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PLEASE RESPOND TO
QUINCY OFFICE

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

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

ASBESTOS

***The *Boston Gas* decision establishing the sharing of liability by pro rata time on the risk, controls allocating to the policyholder the share of the losses of the policyholder when the policyholder did not have coverage. See the prior Newsletter for the First Quarter of 2013 for a discussion on page 1-2 of *Boston Gas*.**

The Supreme Judicial Court on July 24, 2009 decided *Boston Gas v. Century Indemnity Company*, 454 Mass. 337 adopting a pro rata mechanism for determining damage allocation among multiple insurers and the insured where an environmental hazard gave rise to a lengthy period of property damage. The Court ruled that *Boston Gas*, an environmental exposure case, applied to asbestos claims in the within action.

New England Insulation Company v. Liberty Mutual Insurance Company, 83 Mass. App. Ct. 631, 988 NE 2d 450 (May 22, 2013).

AUTOMOBILE

***The insurer of a rental car is not liable under the policy where there has been negligent entrustment by the renter to another driver.**

The Policy provided that there was no coverage for "anyone using an [otherwise covered] auto without the consent of the owner." At the time of the accident, the driver, a member of the household of the renter, was not driving the rental car with the consent of the rental car company.

Mahoney v. American Automobile Insurance Company, 83 Mass. App. Ct. 677, ___NE 2d ___ (June 3, 2013).

***New York no-fault benefits are an offset against benefits payable by the insurer of the other driver who had issued a Massachusetts automobile policy.**

Two motorists were injured in Massachusetts while operating a vehicle registered in New York and insured under a New York policy under which they settled their claims. The Court ruled that, under M.G.L. c. 90, Section 34 M the Massachusetts insurer is entitled to an offset for the benefits received under the New York policy.

Commerce Insurance Company v. Alvarado, 83 Mass. App. Ct. 64, 988 NE 2d 10 (May 14, 2013).

BUILDING LOSS CAUSATION

*** There was no coverage for landslide damage to a building as the policyholder failed to show that a leaky pipe was the predominant cause of the damage.**

The policyholder has the burden of establishing that a water leak in the covered building lead to a covered event only if it "was the efficient proximate cause of the collapse [of the building]... only if the leak was the predominant cause of the collapse or set in motion the cause or causes of the collapse."

The soils expert found that 2% of the water had come from the leaky pipe. Heavy rain and inadequate subsurface drainage combined to cause the slope and the resulting retaining wall failures. There was no coverage.

Stor/Guard, Inc. v. Strathmore Insurance Company, ___F. 3d ___, 2013 WL 2364168.

DISABILITY

***VA benefits were not an offset against LTD benefits as they did not constitute "Other Income" under the Policy.**

The Policy defined the "Other Income" which could be offset against LTD benefits as "any amount of disability or retirement benefits under: a) the United States Social Security Act...; b) the Railroad Retirement Act; c) any other similar act or law provided in any jurisdiction."

The insured is disabled from a blood disease that he contracted from vaccinations during his service in the U.S. Air Force. As a result, he receives a service connected disability compensation under the Veterans' Benefit Act.

The Court distinguished the VA Benefits from Social Security and Railroad Retirement Benefits on the grounds that the primary purpose of the VA Benefits is to care for and support those who have served in the Armed Forces. VA Benefits are linked not to employment but to past service in the Armed Forces. Funding for SSA and Railroad disability benefits derives from a tax on both the employer and employee. VA Benefits are funded by Congress through the VA's budget.

Hannington v. Sun Life and Health Insurance Company, 711 F. 3d 226 (1st Cir. March 29, 2013).

DUTY TO DEFEND

***There was no duty to defend under a title insurance policy.**

The Court ruled that, in light of the limited purpose and scope of title as compared to general liability insurance, title insurers should not be obliged to defend against non-covered claims just because they may be asserted in litigation that also implicates title-related issues to a limited extent. Further, the Court ruled that, because title issues are discrete, they can be bifurcated fairly easily from related claims.

The lender had brought an action to clarify the title and the action ultimately settled. The insured later brought an action for her attorney fees. The Court ruled further that, because the issues covered by a title policy are relatively discrete, an attorney for a title insurance company, who typically

specializes in real property issues, feasibly can defend only the title-related issues. The Court concluded, "Thus, we decline to impose a complete defense obligation on title insurers."

ERISA

***The insurer was not liable for failing to provide a summary plan description.**

The Court ruled that the insurer was not liable under 29 U.S.C. Section 1132 (c) as it did not fall within the definition of an "administrator". The Plan did not specifically designate the insurer as the plan administrator under 29 U.S.C. Section 1002 (16) (a) (i). Further, it is not the plan sponsor as the Plan clearly identifies a third party as the sponsor. Also, the de facto plan administrator doctrine does not apply as the insurer is "clearly distinct from the plan administrator." Plaintiff did not offer any evidence that the insurer exercised actual control over the administrator's functions.

Lastly, the Court ruled that the Plaintiff had not established that the insurer was a fiduciary and that breach of fiduciary duty has no relevance to a claim for penalties under Section 1132 ©.

Tetreault v. Reliance Standard Life Insurance Company, 2013 WL 823314 (March 5, 2013).

FAMILY MEMBER EXCLUSION

*** The Family member exclusion applies to prevent a grandfather from recovering under a policy for the accidental death of his grandson.**

The thirteen year old grandson died while on his grandparents' boat. A Family Member exclusion in the Policy absolves the insurer of any payment obligations where the decedent, whose executor and father has brought the action, and the insureds, the decedent's grandparents and defendants in the underlying action, are related. The Court ruled that the Massachusetts wrongful death statute, M.G.L. c. 229, Section 2, provides that damages for wrongful death may be recovered by the executor for the deceased. The executor brings the action on behalf of the estate and other claimants, not on his own behalf. As a result, any claim the decedent child's father brings as executor of his son's estate falls under this exclusion.

The Northern Assurance Company v. Wells, 2013 WL 2250985 (USDC MA, May 21, 2013).

INSOLVENCY FUND

***The Massachusetts Insurers Insolvency Fund was liable for reasonable attorney's fees under M.G.L. 93A, Section 9 (4).**

The Insolvency Fund is subject to M.G.L. c. 93A. The Court ruled that a plaintiff, who prevails in a consumer action against the Insolvency Fund under M.G.L. c. 93A, Section 9 (1), may recover attorneys' fees. The Court ruled that the Fund is I "the business of insurance" for the purposes of c. 176D and c. 93A. The Court cited to both *Wheatley v. Massachusetts Insurers' Insolvency Fun*, 456 Mass. 594 (2010) ("Wheatley I") and *Hopkins v. Liberty Mutual Insurance Company*, 434 Mass. 536 (2001).

Wheatley v. Massachusetts Insurers' Insolvency Fund, 465 Mass. 297, 988 N.E. 2d 845 (May 31, 2013).

LIFE

*** The life insurer was not liable for making the life insurance proceeds check out to the wrong trust entity.**

The embezzler admitted that he was throughout trying to steal the insurance proceeds. The Court ruled that the embezzlers would have stolen the check even if it had been made out correctly as they had control over both trusts that could have potentially received the insurance proceeds. There were two embezzlers, one was the attorney for each trust and the other was the trustee for each trust. As a result, the insurer's making the check out to the fraudulent trust, while an error, was not the proximate cause of the theft by the embezzlers.

Jakobiec v. Merrill Lynch Life Insurance, 711 F. 3d 217, 2013 WL 1234077.

PUNITIVES

*** Twenty Years of Intentional Building Code Violations By A Restaurant Leading To A Fatal Fall By One of Its Patrons Supported an Award of Treble Damages Under MGL c. 93A.**

The stairs were built and rebuilt without a permit. They had no light, no door at the top, were hidden by plastic strips and were in a part of the restaurant known to be frequented by patrons. There was an inadequate handrail and no landing at the top of the stairs. Previously an employee and a vendor had fallen and had called this to the attention of the owners.

The Court found that the Building Code violations had occurred "in trade or commerce" as the decedent was a patron of the defendant's restaurant. The Court ruled that the conduct was unfair and consciously violated the Building Code for more than twenty years creating hazardous conditions in a place of public assembly which served alcohol to its patrons. [Page 175.]

The Court ruled that very few Building Code violations will give rise to violations of c. 93A. either because they would lack the unfairness or deceptiveness present in this case or because they do not arise in trade or commerce.

Klaimont v. Gainsboro Restaurant, Inc., 465 Mass. 165, 987 N.E. 2d 1247 (May 16, 2013).

COMMENT

There is no coverage issue in *Klaimont*. However, it is a significant discussion by the Supreme Judicial Court on longstanding violations of a separate statute or code as forming the basis for a finding of unfair trade practice and the awarding of treble damages and attorney fees. It bears careful review.

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