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October 17, 2011

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

The following will summarize the Massachusetts decisions which impact the insurance industry for the third quarter of 2011. If you would like to receive a copy of this newsletter via email, please send your email address to phowe@lecomtelaw.com.

AUTOMOBILE

***The insurer need not submit each medical bill under a P.I.P. claim to an independent medical reviewer.**

The plaintiff medical provider claimed that the defendant insurer violated Mass. General Laws, c. 90, Section 34 M, the Motor Vehicles Code Personal Injury Protection, by refusing to pay personal injury protection (P.I.P.) benefits for the full amount billed, without an outside medical review of the bills for reasonableness. While Section 34 M refers to the review by a licensed medical practitioner, that, according to the statute, is only where there has been a refusal to pay the claim based solely on a medical review of the bill or of the medical services of the underlying bill.

The Court ruled that the insurer did not refuse to pay the medical bills at issue, the P.I.P. benefits. The insurer simply paid a lower amount than the medical provider had claimed in the bills. The Court relied on *Boone v. Commerce Ins. Co.*, 451 Mass. 192,196; 884 N.E. 2d 483 (2008) in which the Supreme Judicial Court ruled that a medical review is only appropriate to determine "if the charges are reasonable and the treatment is necessary." All that is at issue in the within action "is the value of the services not their necessity. Hence there is no requirement in the statute of a 'same professional' review [medical review by a provider of the same type of services] of the [subject] records." [Page 8.]

McGovern Physical Therapy Associates v. Metropolitan Property & Casualty Insurance Company, 2011 WL 3276234, ___F. Supp. 2d___ (USDC MA, July 29, 2011).

COMPREHENSIVE GENERAL LIABILITY

***There was no executed contract requiring the insurer to add the additional insured, as provided in the Policy. Consequently, the insurer had no obligation to cover the "additional insured".**

The Comprehensive General Liability Policy did not identify the general contractor and the sub-contractor as "additional insureds". On the additional insured endorsement page there was a space for additional insureds beneath the subheading, "AS REQUIRED BY CONTRACT, PROVIDED THE CONTRACT IS EXECUTED PRIOR TO LOSS."

The insurance broker had sent a certificate of insurance to the sub-contractor describing the general and the sub-contractor as "additional insureds" under a c.g.l. policy issued to the company which leased equipment to the sub-contractor. However, the Court ruled that the Policy language

controlled. The space on the original Policy for "additional insureds" remained blank. As such, the parties did not satisfy the requirement that the contract adding the additional insured be executed before the loss at issue. Consequently, there was no coverage and no duty to defend the general and the sub-contractor in an action for personal injury brought by one of the workers at the construction site.

Suffolk Construction Company at al. v. Illinois Union Insurance Company, 951 N.E.2d 944 (MA Court of Appeals, August 15, 2011).

CONDOMINIUM - HOMEOWNERS

***There was a duty to defend the alleged injury to the Insured's tangible property where the policyholder's air conditioner intruded into the outdoor patio of his condominium neighbor.**

The Policy provided that the insurer would defend the policyholder against actions brought for property damage to "tangible property." The neighbor's interest in the outdoor patio was an easement. The Court ruled that there was no meaningful distinction in whether the policy holder "owns, rents or holds an easement to" the property at issue "the real property in question remains tangible property." [Page 7.]

Citation Insurance Company v. Newman, 80 Mass. App. Ct. 143, 951 N.E. 2d 974 (August 18, 2011)

DUTY TO DEFEND

*** The insurer potentially had a Duty to Defend the Policyholder in an action for personal injuries by a police officer who was injured while the policyholder was resisting arrest.**

The Supreme Judicial Court ruled that there was potentially a duty to defend the policyholder under a homeowner's policy where he was arrested after leaving a home which had been under surveillance for suspected drug dealing. The policyholder tried to escape and the arresting officer broke his own ankle in his attempt to restrain the policyholder.

The policyholder subsequently plead guilty to four counts of assault and battery on a public employee, one count of resisting arrest, one count of disorderly conduct, and one count of possession of a Class B substance, cocaine. [Pages 1and 2.]

The arresting officer later filed a personal injury action in Superior Court against the policyholder alleging "negligent or reckless" conduct in failing "to obey a lawful order to submit to arrest" and attempting to flee which caused the subject injuries. The policyholder tendered his defense to his insurer which first filed a declaratory relief action to establish that it had no liability and then disclaimed any responsibility to provide indemnity or defense. Six days later in the personal injury action the Superior Court entered a default judgment against the policyholder.

The Court in the declaratory relief action granted summary judgment to the insurer on the grounds of the policy exclusion for bodily injury resulting from an act or omission by the insured that is both intentional and criminal. The Superior Court found that there was no doubt that the

policyholder engaged in intentional and criminal acts, in part because he had plead guilty to assault and battery and to resisting arrest. The Superior Court concluded that the policy exclusion for "intentional and criminal acts" barred coverage.

The Supreme Judicial Court set aside the Superior Court's order granting summary judgment to the insurer in the declaratory relief action, vacated the judgment and remanded the case for further proceedings. The Supreme Judicial Court ruled the "intentional and criminal acts exclusion" excluded liability for bodily injury. However, the Supreme Judicial Court went on to rule that, if the insurer had been in breach of its duty to defend when the default judgment entered against the policyholder, it would "be bound by the default judgment that established [the policyholder's] liability for negligence." [Page 3.]

The Supreme Judicial Court ruled the "insurer has the duty to defend an insured against a lawsuit based merely on the potential of liability under a policy, despite the fact the insurer could eventually be determined to have no duty to indemnify the insured." [Page 3.]

The Court went on to rule that where, as in the case at hand, the insurer disclaimed a duty to defend and the underlying case has gone to judgment, "the duty to defend remains entwined with the duty to indemnify because, where the insurer has committed a breach of duty to defend, the breach yields two consequences that may affect the duty to indemnify." The first consequence is that the breach of the duty to defend is a breach of the insurance contract, and the insured is entitled to contract damages caused by the breach. Second, an insurer's breach of a duty to defend may also trigger a duty to indemnify because an insurer in breach of its duty to defend "is bound by the result of [the underlying] action as to all matters therein

decided which are material to recovery by the insured in an action on the policy." [Page 4.]

The Court ruled that the allegations of negligence in the underlying action "would be conclusively established with respect to [the insurer's] duty to indemnify if [the insurer] were found to have committed a breach of its duty to defend" because the default judgment in the underlying action entered before the Superior Court granted the motion for summary judgment to the insurer in the declaratory relief action. [Page 5.]

Lastly, the Supreme Judicial Court ruled that where a criminal conviction follows a guilty plea, the plea may be offered as evidence of a defendant's guilt in a subsequent civil action "but is not given preclusive effect….Because the plea 'may be explained and reasons shown for entering it,' a plea is 'not necessarily conclusive as to the facts admitted.' "[Page 6.]

Metropolitan Property and Casualty Insurance Company v. Morrison, 460 Mass. 352, 951NE 2d 662(August 11, 2011.)

E. R. I. S. A.

***Despite degenerative nerve condition, carpal tunnel syndrome and fibromyalgia, the Insured was not disabled from her sedentary occupation for Sprint which involved 50% computer work and 50% on the phone.**

The Insured's four attending physicians submitted extensive medical records but the RN and the two independent medical examiners consulted by the insurer reviewed the records and

concluded that the Insured was not disabled from her own occupation. The Court ruled that the claim denial was not arbitrary and capricious despite the fact that the insurer was both the plan administrator and the claim administrator. The insurer's payment of a bonus to one rehabilitation consultant for the percentage of her claims where there was a return to work did not establish a conflict of interest. Further, the insurer took several steps to eliminate the impact of any potential conflict of interest including separate units to decide the initial claim and subsequently the appeal. [Page 9.]

The Policy defined disability as the inability to perform "One or more of the [e]ssential duties of [her] occupation." The insurer had considered the "constellation of [the Insured's] ailments along with their aggregate or cumulative effect." [Page 14.] The Court cited *Cusson v. Liberty Life Assur. Co. of Boston,* 592 F.3d 41 (1st Cir. 2009) rejecting the argument that the conclusions of non-examining independent medical examiners are not substantial evidence on which the insurer may rely for its claim denial.

Estrella v. Hartford Life and Accident Insurance Company, 271 F.R.D. 8, 2011 WL 4007679 (USDC MA, September 6, 2011).

If you would like a copy of any of the above decisions, please contact us.

Very truly yours,

/S/ Philip M. Howe

Philip M. Howe

PMH