

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION**

**FILED**

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CLERK US DISTRICT COURT  
WESTERN DISTRICT OF TEXAS

BY

  
DEPUTY

**IN RE:**

**Case No. A-08-CA-351-SS**

**MILDRED L. DICK and DAVID LEWIS**

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**ORDER**

BE IT REMEMBERED on the 6<sup>th</sup> day of February 2009 the Court reviewed the file in the above-styled cause, and specifically Defendant Stonebridge Life Insurance Company's ("Stonebridge") Motion for Summary Judgment and Brief in Support [#27, 26], Plaintiffs Mildred L. Dick and David Lewis's Combined Motion for Summary Judgment and Answer to Defendant's Motion for Summary Judgment ("Plaintiffs' Response") [#35], Defendant Stonebridge's Reply thereto [#37], and Defendant Continental Casualty Company's Motion for Summary Judgment [#36]. After reviewing the motions, the response, the reply, the relevant law, and the case file as a whole, the Court enters the following opinion and order.

**Background**

Defendant Stonebridge issued Marion Dick, deceased husband of Plaintiff Mildred Dick, an Accident Insurance Policy, Policy No. 72A1019691 (the "Stonebridge Policy"), effective September 12, 1975. Stonebridge also issued Mr. Dick a Certificate of Insurance, Certificate No. 86AN1E7049 (the "Stonebridge Certificate"), effective February 17, 1999. Def. Stonebridge's Brief Ex. A, Aff. of Charles Costa at Ex. 1 at 1; Pl.'s Resp. Ex. B at 8. Together, the Stonebridge Policy and Certificate provide for certain accidental death benefits, for which Plaintiff Dick is the named

beneficiary. Mr. Dick also purchased accidental death and dismemberment insurance coverage from Defendant Continental, set forth in Certificate No. ID628752906 (the "Continental Certificate"), effective October 1, 2002, and issued under Group Policy No. CIDC 18-113-952 (the "Continental Policy"). Def. Continental's Mot. for Sum. Judg. Ex. C and Ex. A.

On March 27, 2003, Mr. Dick was involved in a car accident. Def. Stonebridge's Brief Ex. B, Pl. Dick's Admission Responses, Request No. 31. After March 27, 2003, Mr. Dick was not involved in any other accidents which resulted in bodily injury. *Id.* at Request No. 39. Mr. Dick died 277 days after the March 27, 2003 accident on December 29, 2003. *Id.* at Request No. 30. Mr. Dick's Certificate of Death, as originally signed on January 2, 2004, stated "[c]ongestive heart failure" was the immediate cause of death and "[c]oronary artery sclerosis with cardiomegaly" was the condition leading to the cause of death. Pl.'s Resp. Ex. B. The Certificate of Death also originally indicated the "manner of death" was "natural." *Id.* The Certificate of Death was amended three months later on March 18, 2004. *Id.* The immediate cause of death and condition leading to the cause of death were unchanged. *Id.* However, the amendment added "Alleged consequences from motor vehicle accident" in the box provided for "other significant conditions contributing to death **but not resulting in the underlying cause given,**" and changed the "manner of death" from "natural" to "accident." *Id.* (emphasis added).

On December 31, 2003 and January 14, 2004, Plaintiff Dick sent Stonebridge letters with several attachments, which Stonebridge treated as written "proof of loss" and a claim for accidental benefits under the Stonebridge Policy and Certificate. Def. Stonebridge's Brief Ex. A, Aff. of Charles Costa at Ex. 3-7; Def. Stonebridge's Brief Ex. A, Aff. of Charles Costa ¶ 6. On January 28, 2004, Stonebridge sent Plaintiff Dick a letter, denying her claim because the death did not occur

within 90 or 100 days of the accident and because the death was “not due to bodily injuries caused by an accident directly and independently of all other causes.” Def. Stonebridge’s Brief Ex. A, Aff. of Charles Costa at Ex. 8.

On April 27, 2004, Plaintiff Dick filed a claim with Continental as beneficiary under the Continental Certificate. On May 26, 2004, Continental denied the claim for failure to pay the January 2003 premium, expiration of the 31-day grace period, and subsequent lapse of the policy prior to the March 27, 2003 accident. Def. Continental’s Mot. for Sum. Judg. Ex. D.

Plaintiffs sued Stonebridge on March 28, 2008 in the 126<sup>th</sup> Judicial District of Travis County, Texas and sued Continental on March 26, 2008 in the 200<sup>th</sup> Judicial District of Travis County, Texas. Both cases were separately removed to federal court, and the undersigned consolidated the claims into a single case on July 14, 2008. Plaintiffs assert claims for breach of contract, bad faith, and violations of the Texas Deceptive Trade Practices Act (“DTPA”) and Insurance Code based on Defendants’ separate denial of accidental death benefits under each of their respective insurance policies in connection with the death of Marion F. Dick.

Stonebridge filed its motion for summary judgment on December 17, 2008, to which Plaintiffs replied on January 9, 2009. Continental filed its motion for summary judgment on January 9, 2009. Plaintiffs have failed to respond to Continental’s request for summary judgment.

### **Analysis**

#### **I. Summary Judgment Standard**

Summary judgment may be granted if the moving party shows there is no genuine issue of material fact, and it is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). In deciding summary judgment, the Court construes all facts and inferences in the light most favorable to the

nonmoving party. *Richter v. Merchs. Fast Motor Lines, Inc.*, 83 F.3d 96, 98 (5th Cir. 1996). The standard for determining whether to grant summary judgment “is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the nonmoving party based upon the record evidence before the court.” *James v. Sadler*, 909 F.2d 834, 837 (5th Cir. 1990).

Both parties bear burdens of production in the summary judgment process. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). First, the moving party has the initial burden of showing there is no genuine issue of any material fact and judgment should be entered as a matter of law. FED. R. CIV. P. 56(c); *Celotex*, 477 U.S. at 322–23; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). The nonmoving party must then come forward with competent evidentiary materials establishing a genuine fact issue for trial and may not rest upon the mere allegations or denials of its pleadings. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); *Anderson*, 477 U.S. at 256–257. However, “[n]either ‘conclusory allegations’ nor ‘unsubstantiated assertions’ will satisfy the non-movant’s burden.” *Wallace v. Tex. Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996).

## **II. Claims Against Stonebridge**

Stonebridge moves for summary judgment on several grounds: (1) Texas statute of limitations; (2) contractual statute of limitations; (3) Mr. Dick’s death is not covered under the Policy or Certificate because it occurred more than 100 days after the accident; and (4) without coverage or liability under the Policy or Certificate, there can be no violation of the DTPA or Texas Insurance Code.

**a. Texas Statute of Limitations**

Plaintiffs' claims against Stonebridge have all been brought outside the applicable statute of limitations under Texas law and are therefore barred. Plaintiffs' claims accrued on the date coverage under the Policy was denied. *See Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 828-29 (Tex. 1990) (breach of contract and bad faith claims accrue on date of denial); *Provident Life & Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex. 2003) (a claim brought under the DTPA or Texas Insurance Code "based on denial of insurance coverage accrues on the date that the insurer denies coverage."). The statute of limitations under Texas law for claims under the DTPA or Texas Insurance Code and claims for bad faith is two years from the date they accrue. *Id.* The statute of limitations for breach of contract is four years. *Stine v. Stewart*, 80 S.W.3d 586, 592 (Tex. 2002) (citing TEX. CIV. PRAC. & REM. CODE § 16.051).

Plaintiffs' causes of action against Stonebridge accrued on January 28, 2004, the date Stonebridge sent Plaintiff Dick a letter denying her claim. Def. Stonebridge's Brief Ex. A, Aff. of Charles Costa at Ex. 8. Plaintiffs do not contest January 28, 2004 is the date on which their claims accrued.<sup>1</sup> Thus, under Texas law Plaintiffs had until January 28, 2006 to file their DTPA, Texas Insurance Code, and bad faith claims and until January 28, 2008 to file their breach of contract claim. Plaintiffs did not file suit against Stonebridge until March 28, 2008, two months after the limitations period for their breach of contract claim expired and two years and two months after the limitations period for their DTPA, Texas Insurance Code, and bad faith claims expired. The Court thus finds all of Plaintiffs' claims are barred by the applicable Texas statute of limitations.

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<sup>1</sup>Plaintiffs do argue their suit is timely under the terms of the Policy and Certificate, but this argument is addressed below.

**b. Contractual Limitations Period**

Stonebridge next argues Plaintiffs' claims are barred by the contractual limitations periods contained within the Policy and Certificate. Contractual limitations periods in insurance contracts are routinely enforced in Texas. *See Watson v. Allstate Texas Lloyds*, 224 F. App'x 335, 339 (5th Cir. 2007) (unpublished); *Kuzniar v. State Farm Lloyds*, 52 S.W.3d 759, 760 (Tex. App.—San Antonio 2001, pet. denied). The Stonebridge Policy and Certificate each include provisions limiting the time within which suit may be brought to recover on a claim under the respective agreement.

The Stonebridge Policy provides:

**PROOFS OF LOSS: Written proof of loss must be furnished to the Company at its said office in case of claim for loss for which this policy provides any periodic payment contingent upon continuing loss within ninety days after the termination of the period for which the Company is liable and in case of claim for any other loss within ninety days after the date of such loss. Failure to furnish such proof within the time required shall not invalidate nor reduce any claim if it was not reasonably possible to give proof within such time, provided such proof is furnished as soon as reasonably possible and in no event, except in the absence of legal capacity, later than one year from the time proof is otherwise required.**

**LEGAL ACTIONS: No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after written proof of loss has been furnished in accordance with the requirements of this policy. No such action shall be brought after the expiration of three years after the time written proof of loss is required to be furnished.**

Def. Stonebridge's Brief Ex. A, Aff. of Charles Costa Ex. 1 at 4 (emphasis added). The Stonebridge

Certificate similarly provides:

**PROOF OF LOSS: Written Proof of Loss must be given to us within 90 days after the date of the Loss or as soon as possible thereafter. Proof must, however, be furnished no later than one year from the time it is otherwise required except in the absence of legal capacity.**

**LEGAL ACTIONS: No action can be brought to recover on the Policy for at least 60 days after written Proof of Loss has been furnished. No such action shall be brought more than 3 years after the date Proof of Loss is required.**

Def. Stonebridge's Brief Ex. A, Aff. of Charles Costa Ex. 2 at 7 (emphasis added).

Stonebridge argues that under the terms of the Policy and Certificate, Plaintiffs were required to file their claims no later than three years and 90 days after the loss occurred. Plaintiffs disagree. Although acknowledging that the proof of loss "must be given within 90 days after the date of loss," Plaintiffs argue the provision permitting submission of proof of loss up to a year after the expiration of the 90 days extends the time period in which proof of loss is "required" to one year and 90 days, consequently extending the total limitations period to four years and 90 days from the date of loss. Pl.'s Resp. at 2. Under Plaintiffs' interpretation, they had until March 29, 2008 to file suit. *Id.*

The Court disagrees with Plaintiffs' interpretation and finds their claims barred under the terms of the contract for two reasons. First, the clear language of both the Policy and Certificate require proof of loss to be provided within 90 days of the loss. The additional one year period is essentially a grace period within which Stonebridge will still accept proof of loss, but it is not the "required" period for providing the necessary proof. It would make no sense for the contract to include two "required" periods of time for submitting proof of loss. Furthermore, the agreements themselves refer to the 90 day period as the "time required" and "the time it is otherwise required."

Second, even if Plaintiffs' interpretation of the time required for proof of loss for purposes of the contractual limitations period was correct, Plaintiffs' claims would still be barred by the Texas statute of limitations. Assuming, *arguendo*, Plaintiffs' interpretation is correct, the agreements would provide that no action could be brought "more than" or "after the expiration of" four years and 90 days after the loss. Strictly construed, however, this provision would be exclusionary rather than inclusionary. The terms would exclude suits brought after four years and 90 days, but nothing in the Policy or Certificate would permit, allow, or sanction all suits brought up to that date. In other

words, nothing in the agreements can be read to *extend* the Texas statute of limitations. If such was the intent of the parties, then the documents would provide suit “may be brought” for a specific period of time, or similar language. As a result, even if Plaintiffs’ claims were not barred by the contractual limitations period they would be barred by the Texas statute of limitations, as discussed above.

**c. 100/90 Day Requirement**

Stonebridge is also entitled to summary judgment on the merits of Plaintiffs’ claims. Plaintiffs bear the burden of establishing their claim is covered by the Policy and/or Certificate. *Western Alliance Ins. Co. v. Northern Ins. Co.*, 176 F.3d 825, 831 (5th Cir. 1999). The Policy specifically provides:

**ACCIDENTAL DEATH AND DISMEMBERMENT BENEFIT:** If a covered member shall suffer such injury and if such injury shall result directly and independently of all other causes in any of the following specific losses sustained by the Covered Member **within the first 100 days after the date of accident** the Company will pay benefits for the appropriate loss.

Def. Stonebridge’s Brief Ex. A, Aff. of Charles Costa Ex. 1 at 2 (emphasis added). The Certificate also provides for benefits for losses sustained “within 90 days after the date of an accident which caused such injury.” Def. Stonebridge’s Brief Ex. A, Aff. of Charles Costa Ex. 2 at 4.

Texas courts have upheld policy provisions requiring death to occur within a specified period of time after an accident. *Douglas v. Southwestern Life Ins. Co.*, 374 S.W.2d 788, 791 (Tex. Civ. App.–Tyler 1964, writ ref’d n.r.e.) (“To construe the contract as not requiring death to occur within 90 days after the date of the accident would be to ignore the plain words of the policy.”); *Willeford v. Home Indem. Co.*, 411 S.W.2d 640 (Tex. Civ. App.–Texarkana 1967, no writ); *Buford v. North Am. Acc. Ins. Co.*, 3 F.2d 263 (5th Cir. 1925). The only accident alleged occurred March 27, 2003,



but Mr. Dick did not die until December 29, 2003, over 270 days after the accident. Plaintiffs do not contest this fact, but only claim the Stonebridge Policy and Certificate do not contain such a requirement, which is directly contradicted by the record in this case and Exhibit B of Plaintiffs' own response. Consequently, Plaintiffs have failed to establish a genuine issue of material fact as to whether the alleged loss occurred within 100 or 90 days of the accident, and as a result failed to establish their claim is covered by the Stonebridge Policy or Certificate.

**d. DTPA and Texas Insurance Code Liability**

In order to establish their bad faith, DTPA, and Texas Insurance Code claims, Plaintiffs must first establish coverage or liability under the Policy or Certificate. *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 341 (Tex. 1995). Thus, since Plaintiffs have failed to establish coverage or liability under the Stonebridge Policy or Certificate for the reasons stated above, they cannot as a matter of law establish their bad faith, DTPA, and Texas Insurance Code claims against Stonebridge.

**III. Claims Against Continental**

Continental also moves for summary judgment on several grounds: (1) contractual statute of limitations; (2) Texas statute of limitations; and (3) Mr. Dick's death is not covered under the Policy or Certificate because coverage had lapsed due to non-payment of the premium.<sup>2</sup>

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<sup>2</sup>Continental also argues, and the Court agrees, that Plaintiff Lewis lacks any standing to bring this suit. Mr. Lewis was neither in privity with the contract nor an intended third-party beneficiary, and thus lacks standing under Texas law. *See Palma v. Verex Assurance, Inc.*, 79 F.3d 1453, 1457 (5th Cir. 1996) ("Consequently, we conclude...that standing under [Tex. Ins. Code] art. 21.21 is satisfied by not only those who can establish privity of contract or reliance on a representation of the insurer, but also by those who can establish that they were an intended third-party beneficiary of the insurance contract.").

**a. Contractual Limitations Period**

Continental first argues Plaintiffs' breach of contract claim is barred by the contractual limitations periods contained within the Continental Policy and Certificate. As discussed above, contractual limitations periods in insurance contracts are routinely enforced in Texas. *See Watson v. Allstate Texas Lloyds*, 224 F. App'x 335, 339 (5th Cir. 2007) (unpublished); *Kuzniar v. State Farm Lloyds*, 52 S.W.3d 759, 760 (Tex. App.—San Antonio 2001, pet. denied). The Continental Policy limits the time within which suit may be brought to recover under the agreement.<sup>3</sup> The Continental Policy provides:

**WRITTEN PROOF OF LOSS:** Written proof of loss must be given to Us within 90 days after the date of such loss. If it is not reasonably possible to give the proof within 90 days, the claim is not affected if the proof is given as soon as possible. Unless the Insured Person is legally incapacitated, written proof must be given within 1 year of the time it is otherwise due.

**LEGAL ACTIONS:** No action at law or in equity can be brought until after 60 days following the date written proof of loss is given. No action can be brought after 3 years (Kansas 5 years and South Carolina 6 years) from the date written proof is required. After the expiration of three years after the time written proof of loss is required to be furnished.

Def. Continental's Mot. for Sum. Judg. Ex. A at Dft. 0028.

Continental makes an almost identical argument as that made by Stonebridge above. Continental argues that under the terms of the Policy, Plaintiffs were required to file their claims no later than three years and 90 days after the loss occurred. Plaintiffs have failed to file a response to Continental's motion, contesting its claim or raising any material issue of fact. Thus, for the same

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<sup>3</sup>The Continental Certificate is "subject to all the definitions, limitations and conditions of the policy." Def. Continental's Mot. for Sum. Judg. Ex. C. The Court will therefore address and refer to only the Continental Policy.

reasons as those explained above, the Court agrees Plaintiffs' breach of contract claim is barred by the contractual limitations period and grants Continental summary judgment on that issue.

**b. Texas Statute of Limitations**

Continental also argues Plaintiffs' DTPA, Texas Insurance Code, and bad faith claims have all been brought outside the applicable statute of limitations under Texas law and are therefore barred. As explained above, Plaintiffs' claims accrued on the date coverage under the Policy was denied. *See Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 828-29 (Tex. 1990) (breach of contract and bad faith claims accrue on date of denial); *Provident Life & Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex. 2003) (a claim brought under the DTPA or Texas Insurance Code "based on denial of insurance coverage accrues on the date that the insurer denies coverage."). The statute of limitations under Texas law for claims under the DTPA or Texas Insurance Code and claims for bad faith is two years from the date they accrue. *Id.*

Plaintiffs' causes of action accrued on May 26, 2004, the date Continental denied Plaintiff Dick's claim. Def. Continental's Mot. for Sum. Judg. Ex. D. Plaintiffs do not contest May 26, 2004 is the date on which their claims against Continental accrued. Thus, under Texas law Plaintiffs had until May 26, 2006 to file their DTPA, Texas Insurance Code, and bad faith claims. Plaintiffs did not file suit against Continental until March 26, 2008, almost two years after the applicable limitations period expired. The Court thus finds Plaintiffs' DTPA, Texas Insurance Code, and bad faith claims barred by the applicable Texas statute of limitations.

**c. Coverage/Liability**

Finally, Continental argues it is entitled to summary judgment on the merits for the simple reason that Mr. Dick's death was not covered under the Policy or Certificate because his coverage

had lapsed due to non-payment of the premium. According to the undisputed record, Mr. Dick failed to make the required January 2003 premium payment. *See* Def. Continental's Mot. for Sum. Judg. at 7-8. As a result, Mr. Dick's coverage under the Continental Policy lapsed after the expiration of the 31-day grace period, and coverage had not resumed by the time of his accident on March 27, 2003. *Id.* Plaintiffs have failed to raise a material issue of fact regarding whether Mr. Dick properly paid his premiums or was covered at the time of the accident, thus the Court grants Continental's motion for summary judgment.

**Conclusion**

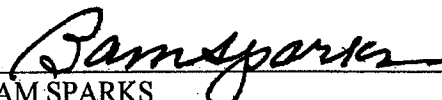
In accordance with the foregoing:

IT IS ORDERED that Defendant Stonebridge Life Insurance Company's Motion for Summary Judgment [#27] is GRANTED as to all claims.

IT IS FURTHER ORDERED that Defendant Continental Casualty Company's Motion for Summary Judgment [#36] is GRANTED as to all claims.

IT IS FINALLY ORDERED that all pending motions are DISMISSED AS MOOT.

SIGNED this the 6<sup>th</sup> day of February 2009.

  
SAM SPARKS  
UNITED STATES DISTRICT JUDGE