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Extension 203

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

The following will summarize the Massachusetts decisions, which impact the insurance industry for the Third Quarter of 2009. See our website for recent newsletters at www@lecomtelaw.com. If you would like to receive this newsletter via email, please send your email address to phowe@lecomtelaw.com.

ATTORNEY'S MALPRACTICE COVERAGE AND BINDING NATURE OF POLICY

***Failure to report a claim during the period of coverage under a claims made policy removes the claim from coverage. Plus, the insured is bound by the terms of the policy even if the policy was not delivered.**

Three successive one year policies provided professional liability coverage for claims against the insured attorney, which required that in order to be covered claims must both have been made against the attorney and reported by him to the insurer within the coverage period under the policy. The insured had purchased coverage from three separate insurers for three successive years from September 1, 2004 through September 1, 2007.

During the first of those policy years, September 1, 2005 to September 1, 2006, another attorney brought an action against the insured for concealing in a workers compensation proceeding the role of that plaintiff attorney in the initial representation of the workers compensation claimant. This concealment deprived that attorney of his share in the fee awarded.

The insured did not report the above claim against him during the first or the second policy years. He reported the claim against him during the third policy year under the policy providing coverage for the period from September 1, 2006 to September 1, 2007. The Court ruled at page 3 that there was no coverage under any of the policies as the claim was made under the first policy but not reported during its coverage period of September 1, 2004 to September 1, 2005. The insured did not report the claim under the second policy from September 1, 2005 to September 1, 2006. When he reported the claim during the third policy year of September 1, 2006 to September 2007, it was not a claim against the insured which had been made during that period of coverage as the claim had been made in March of 2005 during the period of coverage under the first policy.

The Court went on to rule on pages 3-4 against the insured on his failure to deliver the policy argument. The Court ruled on page 4 that, "neither delivery nor actual possession by the insured is essential to the making of an insurance contract unless the contract expressly sets out a requirement of delivery." [citations omitted.] Further, the Court ruled on page 4 that the policyholder could not claim "ignorance of the terms of policies that were delivered to his insurance agent or broker." [citations omitted.]

Gargano et al. v. Liberty International Underwriters, Inc., 572 F. 3d 45; 2009 U.S. App. LEXIS 15484 (1st Cir. July 14, 2009)

Comment

The Court did not cite the coverage provisions under the policies. However, typically professional liability policies cover any negligent act, error or omission by the insured. The Court did not discuss how the insured's concealing in the worker's compensation proceeding the role of the first attorney and suborning the claimant to conspire in this concealment could be a negligent act, error or omission. Nevertheless, the decision is significant for both the holding on the requirement for timely reporting under a "claims made" policy and, even more so, for the ruling that the insured is bound by the terms of the policy even if it is not delivered.

CLASS ACTION CERTIFICATION DENIED

*** Certification of the class will be denied where monetary relief is the primary objective.**

Plaintiffs were beneficiaries under life insurance policies. They had elected an option for payment by the insurer of the life insurance proceeds to a security account in the name of the beneficiaries. Plaintiffs claim that the insurer deposited no funds in the security accounts until a check was presented. They claim that, while they received all of the funds, the use of the security accounts was a violation of ERISA.

Plaintiffs requested a declaration that the insurer had violated ERISA and had been unjustly enriched, that the Court order a constructive trust of all profits the insurer had made from the wrongful use of plaintiffs' assets and that the Court order disgorgement of all such illicit profits. Plaintiffs requested the certification of the class to include all beneficiaries of those life insurance policies who had elected the same payment option.

The Court ruled under Federal Rules of Civil Procedure 23 (b) (2) that the plaintiffs had satisfied all the criteria of 1.) numerosity, the proposed class consisted of thousands of individuals and joinder of all would be

"impracticable"; 2.) commonality, there were three issues common to all members of the proposed class, whether the insurer had done as they claimed, whether this violated ERISA and the amount of unjust enrichment; 3.) typicality, the claims of the class representatives were "typical" where plaintiffs possessed the same interest and suffered the same injury as the proposed class members; and 4.) adequacy, the plaintiffs are represented by experienced counsel and have no conflict of interest with the proposed members of the class.

But, Rule 23 (b)(2) requires that the defendant has acted in such a way that final injunctive relief is appropriate respecting the class as a whole. Certification of the class is "only appropriate where monetary relief is 'incidental' to injunctive relief." Plaintiffs may avail themselves of Rule 23 certification only if "injunctive or declaratory relief is the predominant remedy they seek."

The Court ruled that it was unclear how the proposed class members, those beneficiaries paid through a security account, would benefit at all from the injunctive relief sought. The only individuals likely to face further harm would be those who, coincidentally, were the beneficiaries of another life insurance policy with the same insurer. [Page 5.]

The Court concluded that it was clear that plaintiffs' "primary objective' was "monetary relief." As such, certification under Rule 23 (b) (2) is "unwarranted." [Page 5.]

Roy Mogel et al. v. UNUM Life Insurance Company of America, 2009 U.S. Dist. LEXIS 74220; 47 Employee Benefits Cas. (BNA) 1837 (US Dist. MA, August 19, 2009).

C.G.L. SUCCESSIVE POLICIES AND THE PRO RATA TIME ON THE RISK

***Losses should be allocated on a time-on-the-risk method where it is not feasible to make a fact-based allocation of losses attributable to each successive policy period where losses, such as in a pollution case, span a long period of time during which there was coverage by several insurers.**

The Massachusetts Supreme Judicial Court has adopted an approach to allocating losses among many insurers spread over a long period of time. The Court wrote at page 21:

> "In sum, where it is not feasible to make a fact-based allocation [the evidence was insufficient in view of pollution over sixty-one years] of losses attributable to each policy period, losses should be allocated using the time-on-the-risk method we have described. To prorate using that method:
>
> > '[T]he total amount of damages should be divided by the total number of years to yield the amount of damages that is fairly attributable to each year...'
>
> *Public Serv. of Colo. V. Wallis & Co., 986 P. 2d 924, 941 (Colo. 1999).*
> The policyholder is responsible for any periods that it went without insurance."

Boston Gas Company v. Century Indemnity Company et al., 454 Mass. 337; 910 NE 2d 290; 2009 Mass. LEXIS 419 (July 24, 2009).

DUTY TO SETTLE

***The insurer had no duty to settle the defamation action by Superior Court Judge Murphy against its insured, the Boston Herald.**

Judge Ernest Murphy commenced a defamation action against the Boston Herald for its reporting on Judge Murphy's alleged comments during a rape trial previously held in his Court. Judge Murphy prevailed in the defamation trial and recovered a judgment for over $2 million. The Supreme Judicial Court affirmed the award and the insurer paid Judge Murphy $3 million in satisfaction of the judgment plus interest and costs.

Judge Murphy then made a demand directly on the insurer claiming treble the above award on the grounds that the insurer had failed to effectuate a prompt offer of settlement after the Herald's liability had become reasonably clear. The insurer declined. The insurer brought the within action for declaratory relief. The Court granted the insurer's motion for summary judgment.

The Court ruled on page 5 that the insurer did not have a duty to settle because under the language of the Policy the insurer did not have "control over the litigation." The Herald was free to discuss and negotiate settlement agreements without the insurer's participation. "And though Mutual's [the insurer] consent was required before any settlement could be completed, the Policy states that 'such consent [will]...not...be unreasonably withheld' by Mutual." The Court ruled further on page 6 that the insurer's "option to intervene", which it did not exercise, did not trigger a duty to settle by the insurer.

Mutual Insurance Company, Limited v. The Honorable Ernest B. Murphy, 6 F. Supp. 2d 158; 2009 U.S. Dist. LEXIS 56970 (U.S.D.C. MA July 1, 2009).

ERISA

*** The Plan's failure to produce its complete file to the plaintiff for fifteen months did not toll the 180 day period within which the plaintiff must have appealed the denial of her disability claim.**

The Plan denied the claim and advised the plaintiff of her right to appeal within 180 days. But, the plaintiff did not appeal until approximately two years later. Plaintiff used up 94 of her 180 days before she requested the file. She had 86 days left when the file was sent to her. But, she waited another 168 days to appeal. Further, plaintiff waited fifteen months to bring the missing documents to the Plan's attention.

In *DiGregorio v. Hartford Comprehensive Employee Benefit Services, 423 F. 3d 6, 17 (1st Cir. 2005)*, the First Circuit ruled that in order to get relief from the 180 day appeal requirement, the plaintiff had to "show prejudice in a relevant sense." The Court ruled that the plaintiff had failed to show that the "lack of the 'complete claim file had any impact on her' " appeal.

The Court granted summary judgment to the Plan on the grounds that the plaintiff had failed to file her appeal within the 180 day period.

Mary E. Shaffer v. Foster-Miller, Inc. et al., 2009 U.S. Dist. LEXIS 80877 (USDC MA September 3, 2009).

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

Very truly yours,

Philip M. Howe

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