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Extension 203

July 15, 2009

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

The following will summarize the Massachusetts decisions which impact the insurance industry and related areas of law for the second quarter of 2009. If you would like to receive these newsletters via email, please send your email address to **phowe@lecomtelaw.com** or see our website for recent newsletters at www@lecomtelaw.com.

ATTORNEYS FEES

***Filing a Complaint with "ill will and insincerity" resulted in an award of attorneys' fees for the defendant.**

The plaintiff knew at the time he filed the action against the defendants that one of the defendants, an individual, was not personally liable for the co-defendant corporation's debts. The defendant had prevailed on a motion for summary judgment and then filed a motion for attorneys' fees under M.G.L. c. 231, Section 6 (f) and Mass. R. Civ. P. 11. The Court ruled that the plaintiff's commencement and prosecution of the action was

not the product of a genuine professional judgment, was not based on reasonable inquiry and an absence of bad faith.

Admiral Metals Servicenter Co., Inc. v. Micromatic Products Co., Inc. et al., Mass. Lawyers Weekly No. 11-100-09, 16 pages, (Appeals Court, June 11, 2009).

COMPREHENSIVE GENERAL LIABILITY

*** An umbrella policy excluded coverage, which the underlying policy provided.**

The underlying policy issued to a building contractor included an amendment providing coverage for "removal or repair of your product or your work." The contractor installed extensive pipe work, its product and its work, and the cost of the project dramatically increased due to unforeseen difficulties. The underlying carrier paid its policy limits and the policyholder contractor claimed under the umbrella policy. The umbrella policy did not contain such an amendment.

The Court ruled that the umbrella policy limited the coverage and provided less coverage than the underlying policy.

Insituform Technologies, Inc. v. American Home Assurance Company, 566 F.3d 274; 2009 U.S. App. LEXIS 10992 (1st Cir. 2009).

DISABILITY

***The calculation of disability benefits, entitled "Basic Monthly Benefits", will be based on gross not net pay of the Insured.**

"Basic Monthly Earnings" is a term defined in the policy to be the "average monthly base salary." The policy is unclear as to the period from which the average monthly base salary is to be taken. The insurer, according to the Court, had several different interpretations of the above policy term. The Court ruled that the insurer must calculate the benefits based on an average of the Insured's gross monthly pay over his entire period of employment.

Christopher Smith v. Jefferson Pilot Financial Insurance Company, 2009 U.S. Dist. LEXIS 29625 (U.S.D.C. MA, April 8, 2009)

*** The Court awarded treble damages under the False Claims Act where the insurer required its disability claimants to file claims for Social Security Disability Income without making any determination that the claimants qualified for SSDI.**

The evidence at trial suggested that the insurer had such a general policy. There was testimony about a manual so instructing its claim approvers to require its claimants to file for SSDI. Otherwise, the insurer threatened to reduce the monthly benefits by the amount of SSDI which might have been awarded if the claimant had filed and prevailed on a SSDI claim. The Court wrote, " The Court finds [the insurer's] conduct extremely troubling." Page 274.

Unites States ex rel. Patrick J. Loughren v. UNUM Provident Corp., 694 F. Supp. 2d 269; 2009 U.S. Dist. LEXIS 24340 (U.SD.D.C. MA, 2009).

ERISA DISABILITY EXPERTS

***The trial court sanctioned the insurer for refusing to answer an interrogatory on how many independent medical exams the third party provider had arranged and how many had resulted in the payment of benefits.**

The Court ruled that under *Metropolitan Life v. Glenn,* 128 S. Ct. 2343 171 L. Ed. 299 (2008) it was appropriate to "conduct limited discovery anent [the insurer's] relationship with [the provider of the IME's] and its correspondent physicians as part of an effort to show that [the insurer's] actions were influenced by a conflict of interest." Page 3. The insurer had acknowledged in discovery that it had "paid upwards of $2,000,000 to [the provider's] physicians between 2001 and 2003, and identified 1,204 files that it had referred to [the provider] during that interval." Page 3. As a sanction, the Court 'drew an inference that [the provider] had found against the claimants in all cases..." Page 3.

Denmark v. Liberty Life Assurance Company, 2009 U.S. App. LEXIS 9825 (1st Cir. May 6, 2009).

DUTY TO DEFEND

***An odor can constitute physical injury to property.**

An unwanted odor from the laying of carpet permeated the building and caused a loss of use of the building. Nothing in the policies suggests that odor cannot constitute physical injury to the property. The First Circuit Court ruled that the Massachusetts Supreme Judicial Court had not yet ruled on whether an odor may constitute a "physical injury" for the purpose of a commercial liability coverage. The Court went on to make "an informed

prophecy" of what the S.J.C. would do and ruled that "...odor can constitute physical injury to property under Massachusetts law, and also that allegations that unwanted odor permeated the building and resulted in a loss of use of the building are reasonably susceptible to an interpretation that physical injury to property has been claimed." Page 406. As a result, there was a duty to defend the policyholder from an action for loss of use due to the odor.

Essex Insurance Company v. Bloomsouth Flooring, Corp., 562 F. 3d 399; 2009 U.S. App. LEXIS 7896 (1st Cir. 2009)

GOOD FAITH CLAIM DENIAL

***The property insurer denied the claim for asbestos damage in good faith as the policyholder refused to allow the insurer's reasonable requests to inspect the premises.**

The policyholder had refused the insurer's requests to reinspect the subject boiler for asbestos, unless the insurer agreed to remove the asbestos. The policy requires that the policyholder must cooperate by showing the damaged property "as often as [the insurer] reasonable require[s]." The Court ruled, "That the initial inspection, which took place the day after the breach, was not performed by a licensed engineer does not forestall further inspection by the insurer or its agents." Page 4.

Clemens v. Vermont Mutual et al.. _____Mass. App. Ct. _____ (July 2, 2008)

Comment

We are proud to report that Matthew W. Perkins, Esq. of our firm successfully argued the *Clemens* case for Vermont Mutual. Sadly, the late

Roger A. Emanuelson, Esq., the original lead attorney on the case, is no longer with us. But, his name and high standards live on.

NEGLIGENCE

***The employer owed no social host duty to a third party injured when struck by a car driven by a drunken employee.**

The employee had met his supervisor at a restaurant where they had drinks and discussed business. The employee became intoxicated, left in his car and struck the plaintiff. The Court cited the 2008 Supreme Judicial Court decision in *Commerce Ins. Co. v. Ultimate Livery Service, Inc.*, 452 Mass. 639, 897 NE 2d 50 on social host liability. The Court ruled that there was no liability where the employer did not control the alcohol consumed. The employee was not conducting business and was driving home. The Court also ruled that the existence of the employer's policy against drinking while conducting business off the premises did not create host liability for the employer.

Lev v. Beverly Enterprises-Massachusetts, Inc., 74 Mass. App. Ct. 413; 2009 Mass. App. LEXIS 769 (June 18, 2009).

***The hospital did not owe a duty of care to a police officer who was injured responding to an accident involving a patient whom the hospital had released without an escort following a colonoscopy.**

The Court ruled, "...We have not recognized, and do not now recognize, a duty to a third person of a medical professional to control a patient (excluding a patient of a mental health professional...) arising from any claimed special relationship between the medical professional and the patient." Page 42. The Court further ruled at page 44 that the injury to the

police officer "was not 'caused' by the hospital because it falls outside the scope of foreseeable risk arising from any negligent conduct that would make the hospital's alleged misconduct tortious."

Leavitt v. Brockton Hospital, Inc., 454 Mass. 37; 2009 Mass. LEXIS 174 (June 9, 2009).

PLEADINGS

***"While legal conclusions can provide the complaint's framework, they must be supported by factual allegations." Page 2.**

The United States Supreme Court ruled that, n testing a Complaint, court need not accept as true "threadbare recitals of a cause of action's elements, supported by mere conclusory statements." Page 2. The plaintiff was a Pakistani who was incarcerated following September 11, 2001. He alleged in his complaint against former Attorney General Ashcroft and F.B.I. Director Mueller that "...they adopted an unconstitutional policy that subjected respondent to harsh conditions of confinement on account of his race, religion, or national origin." Page 3.

The Complaint alleged that "...the policy of holding post-September 11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001." Page 4. The Court ruled, "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' [citations omitted]. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Pages 8-9.

The Court discussed at length Federal Rules of Civil, No. 8 (a)(2) requiring the pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." The Court remanded the matter to the Second Circuit Court to decide in the first instance whether to remand to the District Court to allow [the plaintiff] to amend his "deficient complaint." Page 3.

Ashcroft et al. v. Iqbal et al., 129 s. Ct. 1937; 173 L. Ed. 2d 868; 2009 U.S. LEXIS 3472 (May 18, 2009).

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

Very truly yours,

Philip M. Howe

PMH