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Roque v. Pilot: A limitation period minefield

Plaintiff's counsel left with three courses of action, none ideal


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The Ontario Court of Appeal's recent decision in *Roque v. Pilot Insurance Co.* [2012] O.J. No. 2098 has raised concern among the personal injury bar that it will lead to a proliferation of unnecessary claims against underinsured insurers.

In *Roque*, the court held that a plaintiff's limitation period against an underinsured insurer begins to run when the plaintiff has enough evidence to give him a "reasonable chance" of persuading a judge that his claims would exceed the minimum limits $200,000. This is a departure from some previous cases — *Hampton v. Traders General Insurance Co.* [1996] O.J. No. 41, most notably — that held that the limitation period only begins to run from the time when the plaintiff knows that the available insurance coverage under a defendant's policy is less than that available under his or her own coverage. While the language of OPCF 44 endorsement in question — the "family protection" endorsement that extends to the policyholder the same rights provided to third parties — arguably left the appeal court little choice, the resulting situation cries out for legislative intervention.

The facts of *Roque* are relatively straightforward. Fernando Roque was injured in a motor vehicle collision in December, 1996. He started a lawsuit against the at-fault driver within the two-year limitation period. By 1998, it was clear that the value of Roque's claim was well in excess of $200,000. However, it was not until 2002, well after the after the expiry of the two-year limitation period, that Roque's lawyer learned that the defendant only had $200,000 of insurance coverage, the minimum limits of motor vehicle liability coverage in Ontario.

Roque's insurance policy contained an OPCF 44 that provided him with insurance coverage for damages caused by an inadequately insured motorist, up to his policy limit of $1-million.

Roque started a lawsuit against his insurer, Pilot Insurance, within several months of learning of the defendant's inadequate insurance coverage. Pilot brought a motion to dismiss Roque's action on the basis that the limitation period had expired.

Justice Russell Juriansz, writing for a unanimous court, upheld the motion's judge decision dismissing Roque's action. He held that the clear language of the OPCF 44 dictated that the limitation period begins to run when the plaintiff has a reasonable prospect of proving that his or her case exceeds the minimum limits of $200,000. The relevant language is set out in s. 17 of the OPCF 44:

> Every action or proceeding against the insurer for recovery under this change form shall be commenced within 12 months of the date that the eligible claimant or his or her representative knew or ought to have known that the quantum of claims with respect to an insured person exceeded the minimum limits for motor vehicle liability insurance in the jurisdiction in which the accident occurred.

The court suggested that its decision will not result in a multiplicity of proceedings because s. 258.4 of the *Insurance Act* obligates an insurer to promptly inform the plaintiff of the existence of a motor vehicle liability policy, the liability limits of the policy and whether the insurer will respond to the claim. On this view, a plaintiff need only commence an action against his or her own insurer where a defendant's insurer does not comply with s. 258.4 or where the insurer specifically states that there is insufficient insurance available to respond to the plaintiff's claim.

However, this ignores the fact that *Roque* dictates that the limitation period will not be extended where a plaintiff initially receives information in accordance with s. 258.4 that suggests a defendant has sufficient liability insurance available to respond to the plaintiff's claim and will in fact respond, only to later learn that the defendant's insurer has changed its position.

This effectively leaves plaintiffs' counsel with three courses of action.

First, counsel can give notice to the plaintiff's insurer and secure an agreement that the insurer will waive a limitations defence in exchange for the plaintiff's agreement not to issue a Statement of Claim until it becomes clear that there are insufficient insurance proceeds available from the tortfeasor's liability insurer.

Second, counsel can issue against the plaintiff's insurer in every motor vehicle case and later discontinue the action after securing a similar limitation period waiver. Obviously, this course of action is undesirable to both plaintiffs and insurers as it is clear that the insurer will be in an unnecessary party in the vast majority of cases.

Finally, counsel can operate as the appeal court suggested by asking that defendants' insurers comply with s. 258.4 of the *Insurance Act,* and only issuing against the plaintiff's insurer where the insurer does not comply. However, this leaves plaintiffs to bear the risk of running out of time in cases where the defendant's insurer is forthcoming with information but later reverses its coverage decision. The plaintiff may have a claim for negligent misrepresentation in such cases, but that will only be possible where the insurer did not have good reason to provide the initial information regarding coverage.

Ultimately, none of these courses of action are ideal, either for plaintiffs or insurers. This situation will not change until the language of the OPCF 44 is replaced with language that makes clear that the limitation period does not begin to run until a plaintiff knows or ought to know that the value his or her claim exceeds the tortfeasor's available insurance coverage.

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