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SEF 44 Provision is Still Favorable to Insureds

By Andrew Bitz, Lawyer

Summary: Courts have repeatedly ruled against insurers who have argued insureds brought their SEF 44 claims after the limitation period had expired. In ruling against insurers, courts have held:

1. The short 12-month limitation period within Section 6(c) of the SEF 44 is invalid.
2. Limited room exists for interpreting when insureds or their counsel "ought to have known" the insureds' claims would exceed available amounts.
3. Section 6(c) is ambiguous and requires rulings in favor of insureds (*contra proferentum*).

Unless an insurer has an airtight contrary argument, an insurer is unlikely to succeed in arguing any limitations defence on the basis their insured or their counsel ought to have known the insured's claim would exceed amounts available to them through the MVAC fund or the tortfeasor's policy. Insurers should beware of wasting their money.

Background: 12-month discoverability term under Alberta SEF 44 endorsement

In Alberta, those with automobile insurance can take out an SEF 44 endorsement or a family protection endorsement on top of their standard insurance. This extra insurance covers the policyholder and the policyholder's family members if they are involved in an accident and the at-fault party has insufficient insurance coverage to pay full damages. In this case, the policyholder and their family members can sue their insurance company under the SEF 44 endorsement.

Section 6(c) of Alberta's SEF 44 endorsement came into issue in *Nebozuk v Northbridge General Insurance Corporation*, 2022 ABQB 212. This section reads:

> Every action or proceeding against the Insurer for recovery under this endorsement shall be commenced within 12 months from the date upon which the eligible claimant or his legal representatives knew or ought to have known that the quantum of the claims with respect to an insured person exceeded the minimum limits for motor vehicle liability insurance in the jurisdiction in which the accident occurred [$200,000 in Alberta]. No action which is commenced within 2 years of the date of the accident shall be barred by this provision.

13 months after settlement of 20-year-old case for triple the limit, sued under SEF 44

This clause was at issue given the Plaintiff filed a Statement of Claim against his insurer over 12 months (but less than 2 years) after he settled and discontinued his lawsuit against the at-fault driver. The SEF 44 claim against the insurer began over 20 years after the motor vehicle accident.

The insurer made two arguments in taking the position the Plaintiff's SEF 44 claim was limitations barred:

1. *The Plaintiff knew his claim was more than $200,000* – The wording of Section 6(c) suggests a limitation period triggers when a plaintiff or their legal representatives ought to have known the Plaintiff's claim exceeded the amounts available to them, either through the MVAC fund or the tortfeasor's insurance policy. The insurer argued the Plaintiff's counsel knew the Plaintiff's claim exceeded $200,000 in 2009 when the Plaintiff filed a brief in support of an application to amend his Statement of Claim's request for damages from $251,000 to $634,500.

2. *10 year limitation period had expired* – The filing of the SEF 44 claim exceeded the 10 year limitation period set out in section 3(1)(b) of the *Limitations Act*.

The court (like others) rejected the limitation defences, despite signs of high damages

On the insurer's first argument, the Court rejected this reasoning despite noting the Plaintiff's brief had "fairly detailed information as to the nature of the Plaintiff's injuries and the damages [he] was claiming." Consistent with prior rulings on Section 6(c), the Court found the limitation period did not start until the underlying tort action settled in October 2017 — thus also disposing of the 10-year limitation period argument. In ruling against the insurer, the Court noted section 7(2) of the *Limitations Act* prevents parties from contractually reducing limitation periods, rendering the 12-month period within Section 6(c) invalid.

In interpreting the "ought to have known" portion of Section 6(c), courts have considered certain scenarios for when the limitation period should start, including:

1. when the plaintiff or their counsel has received medical records or reports;
2. when the plaintiff consulted a lawyer; or
3. the amounts pled or requested (in a Statement of Claim, brief, or demands).

Ultimately, courts have shown none of the above scenarios trigger the limitation period in Section 6(c), all ruling the trigger date is most likely to be the date of judgment or settlement in the underlying tort action.

No cases have interpreted Section 6(c) in favor of insurers. A court has even gone as far as ruling for an insured who lost their leg in an accident, but only had access to $200,000.[1] Most decisions have suggested any information a plaintiff or their counsel have received before judgment or settlement is too uncertain to trigger the start of the limitation period; anything can happen during litigation, including the resolution of an

1. *French v Kay* (unreported November 30, 1992), Ontario Court of Justice General Division.

insured's injuries. Courts have also relied on the principle of *contra proferentum*, noting that the ambiguity of Section 6(c) requires rulings in favor of insureds. In sum, except in an exceptional case, insurers will fail in arguing the limitation period for an SEF 44 claim starts earlier than the date of judgment or settlement in the underlying tort action.

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A general practice litigator, Andrew Bitz enjoys assisting clients through high-stress situations. His primary areas of focus are insurance defence claims involving personal injury, property damage, occupier's liability, subrogation, construction, professional liability, and coverage disputes.

If you have any questions with respect to this bulletin, please contact **Andrew Bitz** at abitz@brownleelaw.com or at 403.260.5321

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