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PLEASE RESPOND TO
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Extension 203

May 1, 2009

Re: Recent Developments in Massachusetts Insurance Law, First Quarter of 2009

Dear :

The following will summarize the Massachusetts decisions which impact the insurance industry for the first quarter of 2009. If you would like to receive these newsletters via email, please send your email address to **phowe@lecomtelaw.com**.

DISABILITY

*** The insurer acted arbitrarily and capriciously when it excluded the risk of a drug addiction relapse from its consideration of whether the Insured had a disabling condition.**

The Insured, an anesthesiologist with severe back pain, became addicted to fentanyl, a powerful opioid which she administered to her patients. The Insured stopped practicing medicine, lost her medical license and enrolled in an inpatient substance abuse program. The Insured claimed and received disability benefits while she was an inpatient. The insurer terminated the benefits upon her discharge.

The insurer, without explanation, categorically excluded the risk of relapse into drug abuse as an impairment that could ever render an individual disabled. The Court wrote, "It is clear that, from both logic and experience, some substance abusers will in fact have such strong attractions to their drugs of choice that they will be unable to return to their occupations without seriously risking their own and others' health and well-being." This was particularly true in this case as the Insured would be required as a physician to come in contact with her drug of choice. The Court found that under ERISA this was arbitrary and capricious as the insurer's decision to terminate benefits was not "reasoned and supported by substantial evidence."

The Court found that the Insured's evidence included expert opinion that her return to work as a "physician posed a dangerously high risk of her relapsing into active abuse of Fentanyl or other opioids." The Court noted that the insurer chose not to rebut this evidence.

The Court found that the insurer had admitted that the risk of relapse of heart disease would be covered. So, "fabricating an exception out of whole cloth [for the risk of relapse of drug addiction] that contravenes existing terms and interpretations of the Plan is the very definition of arbitrary and capricious."

The Court acknowledged that there is a split in authority on the issue of whether risk of relapse constitutes a disabling condition citing to the Fourth Circuit's decision in *Stanford Continental casualty Co.*, 514 F 3d 354 (4th Cir. 2008).

The Court awarded attorneys' fees under ERISA, citing the five factor test under *Grey v. New England Tel. and Tel.*, 792 F 2d 251, 257-258 (1st Cir. 1986).

Colby v. Assurant Employee Benefits, 2009 U.S. Dist. LEXIS 24419 (U.S. D. C. MA, February 23, 2009).

DUTY TO DEFEND

*** Even though the insurer prevailed in the declaratory relief action, there would be no award of attorneys' fees.**

"It is well settled that an insured is entitled to recover reasonable attorney's fees and expenses incurred in successfully establishing the insurer's duty to defend under the terms of the policy. See *Preferred Mut. Ins. Co. v. Gamache,* 426 Mass. 93, 98 (1997). But, the Court would not extend the above rule to cases where it was the insurer, not the Insured, which had brought the action to establish the duty of another insurer to provide coverage and to defend the Insured in the underlying action.

John T. Callahan & Sons, Inc. v. Worcester Ins. Co., 453 Mass. 447, 902 NE2d 923, 2009 Mass. LEXIS 45.

HEALTH

***Inpatient treatment for substance abuse was not medically necessary.**

The three separate medical opinions supporting Blue Cross' decision substantially justified its denial of benefits. The single medical opinion which supported the inpatient treatment for substance abuse did not render the Blue Cross decision arbitrary under ERISA standards.

Smith v. Blue Cross Blue Shield of Massachusetts, Lawyers Weekly No. 02-030-09, February 12, 2009 (U.S.D.C. MA 2009).

INTERPLEADER

*** The Court awarded attorneys' fees and costs to the insurer.**

The plaintiff failed to contest the award of attorneys' fees to the insurer in his argument to the trial court and did not challenge the insurer's assertion that there had been a dispute between the between the beneficiaries over the insurance proceeds. Even if he had not waived the issue, the Court ruled that the trial court committed no error in finding that a dispute existed and did not abuse its discretion in awarding fees to the insurer.

Sun Life Assurance Company of Canada v. Sampson, 2009 U.S. App. LEXIS 2717 (1ST Cir. 2009).

MISREPRESENTATION

***An insurer ignored Mass. General Laws, c. 175, Section 124 and was assessed treble damages.**

The applicant completed the Application for life insurance and the insurer did not require a medical examination. The applicant was diagnosed with breast cancer after completing the Application but prior to delivery of the Policy. Section 124 requires the insurer to consider the statements in the Application on the physical condition of the applicant to be binding when no medical examination is required prior to the insurer's issuing the Policy, unless the statement in the Application was willfully false, fraudulent or misleading. The Court cited *Robinson v. Prudential Insurance Company of America,* 56 Mass. App. 244, 245 (2002) for it's ruling that a medical examination under Section 124 must be an examination by a licensed

physician. An examination by a paramedic, as the insurer had performed in this case, will not satisfy the requirements of Section 124 and *Robinson* for an examination by a licensed physician.

The insurer's practice was to ignore Section 124 and treat the same all claims involving misrepresentation in the Application regardless of the laws of the individual state in which the claim arose. The insurer's basis for the claim denial was not any willful misrepresentation in the Application, but the fact that the applicant had failed to disclose at the time of the Policy delivery that she had had several cancer treatments. The applicant had signed a certification, upon her receipt of the Policy, that the information in her Application, denying that she had been diagnosed with breast disease, was still accurate.

The Court ruled that such a certification was not part of the Application based in part on the admissions made in discovery by the insurer.

The Court found that the insurer's claimed reliance on the advice of counsel defense was woefully insufficient and not a proper defense. The Court also found that the opinion of counsel was neither diligent nor in good faith and could not have been reasonably relied on by the insurer. The Court cited to *Boston Symphony Orchestra v. Commercial Union Ins. Co.*, 406 Mass. 7, 14-15 (1989) where the insurer had relied in good faith "upon a plausible although ultimately incorrect, interpretation of its policy." Here the Court ruled that, in contrast, counsel for the insurer ignored applicable and controlling precedent, which governed the coverage issue.

Under the 1989 amendment to G.L. c. 93A, Section 11 the Court awarded treble the $1 million face amount of the Policy, increased by interest, relying on *R.W. Grainger & Sons Inc. v. J & S Insulation Inc.*, 435 Mass 66, 77, 82 (2001).

Hejinian v. General American Life Insurance Company, 2009 Mass. Super. LEXIS 70, Lawyers Weekly No. 12-002-09, Suffolk Superior Court, January 9, 2009.

Comment

The Hejinian decision has been issued by the Superior Court and, as a result, is not an appellate decision with precedent value. However, it includes an extensive discussion of the issues and thorough legal research. Its author, Judge Ralph Gants, has recently been appointed to the Supreme Judicial Court. As such, the decision bears careful reading. However, it is interesting that the decision did not discuss the line of First Circuit Court decisions which rule that, if an insured fails to satisfy a condition precedent to coverage, the coverage is void regardless of whether there was proof on intent to deceive or an increased risk of loss. *Massachusetts Mutual Ins. Co. v. Fraidowitz,* 443 F.3d 128, 132, 2006 U.S. App. LEXIS 8199 (1ST Cir. 2006). For a discussion of related issues in the area of misrepresentation in the Application, see my April 6, 2009 article at 37 MLW [Massachusetts Lawyers Weekly] 1383 or ask me for a copy.

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

Very truly yours,

Philip M. Howe