LECOMTE, EMANUELSON and DOYLE

ATTORNEYS AT LAW

BATTERYMARCH PARK II

ONE PINE HILL DRIVE, SUITE 105

QUINCY, MASSACHUSETTS 02169

(617) 328-1900

FACSIMILE (617) 328-2030

155 SOUTH MAIN STREET
PROVIDENCE, RHODE ISLAND 02903
(401) 454-3111

PLEASE RESPOND TO
QUINCY OFFICE

Philip M. Howe
phowe@lecomtelaw.com

Extension 203

February 19, 2013

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

The following will summarize the Massachusetts decisions which impact the insurance industry for the fourth 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.

ATTORNEYS' FEES

***The insurer was liable only to reimburse the insured for reasonable attorney fees, not the higher fees incurred by the insured.**

The Court ruled that the burden was on the insured to prove that its attorneys' rates in the underlying action were reasonable and appropriate. The insured under the commercial general liability policy chose not to accept the attorney offered by the insurer to defend the underlying action. Instead the insured hired attorneys whose fees varied from $160 to $690 per hour. The insured's traditional counsel billed in the range or $160 to $260 per hour with one exception who billed $325 per hour.

The attorneys chosen by the insured billed a total of $7,428,670.46. The insurer reimbursed the insured $5,234,430.57. As the result of the Court's ruling, the insured had to absorb the $2,194,239.89 in fees which the insurer would not reimburse.

Vicor v. Vigilant, 2012 WL 4469084 (USDC MA, 2012).

CONDOMINIUMS

***There was no coverage where the tilt of the foundation slab was not caused by an abrupt collapse as required by the Policy.**

The Policy required that, in order to be covered, the collapse had to be abrupt and had to have prevented the occupancy of the structure. The subsidence of the structure took up to six months and the condominium unit at issue was occupied at all times.

Audubon Hill South Condominium Association v. Community Association Underwriters, 82 Mass. App. Ct. 461, 975 NE 2d 458 (2012).

DUTY TO DEFEND

***The anti-trust exclusion to the errors and omissions coverage extended to include an action charging RICO violations.**

The Policy excluded coverage for actions arising out of any actual or alleged violation of the Sherman Anti-Trust Act. The Second Amended Complaint in the underlying action alleged RICO violations which were based on fraud and interference with prospective economic advantage.
The Court ruled that Massachusetts law construes the term "arising out of"

as looking at the character of the behavior alleged. If it fits the terms of the exclusion, that exclusion governs, although the statute is denominated in different or broader terms as the exclusion in this case referring to the Sherman Anti-Trust Act.

Saint Consulting Group v. Endurance American Specialty Insurance Company, 699 F. 3d 544 (1st Cir. 2012).

E.R.I.S.A./EXCLUSION

***The Limited Disability Provision applies to limit LTD coverage for disability due, in part, to the excluded soft tissue disorders. Consequently, denial of the claim was reasonable.**

The LTD Policy limited coverage to twenty-four months of benefits for disability due to "neuromusculoskeletal and soft tissue disorders". The insured employee was disabled from a combination of ailments, some of which were within the neuro limitation and some of which were not. The Court ruled that it was not an abuse of discretion for the insurer to terminate the claim after twenty-four months as the insured was not disabled "but for the presence of his neuromusculoskeletal and soft tissue disorders."

Brien v. Metropolitan Life, 2012 WL 4370677 (USDC MA, 2012).

ERISA LTD CLAIM/RISK OF RECURRENCE

*** The risk of recurrence of a drug addiction was totally disabling under the own occupation coverage for an anesthesiologist. It was arbitrary and capricious for the plan administrator to pluck from thin air an exclusion for risk of recurrence.**

The plan administrator had paid benefits while the insured was in a treatment facility for her substance abuse but had terminated the claim when the insured was discharged. She claimed that she was still disabled as her return to her occupation as an anesthesiologist exposed her to the serious risk of relapsing into abusing fentanyl, an anesthetic which she had been abusing for her back pain. The plan administrator in the Court's words had "categorically" rejected this position arguing that the risk was a speculation and not a current disability.

The Court ruled that the "risk of relapse into substance dependence - like a risk of relapse into cardiac distress or a risk of relapse into orthopedic complications - can swell to so significant a level as to constitute a current disability." (p. 2.) The Court readily acknowledges that the case law on this issue is "mixed." The Court cited *Stanford v. Cont'l Cas. Co.,* 514 F. 3d 354, 360 (4th Cir. 2008) upholding the denial of a very similar claim involving addiction to fentanyl by an anesthesiologist. But, the Court also cited to *Kufner v. Jefferson Pilot Fin. Ins. Co.,* 595 F. Supp. 2d 785, 787-88 (W.D. Mich. 2009) where the Court overturned the insurer's termination of ltd benefits to an opioid and alcohol dependent anesthesiologist. (pp. 4-5.)

The Court further ruled that the language of the plan had no such categorical bar to coverage for risk of recurrence. This silence is telling in an ERISA case because the discretion of a plan administrator is "cabined by the text of the plan and the plain meaning of the words used….Plucking an exclusion for risk of relapse out of thin air would undermine the integrity of an ERISA plan." (p. 5.)

Colby v. Union Security Insurance Company, ___F. 3d ___, 2013 WL 4419 (1st Cir. January 17, 2013).

COMMENT

Colby is significant both on the risk of relapse and even more so on the "plucking" out of "thin air". The former issue is limited to anesthesiologists, other physicians and those whose occupations involve access to drugs. Arguably, it might also apply to someone in the bar and restaurant business with a drinking problem. The latter issue has greater significance in policy interpretation. Furthermore, the *Colby* Court cited to *D & H Therapy v. Boston Mut. Life Ins.,* 640 R. 3d 27, 34 and n.5 (1st Cir. 2011), its recent decision on the strict interpretation of the policy language as written and against the administrator's supplying any words not in the Policy. While *Colby* was decided in January 2013 we have included it with the Fourth Quarter 2012 decisions as it has just been issued and it is a significant development in the First Circuit in the areas of ERISA and disability/risk of recurrence.

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