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PLEASE RESPOND TO
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Extension 203

July 16, 2008

Re: Recent Developments in Massachusetts Insurance Law, Second Quarter of 2008

The following will summarize the Massachusetts decisions which impact the insurance industry for the second quarter of 2008. If you would like to receive the e newsletters via email, please send your email address to **phowe@lecomtelaw.com**.

AUTOMOBILE

*** An insurance company could terminate personal injury protection benefits for chiropractic treatment based on an independent medical exam by an orthopedic surgeon.**

The Court ruled that the "same profession" requirement of M.G.L. c. 90, s. 34M did not apply as the termination was based on independent medical exam and not on just a medical review of the chiropractor's bill or of the medical services underlying the bill.

Boone v. Commerce Insurnace Company, 451 Mass. 192; 884 NE 2d 483; 2008 Mass. LEXIS 224 (2008).

CLAIM PRECLUSION

*** The Plaintiff is precluded from claiming in a second action claims he could have amended and added to his first action.**

The Plaintiff settled the first action before filing the second action. He claimed in the second action that the defendant had defrauded him into settling the first action based on fraudulently stated property values. But, the plaintiff knew of the fraud before settling the first action.

The Court ruled that the Plaintiff should have amended his complaint in the first action to add counts for fraud. The Court ruled that the entry of a valid and final judgment extinguishes all rights of a plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the original action arose.

Massaro et al. v. Walsh et al., 71 Mass. App. Ct. 562; 884 NE 2d 986; 2008 Mass. App. LEXIS 408 (2008).

COMMENT

The above Massaro decision does not include an insurance issue. But, it is a most significant procedural principle to bear in mind through any insurance litigation.

CLASS ACTION

*** The facts did not support a certification of the class for the purposes of a class action because the non-Massachusetts plaintiffs had no contact with Massachusetts other than their purchase of an insurance policy from a Massachusetts company.**

In this case the defendant had raised a statute of limitations defense arguing the plaintiffs' situations varied in terms of when they knew or should have known of their claims for unfair insurance practices in the sale of disappearing premium policies. As a result, individualized inquiry would be required to determine when the statute had begun to run for each class member.

Moelis et al. v. Berkshire Life Insurance Company, 451 Mass. 483; 887 NE 2d 214; 2008 Mass. LEXIS 253 (2008).

CONSUMER PROTECTION CHAPTER 93A

*** Two month delay in making a $2 million settlement offer after liability had become clear was reasonable.**

The Court ruled that the defendant primary insurer's above delay of over two months did not constitute a failure to make a "prompt" settlement offer. The Court wrote, "It is reasonable for an insurance company to require a tender as large as $2 million to be authorized at a high level in the company and it is equally reasonable to require that such a request be accompanied by a detailed written justification such as the BI Claim Report. It is reasonable to expect that such a written justification will require a significant amount of time to prepare and for the authorizing officer to consider…"

The Court went on to rule, however, that the excess insurer's delay of three plus months before making its offer violated the obligation to make a prompt settlement offer. The Court went on to rule that the excess insurer also made an unreasonable settlement offer after trial when it offered only 60% of the amount of the judgment in the underlying action. The Court ruled that such an offer, given "the meager chance of prevailing on appeal" and that the offer was unreasonable, a violation of c. 93A, the Consumer Protection Law, and 176D, the Unfair Claims Practices Act, and was "insulting".

Rhodes et al. v. AIG Domestic Claims, Lawyers Weekly No. 12- 167-08, 65 pages, (Suffolk Superior Court, June 3, 2008).

DISABILITY

*** Disability benefits terminated at age 65.**

The Policy provided that total disability benefits would not be made beyond the Policy anniversary that falls on or most nearly following the Insured's sixty-fifth birthday. The Insured had chosen on the Policy application to receive benefits for sixty months after becoming disabled, rather than until age sixty-five. But the Court interpreted the Policy to mean that the Insured would receive disability benefits for sixty months but no later than when he turned sixty-five.

Spence v. Berkshire Life Insurance Company, 2008 U.S. District LEXIS 46624.

ERISA

*** One of the factors to consider in reviewing a decision to deny disability benefits is whether there was a conflict of interest for the plan administrator who both determines and pays claims.**

The U.S. Supreme Court ruled that ERISA imposes higher-than-marketplace standards on insurers, requiring a plan administrator to discharge its duties in respect to discretionary claims solely in the interests of the plan participants and the beneficiaries.

The Court wrote," The significance of the conflict of interest factor will depend upon the circumstances of the particular case. *Firestone* [489 U.S. 101] 'weighed as a factor language', 489 U.S. at 115, 109 S. Ct. 948, 103 L. Ed. 2d 80, does not imply a change in the *standard* of review, say, from deferential to *de novo.*"

Metropolitan Life Insurance Company et al. v. Wanda Glenn, 128 S. Ct. 2343; 2008 U.S. LEXIS 5030; 76 U.S.L.W. 4495 (2008).

HEALTH

*** A health insurer could defer payment of accident related medical costs above $2,000.00 since the policyholder had purchased optional medical payment, or MedPay, as part of his automobile policy.**

The Court ruled that M.G.L., Chapter 90, Section 34A prohibits the health insurer from denying coverage because of the existence of personal injury protection, or PIP, benefits. The Court ruled that Section 34A contains no prohibition with regard to MedPay benefits. The Court went on to rule that, when a health insurer denies coverage because of a clause in its contract allowing it to defer to MedPay, the automobile insurer must pay those expenses under MedPay, not under PIP.

Metropolitan Property and Casualty Insurance Co. v. Blue Cross and Blue Shield of Massachusetts, 451 Mass. 389; 885 NE 2d 825; 2008 Mass. LEXIS 244 (2008).

PUNITIVE DAMAGES

*** The U.S. Supreme Court in the Exxon Valdez decision created a punitive damages ratio of one to one with the amount of compensatory damages.**

The Court reduced to approximately $5 hundred million from $2.5 billion the punitive damages award against Exxon for the 1989 Exxon Valdez oil spill. The Court wrote, "Regardless of the alternative rationales over the years, the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct." P. 10. [All pages references are to the print-out of the decision found at 2008 LEXIS 5263.] The Court engaged in a lengthy analysis of punitive damages, particularly in the context of maritime law, the focus of this decision. The Court wrote, "Today's enquiry differs from due process review [of prior decisions like State Farm v. Campbell, 538 U.S. 408.] because the case arises under federal maritime jurisdiction, and we are reviewing a jury award for conformity with maritime law, rather than the outer limit allowed by due process…" P. 14. The Court wrote, "Indeed, the compensatory remedy sought in this case is itself entirely a judicial creation. The common law traditionally did not compensate purely economic harms, unaccompanied by injury to person or property." P. 17.

The Court addressed what it saw as the real problem. "The real problem, it seems, is the stark unpredictability of punitive awards." P. 13. The Court wrote, " Thus, a penalty should be reasonably predictable in its severity, so that even Justice Holmes' 'bad man' can look ahead with some

ability to know what the stakes are in choosing one course of action over another." P. 14.

The Court reasoned, "The more promising alternative is to leave the effects of inflation to the jury or judge who assess the value of actual loss, by pegging punitive to compensatory damages using a ratio or maximum to multiply." P. 16. The Court characterized Exxon's conduct as "worse than negligent but less than malicious". P. 17.

The Court concluded, "Accordingly, given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio, which is above the median award [based on the Court's research] is a fair upper limit in such maritime cases." P. 19.

Exxon Shipping Company et al. v. Grant Baker et al., 2008 U.S. LEXIS 5263; 76 U.S.L.W. 4603; 66 ERC (BNA) 1545 (U.S. Sup. Ct., 2008).

Comment

Exxon is a most significant decision, both in what it holds and in what it does not. We recommend a thorough reading of the majority opinion and the four ancillary opinions, some of which concur and some dissent. The decision provides the Court's view of the history of punitive damages and a review of the recent decisions such as State Farm, which it cites with respect in reference to the "due process" discussion. P. 19. But, given the Court's focus on maritime law as the context for this decision, the Exxon decision applies to maritime law. However, it gives valuable insight into the Court's thinking on the entire issue of punitive damages.

Please contact us if you would like a copy of any of the above decisions.

Very truly yours,

Philip M. Howe

PMH