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Extension 203

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Re: Recent Developments in Massachusetts Insurance Law, First Quarter of 2011

The following will summarize the Massachusetts decisions which impact the insurance industry for the first quarter of 2011. If you would like to receive these newsletters via email, please send your email address to **phowe@lecomtelaw.com**.

ATTORNEY FEES –UNFAIR CLAIMS PRACTICES

*** Attorney was entitled to his fees from the insurer for defending the insured and it was a violation of the Unfair Claims Practices Act to refuse to pay.**

The insured was a realty trust against which the plaintiffs in the underlying action, tenants of the trust, had filed an action for exposure to mold. The insurer issued a reservation of rights letter and the trust retained its own counsel at an hourly billing rate of $225. That counsel's typical hourly rate was $385.

Counsel kept the insurer informed of developments in the case and submitted one bill in April 2002 which the insurer paid in June 2003, but at an

hourly rate of $150. Counsel settled the underlying action in October 2003 favorably to the trust and the insurer. Counsel later sent a demand letter to the insurer for the difference between the $150 and the $225 rates pursuant to c. 93A, the Unfair Claims Practices Act, which the insurer declined.

In the subsequent litigation, the Trial Court found that the $225 was "extremely reasonable" [Page 2] despite evidence that the insurer paid its regular panel defense attorneys $140 per hour. An expert testified that the $225 was "remarkable" given counsel's abilities and reputation. The Court also found that it was the hourly rate to which the trust had agreed.

The Trial Court had ruled that the hourly rate should be $350. But the Court of Appeal reversed that amount ruling that counsel had agreed to the $225 and "recovery shall be in the amount of the actual damages.[the actual fees billed]" [Page 3.] That is, the amount of the award would be $75 per hour, the difference between the $150 per hour already paid and the $225 per hour awarded by the trial court.

But, the Court of Appeal affirmed the finding of the violation of c. 93A on the grounds that the insurer "unnecessarily and unreasonably delayed payment" of counsel's first bill "for fourteen months... Further, it did not pay the undisputed and reasonable court expenses,...it refused to negotiate [with counsel on the fee issue], ...; it disregarded advice from its own counsel and claims manager [that it pay the $225 rate]; and...it intentionally delayed payment of its bills in the hope of unfairly securing an advantageous financial outcome." Plus, counsel achieved an excellent resolution of the underlying case. [Page 3.]

Northern Security Insurance Company, Inc. v. R.H. Realty Trust & another, 211 Mass. App. LEXIS 161 (Feb. 8, 2011)

ERISA

***There is no ERISA governed plan where severance package benefits consisted wholly of a one-time cash benefit requiring a simple mechanical calculation and disbursement when an employee accepts the severance offer and no further administration is required by the employer.**

The Court held, following the above ruling, that the employer's "retaining discretion to declare employee surpluses does not upset this conclusion that the program itself required minimal administration by [the employer]. See *White v. Bell Atl. Yellow Pages, No. 01-10157, 2004 U.S. Dist. LEXIS 4720; 2004 WL 594957, at * 9 (D. Mass. Mar. 23, 2004.)*" [Page 8.]

The Court ruled, " A 'plan' falls within ERISA only if its 'provision[s] by nature require an ongoing administrative program to meet the employer's obligations.' *Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 11, 107 S. Ct. 2211, 96 L. Ed. 1 (1987).* Thus, the Court looks to 'the nature of and extent of an employer's benefit obligations. *Rodowicz v. Mass. Mut. Life Ins. Co., 192 F. 3d 162, 170....*Where subjective judgments would call upon the integrity of an employer's administration, the fiduciary duty imposed by ERISA is vital. But where benefit obligations are administered by a mechanical formula that contemplates no exercise of discretion, the need for ERISA's protections is diminished.' *O'Connor v. Commonwealth Gas Co., 251 F. 3d 262, 267 (1st. Cir. 2001)."* [Page 7.] The determination of what constitutes an ERISA plan thus turns most often on the degree of an employer's discretion in administering the plan.

The First Circuit had held in *O'Connor, supra at 266-267,* that a severance package "was not an ERISA plan, as it consisted primarily of a 'one-shot, take-it-or-leave-it incentive,' the administration and application of which was purely mechanical once an employee opted in, making the risk of employer abuse or mismanagement negligible." [Page 7.]

Arivella et al. v. Alcatel-Lucent et al., 2010 U.S. Dist. LEXIS 137331, 50 Employee Benefit Cas. (BNA) 2166, (USDC MA, December 22, 2010).

HOMEOWNERS –INSURED'S REFUSAL TO COOPERATE

*** Insured's refusal to answer deposition questions and to produce documents breached the Policy and relieved the insurer from the obligation to pay a fire loss.**

The co-insured wife refused, at her husband's direction, to answer interrogatories and questions in an examination about the fire loss at their home and about their financial affairs. The wife refused to produce documents related to their home security system or their financial affairs until after the claim denial. The Police investigation indicated that the fire had been set intentionally, accelerants were found in the house, there was no sign of forced entry, and the husband and co-insured was a "person of interest". [Page 2.]

The Court ruled that, based on the above findings, the wife breached her contract with the insurer and is, therefore, "barred from recovery under the insurance policy." The Court relied on *Lorenzo-Martinez v. Safety Insurance Company, 58 Mass. App. Ct. 359, 790, NE 2d 692, 695-696, (Mass. App. Ct. 693) and Mello v. Hingham Mut. Fire Ins. Co., 421 Mass. 333, 656 NE 2d 1247, 1250 (Mass. 1995).* [Page 3.]

The Court went on to rule that the wife's refusal to cooperate prejudiced the insurer as it prevented the insurer from completing its investigation as to the cause of the fire and it was unable to eliminate the husband as the person who caused the fire. The Court wrote that the Massachusetts standard for determining when an insured's failure to comply with an examination under oath is willful and unexcused is whether the insured "had an excuse that relieved [her] from submitting to an examination under oath." In refusing to answer questions and provide the requested documents to the insurer, the wife "failed to comply with the insurer's reasonable request for an examination under oath and most certainly exhibited the obstructionism that, under Massachusetts law, constitutes a willful and unexcused failure to comply with her obligations." [Page 4.]

James Miles, Theresa Miles v. Great Northern Insurance Company, 634 F3d 61, 2011 U.S. App. LEXIS 4744 (1st Cir. March 10, 2011)

JUDICIAL ESTOPPEL

*** Judicial Estoppel did not prevent the successful plaintiff in the underlying automobile action from pursuing in a subsequent action the automobile insurer who defended the underlying action.**

The plaintiff prevailed with a jury verdict in the underlying action for $17 million against the defendant who was driving under the influence when she hit the plaintiff on his motorcycle. The plaintiff received an assignment of the defendant's rights and proceeded in his action for legal malpractice against the attorney who defended the underlying action, as well as breach of contract for failure to defend the insured, also claiming unfair claims practices under G.L. c. 176D and violation of 93A, the consumer protection statute, against the insurer.

The Trial Court granted Motions to Dismiss on the basis of judicial estoppel and the Court of Appeal affirmed in part and reversed in part. The Court referenced the decision in *Otis v. Arbella Mut. Ins. Co., 443 Mass. 634, 639-640 (2005)*, the seminal Massachusetts case on judicial estoppel, but distinguished it on its facts. The Court went on to state the basic elements of judicial estoppel as first, "the position asserted...[is] directly contrary to the position previously asserted (in the prior action)" and second," the party must have succeeded in convincing the court (in the prior action) to accept its prior position." [Page 2.]

The Court went on to rule that the claims against the defendants can generally be divided into two categories: first, that the defendants failed to adequately prepare for and defend at trial and, second, that the defendants failed to explore settlement opportunities and convey them to [the insured]. The Court ruled, "Judicial estoppel does not bar [the insured] from asserting either category of claims against the defendants...judicial estoppel cannot be logically applied in...circumstances where the plaintiff is attempting to show that her position in the [underlying] action was the result of the defendant's malpractice." [Page 2.]

But, the Court further ruled, "Judicial estoppel bars [the plaintiff in the underlying action] from bringing the first category of claims regarding the adequacy of the defendants' preparation for and actions at trial. In the underlying action, [the plaintiff] successfully argued, and our court agreed, that the damage award was not excessive. [citation omitted] The plaintiff now contends that the defendants' failure to properly defend at trial 'unduly exposed (the insured) to an excess judgment.' [The plaintiff's] current position is directly contrary to the position he previously and successfully asserted." [Page 2.]

"Judicial estoppel cannot be invoked, however, with respect to the second category of claims regarding settlement opportunities. [The plaintiff's] current claim that he would have settled his underlying claims against [the insured] is not inconsistent with his argument in the underlying case that [the insured] was negligent and liable to him for damages." [Page 3.]

Sandman v. McGrath & another, 2011 Mass. App. LEXIS 260 (February 24, 2011.)

Please contact us if you would like copies of any of the above decisions.

Very truly yours,

Philip M. Howe

PMH