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Extension 203

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Re: Recent Developments in Massachusetts Insurance Law, Third Quarter of 2012

The following will summarize the Massachusetts decisions which impact the insurance industry for the third quarter of 2012. If you have not already done so, please send us your email address and we will send you these newsletters via email.

ACCIDENTAL DEATH

***Death from cocaine and alcohol use could be accidental.**

The Insured died from cocaine and alcohol use. The accidental death policy did not have an exclusion for death due to drug or alcohol use. The Court referred to the controlling two First Circuit decisions *Wickman v. Nw. Nat. Ins. Co., 908 F 2d 1077, 1079 (1sr Cir. 1990)* and *Stamp v. Metropolitan Life Insurance, 531 FR 3d 84, 91 (1st Cir. 2008).* Court ruled that the critical determination lies in an objective analysis of what the insured reasonably should have expected when he decided to engage in the fatal activity. Such objective analysis does not depend on the statistical probability of death from that activity. Instead, the chief concern is whether a

reasonable person would perceive the likely outcome of the intentional conduct.

The Court went on to rule that it was plaintiff's burden to show that a reasonable person with the background and characteristics similar to the insured would not have viewed the injury as highly likely to occur as a result of the insured's intentional conduct. The Court went on to rule that not every drug and alcohol user intends to injure himself with such use.

McDonough v. Federal Insurance Company, 2012 WL 4060564 (USDC MA, September 14, 2012).

COMMENT

The *McDonough* decision includes a most interesting discussion of accidental death, drug and alcohol use. However, we note that it involves the partial granting of Plaintiff's Motion for Summary Judgment and the denial of the Defendant's Motion for Summary Judgment.

DISABILITY

***The Own Occupation Disability Policy was ambiguous as to the point in time when to determine the Insured's own occupation.**

The Insured declared in his application that he was a chiropractor. Later, as his thumb symptoms became worse, he trained and began practicing part-time as a nurse. The Court ruled that the Policy did not specify the point in time at which the Insured's occupation should be determined. A fair understanding of the policy is that the Insured contracted for coverage of the specific occupation of chiropractor, not nurse, his occupation at the time of disability.

The Court ruled that disability benefits must be paid from the date the Insured became disabled as a chiropractor, not the later date when he became disabled from being a nurse.

McLaughlin v. Berkshire Life Insurance Company, 82 Mass. App. Ct. 351, ___NE 2d ____ (August 23, 2012)

DUTY TO DEFEND

*** The landlord's outrageous, racist and vulgar actions towards the tenant did not raise a duty to defend under his commercial liability policy.**

The landlord made numerous threatening and harassing phone calls to the commercial tenant who was behind in her rent. He then went to her place of business, the subject premises, yelled at the tenant in front of two of her customers, demanded his rent and called her a racial slur.

She brought an action for negligent and intentional infliction of emotional distress and interference with business relations. She recovered a judgment and the commercial insurer declined the claim to defend or indemnify the landlord.

The Appeals Court ruled there is no duty to defend and no coverage under the commercial liability policy. The tenant's claims were for emotional distress and interference. The policy covered bodily injury arising out of the "wrongful eviction from, wrongful entry into,

or invasion of the right of private occupancy..." None of that had been alleged in the underlying action.

Freedman v. United States Liability Insurance Company, 82 Mass. App. Ct. 331, 972 NE 2d 1059 (August 8, 2012).

E.R.I.S.A.

***The three year contractual limitation of actions applied and barred the Insured's action for disability benefits under the Employee Benefit Plan.**

The insured employee's claim for disability benefits was denied on February 27, 2004. He filed his action for benefits on May 28, 2010. The Policy provided that all legal actions must be filed within three years of the date on which proof of disability must be filed under the Policy. The Policy required proof of claim within 180 days of the date of disability.

The Court ruled that there is no limitation of actions for an E.R.I.S.A. claim under 29 U.S.C. S. 1132 (a) (1) (B). As a result, the Court will enforce a contractual limitations of actions if it is reasonable. The Court ruled that the action had been filed long after the three years had expired.

Santaliz-Rioz v. Metropolitan Life Insurance Company, ___F 3d ___, 2012 WL 3734344 (1st. Cir. August 30, 2012).

EXCLUSIONS

***Defective exterior staining of the policyholder's house came within the gradual deterioration exclusion of the Policy.**

The deterioration of the stain over a period of more than a year before the coverage was claimed in 2009, and occurred over a period from seven to nineteen months after the stain was applied to the house in 2006. The Court ruled that the exclusion applied.

The Court wrote, "...to be sure, 'gradual' has no mathematically fixed range, the pace of the detaching stain was a long way from a lightning bolt or a falling tree..."

Gargano v. Vigilant Insurance Company, 2012 WL 3632442 (1st Cir. 2012)

***There was no coverage for violent abuse of the minor child by her adoptive mother and stepfather because of the exclusion for such acts which occurred while the child was under the care of the policyholder.**

The Policy excluded coverage for abuse which occurs to anyone in the policyholder's "care, custody or control." The minor child had been receiving bi-weekly outpatient therapeutic services for fourteen months. While the child was not in the custody of the policyholder, she was under their care.

Valley Forge Insurance Company v. Field, 670 F 3d 93 (1st Cir. 2012).

The Court enforced an anticoncurrent cause exclusion in a homeowner's policy where flood water, an excluded cause, and water backing up from a drain, not an excluded cause, combined to cause the damage.

The Massachusetts Supreme Judicial Court ruled, "When damage arises from multiple causes, an 'anticoncurrent cause' provision may operate to bar coverage. Anticoncurrent cause provisions, which disclaim coverage when damage is caused concurrently by an excluded peril and a covered peril, are valid and enforceable under Massachusetts law..." See *Boazova, 462 MA 346, 357.*

Surabian Realty Company v. NMG Insurance Company, 462 MA 715, 971 NE 2d 268 (2012).

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