

LGR Realty, Inc. v. Frank and London Insurance Agency – STATUTE OF LIMITATION ON CLAIM AGAINST INSURANCE AGENT IS UNAFFECTED BY “DELAYED DAMAGE” RULE

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Background

One of the more difficult issues to determine when it comes to applying statutes of limitations is when the cause of action commences, as that determination must be made in order to determine when the statute has run. One state Supreme Court recently weighed in on the issue in the context of claims against an insurance agent/broker. In *LGR Realty, Inc. v. Frank and London Insurance Agency*, the Supreme Court of Ohio declined the opportunity to apply Ohio’s “delayed damage” rule and held a cause of action for negligent failure to procure insurance commenced – and, hence, the statute began to run – when the liability policy at issue was issued. *LGR Realty, Inc.* involved the issuance of a professional liability policy that contained an exclusion applicable to a claim asserted against the insured. The insured then sued its broker, alleging its negligent failure to procure proper professional liability insurance caused it to incur over \$400,000 in defense costs. The broker asserted a statute of limitations defense, arguing the cause of action accrued on the date the policy was issued. The insured argued Ohio’s “delayed damage” rule applied, which deems a cause of action to accrue when the actual injury has been sustained, which the insured claimed did not happen until the claim was denied almost a year after the policy went into effect. The trial court ruled the cause of action commenced when the policy was issued.

Court’s Holding

The Ohio Supreme Court vacated a decision by the intermediate appellate court reversing the trial court's decision. In doing so, the Supreme Court reaffirmed – and clarified – the law on when a cause of action against an insurance broker accrues. The Court noted, in general, a cause of action accrues when the act at issue is “perpetuated.” 98 N.E.3d at 245. However, the Court was charged with determining whether two recognized exceptions to this general rule apply, one of which was the “delayed damage” rule. That rule provides an exception where the act at issue is not “presently harmful” and deems the cause of action to not accrue until the actual damage occurs. *Id.* at 246. In concluding the “delayed damage” exception did not apply, the Court distinguished one of its own cases that did apply this exception in the context of a claim for negligent failure to procure insurance. Significantly, the Court's decision not to extend the “delayed damage” exception in this case was based on a narrow, but significant distinction – the fact that the exclusionary endorsement at issue was a part of the policy at issue when the policy was issued as opposed to having been added to the policy at a later date. Hence, the Supreme Court held “the delayed-damage rule does not apply to a cause of action alleging negligent procurement of a professional-liability insurance policy or negligent misrepresentation of the terms of the policy when the policy at issue contains a provision specifically excluding the type of claim that the insured alleges it believed was covered by the policy.” *Id.* at 248.

Takeaway

The *LGR Realty, Inc.* decision is significant because it includes in the analysis of when a cause of action accrues the reason for the denial of coverage that led to a liability claim against an agent or broker. For state's applying this analysis, then, when a claim is deemed to accrue against an insurance agent or broker – and specifically whether the “delayed damage” exception applies – requires an analysis of the reason why a claim was denied by the insurer. Where the denial was based on an exclusion present in the policy when issued, the “delayed damage” exception to the general rule may not apply. If, however, there is a change in the policy after issued, the “delayed damage” exception could apply. Still somewhat uncertain in Ohio after the *LGR Realty, Inc.* decision, however, is whether the cause of action would be deemed to accrue in situations where the “delayed damage” rule does apply when the coverage-changing event takes place, such as an endorsement of the policy, or when the damage actually occurs, such as the denial of a claim by the insurer.

Case Citation: 98 N.E.3d 241, (Oh. 2018)