email messages, plaintiff's counsel said no more than that the plaintiff intended to make a claim under the underinsured motorist policy. No money was requested or demanded and there was no legally valid claim for Coseco to respond to. Coseco's failure to respond to the intended claim did not amount to a breach of the contract of insurance causing a loss to the plaintiff.

[20] Furthermore, Coseco's own evidence does not support its contention. In her email to plaintiff's counsel of April 15, 2016, Ms. Sitko says: "I understand that Progressive has offered their limits of \$25,000 and that you will be accepting the limits and proceeding with an underinsured motorist claim for Ms. Schroeder under her auto policy with Coseco." In her evidence, she says that the email was a follow-up to a telephone conversation in which plaintiff's counsel said that "he would be dealing with the underinsured motorist claim." Advice that the plaintiff would be proceeding with such a claim or that her counsel would be dealing with such a claim does not amount to a claim or demand for indemnification. There was also no denial of a claim for indemnification. It cannot be said that Coseco failed to satisfy its legal obligation under the OPCF 44R by failing to satisfy an intended claim for indemnification the following day.

[21] In the alternative, Coseco argues that the voice mail messages that Ms. Sitko says she left for plaintiff's counsel in December 2016 inquiring as to the "status" of the statement of claim amounted to a denial of the claim. However, I do not accept the argument that by asking, in effect, "have you yet or do you intend to issue a statement of claim", Coseco was denying a claim that the plaintiff had not yet made. I also note that when cross-examined on the point, Ms. Sitko testified that Coseco did not, at any point prior to service of the statement of claim, deny the plaintiff's claim.

[22] Under s. 15 of the OPCF 44R contract, the plaintiff was required to provide written notice of the accident to Coseco and to provide all available particulars. After receiving notice, Coseco was entitled to conduct investigations up to and including obtaining evidence under oath.

[23] The insuring agreement of the OPCF 44R contract provides that the insurer shall indemnify a claimant for the amount he or she is legally entitled to recover as compensatory damages from an inadequately insured motorist. I agree with the plaintiff that OPCF 44R clearly distinguishes between the notice requirement in s. 15 and the indemnity agreement, and that Coseco's argument conflates communications which amounted to notice for an actual request for indemnity. I also note that the communications relied upon by Coseco do not specify an amount and agree with the plaintiff that the insuring agreement requires a request or demand for a specific amount.

[24] Coseco argues that if it is required to defend the plaintiff's claim, it will be prejudiced by the delay. I disagree, as did the court in *Schmitz*. As the court said in that case, at para. 21: "There are a number of ways in which underinsurers can protect their interests including those provided in s. 14 of the OPCF 44R and through a provision requiring the insured to provide timely notice to the insurer when he knew or ought to have known he was underinsured." In that case, the plaintiff did not bring a claim against the OPCF 44R insurer for close to four years after the accident.

[25] I also see no reason why, if Coseco wished to move the claim forward, it could not have expressly refused to indemnify the plaintiff (even in the absence of a demand) and thereby trigger the applicable limitation period: see *Tucker v. Unknown Person*, 2015 NLCA 21, at para. 23, and *Rooplal v. Fodor*, 2021 ONCA 357, at para. 88.


[26] In the result, I find that the February 13, 2019 request for indemnification constituted the first demand for payment of compensatory damages necessary to trigger a legal obligation under the insuring agreement and require Coseco to indemnify the plaintiff. Accordingly, the limitation period did not begin to run until February 14, 2019 which is the date from which Coseco failed to honour its obligation under the contract by failing to indemnify the plaintiff.

Disposition

[27] For the reasons given, Coseco's motion for summary judgment is dismissed.

[28] If the parties are unable to agree on costs, I will consider brief written argument provided that it is delivered to monica.mayer@ontario.ca, no later than April 17, 2023.

Released: March 24, 2023

A handwritten signature in black ink, appearing to read "S. Mayer", is located in the bottom right corner of the page.

CITATION: Schroeder v. Coseco Insurance Company, 2023 ONSC 1937
COURT FILE NO. CV-20-0000033-0000
DATE: 20230324

ONTARIO
SUPERIOR COURT OF JUSTICE

(PROCEEDING COMMENCED AT Oshawa)

BETWEEN:

Lynn Schroeder

Plaintiff

– and –

Co-operators General Insurance Company
and Coseco Insurance Company

Defendants

REASONS FOR DECISION

S.T. Bale J.