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High Tide for Lapse Cases? New York Federal Court Holds That Investor Lawsuit Is Not Barred by Statute of Limitations

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On March 28, 2014, a New York federal court issued an opinion that may have a significant impact on the already increasing number of **lapse-related lawsuits** in the life insurance industry. In *Lebovits v. PHL Variable Insurance Co.*, Case No. 12-cv-6397, the United States District Court for the Eastern District of New York held that the two year statute of limitations for actions "to recover on any life insurance policy...which has lapsed because of default in making [a premium] payment," does not apply to actions challenging the lapse of a policy that are styled as declaratory judgment actions. See N.Y. Ins. Law § 3211(d).

Lebovits involved a \$4 million life insurance policy issued by PHL Variable Insurance Company ("PHL") on the life of Abigail Weberman. The policy purportedly lapsed on August 27, 2010. On December 28, 2012, more than two years after the lapse, the owner of the policy, the Weberman Family Irrevocable Life Insurance Trust, commenced litigation seeking a declaratory judgment that the policy remained in force.

In a motion for judgment on the pleadings and a supplemental letter brief, PHL argued that the lawsuit was barred by the two year statute of limitations set forth in § 3211(d) of New York's Insurance Law. The court disagreed. Acknowledging PHL's argument that a strict application of the "action to recover" language of § 3211(d) may render the statute meaningless, the court explained that the statute, by its plain terms, applied only in "action[s] to recover." Because, reasoned the court, the *Lebovits* lawsuit was a declaratory judgment action regarding whether the policy remained in force, the court found that it did not constitute "an action to recover" on the policy. The court therefore held that the lawsuit was not subject to the statute of limitations provided in § 3211(d).

The *Lebovits* decision, which we believe was wrongly decided, may nonetheless pose new challenges for insurers already facing an increasing number of lapse cases: Policyholders that would otherwise be time-barred from bring a lapse-related case after the expiration of the two-year limitation period may now have some reprieve, according to the Eastern District of New York. To avoid the two-year limitation period set forth in § 3211(d), policyholders may style lawsuits that should be deemed "action[s] to recover" as declaratory judgment actions. Despite the limited precedential value of *Lebovits*, the result for insurers could be a longer period of exposure.

This article was written with contributions from Leslie J. Coletti.

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