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October 23, 2013

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

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

DUTY TO DEFEND/COMPREHENSIVE GENERAL LIABILITY/EXCLUSIONS

*** The worker employee was furnished to meet a short-term workload condition, even if her workload term was not for a "finite duration." As such she was a "temporary worker" and there was coverage under the comprehensive general liability policy.**

The worker employee had been assigned to the employer by an employment agency and was injured while working. She made a claim and received workers' compensation benefits under the employment agency's policy. She also brought an action against the employer for her injuries. The employer sought indemnification under its comprehensive general liability

policy. That insurer brought the within action seeking a declaratory judgment that it owed no duty to defend the employee's action for injuries suffered.

The policy excluded coverage for bodily injury to an employee, who is defined in the policy to include a "leased worker" but does not include a "temporary worker". The latter is defined to be a "person who is furnished to you to substitute for a 'permanent employee' on leave or to meet seasonal or short-term workload conditions."

Citing *Boazova v. Safety Ins. Co.,* 462 Mass. 346, 351 (2012), the Court ruled that the burden is on the insured to prove coverage where the insured seeks to establish coverage through an exception to an exclusion. As a result, the employer insured bore the burden of establishing that the injured worker was a temporary worker furnished to meet short-term workload conditions. The Court went on to rule that a short-term workload condition need not be of finite duration. The employer had projected that the worker would need five to six weeks to complete the order which a customer had placed with the employer. The Court found that the employer/insured had met its burden of establishing that the worker was a "temporary worker", the exclusion did not apply and there was coverage under the CGL policy.

Central Mutual Insurance Company v. True Plastics, Inc. 84 Mass. App. Ct. 17 (July 10, 2013)

DUTY TO DEFEND/TITLE INSURANCE

*** There was no duty to defend under a title insurance policy where the issue in the underlying action was not an attack on the validity of the mortgage lien, but was an attack on the underlying mortgage loan as the result of "predatory lending".**

The Court ruled that the title insurer does not have a duty to defend claims outside the scope of the title insurance policy. Title insurance is an agreement to indemnify the policyholder against loss through defects in title. The Court ruled further that, when the allegations in the Complaint in the underlying action "lie expressly outside the policy coverage and its purpose, the insurer is relieved of the duty to investigate or defend the claimant."

The Complaint alleged that the underlying debt should be voided because the plaintiff had been the victim of a predatory lending scheme by the defendants. The Court ruled that this was "an attack on the underlying debt." The Court went on to note that a mortgage lien and a mortgage debt were two entirely different legal concepts. A title insurance policy which guaranteed the validity of the mortgage "should not be construed as guaranteeing that the insurer has made a careful investigation of the origin of the mortgage debt and guarantees its payment or validity."

Deutsche Bank National Association v. First American Title Insurance Company, 465 Mass. 741 (July 11, 2013).

ERISA/CLAIMS GUIDLEINES

***The Court permitted discovery of the claims guidelines in an ERISA case.**

Citing *Glista v.Unum Life Insurance Co. of America*, 378 F. 3d 113, 122-23 (1st Circuit 2004) the Court allowed the Plaintiff's request for "internal guidelines, policies, procedures and training materials, but only to the extent that they related to the treatment of [Plaintiff's] claims, were in effect at the time of the benefits determinations, and were available to claims adjusters."

However, the Court denied the Plaintiff's request for information relating to the insurer's relationships with its paid consultants and claims reviewers to explore the nature, magnitude and effect of the insurer's alleged conflict of interest. The insurer was both the plan administrator and made decisions on claims. The Court ruled that the Plaintiff had not made out any "colorable claim of bias" under *Denmark v. Liberty Life Assur.,* 566 F. 3d 1, 10 (USDC MA 2010). The Plaintiff had failed to point to any evidence to indicate any colorable theory that compensation or performance of the claims handler was linked to the number of claims denials.

Semedo v. Boston Building Service Employees Trust, 2013 WL 3805130 (USDC MA July 129, 2013).

E.R.I.S.A./RETAINED ASSET ACCOUNTS

THE COURT RECONSIDERED ITS PRIOR DECISION AND RULED THAT PAYMENT OF LIFE INSURANCE PROCEEDS UNDER A RETAINED ACCOUNT WAS NOT A BREACH OF FIDUCIARY DUTY UNDER E.R.I.S.A.

The Court was persuaded by the reasoning in the recent Third Circuit decision in *Edmonson v. Lincoln National Life,* 2013 US App. LEXIS 16300, 2013 WL 4007553 (3rd. Cir. August 7, 2013), decided since the previous decision in the within action, *Van Luitgaren v. Sun Life Assurance of Canada,* 2012 WL 5875526 (U.S.D.C. MA, November 19, 2012). The Court ruled that the Policy at issue permitted payment of the life insurance proceeds either in a lump sum or in a retained asset account. As a result, the insurer had the discretion to pay the proceeds by setting up a retained asset account and issuing a check book to the beneficiary. The Court distinguished these facts from those in *Mogel v. UNUM Life Insurance,* 547 F. 3d 23 (1st Cir. 2008) which required payment of the life proceeds only in a lump sum.

The Court ruled that a person acts as a fiduciary under E.R.I.S.A. only to the extent that he performs a defined fiduciary function. The insurer in this case did so by selecting to pay benefits through a retained asset account and in determining the interest rates to be credited to the retained asset accounts.

The Court found persuasive the reasoning of the *Edmonson* decision which had ruled that the insurer had no duty with respect to managing or administering the plan beyond its payment of benefits to the beneficiary. The Court went on to rule that the insurer had acted as a fiduciary but that it did

not violate its fiduciary duty when it paid the benefits in the form of a retained asset account and sent a check book to the beneficiary.

The Court also relied on *Faber v. Metropolitan Life,* 648 F. 3d 98 (2d Cir. 2011) which held that the insurer had discharged its fiduciary obligations as a claims administrator and ceased to be an E.R.I.S.A. administrator when it created the beneficiaries' retained asset accounts, credited them with the amount of benefits due, and issued checkbooks enabling the beneficiaries to withdraw their proceeds at any time. The Court in *Faber* ruled that the insurer was not acting as a fiduciary when it invested the funds which supported the beneficiaries' retained asset accounts.

The Court further ruled that the insurer did not breach any fiduciary duty when it paid benefits by using a retained asset account and provided interest on that account in an amount that allowed "the insurer to make more than a de minimis profit."

Vander Luitagren v. Sun Life Assurance Company of Canada, 2013 WL 4059816, 56 Employee Benefits Cases 1347 (U.S.D.C. MA August 9, 2013.)

MUTUAL MISTAKE

***There was no mutual mistake, and, as a result, no reformation of the policy where the agent and the policyholder never communicated their parallel misunderstanding on the policy limits.**

The policyholder and the agent for the insurer both mistakenly believed that dog bite claims were covered under the homeowner's policy.

But, the Policy as delivered contained an "animal liability" endorsement excluding such coverage.

The policyholder argued that the Policy should be reformed to strike that endorsement. The Court refused to make such a reformation ruling that the policyholder and the agent never communicated their equally mistaken beliefs to each other. As a result there was no mutual mistake warranting reformation of the Policy. The reason for this was that there had not been some prior agreement between the parties as to coverage for animal bites different than that contained in the Policy. [Page 2.]

The Court went on to rule that the mutual mistake doctrine exists to effectuate the agreement intended by the parties where the contract language fails to capture that agreement. Central to this theme is the fundamental underpinning that the parties had reached an agreement on a point which they intended to enshrine in the written contract but which, for some reason, was mistakenly omitted from the written contract. The Court cited to *Sancta Maria Hospital v. Cambridge,* 369 Mass. 586, 341 NE 2d 674 (1976) and 2 G Couch Insurance, Section 27:3.

Caron v. Horace Mann Insurance Company, 466 Mass. 218 (August 9, 2013).

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

Very truly yours,

Philip M. Howe

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