October, 2017

I. INSURANCE LAW

Proof of Motive of Self-Interest or Ill Will on Part of Insurer Not Required in Statutory Bad Faith Claims.

In *Rancosky v. Washington National Ins. Co.*, 2017 Pa. LEXIS 2286 (Pa. Sept. 28, 2017, the Pennsylvania Supreme Court considered the elements of a bad faith insurance claim brought pursuant to Pennsylvania's bad faith statute. The dispute arose out of a coverage dispute where appellee LeAnn Rancosky purchased a cancer insurance policy as a supplement to her primary employer-based health insurance. Ms. Rancosky was initially diagnosed with cancer in 2003, but cancer recurred in 2004 and again in 2006. The insurer made payments following the 2003 and 2004 diagnoses, but denied payment following the 2006 recurrence, having concluded that the policy lapsed in 2003 for failure to pay a premium. Ms. Rancosky argued that her policy had not lapsed because she had a waiver of premium benefit under her policy, which provided that the policy remained in force without premiums due after the 2003 diagnosis.

A bad faith suit was filed against Washington National parent company, Conseco, in the Court of Common Pleas. To determine whether a plaintiff can recover in a statutory bad faith action, Pennsylvania courts adopted the two-part test articulated in Terletsky v. Prudential Property & Cas. Ins. Co., 649 A.2d 680 (Pa. Super. 1994) Under Terletsky, a plaintiff claiming bad faith must prove by clear and convincing evidence that: 1) the insurer did not have a reasonable basis for denying policy benefits; and 2) that the insurer knew or recklessly disregarded the lack of reasonable basis for denying the benefits. The Terletsky decision relied, in part, upon a definition in Black's Law Dictionary defining insurance bad faith as involving "a motive of self-interest or ill will."

After a bench trial, the court concluded that the plaintiff failed to satisfy the first Terletsky element because of the failure to establish that the insurer "acted out of 'some motive or self-interest or ill will." The Pennsylvania Superior Court disagreed and ruled that proof of an insurer's self-interest or ill will is not a third element required under Terletsky, nor is it a part of the objective analysis contained in the first prong of Terletsky.

The Pennsylvania Supreme Court granted the insurer's petition for allowance of appeal. The Court held :

> [W]e hold that, to prevail in a bad faith insurance claim pursuant to Section 8371, a plaintiff must demonstrate, by clear and convincing evidence, (1) that the insurer did not have a reasonable basis for denying benefits under the policy and (2) that the insurer knew or recklessly disregarded its lack of a reasonable basis in denying the claim. We further hold that proof of the insurer's subjective motive of self-interest or ill-will, while perhaps probative of the second prong of the above test, is not a necessary prerequisite to succeeding in a bad faith claim. Rather, proof of the insurer's knowledge or reckless disregard for its lack of reasonable basis in denying the claim is sufficient for demonstrating bad faith under the second prong.

Accordingly, the Supreme Court "affirm[ed] the judgment of the Superior Court, which vacated the trial court's judgment in part and remanded for further proceedings on Appellee's bad faith claim."

II. EMPLOYMENT LAW

Employers Are Required to Compensate Employees for All Rest Breaks of Twenty Minutes or Less

In *Secretary, United States Department of Labor v. American Future System*, No. 16-2685 (3d Cir. October 13, 2017), American Future Systems d/b/a Progressive Business Publications (Progressive), used sales representatives who are paid an hourly wage plus bonuses based on the number of sales per hour while they are logged onto their work computers. Progressive previously gave employees two 15-minute paid breaks per day. In 2009, Progressive instituted a "flex time" policy in which employees were entitled to log off of their computers throughout the work day at will and for any reason. There was no limit set on the duration; however, once the employee was logged off for more than ninety seconds, he was considered on "flex time." Furthermore, employees were only compensated for time that they were logged in to the system; they were not compensated for "flex time." Progressive did not consider its employees' "flex time" as a "break" requiring compensation.

The Secretary of the United States Department of Labor brought this lawsuit on behalf of Progressive's employees for violation of the Fair Labor Standards Act, 29 C.F.R. 785.18, which requires employers to compensate employees for all breaks of twenty minutes or less. The district court agreed that 29 C.F.R. 785.18 created a bright-line rule. Under that interpretation, breaks of five to twenty minutes are viewed as "common in the industry," "promote the efficiency of the employee," and are "customarily paid." As such, breaks of twenty minutes or less must be compensated and count as working hours.

On appeal, Progressive claimed that its "flex time" hours were not breaks. It argued that employees are not working unless they are logged into the system. Its employees are free to log out at any time for any duration; when employees log back in, they are back at work. The Third Circuit held that this view of "work" conflicts with the purpose of the FLSA. The FLSA requires employers to compensate employees for "hours worked," but does not define "work." The flex time provided for by Progressive, however, is clearly a "break" under the FLSA.

Court Upholds Arbitration Requirement for Discrimination Claims

In *Riley v. Raymour & Flanigan*, No. A-2272-16T1 (Superior Court N.J. October 20, 2017), plaintiff Kuashema Riley appealed from an order granting a motion by Raymour & Flanigan (R&F) and Moshin Chunawala compelling arbitration of plaintiff's employment discrimination claims and dismissing her complaint without prejudice.

Plaintiff was employed by R&F in December 2012, as a furniture salesperson. She alleged several incidents of hostile work environment in violation of the New Jersey Law Against Discrimination (LAD). Specifically, she asserted that her store manager frequently played rap music that contained objectionable words and that Chunawala and other employees frequently used the objectionable words in her presence. Plaintiff also alleged Chunawala threatened to bring a firearm into the workplace after the storeroom windows of the store had been shot out and that he emailed a lewd photograph to a co-worker.

Plaintiff asserted she complained about the hostile work environment to her supervisors, but the discriminatory conduct continued, and she was terminated in retaliation. Plaintiff filed a complaint in the Law Division alleging her termination was in violation of the LAD. She also alleged defendants were responsible for the hostile work environment and the discrimination plaintiff experienced while an employee at R&F.

Defendants filed a motion to compel arbitration and stay the litigation in the Law Division pursuant to the Federal Arbitration Act. Defendants argued plaintiff entered into an agreement to arbitrate all claims against R&F when she signed a document known as the "Associate's Agreement & Consent," during her employment. This form expressly stated employees who signed it consented to dispute resolution of all claims under the Employee

Arbitration Program (EAP). A trial judge agreed with R&F that the arbitration agreement was enforceable, and dismissed Riley's claim on summary judgment.

On appeal, plaintiff argued that the EAP was unconscionable, unenforceable and a violation of public policy. She also argued that it was unfair to her because it required her to pay a filing fee, and that it was signed under duress since she had to sign it in order to be allowed to work.

The Superior Court rejected plaintiff's claim that the EAP as a whole should be deemed unenforceable because of the fee provisions. The court noted that the standard arbitration filing fee in New Jersey is $200, and that R&F would be required to pay all other fees. These fees do not render the EAP unconscionable since Riley would have to bear the filing fees and other costs of litigation in the Law Division were there no arbitration agreement. The court also noted that nothing bars the arbitrator from re-allocating fees to the prevailing party, especially considering plaintiff's claims are grounded in the LAD, which is a fee shifting statute. And, the court added, that it has long been accepted that public policy is strongly in favor of using arbitration to settle disputes rather than litigation.

Regarding plaintiff's claim of having to sign the agreement under duress, the judges noted that the state Supreme Court, in its 2002 ruling in Martindale v. Sandvik, said it was permissible to require prospective employees to sign arbitration agreements as a precondition of employment. The court held that the record lacks objective evidence of duress exerted by R&F.

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