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COURT CLEARS UP CLAIMS CONFUSION

The Ontario courts may just have thrown out everything you thought you knew about time limits for all-risk claims, writes **Mark Mason**, with McCague Borlack. But don't forget to read the fine print

It's a case that would otherwise have slipped under the radar screen of most brokers, and rightfully so. After all, *Boyce v. Cooperators General Insurance*, 2013, focused on what appeared to be a straightforward case of damage – in this particular instance, a clothing store. On Oct. 30, 2010, the owners – Mr. and Mrs. Boyces – were confronted with a foul stench after entering the women's boutique. That smell came courtesy of a skunk and was powerful enough to send the couple running for the phone and their insurer, the Cooperators.

The business was immediately closed for cleanup, with costs also stemming from the loss of inventory deemed beyond salvage. Cooperators took the position that the smell was caused by a skunk and that the damage was not covered by the policy. The Boyces claimed the business had been vandalized, a peril covered by the policy.

The Boyces issued a Statement of Claim against Cooperators more than one year after they discovered the foul odour, but less than two years after the incident. Cooperators moved for summary judgment claiming that the action was time-barred by a one-year limitation period. The judge dismissed Cooperators' motion. Cooperators appealed the decision to the Ontario Court of Appeal.

On appeal, the Court of Appeal framed the central issues:

Is there a term in the contract of insurance that provides for a one-year limitation period?

If there is a term in the contract imposing a one-year time limit on claims, is that term capable of overriding the otherwise applicable two-year limitation period set out in the *Limitations Act, 2002*?

Is the contract of insurance a "business agreement" as defined in s. 22(6) of the *Limitations Act, 2002*?

The insurance contract contained the following provision: "Every action or proceeding against the insurer for recovery of any claim under or by virtue of this contract is absolutely barred unless commenced within one year next after the loss or damage occurs." The wording of this provision is the same as statutory condition 14 as set out in s. 148 of the *Insurance Act*. The court agreed with Cooperators that the one-year limitation period in the policy was clear and unambiguous

The second and third issues turned on the interpretation of section 22 of the *Limitations Act, 2002*. The section provides that a limitation period under the Act could be varied by a "business agreement," which was defined in the Act as "an agreement made by parties none of whom is a consumer, as defined in the *Consumer Protection Act, 2002*" ("CPA"). A "consumer" in the CPA is defined as "an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes." Based on this definition, the court had no trouble concluding that the insurance contract was a "business agreement" capable of varying the statutory limitation period of two years. As a result, the court allowed Cooperators' appeal and held that the Boyces' claim was barred as they had commenced the action after the one-year limitation period as set out in the policy.

The *Boyces* decision establishes important principles for claim handling. The case stands for the following propositions:

If the subject matter of the insurance relates to business purposes, a one-year limitation period will apply if the language in the policy adopts the wording of or is similar to statutory condition 14. If such a policy is otherwise silent about the limitation period, the two-year limitation period in the *Limitations Act, 2002,* will apply.

If the subject matter of the insurance relates to "personal family or household purposes," such as homeowner's insurance, the two-year limitation period in the *Limitations Act, 2002,* will apply.

The decision also has significant implications for subrogation. An insurer's right of subrogation is derived from and dependent on the insured's right of action. If the insured's right of action is limited by contract, the subrogating insurer's claim will also be limited. Following the *Boyces* decision, if the insured enters into a business contract with a third party in which there is a clause that purports to vary the limitation period for any right of action, the subrogating insurer will be bound by the terms of the contract.

A subrogating insurer can no longer assume that the limitation period for commencing a claim involving business or commercial entities is two years from the date of the occurrence. When investigating such claims, insurers should take immediate steps to review any business agreements or contracts entered into by their insureds and potential third parties which may impact on the insurer's right to pursue subrogation. This has always been the case with hold harmless clauses and waivers of subrogation. The decision in *Boyces case* should alert insurers that subrogated actions could also be contractually barred in circumstances where the limitation period has been varied in a business agreement. IB

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BROKER BULLET POINTS

The Boyces decision lays out key principles for claim handling:

- It's all about business. A one-year limitation period will apply if the language in the policy adopts the wording of or is similar to statutory condition 14. However, if otherwise silent about the limitation period, the two-year limitation period will apply.

- If the subject matter of the insurance relates to "personal family or household purposes," such as homeowner's insurance, the two-year limitation period will apply.

...and on subrogation:

- If the insured enters into a business contract with a third party in which there is a clause that purports to vary the limitation period for any right of action, the subrogating insurer will be bound by the terms of the contract.