

Policy provision doesn't time-bar deceit, 93A claims

By Eric T. Berkman
Lawyers Weekly Correspondent

A limitations provision in a man's life insurance policy did not bar his wife's claims that the insurer engaged in deceit and violated Chapter 93A by failing to advise her to keep paying premiums on his existing policy while waiting for his application for a new one to be approved, the Appeals Court has ruled.

Plaintiff Michelle Brown's husband, Daniel, died after applying for a new policy that was to replace an existing one in which the premium jumped dramatically after 10 years.

The insurer, SBLI, denied her claim under the existing policy on grounds that it had lapsed for nonpayment.

She subsequently sued SBLI for negligent supervision, deceit and Chapter 93A violations. Specifically, she alleged that while company policy required representatives to advise insureds to keep their policies in force while applying for new ones, the representative she was dealing with failed to do so before the policy lapsed and subsequently failed to present options for reinstating the old one.

A Superior Court judge dismissed her claims as a matter of law. When the plaintiff appealed, SBLI argued that not only were the claims properly dismissed on the merits, they were also barred by a limitations period in the policy stating

that any lawsuit "on or in respect to" the policy had to be filed within two years.

The Appeals Court disagreed.

"The language of the policy ... does not put an average member of the public on notice that independent tort and tort-based consumer protection claims must be brought within two years," Judge Mary T. Sullivan wrote for the court.

The panel's opinion emphasized that, as a contract of adhesion not up for negotiation, the language had to be construed in favor of the insured and that the imposition of a contractually shortened limitations period on such non-contract-based claims would violate public policy.

The Appeals Court also found that the plaintiff's tort-based claims should not have been dismissed on their merits at that stage.

The 35-page decision is *Brown v. Savings Bank Life Insurance Company of Massachusetts*, Lawyers Weekly No.

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11-089-18. The full text of the ruling can be found at masslawyersweekly.com.

'Cogent and powerful'

Plaintiff's counsel Anil Madan of Boston said he was pleased that the court rejected SBLI's "untenable position" that an insurer could insulate itself from all wrongdoing simply by inserting a shortened limitations period clause into a contract of adhesion.

"Most importantly, the court recognized that SBLI's employee engaged in deceitful conduct that was intentional because it was self-serving," Madan said, referencing his client's allegations that SBLI's representative was motivated by the commission he could earn on a new policy but which he could not earn on reinstatement of an old policy.

SBLI's attorney, Megan C. Deluhery of Boston, declined to comment on the record.

But Boston insurance lawyer Harvey Nosowitz said that despite the decision's "interesting nuances," practitioners should not lose sight of the fact that the court was still affirming the viability of contractual limitations provisions in any type of insurance policy to two years when dealing with contractually based claims.

"So any practitioner with a potential claim for breach of an insurance policy should read the policy carefully, since the six-year limitations period for contract actions in general may not apply," he said.

Hingham insurance lawyer Jason W. Morgan said the decision is significant because it shows the Supreme Judicial Court's 2012 ruling in *Creative Playthings v. Reiser* is good law.

In that case, which Morgan argued before the SJC, the court held that a limitations period in a contract is enforceable if it is subject to negotiation, is not otherwise limited by controlling statute, is reasonable, and is not contrary to public policy.

Morgan also found it noteworthy that the Appeals Court went out of its way to point out that the plaintiff in *SBLI* made no argument that the limitations period was unreasonable as a breach-of-contract claim she also brought. To him, that signaled the court's openness to such an argument in the insurance context under *Creative Playthings*.

"There is pretty clear language — more than mere dicta in my opinion — that the Appeals Court is ruling that life insurance contracts are contracts of adhesion that

do not allow for limitations provisions as against policyholders," Morgan said. "It appears that the Appeals Court is sending the message that such a provision in an insurance contract is not a negotiated provision, it's unreasonable, and it's otherwise contrary to public policy."

Limitations provision

The plaintiff and her husband purchased three life insurance policies from SBLI. Daniel's \$1 million policy named Michelle as the beneficiary.

All three policies had a "level premium" that stayed the same for 10 years before increasing significantly. For Daniel's policy — which reached the end of the 10 years on Nov. 28, 2011 — the premium increased from \$440 to \$5,340 annually.

In a summer 2011 phone conversation with the plaintiff, SBLI employee David Wood recommended that both she and Daniel buy new policies. It was SBLI company policy to tell an insured to keep an existing policy in place until a replacement policy issued, and Wood acknowledged in a deposition that it would be grounds for termination not to do so. According to the plaintiff, however, Wood gave no such warning.

In any event, Daniel paid none of his premium once it increased and did not apply for a new policy before the existing one lapsed.

On Jan. 6, 2012, SBLI sent a notice of policy lapse to the parties' home, notifying Daniel that he could revive the policy by applying for reinstatement and paying the overdue premium. By that point, the couple was separated and Daniel was living elsewhere.

In a phone conversation with the plaintiff a week later, Wood apparently reiterated why the policy premium had jumped and, in response to Michelle's query about their options, told her they needed to reapply for new contracts. In response to her concerns about Daniel's policy having lapsed, leaving him uncovered, Wood apparently told her they would have to do a reinstatement that would entail paying the entire \$5,340. He also allegedly said, "I don't think you want to do that," reiterating that it would be cheaper for him to apply for a new plan instead.

Wood allegedly never offered reinstatement pending approval as an option, nor did he discuss installment payments — provided for under the policy — to maintain coverage while the new application was pending. He also apparently did not discuss the possibility of a refund if the new policy was issued.

Wood later testified in a deposition that he could earn a commission only if Daniel purchased a new policy.

In March 2012, Daniel applied for a new policy, On May 2, SBLI notified him that he had been denied. SBLI sent the notification to the Hopedale address instead of Daniel's new Sandwich address, so Michelle was unaware of the denial until after he died on June 6. Had they learned of the denial before his death, he could have sought reinstatement under the lapsed policy.

Michelle's subsequent claim for death benefits was denied. On March 20, 2015, she filed suit in Superior Court alleging breach of contract due to SBLI's failure to automatically renew the original policy. She also alleged negligent supervision of Wood as well as deceit and violation of Chapter 93A.

Judge Dennis J. Curran ruled that the contract claim was barred by the two-year limitations provision in the policy and dismissed the other claims as a matter of law.

Michelle appealed.

Sounding in tort

The Appeals Court noted that Michelle was not arguing that the limitations period was unenforceable as to her contract claim.

At the same time, it rejected SBLI's

argument that Michelle's remaining claims were "disguised contract claims" also barred by the limitations provision.

"The deceit and negligent supervision claims are based not on the contract, but on the ... telephone conversations with Wood," Sullivan wrote. "These conversations do not form the basis of a breach of contract claim [and] sound in tort."

The court also looked to *Creative Playthings*, in which the SJC approved a limitations provision in a contract where it was subject to negotiation by the parties, was not otherwise limited by controlling statute, was reasonable, and was not contrary to public policy.

"Here, in contrast ... the deceit and deceit-based statutory claims are not claims based 'on th[e] policy,' do not 'aris[e] from [the] contract,' and are not 'in respect to' the policy," Sullivan wrote. **MLW**

THE ISSUE: Did a limitations provision in a man's life insurance policy bar his wife's claims that the insurer engaged in deceit and violated Chapter 93A by failing to advise her to keep paying premiums on his existing policy while waiting for his application on a new policy to be approved?

DECISION: No (Appeals Court)

LAWYERS: Anil Madan and Marc Redlich, of Boston (plaintiff)

Megan C. Deluhery of Todd & Weld, Boston; Edward Kelley Kimball of Savings Bank Mutual Life Insurance Co. of Massachusetts, Woburn (defense)