Denying Disability Benefits: Good Faith and the Limitation Period

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December 2017

On December 21, 2017, the Supreme Court of Canada denied leave to appeal the Ontario Court of Appeal case of *Usanovic v. La Capitale Financial Security Insurance Company*, 2017 ONCA 395. The Ontario Court of Appeal had rejected the plaintiff's attempt to broaden of the duty of good faith on insurers, and clarified the test of when an insurer can rely on a limitation period defence in a claim for disability benefits. Disability insurers across Canada will breathe easier in 2018, given the Supreme Court's denial of leave to appeal. It is difficult to understate the impact of a reversal of the Court of Appeal decision, as a significant number of denials would likely have been reopened and litigated.

Summary judgment was granted to the respondent insurer in this matter, on the basis of the expiry of the limitation period. The appellant was injured in September of 2007, and received long term disability benefits until November of 2011.

On January 12, 2012, the insurer wrote to the appellant explaining the denial of benefits, and indicated that further medical documentation could be sent in support of the appellant's claim, within sixty days. In this letter, the insurer made no mention of the *Limitations Act, 2002*, or of the time by which an action would need to be brought. An action against the insurer was not commenced until 2015.

The Court of Appeal upheld the motion judge's finding that the two year limitation period began to run as of the date of the unequivocal denial of benefits in 2012, and that the limitation period had expired by the time the action was commenced.

At issue on appeal was whether the respondent insurer's duty of good faith toward the appellant imposed an obligation to inform the appellant of the applicable limitation period to commence a claim for the denial of benefits. Of note, the appellant conceded on appeal that his claim was discoverable as of January 12, 2012. The appellant argued, however, that the insurer forfeited the right to rely on a limitation period defence, as a result of failing to advise of the limitation period.

The Court of Appeal indicated that the duty of good faith on insurers does not impose this obligation. The Court outlined that the duty of good faith requires an insurer to act promptly and fairly in the processing of claims, including in the manner of investigation and the decision to provide or deny benefits.

In coming to its conclusion on the appeal, the Court focused on the fact that, while it is arguably part of the duty of good faith for an insurer to advise an insured of the rights and benefits under the policy, there is no such obligation to advise of the application of legal remedies external to the policy.

The Court of Appeal noted that certain Canadian jurisdictions, such as Alberta and British Columbia, impose an obligation on insurers to advise of the limitation period, and also outline the consequences for failing to do so. The Court noted that no court to date has imposed this obligation. In denying the appeal, the Court of Appeal indicated that it is up to the legislation to include such a requirement on insurers.

In Ontario, an amendment to the *Insurance Act* in regards to life, disability and creditor insurance, which came into force on July 1, 2016, requires insurance policies and certificates to state that actions and proceedings against the insurer are barred unless commenced within the time set out in the *Limitations Act, 2002*. However, there is still no obligation on a disability insurer to advise of the two year limitation period when denying benefits.

Now that leave to appeal to the Supreme Court has been denied, then the question will be whether the legislature will follow the path set by Alberta and British Columbia. A lot of eyes will now turn to Queen's Park to see if there is an appetite to broaden the duty of care on insurers in this province.