

Policyholder Prevails In Lapse Action: Despite Admitted Non-Payment of Premium, Court Deemed Grace Notice “Legally Insufficient”

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A recent federal court decision may impact insurers confronting policy lapses arising under New York Law.

On October 2, 2018, Judge Allyne Ross of the Eastern District of New York granted summary judgment in favor of a policyholder in a dispute concerning the 2012 lapse of a life insurance policy. *Shimon Halberstam, as Trustee of the Zupnick Family Trust 2008 B v. Allianz Life Ins. Co. of N. America*, Case No. 1:16-CV-6854 (ARR) (ST), 2018 WL 4762253 (E.D.N.Y. Oct. 2, 2018).

Background

The subject policy was a Flexible Premium Adjustable Life Insurance Policy with a face value of \$8 million. The policy contained a 61-day grace period provision, which stated, in relevant part: “[A]t least 30 days prior to Termination, we will send written notification . . . advising that the Grace Period has begun. A premium payment sufficient to keep this policy in force for three months is required and must be received prior to the last day of the Grace Period or this policy will Lapse.”

On July 7, 2012, the policy entered a grace period. On August 7, 2012, the insurer sent a grace notice to the plaintiff advising that the policy would lapse unless a premium payment of \$116,511.84 was made by September 7, 2012. The amount requested in the grace notice represented “at least three full months [of premiums] in addition to the month for which a balance was owing.” The plaintiff did not make payment by September 7, 2012. The insurer promptly sent the plaintiff a notice advising that the policy had lapsed.

Litigation

Four years later, the plaintiff sued the insurer, seeking a judicial declaration that the policy was in full force and effect because the grace notice was legally deficient. The plaintiff relied in large part on the amount requested in the grace notice as allegedly exceeding three months of anticipated charges

(i.e., premium). The parties did not dispute the application of New York law.

The parties cross-moved for summary judgment. The insurer argued that the grace notice was compliant but that, even in the event the grace notice was deemed non-compliant, the plaintiff had not paid any premium since 2012 and thus under N.Y. Ins. Law § 3211(a)(1), the policy had lapsed by default.

Outcome

On October 2, 2018, the court granted summary judgment in the plaintiff's favor. The court first held that the grace notice did not comply with N.Y. Ins. Law § 3203(a)(1), which contemplates the grace period as a 61-day period in which to "pay sufficient premium to keep the policy in force for three months from the date the insufficiency was determined." Because the grace notice requested more than three months of anticipated charges, the court concluded that the grace notice was "legally insufficient." Seemingly treating the statutory language as prohibitive – rather than permissive, the court applied Section 3203(a)(1) as requiring an insurer to request *only* an amount of premium to keep the policy in force for three months from the date on which the policy entered grace.

Citing Section 3211(a)(1), the insurer argued that "[e]ven where the notice is incorrect and ineffectual, a policy will still lapse for nonpayment after a year as a matter of law." The court disagreed based on the facts presented. The court explained that the insurer demonstrated an "anticipatory repudiation" of the contract in its post-lapse conduct by, for example, allegedly representing that it would not apply premium received until the policy was reinstated. Thus, the court concluded that the insurer could not rely upon Section 3211's forfeiture provision.

Looking Ahead

Policyholders might cite *Halberstam* in New York cases in which insurers have issued grace notices requesting more than three months of anticipated charges. Several defenses may be available to insurers in such cases.

First, it may be prudent to emphasize that Section 3203(a)(1) mandates certain policy provisions, but not the content of grace notices. The requisite content of grace notices is squarely addressed in Section 3211(b)(2) (requiring a notice to "state the amount of such payment" due). In addition, insurers sued in lapse disputes may look to Section 3211(d) as a time-bar when litigation is commenced more than two years after the date on which the subject policy lapsed. Along these lines, insurers may want to advance waiver/estoppel defenses based on, *inter alia*, the significant passage of time.

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