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**Re: Recent Developments in Massachusetts Insurance Law, Fourth Quarter of 2009**

The following will summarize the Massachusetts decisions which impact the insurance industry for the fourth quarter of 2009. If you would like to receive these newsletters via email, please send your email address to **phowe@lecomtelaw.com**.

## DIRECTORS & OFFICER'S COVERAGE

***There was no coverage under a Directors' and Officers' liability policy for a settlement the policyholder made with its disgruntled shareholders.**

The policy covered against "all Loss for which [the policyholder] … has become legally obligated to pay on account of any Claim …for a wrongful act committed…during the Policy Period." [Page 4.] The Court ruled, "When a corporation pays a settlement to resolve a claim that it benefited one group of shareholders at the expense of another group of shareholders, is this settlement an insurable loss? The answer to this question must undoubtedly be 'no'." [Page 7-8.]

**Genzyme Corporation v. Federal Insurance Company, 2009 U.S. Dist. LEXIS 91759 (USDC MA, 2009).**

## DUTY TO DEFEND

***The insurer has a duty to defend against a claim for environmental clean up costs.**

The policy provided coverage for environmental clean up costs, but a subsequently issued endorsement to the policy reduced the coverage to eliminate environmental clean up costs. The Court ruled that the insurer had not complied with the notice requirements under the policy where there is to be a reduction in coverage. Consequently, the Court ruled that the reduction in coverage was invalid and the insurer had a duty to defend.

**Whitaker Corp. v. American Nuclear Insurers et al., 2009 U.S. Dist. LEXIS 84415 (USDC MA 2009).**

## ERISA DISABILITY

*** It was arbitrary and capricious for the insurer to deny the disability claim where the Insured left work after suffering a psychotic episode.**

The Court found that the insurer arbitrarily disregarded the opinions of two treating physicians that the Insured was unable to function, misquoted her physicians and failed to consider important evidence of her disability. The insurer's decision to deny benefits was not "reasoned or supported by substantial evidence".

The Court ruled that while the insurer was not required to "accord special weight to a treating therapist's opinion, they cannot 'arbitrarily refuse to credit a claimant's reliable evidence. [Citation omitted.] At the very least, [the insurer] must examine [the treating therapist's] clinical diagnosis and give reasons for rejecting it. Here, [the insurer] simply ignores the diagnosis." [Page 4.] Further, the insurer was on notice that the Insured had changed psychiatrists but did not send the report of the insurer's evaluating psychiatrist to the Insured's current psychiatrist. [Page 4.]

**Whitehouse v. Raytheon Company et al., 2009 U.S. Dist. 113780 (USDC MA 2009).**

**ERISA DISABILTY**

***The insurer is not required to wait indefinitely for an opinion from the Insured's physician.**

The court upheld the denial of a claim for disability benefits based on obstructive sleep apnea and high blood pressure. The insurer requested the attending physician on "several occasions" to submit specific information, test results and progress notes. The physician "remained silent". [Page 4.] The Court ruled that the insurer was "not obligated to accept or even to give particular weight to the opinion of a claimant's treating physician." [Page 3.]

**Medina v. Metropolitan Life Insurance Company, 2009 U.S. App. LEXIS 25879 (1st Cir. 2009).**

**ERISA DISABILITY**

*** Even though the interpretation of the Plan may not be perfect, it was not arbitrary and capricious.**

The Plan provided for disability benefits to be calculated based on a percentage of the employee's Regular Monthly Earnings which included paid commissions for non-management persons. [Page 4.] The Insured changed positions from management to non-management during the year in question. The Plan is funded by employee contributions. As the Insured was in management for a portion of the year, she was not contributing to the Plan. [Page 4.] The Plan language does not specifically require that the commissions used to calculate the benefits be only those commissions earned as a non-management employee. The Court ruled, "The premises on which Corporate Benefits [the Plan Administrator's delegate] operated may or may not be perfect, and the rationale it employed involves judgment calls as to prudence and internal consistency, but neither the premises nor the reasoning seems to us arbitrary or capricious." [Page 5.]

**Wallace v. Johnson & Johnson et al., 2009 U.S. App. LEXIS 22529 (1st Cir. 2009).**

## ERISA STATUTE OF LIMITATIONS

***The claim for disability benefits was barred by the Massachusetts state law six year statute of limitations.**

The Insured suffered injuries in an automobile accident in June 1997 which included some cognitive loss. The insurer denied the claim in February 1998 on the grounds that the Insured was not totally disabled from her position as a senior economist. The Insured appealed the denial and the insurer denied the appeal on March 10, 2000.

The insurer wrote to the Insured on May 19, 2006 stating that it had received her request to participate in its Claim Reassessment Process. The Reassessment documents provided that the statute of limitations would be tolled during the reassessment process. The Insured retained counsel to represent her in the appeal and reassessment process but he failed to respond to her calls and failed to take action from June of 2006 to October of 2007.

The Court ruled on page 6-7 that the six year statute of limitations under Mass. General Laws, chapter. 260, section 2 applied as there is no statute of limitations under ERISA. The Insured's claim accrued on March 10, 2000 when the insurer denied the appeal and, as a result, the six years expired on March 10, 2006. Consequently, the six years had expired before the insurer ever contacted the Insured in May 2006. [Page 7.]

The Court ruled that the there had been no tolling of the six year period by agreement as it had already expired before the insurer contacted the Insured in May 2006. The Court also ruled that the Insured was bound by the inaction of her attorney, although she apparently did not retain him until June 2006. [Page 9] after the six years had expired.

**Anne Forrest v. The Paul Revere Life Insurance Company, 2009 U.S. Dist. LEXIS 97296 (U.S.D.C. MA 2009).**

## EVIDENCE ELECTRONIC DISCOVERY

***Destruction of emails in violation of the Court's Order leads to dismissal of the Plaintiff's action and an award of costs.**

The Defendant, former employer of the Plaintiff, had notified the Plaintiff prior to his filing this action that it wanted to examine his emails within a certain time period regarding the Plaintiff's possible violation of his

non-competition agreement. During the action there was a discovery dispute over the production of the emails. The Court ordered the Plaintiff to refrain from deleting any emails and submit his computer for a forensic examination.

The examination revealed that during the discovery dispute and after Defendant had filed its Emergency Motion to Compel production of the emails the Plaintiff had installed "Drive Scrubber 3" on his computer to erase the emails. [Page 3.] The Court ruled that, even prior to litigation, the Plaintiff had a duty to preserve all materials which "would be potentially relevant to the litigation." The Court found that the Plaintiff acted in "utter disregard of his obligations and of the authority of the Court." [Page 6.]

As sanctions, the Court found that the Plaintiff had imposed substantial costs on the Defendant and significantly prejudiced its position by depriving it of the emails at issue. The Court dismissed the Plaintiff's claims for compensation from his former employer, imposed the assessment of costs for the discovery dispute and ruled that at the trial of the Defendant's counterclaim the Defendant could introduce evidence of the Plaintiff's conduct. Further, the Court will instruct the jury that it may infer that additional documents existed and would have provided evidence to support the Defendant's claims. [Page 7.]

**Stein v. Clinical Data, Inc., 26 Mass. L. Reports 269, 2009 Mass. Super. LEXIS 296 ( Superior Court, October 9, 2009).**

**COMMENT**

This is not an action involving an insurance issue. However, the Stein decision is a rare and thorough review of an egregious incidence of discovery abuse particularly in view of the growing significance of electronic discovery and the duty to preserve electronic data. The decision is scholarly and well worth study by all.

## FIRE

***Failure to cooperate with the insurer's investigation was a material breach of the fire insurance policy.**

The policyholder refused to answer certain questions during his examination under oath and refused to provide documents, including tax returns and fire alarm records. The Court ruled that this was a "willful refusal to comply with the terms of their insurance contract [resulting] in a material dilution of [the insurer's] rights…" The Court awarded the insurer the amount it had paid to the policyholder's mortgagees for the fire damage and the amount it had paid to the policyholder for living expenses for a total of $1,050,301.

**Miles v. Great Northern Insurance Company, 2009 U.S. Dist. LEXIS 112561 (USDC MA 2009).**

## WORKERS' COMPENSATION

***A teacher suffered a work-related injury in a ski accident while chaperoning a student ski trip.**

The Court found that the employee teacher served as a ski club chaperone. It ruled that the recreational aspects of her services were subordinated to the work-related duties she performed. The ski club was officially sanctioned by the city and the adviser to the club, another teacher, received a stipend. Chaperones were expected to supervise the students including while they skied and the ski club paid their trip expenses. In addition, the school committee expected the teachers to become involved in the school's extracurricular activities.

The Court ruled that the teacher's injuries arose out of and in the course of her employment. The Court applied the five-step test in *Moore's Case, 330 Mass. 1, 4-5 (1953)* of 1. the customary nature of the activity, 2. the employer's encouragement of the activity, 3. the extent to which the employer managed the activity, 4. the pressure to participate, and 5. the employer's benefit from the employee's participation. The Court ruled that the above five-step test remains authoritative for the purposes of determining whether an injury arises out and in the course of a worker's employment, despite the statute enacted in 1985, G.L.c. 152, Section 1 (7A) excluding "voluntary participation in any recreational activity."

**Karen's Sikorski's Case, 2009 Mass. LEXIS 905 (2009).**

Please notify us if you would like a copy of any of the above decisions.

Very truly yours,

Philip M. Howe

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