# 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


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

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

## AUTOMOBILE

- **The covered "use" of a vehicle includes the loading and unloading of commercial fuel.**

The commercial automobile policy covered liability for injuries suffered when the driver of a fuel truck fell while loading fuel at a commercial oil distribution center. The general liability carrier was not liable as its policy excluded liability for injuries which "arise out of" any maintenance of or use of a vehicle.

**American Home Insurance Company v. First Specialty Insurance Company, 74 Mass. App. Ct. 1, 894 N.E. 2d 1167, 2008 Mass. App. LEXIS 1057 (2008).**

## CONSUMER PROTECTION

- **There was no need for the insurer's settlement offer to be in writing in order to satisfy the reasonable settlement offer requirements of c. 176D and c. 93A.**

The commercial general liability policy included an endorsement limiting liability of the employer for sexual abuse by its employee to $100,000 per occurrence. The First Circuit affirmed a judgment in favor of the insurer under the Consumer Protection Statute, c. 93A, ruling that the insurer "was not required to present evidence of a written settlement offer [of the $100,000] to comply with Mass. General Laws ch. 176D, [Section] 3(9)(f), the Unfair Practices in Insurance Act."

**National Union Fire Insurance Co. v. West Lake Academy, 548 F 3d 8, 2008 U.S. App. LEXIS 23306 (1st Cir. 2008).**

## DRAM SHOP LIABILITY

- **It was foreseeable to the liquor store that sale of alcohol to one minor would lead to his sharing it with another minor who would drive drunk and cause a death.**

The Court ruled, "It is not outside the scope of foreseeability that a minor purchaser would share such a quantity of beer with other minors and that one of these minors would drive while intoxicated….causing a disastrous collision."

**Mary Zinck v. Gateway Country Store, Inc., 72 Mass. App. Ct. 571, 893 N.E. 2d 364, 2008 Mass. App. LEXIS 930 (2008).**

**Comment**

While the Zinck decision does not include a coverage issue, it bears careful reading for its discussion of negligence, causation and foreseeability particularly with respect to the sale of liquor to minors.

## ERISA – DISABILITY

- **There is not total disability if there are positions available to the insured requiring the same duties but at a lower rate of pay.**

The duties of the employee of the Boston Globe included sitting, using a computer, using the telephone and typing. The Court made a de novo review of the record and concluded that the employee was able to perform the primary duties of the job she had held at the Globe, although the jobs available were at a lower rate of pay. The loss of vision in one eye and slight impairment of vision in the other eye did not prevent the employee from performing at positions, which were available at other employers.

**Dickerson v. Prudential Life Insurance Company, 574 F. Supp. 2d 239, 2008 U.S. Dist. LEXIS 67066 (U.S.D.C. MA 2008).**

## ERISA - LIMITATION OF ACTIONS

- **The two year contractual limitation of actions will bar an action filed more than two years after the claim denial.**

The Massachusetts State Agency upheld the Blue Cross denial of a claim for residential care of a minor. The Blue Cross contract that suit be brought within two years of the denial of benefits. Since federal law governs ERISA claims and this is such a claim, the Court wrote that "conceivably a federal court could for good cause refuse to recognize such a provision, but there is no obvious reason to do so here. Insurance benefits are a creature of contract, and there is nothing facially unreasonable, much less unconscionable, about this contractual limitation."

**Island View Residential Treatment Center v. Blue Cross Blue Shield of Massachusetts, 548 F.3d 24, 2008 U.S. App. LEXIS 23703 (1st Cir. 2008).**

## PROFESSIONAL LIABILITY

- **The intellectual property exclusion to a professional liability policy will be broadly interpreted to included the acts of a temporary employee paid in cash.**

The policyholder hired the nephew of an employee as a temporary employee who was paid in cash to help the policyholder's records management company meet deadlines. The nephew stole confidential trade secrets from the client of the management company. When the victim of the theft brought its action against the company and the company tendered its defense to its liability insurer, the insurer declined. The policy excluded "any

claim arising out of any misappropriation of trade secret". The Court ruled that the insurer properly relied on that exclusion even though the insurer bore the burden of establishing that the exclusion applied.

**Finn v. National Union Fire Insurance Company of Pittsburgh, 452 Mass. 690, 896 N.E.2d 1272, 2008 Mass. LEXIS 794 (2008).**

- **The claims for coverage under a "claims made" professional liability policies were made outside the period during which the policies were in force. Consequently, they were not covered.**

The Court ruled that "courts applying Massachusetts law have recognized the validity of 'claims made and reported' insurance policies and have held that failure to report the claim within the term of the policy is sufficient to entitle the insurer to deny coverage." The Court went on to note that it does not matter that the "insured did not receive the actual text of [the] policy" because an insured is charged with his agent's knowledge where the agent had the actual policy.

**Gargano and Gargano v. Liberty International Underwriters Inc. et al., 2008 U.S. Dist. LEXIS 68403**

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

Very truly yours,

Philip M. Howe

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