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April 22, 2013

Re: Recent Developments in Massachusetts Insurance Law, First Quarter of 2013

The following will summarize the Massachusetts decisions which impact the insurance industry for the first quarter of 2013. If you have not already done so, please send us your email address and we will send you these newsletters via email.

BROKER LIABILITY

***The broker had no duty to notify the policyholder that the insurer would cancel the Policy.**

The Court ruled that M.G.L. c. 175, Section 93P only required the insurer, not the broker, to notify the policyholder that it would cancel a commercial fire insurance policy. Further, there was no duty of care and no negligence by the broker as the only fact established on this issue was that the broker knew that the individual policyholder had been ill.

Lastly, there was no contractual duty for the broker to give notice of the impending cancellation. The policy placed no such duty on the broker.

Fayette v. Jose S. Castelo Insurance Agency, 83 Mass. App. Ct. 1111 (February 6, 2013)

CONTAMINATION ALLOCATION

***The proper method of allocation of liability among many insurers on the risk over a period of time is a proportionate allocation.**

The First Circuit Court had certified the question to the Supreme Judicial Court which had ruled on the issue in *Boston Gas Co. v. Century Indemnity Co.,* 910 NE 2d 290, 312 (2009). The Court had ruled that the proper method for calculating an insurer's liability for contamination of the land over an extended period of time was first to try to determine what losses actually occurred during the period of coverage for each insurer.

If this is not possible, the Court ruled that there should be a proportioning of the exposure. The method of calculating that proportion is to take the total damages and multiply them by a fraction. The numerator of that fraction is the number of years the insurer was on the risk. The denominator of that fraction is the total number of years of coverage from all insurers. In the case at bar, the insurer was exposed to 14.9 % of the total damages.

Boston Gas Co. v. Century Indemnity Company, 708 F. 3d 254, 2013 WL 203578 (1st Cir., January 18, 2013)

DISABILITY

***There was not appropriate care by a physician as required the Policy.**

The disability insurance Policy required that the Insured received care by a physician which "is appropriate for the condition causing the disability." The Court ruled that the Insured failed to satisfy that requirement. He obtained care from a psychiatrist which focused on a change in his occupation not a return to his prior occupation. He had been a global sales manager for a manufacturer of electronic components. He suffered from incontinence and resulting depression following surgery to remove his prostate.

The Insured did not obtain treatment to resolve this condition and enable him to return to his occupation. The insurer's independent medical examiner psychiatrist testified that, with the appropriate treatment and motivation, the Insured could return to his prior occupation within six months. The Insured presented no opposing evidence and his psychiatrist did not testify at trial.

The Court ruled that care appropriate for the disabling condition is that care "where, to the extent medically and otherwise reasonable, it seeks to ameliorate the condition preventing the insured from returning to his or her prior occupation." [page 6.] Care expressly disavowing the insured's return to his or her prior occupation will not satisfy the appropriate care requirement. It was the insured's burden to prove that his claim was covered by the policy. He did not.

Metropolitan Life Insurance Company v. Cotter, 464 Mass. 623, ___NE 2d ___ (March 15, 2013).

*** There was issue preclusion in an action under a disability Policy where the plaintiff failed to timely move to amend his complaint to add a second cause of action.**

The Insured under a disability Policy filed a breach of contract action for denial of his claim. While that action was pending, the insurer became subject to the Regulatory Settlement Agreement ("RSA") requiring the insurer to reevaluate certain claims which had previously been denied. The Insured was aware of his potential cause of action under the RSA during the pendency of his action. But, he failed to timely move to amend his Complaint and did not have good cause to explain his fourteen day delay after the deadline for motions to amend. The Court in the initial action ruled against the Insured on the merits that he had failed to document adequately his claimed disability and his loss of income. [page 434.]

The Court ruled that, as a result, there was res judicata in the second action which the Insured filed alleging his claim that the insurer had violated the RSA. The Court ruled that ,"a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." [page 436.] The Court went on to rule that denial of the motion for leave to amend "constitutes res judicata on the merits of the claims which were the subject of the proposed amended pleading." [page 437.]

Korn v. Paul Revere Life Insurance Company, 83 Mass. App. Ct. 432, ___NE 2d ___ (March 13, 2013).

HOMEOWNERS

*** Injury from fire pit was not excluded from coverage as it did not arise out of the covered premises.**

The Policy excluded claims for injuries arising out of premises owned by the policyholder that are not an insured location. The injury occurred at a property which was not an insured location. The fire pit was not attached to any part of the property. It was moveable and kept in a shed. The injury occurred when the fire pit was ignited with gasoline.

The Court ruled that, as a result, the insurer had a duty to defend the claim against the policyholder as the injury did not arise out of the property at issue and, as a result, the exclusion did not apply.

Vermont Mutual Insurance Company v. Zamsky, ___F. Supp. 2d _____, 2012 WL 6896847 (USDC, MA, January 17, 2013).

ERISA - RETAINED ASSET ACCOUNTS

*** The insurer was not acting as a fiduciary when it established a Retained Asset Account for the proceeds of a group life insurance policy.**

The Court found that the policy at issue did not specify a particular method by which death benefits were to be paid, that the method of payment could be other than in a lump sum, and would be based on benefit options offered by the insurer. As a result, when the insurer set up the retained asset account, it complied with the terms of the policy. All fiduciary duties were

discharged. There was no longer a fiduciary relationship with the beneficiary, but rather a straightforward creditor-debtor relationship.

The Court cited to two key decisions in this area, *Mogel v. UNUM,* 547 F. 3d 23 (1st Cir. 2008) and *Faber v. Metropolitan Life,* 648 F. 3d 98 (2d Cir. 2011). The Court distinguished the First Circuit's decision in *Mogel* as the policy in that case called for payment in a lump sum.

Vander Luitgaren v. Sun Life, ___F. Supp. 2d ____, 2012 WL 5875526 (USDC MA, November 19, 2012).

Comment

As the U.S. District Court in *Vander Luitgaren* drew a fine distinction from the First Circuit's decision in *Mogel,* we will watch closely to see if the First Circuit deals with *Vander Luitgaren* on appeal.

UNFAIR CLAIMS PRACTICES

*** There was no unfair claims practice as there was no settlement offer until liability was reasonably clear.**

The Policy covered claims against the policyholder for bodily injury and medical payments. The plaintiff suffered an ankle fracture on ice in a parking lot next to the insured property. The Court ruled that the defendant property owner's liability was not reasonably clear when, ten months after the accident, the plaintiff sent a c. 93A demand letter. *Clegg v. Butler,* 424 Mass. 413, 676 NE 2d 1134 (Mass. 1997).

The Court wrote further that at that time there were legitimate questions as to both fault and damages. There was the possibility that the defendant could prove the snow and ice accumulation resulted from a natural

accumulation and the possibility that the plaintiff had contributed to his own injury through comparative negligence. But, see *Papadopoulos v. Target Corp,* 457 Mass. 368, 930 NE 2d 142 (Mass. 2010) which has since changed the Mass. Law on this issue. The Court also wrote that there were jury questions as to whether the plaintiff had been a trespasser and whether all of plaintiff's medical bills constituted his reasonable medical expenses. *Bobick v. U.S. Fidelity and Guarantee,* 439 Mass. 652, 790 NE 2d 653 (Mass. 2003).

The Court ruled that defendant's liability became reasonably clear only after plaintiff accepted defendant's offer of judgment two years later. At that point the damages were in the amount of $61,000. The insurer's offer two years earlier of $30,000 did not compel litigation in violation of M.G.L. c. 176D, Section 3(9) (g), the Unfair Claims Practices Act. Liability was not clear at that time and nor was the amount offered "outside the range of possible settlement values at that time" given the $61,000 which the plaintiff accepted two years later.

Bohn v. Vermont Mutual, ___F. Supp. 2d___, 2013 WL 275576 (USDC MA January 22, 2013).

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