YERS WEEKLY

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Employees Bring Suit For Abrupt Termination

CAD: Bias Reflected Manner Of Firing

BY PAUL D. BOYNTON

nority employees who were given a hour notice before being fired and "closely monitored" as they left were led to damages under Chapter 151B ven though the layoffs were due to le- nate budget cuts, an MCAD commis- r has decided.

e claimants conceded that the layoff justified, but that they were subject- o differential treatment because of race and gender.

mmissioner Douglas T. Schwartz ed.

]n employer's actions attendant to a ff may constitute terms, conditions, ivileges of employment ... [and] the ns complained of are sufficiently con- ential to be actionable," Schwartz e.

e 33-page decision is *Coney, et al. v. ees of Health & Hospitals of the City of*

■ continued on PAGE 36

'Stacking' Of Foreign, Local Auto Policies OK

Injured Man Gets UM Benefits From Both

BY WENDY L. PFAFFENBACH

A man injured in a car accident can collect on both an in-state underinsured-motorist policy and one issued in a foreign state, a Superior Court judge has ruled.

The local insurance company argued that G.L.c. 175, §113L prohibits the "stacking" of Massachusetts and Virginia auto insurance policies.

But Judge Timothy S. Hillman disagreed.

"[The insurance company's] reliance on the statute is misplaced because [it] governs Massachusetts policies only," Hillman wrote. "Since [the out-of-state] policy was neither delivered nor issued in Massachusetts, [the insurance company] can not prove that [the statute] applies to [the individual's] claim."

The eight-page decision is *Commerce Insurance Co. v. Doherty,* Lawyers Weekly No. 12-218-00.

'Helpful' Decision

According to Edward C. Bassett Jr. of Worcester, counsel for the claimant, the ruling shows that "Massachusetts law does not relieve a Massachusetts insurer of its obligation to pay underinsurance benefits merely because an out-of-state insurer has paid an excess policy."

EDWARD C. BASSETT JR.
Claimant's attorney

The statute clearly states that the anti-stacking provision prohibits *only* the stacking of Massachusetts policies, he added.

Braintree personal-injury lawyer J. Michael Conley said the decision is particularly helpful because the issue of stacking

■ continued on PAGE 35

iquor-Liability Carrier Is ued Under Chapter 176D

oman Had Won $21M Tort Suit Vs. Tavern

BY MEGHAN S. LASKA

woman who won a $21 million jury ct against a tavern could sue its lia- carrier — the state-created Liquor lity Joint Underwriting Association unfair claims settlement practices, a

Superior Court judges had ruled that the Liquor Liability Joint Underwriting Association of Massachusetts is *not* subject to suit for unfair claims settlement practices.

He referred to the June 1999 ruling in *Liquor Liability Joint Underwritng Association v. Great American Ins. Co.* (Suffolk Sup. Ct. No. 96-03127) and the December

Borrowers' Suit Against Bank's Counsel Is Rejected

Attorneys for a lender at refinancing closings were not liable to non-client borrowers for the failure of the lender to provide the promised loan money prior to the

'Stacking' Of Foreign, Local Auto Policies OK

■ continued from PAGE 1

auto policies arises often in the comparatively small New England region.

Furthermore, it seems the decision fills a gap in the law, he added, noting that it is the first decision he has seen on the issue.

"It's certainly helpful to all of us on both sides to have a decision that makes [the stacking rules] clear," Conley said.

Mark C. Darling of Worcester, counsel for the plaintiff insurance company, declined comment.

Foreign Policies

The defendant, Paul A. Doherty, was seriously injured when a drunk driver, Valerie Huzinec, rear-ended him and his son-in-law when they were traveling in the son-in-law's car.

At the time of the accident, the son-in-law's car was registered in Virginia and insured by United Services Automobile Association.

The policy had an uninsured motorist coverage of $100,000. Huzinec had bodily insurance coverage of $20,000.

The defendant recovered the full amount of Huzinec's insurance coverage and USAA offered the difference of its policy ($80,000) to the defendant's son-in-law.

On Nov. 12, 1992, the plaintiff, Commerce Insurance Co., informed the defendant that it would serve as the "excess carrier."

On Oct. 12, 1995, the plaintiff notified the defendant that it would not pay any claim in its position as excess carrier because USAA had paid its policy limit, and the plaintiff was, therefore, obligated to pay USAA a pro-rata share of that settlement.

The defendant attempted to use arbitration to resolve his claim, alleging that the plaintiff used stalling tactics and refused to take any action on his claim.

The plaintiff then filed suit seeking declaratory judgment under G.L.c. 231A.

Stack Away

The cases relied on by the plaintiff, for the proposition that "stacking" is not permitted in the commonwealth, only deal with the "stacking" of two Massachusetts policies, Hillman stated.

"The statutory scheme underlying the 1988 Automobile Insurance Reform Act dictates that stacking of uninsured motorist coverage is not allowed under any Massachusetts auto insurance policy issued on or after [Jan. 1, 1989]," he noted.

Furthermore, the judge said, the Supreme Judicial Court has stated that the statute concerning the stacking of auto policies must be strictly applied, Hillman noted, and the statute must be interpreted to prohibit stacking only of policies issued and delivered in Massachusetts.

Legislative intent, the judge observed, further supports this interpretation.

When it passed the Automobile Insurance Reform Act of 1988, the Legislature was driven to lower insurance rates in the state, he said.

"These rates were increasing due to stacking of policies by Massachusetts insureds when they got into auto accidents," Hillman wrote. "Massachusetts insureds lost the ability to use stacking to increase the amount of their settlement, but gained a lower insurance rate [that] enabled them to purchase more insurance coverage."

"Massachusetts law does not relieve a Massachusetts insurer of its obligation to pay underinsurance benefits merely because an out-of-state insurer has paid an excess policy."

- Edward C. Bassett Jr., claimant's attorney

Pay The Policy

Hillman concluded that Virginia law governed the construction of the relevant policy language, and that the plaintiff breached the insurance policy by failing to pay the claimant.

Massachusetts courts look to other state laws when construing auto insurance policies, he noted.

The plaintiff "cannot show that Massachusetts law should govern because Massachusetts has no substantial interest in this insurance policy claim," the judge determined.

In addition, the judge rejected the plaintiff's assertion it did not owe the defendant money, but instead owed the Virginia insurance company half of what it paid to the defendant.

"[T]he Virginia policy allows for the pooling of the policies which would create $200,000 worth of coverage," Hillman reasoned. "[The defendant] has not recovered this amount so the Virginia policy is not owed any money, and [the defendant] is owed the difference between what he has recovered, $100,000, and what the Virginia policy would allow in recovery, $200,000."

Thus, the plaintiff is liable to the defendant because the he has not recovered the full limit of the policies, Virginia law governs, and the plaintiff accepted its role as excess carrier, the judge concluded.

The judge denied the defendant's motion for summary judgment based on alleged violation of Chapter 93A, concluding that issues of material fact remained in dispute. MLW

Liquor Liability Carrier Can Face 176D Exposure

■ continued from PAGE 1

the same extent as if they had coverage through any other private company," Yarashus explained.

Marianne C. LeBlanc of Boston said she hoped that "the impact [of the case] will be that LLJUA will take the claims against its insureds more seriously in a way that is in accord with their obligations under the law."

Joseph J. Cariglia of Worcester, counsel for the plaintiff, declined comment.

Jury Verdict

Lynn Bolden was seriously injured as a passenger in a vehicle involved in a collision on March 10, 1991.

Prior to the accident, Lynn and the driver of the car had been at Leitrim's Pub in Worcester.

The plaintiff, Geraldine Bolden, individually and as guardian of Lynn, sued Leitrim's for negligently serving alcohol to the driver which led to Lynn's injuries.

The defendant, the Liquor Liability Joint surance associations.

"It seems straight-forward that, if it can be fairly argued that the LLJUA was 'in the business of insurance' under Chapter 176D, then it should face liability under Chapter 93A for its failure to settle a specific claim, and thus could incur liability in excess of the statutory limit on a policy," he wrote.

The fact that the defendant was created by the Legislature should not excuse it from liability for unfair settlement practices, Hillject to Chapter 93A.

"The Legislature's decision to encompass 'joint underwriting associations' within the strictures of Chapter 176D only confirms the LLJUA's susceptibility to suit under Chapter 93A," he wrote.

The plain language of the association's enabling statute indicates that the defendant is to "provide liquor legal liability insurance on a self supporting basis," he contended.

Accordingly, LLJUA occupies a significentive to the member-insurers not present in the context of the MMPIA," Hillman wrote.

He further noted that because LLJUA can recoup any deficit through assessments on policyholders or a rate increase, its member-insurers have an incentive to avoid higher contributions and premiums. Similarly, large judgments against the LLJUA reflect on its members and losses cannot be passed onto individual claimants.

"It looks as though this issue will have to be decided by the Appeals Court or the Supreme Judicial Court."

Assignment Of Rights

Hillman also turned away the defendant's claims that the pub breached the policy provisions requiring it to cooperate in the defense of any claim, and to obtain the association's assent before assuming any obligations.

"LLJUA points to [the bar's] assignment of its rights to the plaintiff, and the plaintiff's subsequent efforts to dismiss the LLJUA's motion to intervene in the appeal

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THE WEEK'S OPINIONS

Insurance

'Stacking' Of Massachusetts And Virginia Policies

Where a plaintiff insurance company seeks, by way of a summary judgment motion, a declaration that the combining or "stacking" of a Massachusetts auto insurance policy and a Virginia auto insurance policy is barred by G.L.c. 175, §113L, I find that this court cannot issue such a declaration, as §113L prohibits only the stacking of two Massachusetts auto insurance policies.

As regards other issues raised in this case, I find that a defendant auto injury victim is entitled by the evidence to summary judgment on a breach of contract counterclaim against the plaintiff, but not to summary judgment on a G.L.c. 93A counterclaim.

Background

"[Plaintiff] Commerce [Insurance Company] is a Massachusetts corporation with a usual place of business situated in Webster, Worcester County, Massachusetts, and is an insurance company duly licensed to sell automobile insurance in the Commonwealth of Massachusetts. [Defendant Paul A.] Doherty is a resident of Foxboro, Massachusetts.

"On September 10, 1991, Doherty was seriously injured when a drunk driver, Valerie Huzinec, rearended him and George Lancaster, Doherty's son-in-law, while they were in Lancaster's automobile. As a result of the crash, Doherty sustained fractured ribs, a punctured lung, a torn rotator cuff, a fractured left ring finger and suffered from pneumonia and emotional distress. At the time of the accident, Lancaster's automobile was registered in Virginia and insured by United Services Automobile Association. The USAA policy had an 'uninsured motorist' coverage of $100,000. Huzinec had the bodily insurance coverage for $20,000.

"Doherty recovered the full amount of Huzinec's bodily injury insurance coverage and USAA tendered the difference of its policy with Lancaster. On November 21, 1992, Commerce informed Doherty that USAA was the 'primary carrier' for underinsurance benefits and that Commerce would serve as the 'excess carrier.' On October 12, 1995, Commerce notified Doherty of its intention not to pay any claim as the excess carrier. Commerce stated as the grounds for this refusal the fact that USAA had paid over its policy limit and therefore Commerce was obligated to now pay USAA a pro rata share of that settlement.

"Doherty alleges that Commerce used stalling tactics against Doherty by refusing to take any action on Doherty's claim. Doherty insisted on arbitration to settle the dispute, Commerce then initiated this action in Superior Court for declaratory judgment under G.L.c. 231A."

Plaintiff's Complaint

"Commerce relies heavily on c. 175, §113L, and Massachusetts case law to support its position that 'stacking' is not permitted in Massachusetts. These cases, however, only deal with a Massachusetts insured trying to stack one Massachusetts auto insurance policy with at least one other Massachusetts insurance policy. ... The statutory scheme underlying the 1988 Automobile Insurance Reform Act dictates that stacking of uninsured or underinsured motorist coverage is not allowed under any Massachusetts auto insurance policy issued on or after January 1, 1989. ... The Supreme Judicial Court has stated that the 'strict command' of c. 175, §113L, must be followed concerning the stacking of auto insurance policies. ...

"Each of the cases cited by the court instructs that the language of the statute is subject to strict interpretation. Applying such a strict interpretation, the court reads c. 175, §113L, to apply to auto insurance policies that are issued or delivered in the Commonwealth. The court interprets this to mean therefore, that c. 175, §113L, prohibition against stacking, applies only to policies that are issued and delivered in Massachusetts.

"The court's interpretation of the statute is supported by the legislative intent behind the statute. The legislature's intent in creating the Automobile Insurance Reform Act of 1988 was to lower the rates Massachusetts insured were paying. These rates were increasing due to stacking of policies by Massachusetts insured when they got into auto accidents. Massachusetts insured lost the ability to use stacking to increase the amount of their settlement, but gained a lower insurance rate and enabled them to purchase more insurance coverage.

"Given this strict reading of the statute, this court can not apply G.L.c. 175, §113L, in this case. Commerce's reliance on the statute is misplaced because the statute governs Massachusetts policies only. Since Lancaster's policy was neither delivered nor issued in Massachusetts, Commerce can not prove that the c. 175, §113L, applies to Doherty's claim. The involvement of the Virginia insurance policy bars the application of the statute."

Defendant's Counterclaims

"Doherty's motion for summary judgment is based on two counts[:] Commerce can not show that it did not breach of contract and that it did not violate G.L.c. 93A. This court agrees in part with Doherty's argument. ...

"Doherty's motion on breach of contract is based on two propositions, the first is that G.L.c. 175, §113L, is inapplicable in this case and does not excuse Commerce's performance. His second proposition is that this court should apply the Virginia insurance policy and allow Doherty to stack the policies, placing Commerce further in breach.

"The court's determination of Doherty's first argument is apparent from the aforementioned analysis concerning Commerce's summary judgment motion. G.L.c. 175, §113L, is inap-

plicable in this case because both policies were not issued or delivered in Massachusetts. Because the statute is inapplicable, Commerce would not be able to show that it can reasonably prove an essential element of its defense. Doherty's second proposition leaves this court with a choice of law issue.

"The notion of Massachusetts' courts looking to foreign state laws when construing auto insurance policy is not novel. The Supreme Judicial Court recently looked to the policy of a foreign state when the question of statute of limitation arose in an auto insurance case involving two Massachusetts residents in an auto accident in Massachusetts but one of the auto was insured in a foreign state. ... In that case, the Supreme Judicial Court applied the foreign state law and stated that because the foreign state may have more of an interest even though the accident occurred and its participants are in Massachusetts. ...

"In the case at bar, Commerce can not show that Massachusetts law should govern because Massachusetts has no substantial interest in this insurance policy claim. The foreign insurance company has already negotiated the settlement, Commerce accepted its secondary role as the excess carrier in this agreement, and this case will not adversely effect insurance rates in Massachusetts since Commerce will be the only Massachusetts insurance company paying on the claim. As previously stated, there is no stacking as defined by the statute and case law because it is not two Massachusetts insurance policy at issue in this case which further lessens Massachusetts interest in this case.

"Commerce has already argued, in the alternative that if the court did not apply G.L.c. 175, §113L, that it does not have to pay Doherty any sum of money but rather would owe the Virginia insurance company half of what it paid Doherty. The court disagrees with this assertion because the Virginia policy allows for the pooling of the policies which would create a $200,000 worth of coverage. Doherty has not recovered this amount so the Virginia policy is not owed any money, Doherty is owed the difference between what he has recovered, $100,000, and what the Virginia policy would allow in recovery, $200,000. Commerce owes Doherty since Doherty has not recovered the full limit of the policy because the Virginia policy governs and Commerce accepted it role as the excess carrier.

"This court applied the choice of law analysis and determined that Virginia insurance will govern this transaction. When this court applies the Massachusetts summary judgment standard to this transaction, Commerce does not have a reasonable expectation of showing that under the Virginia policy as applied by this court, it does not owe Doherty its share as the excess carrier on the stacked policy.

"The question of whether Commerce violated G.L.c. 93A in its investigation of Doherty's claim should be left for the trier of fact because Commerce may be able to show that it did investigate the claim and did not commit an unfair or deceptive act in its investigation of Doherty's claim. ...

Conclusion

"Commerce's motion for summary judgment is denied. Doherty's motion for summary judgment is allowed as to Doherty's breach of contract claim and it is hereby ordered that Commerce must pay the remainder of the combined recovery pool between the Virginia policy and Massachusetts policy. Doherty's motion for summary judgment based on a G.L.c.93A claim is denied."

See news story on page 1.

Commerce Insurance Company v. Doherty (Lawyers Weekly No. 12-218-00) (8 pages) (Hillman, J.) (Worcester Superior Court) Mark C. Darling for the plaintiff; Edward C. Bassett Jr. for the defendant (Civil Action No. 97-1557C).