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Investors should be cautious about investing in viatical settlements

By Greg Hagen

Cases Considered:

Stack v. Hildebrand, 2008 ABQB 668.

As a result of the credit crunch, investors have become wary of risky investments. In its 2006 study, the BC Law Institute noted that, like many asset-backed instruments, viatical investments (or viaticals) are very risky investments. A typical viatical settlement occurs when an insured person sells his or her entitlement to receive a life insurance policy's death benefit to a financial company who later sells a fractionalized portion of the entitlement to an investor. The financial company typically pays the premiums of the insurance policy. The primary risk is that the insured person will exceed his or her life expectancy. Another risk is that the financial company does not pay the premiums. *Stack v. Hildebrand*, 2008 ABQB 668 is a reminder that investors need to be cautious when considering investments in viaticals.

In *Hildebrand*, Stack sued her financial advisor, Hildebrand and his company, PRG Financial Inc. (PRG), alleging that they misrepresented investments in viaticals that she made in 1998. On Hildebrand's recommendation, she purchased an interest in life insurance policies on two people for $61,000 from Mutual Benefits Corporation (MBC). Hildebrand reportedly told her that the two insured persons were on their death beds and virtually guaranteed to die within two and three years. They failed to die in the expected period and, apparently, were still alive when Master in Chambers Judith Hanebury wrote her judgment. Hildebrand successfully applied for summary judgment that the action was barred under the Alberta Limitation Act, R.S.A. 2000, c. L-12 ("Act").

At issue was s. 3(1)(a) of the Act which states in part:

> 3(1) Subject to section 11, if a claimant does not seek a remedial order within
>
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> (i) that the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to conduct of the defendant, and
>
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding…

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> … the defendant, on pleading this Act as a defence, is entitled to immunity from liability …

Master Hanebury found that the three criteria from s. 3(1)(a) were met. By 2003, Stack had received information from MBC that the medical conditions of one of the insured persons was not imminently terminal. Also, at the time that Stack knew that she had suffered her loss she knew or ought to have known that it resulted from the conduct of Mr. Hildebrand in convincing her to invest in the viatical contracts since he was the only person with whom she had dealings. Finally, in 2003 the insured parties were both still alive and written information on the medical condition of one had been provided; Stack knew or ought to have known that the injury warranted bringing a proceeding. As a result, summary judgment was granted for Hildebrand and PRG on the basis that they had immunity from liability under the Act.

Notwithstanding the judgment of Master Hanebury, the reported facts of *Hildebrand* do not appear to be sufficient to allow for a summary judgment in favour of Hildebrand and PRG. From the reported facts, Stack could have suffered two economic losses, one because the insured parties did not die within the expected periods and another because the insurance premiums were not paid. These are both economic losses but distinct injuries. In *Sun Gro Horticulture Canada Ltd. v. Alberta Metal Building Sales Inc.*, 2006 ABCA 243, the Court of Appeal noted that the clock for the limitation period may begin ticking at different times for different injuries arising out of the same incident. The difficulty with determining the limitation period(s) in this case is that it is not known from the reported facts if or when MBC stopped paying the premiums on the insurance policies. If, for example, MBC stopped paying the premiums in 1998, then the fact that the insured parties lived past their expected time of death did not cause any injury to Stack. In that case, even if they had died within the period represented by Hildebrand, there would be no pay-out of death benefits since the policies would have lapsed. Hence, if Stack had learned in 2003 that the insured parties were still alive she could not have suffered an economic loss due to the longer-than-expected lives of the insured. The damaged had already been done. Later, in 2005, Stack learned that sufficient funds had not been set aside to pay insurance premiums. At that time she would have come to know of her investment loss. It follows that the reported facts leave open the possibility that the limitation period had not expired when Stack sued Hildebrand in 2006.

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