

LECOMTE, EMANUELSON and DOYLE

ATTORNEYS AT LAW

BATTERYMARCH PARK II

ONE PINE HILL DRIVE, SUITE 101

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

October 14, 2008

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

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

AGENT LIABILITY

*** The agent has no general duty to ensure that coverage is adequate. But, such a duty arises only under special circumstances of assertion, representation and reliance.**

The policyholders, who owned the boat at issue in the case, never asked the agents if the coverage was sufficient, never asked that they be told if the coverage became insufficient and the agents made no such representations to the policyholders. While one of the agents testified that the policyholders relied on him "generally", the Court ruled that "special circumstances exist only where reliance [by the policyholder] is based on an assertion or representation" by the agent.

AGA Fishing Group, Limited v. Brown & Brown, Inc., 533 F. 3d 20, 2008 U.S. App. LEXIS 14699 (1st Cir. 2008).

ERISA

***Plaintiffs had standing to file suit against their former employer as they had been plan participants.**

Plaintiffs had accepted lump sum distributions of the entire balance of their employer's defined contribution plan. They brought an action against their employer for breach of its fiduciary duty which diminished the value of the plan. The Court ruled that the former employees had standing to bring the action. The Employment Retirement Income Security Act ("ERISA") does not authorize actions for extra-contractual damages, damages separate from the benefits under the plan document, such as emotional distress for the plan's failure to honor its obligations.

However, this action seeks not extra-contractual damages, but rather claims breach of fiduciary duties by the plan. These are expressly contemplated by ERISA, Section 409, which requires fiduciaries who breach their duties to "make good" on such losses.

Evans et al. v. Akers et al. 534 F. 3d 65, 2008 U.S. App. LEXIS 15300 (1st Cir. 2008)

*** Plaintiff's firing was not in retaliation for his claim for short-term disability benefits.**

Specific intent is required in order to establish that the employer's discrimination complained of by the employee was retaliatory. Unless such specific intent is required, "...That would destroy ERISA's carefully calibrated balance of rights, remedies and responsibilities in the workplace." Here, the plaintiff employee accepted work while simultaneously drawing disability benefits from the employer's disability benefit plan. The Court ruled that considering all of the evidence the plaintiff did not make out a genuine issue of material fact as to discriminatory intent.

Kouvchinov v. Parametric Technology Corp., 537 F. 3d 62, 2008 U.S. App. LEXIS 16954 (1st Cir. 2008).

*** The insured died when his car hit a tree and his blood alcohol content was three times the legal limit. The death was not an accident.**

The Court used a three part test as set forth in *Wickman v. Northwestern National Ins. Co.*, 908 F. 2d 1077 (1st Cir. 1980) for determining what constitutes an accidental death within the meaning of an ERISA-regulated Accidental Death Plan. First, the fact-finder should consider the insured's subjective expectations when he enrolled in the coverage. If the insured did not expect an injury similar to the one suffered, the fact-finder then should ask if the insured's expectations were objectively reasonable. Finally, if the fact-finder cannot determine the insured's subjective expectation, the fact-finder should then ask, "whether a reasonable person, with background and characteristics similar to the insured, would have viewed the injury as highly likely to occur as a result of the insured's intentional conduct."

Applying *Wickman*, the Court concluded that it was not arbitrary and capricious for the insurer to conclude that a reasonable person would view

death or serious injury as a highly likely outcome of driving while so drunk that that one may need help to stand or walk and is likely to black out.

Stamp v. Metropolitan Life Insurance Company, 531 F. 3d 84, 2008 U.S. App. LEXIS 13770, 2008 WL 2571408 (1st Cir. 2008).

ESTOPPEL

*** Estoppel is appropriate where there has been a representation intended to induce reliance, reliance on that representation and resulting detriment.**

The plaintiff added his name to an automobile policy based on the representation of the agent. He was later struck by an uninsured motorist and the insurer denied the claim for underinsured motorist coverage. The Court ruled that, based on the above principles and evidence of representations by the agent, the plaintiff had a sufficient case to go to the jury on the issue of coverage based on estoppel.

Kanamaru v. Holyoke Mutual Insurance Company, 72 Mass. App. Ct. 396, 892 N.E. 2d 759, 2008 Mass. App. LEXIS 894 (2008).

PROPERTY

*** Policyholder's refusal to cooperate relieved the insurer of any obligation.**

The policyholder claimed a break-in at his business. The insurer requested an examination under oath. The insured failed without explanation to appear at the first scheduled examination and was nonresponsive at two rescheduled examinations. This constituted a "material breach of a condition

precedent to the insurance contract and discharges the insurer's obligations thereunder. The insurer need not show prejudice in such circumstances..."

Hanover Insurance Company v. Cape Cod Custom Home Theatre, 72 Mass. App. 331, 2008 Mass. App. Ct. 84, Lawyers Weekly No. 11-131-08, 11 pages (2008).

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

Very truly yours,

Philip M. Howe

PMH