MASSACHUSETTS

Superior Court Outlines Procedures for New Attorney-Conducted Voir Dire

The Massachusetts Superior Court recently issued Standing Order 1-15 outlining the temporary procedures for attorney-conducted voir dire. The rules went into effect February 2, 2015, though they may be superseded or modified once the Supreme Judicial Court Committee on Juror Voir Dire addresses the issue.

Pursuant to MASS. GEN. LAWS c. 234, § 28, attorneys and pro se parties may now directly question jurors during the empanelment process in all trials in the Superior Court. Under the recently issued standing order, a party to a civil matter must file a motion requesting leave to do so. The motion must follow Superior Court Rule 9A procedures and must be filed by the earlier of (a) the final pre-trial conference or (b) 14 days prior to the start of trial. The motion must identify the general topics about which the jurors will be asked and, if the judge so requires, the language of any proposed questions. The motion should also contain proposed language for brief preliminary instructions on principals of law.

Generally Acceptable Topics for Questions

- The backgrounds or experiences of perspective jurors that are pertinent to issues of the case
- Whether or not such backgrounds or experiences might influence the juror in the case
- Any potential biases regarding the parties, claims or issues of the case
- The willingness and ability of perspective jurors to accept and apply relevant legal principals

Generally Unacceptable Topics for Questions

- Those that duplicate Confidential Juror Questionnaire (unless it is to expand on an answer)
- Politics, religion, charitable giving, hobbies and insurance, unless such matters may be relevant to the case or may effect a juror's impartiality
- The outcome of a trial on which a potential juror previously served
- Attempts at instructions on the law
- Attempts at argument or persuasion
- Hypothetical facts or legal issues
- Topics that may embarrass, offend, or invade the privacy of a juror

Judge's Duties Prior to Questioning

- Give a brief description of the case, including relevant facts, locations, dates, and parties or persons involved
- Provide brief, preliminary instructions on legal principals involved, including the burden and standard of proof, and elements of the claims and defenses
- Explain the empanelment process and the topics of questions to be asked
- Ask questions required by law, either to venire as a group or individually
- Excuse jurors after determination of hardship or impartiality

Attorney-Questioning Process

- Party with the burden of proof first poses questions to potential jurors
- Judge may decide if questions shall be posed individually or in private
- Parties may request that jurors be questioned as a group, though efforts must be made to secure juror privacy
- Parties may assert challenges for cause due to juror responses
- Parties may object to questions by stating "objection" without further argument or elaboration
- Judges may set a reasonable time limit on the questioning of potential jurors

VIRGINIA

Absent Express Policy Provisions, Good Faith Precludes Intentional Delay in First-Party Payments

The US District Court for the Eastern District of Virginia recently found that an insured had pled sufficient facts to move forward with its breach of an implied covenant of good faith and fair dealing claim where the complaint alleged various dilatory tactics by the insurer and the governing contract did not impose a deadline or timeframe for the payment of claims. The case is *Great Am. Ins. Co. v. GRM Mgmt., LLC*, No. 3:14CV295, 2014 WL 6673902 (E.D. Va. Nov. 24, 2014).

There, the insured hotel company had submitted various claims for losses related to the theft of the hotel's rooftop HVAC units. Beginning on September 18, 2013, the insurer's investigation of the claims indicated that the parts may have been stolen by a former employee, triggering a policy provision excluding coverage for criminal acts of the insured's employees. During a November EUO, the hotel's manager maintained that the individual in question was not an employee, but an independent contractor. Over the course of the investigation, the insurer issued five letters reserving its rights to deny coverage and requested two separate EUO's of the hotel manager, each time instructing him to produce documents. He did not produce the requested documents at either EUO.

While continuing to reserve its rights, the insurer sought a declaratory judgment that it did not owe coverage under the policy. The insured filed a counterclaim alleging, inter alia, a breach of the implied duty of good faith and fair dealing. The insurer moved to dismiss the complaint.

Although courts have recognized that an implied duty of good faith and fair dealing governs first-party insurance relationships under Virginia law, the extent of such a duty remains unclear.[1] On the one hand, the implied duty of good faith and fair dealing cannot override the express and concrete terms of the policy. *See Ward's Equipment, Inc. v. New Holland North America, Inc.*, 493 S.E.2d 516, 520 (Va. 1997). However, courts maintain that the implied duty of good faith and fair dealing may be supplied at least where it is not inconsistent with express policy terms.

Here, the court looked to the policy language and the insured's complaint to determine whether the bad faith claim could survive dismissal. Although the insurer had never issued a formal denial of coverage, a claim for breach of the implied covenant of good faith and fair dealing was not precluded. Because the policy did not contain a provision expressly imposing a deadline or timeline for the payment of claims, the duty of good faith and fair dealing could be supplied. Where the complaint – taken as true at this stage of the pleadings – contained several allegations of intentional delay aimed at harming the insured and avoiding payments for coverage, the insurer's motion to dismiss was denied.

[1] As the court noted, "the duty of good faith defies a fast and true definition."

MASSACHUSETTS

Insurer Cannot Compel EUO of Medical Provider Seeking PIP Benefits

Judge William P. Hadley of the Springfield District Court recently ruled that an unpaid medical provider seeking personal injury protection (PIP) payments for services rendered to an insured cannot be required by the insurer to submit to an examination under oath (EUO).[2] *See VIP Physical Therapy, Inc. v. Government Employees Ins. Co.*, No. 1323CV1278 (Jan. 8, 2015).

There, the plaintiff had provided medical treatment to individuals who were injured in a car accident and were insured by the defendant under a MA Automobile Policy. The plaintiff filed suit seeking payment for treatments rendered. The defendant asserted as affirmative defenses that it rightly denied payments for plaintiff's failure to submit to an EUO and otherwise cooperate with the investigation of the claim. Plaintiff then moved for partial summary judgment as to these affirmative defenses, seeking a determination that under MA law, a medical provider cannot be compelled to submit to an EUO in order to claim PIP benefits.

MASS. GEN. LAWS c. 90, § 34M allows a medical provider to seek PIP benefits for treatment provided to an injured person covered by the PIP policy. Where PIP benefits remain unpaid by the insurer, the unpaid party is deemed a party to the insurance contract and can seek payments through suit for breach of contract. The injured person must cooperate with the investigation of such claims, submit to reasonably required physical exams and otherwise do "all things necessary to enable the insurer to obtain medical reports and other needed information to assist in determining the amounts due." The insurer can refuse payments for the noncooperation of the injured party. While the insurer can compel the injured party to submit to an EUO, a MA appellate court has not decided if an unpaid party has a similar duty to cooperate.

Here, the defendant argued that because an unpaid medical provider is "deemed a party to the contract," the plaintiff would step into the shoes of the insured not only for purposes of bringing suit, but in all other regards. Accordingly, the insured's duty to cooperate with the insurer's investigation of the claim could here be imputed to the plaintiff. The language in the MA Standard Auto Policy, which differs from the language of the PIP statute, would seem to support this approach. For example, the Standard Auto Policy does not discern between "unpaid parties" and "injured persons," instead providing more broadly that all claimants must cooperate with the insurer's investigation of claims and submit to an EUO.

Considering the language of the applicable statute and policy, Judge Hadley determined that the defendant's interpretation sweeps too broadly. For instance, he opined that if an unpaid medical provider were to step into the shoes of the insured, the insurer could compel a medical provider to submit to a physical exam as part of the duty to cooperate. Moreover, forcing medical providers to appear for an EUO at the insurer's request would frustrate the purpose of no-fault insurance, which is "to provide prompt payments of PIP benefits and reduce litigation." Accordingly, Judge Hadley found that pursuant to the PIP statute an unpaid medical provider is deemed a party to the insurance contract only so as to authorize a claim for breach of contract for nonpayment of PIP benefits.

[2] Note that the district court decision is not binding on other courts.

MINNESOTA

Replacement Cost Provision Required Reasonable Color Match between New and Existing Siding

The Supreme Court of Minnesota recently held that where replacement costs were determined by the cost of replacing damaged property with property of "comparable material and quality," the term "comparable" required replacement siding panels on the exterior walls of the insured's buildings to reasonably match the color of existing siding. Because the insurer could not replace the damaged siding with a reasonable color match, it was obligated to pay for the replacement of all covered siding panels – even those that were undamaged. The case is *Cedar Bluff Townhome Condo Ass'n, Inc. v. Am. Family Mut. Ins. Co.*, No. A13-0124, 2014 WL 7156914 (Minn. Dec. 17, 2014).

The dispute arose after a hail storm caused damage to the siding panels of 20 townhomes covered under the policy. The panels were 15 sq. ft. and the damage to each building varied; one building suffered damage to ten panels whereas another suffered damage to only a single panel. The manufacturer of the siding no longer produced panels of the same color as those found at the covered property.

Conceding coverage for the damaged panels, the insurer elected to pay the replacement cost of *only* those panels. The policy held that replacement costs were determined by the cost of replacing damaged property with property of "comparable material and quality." The insured argued that to be considered "comparable material", the replacement panels had to match the color of existing panels. As no replacement panels could be obtained that reasonably matched the color of existing panels, the insured argued that the replacement cost must be measured by the cost of replacing all siding, whether damaged or undamaged. Because the parties disputed the value of the loss, the insured demanded appraisal.

The appraisal panel agreed with the insured and issued an award for the total replacement of the siding. Believing the award to be based on unauthorized coverage determinations, the insurer refused payments and the insured filed an action in the district court to enforce the award. There, the district court granted summary judgment to the insurer, finding that coverage did not apply to undamaged property that did not suffer "direct physical loss." The court of appeals reversed, holding that the appraisal panel properly determined that "comparable" material required a color match. The insurer appealed.

In upholding the appraisal award, the court noted that while an appraisal panel is confined to the determination of the amount of loss, it may nonetheless resolve issues of fact or law that are mere incidents to that determination. Under the policy, the determination of a replacement value necessitated a construction of the phrase "comparable material." Under the plain meaning of the phrase, the court held that the policy required a reasonable color match between the damaged and replacement siding, the standard properly applied by the appraisal panel.

Given the fact that no replacement materials of matching color existed, the court next considered whether a color mismatch constitutes "physical damage" under the policy. Concluding that the color mismatch that would result from partial replacement constituted a "distinct, demonstrable and physical alteration," the court held that such a loss was covered. Noting the great deference given appraisal panel determinations in Minnesota, the court affirmed the appraisal award.

THE USE OF REASONABLE CARE TO MAINTAIN HEAT

New England winters bring freezing temperatures and a significant risk of loss caused by frozen pipes. Insurance policies typically exclude coverage for such losses to vacant buildings unless the insured has used reasonable care to "(1) maintain heat in the building; or (2) shut off the water supply and drain the system and appliances of water." *See, e.g. Chow v. Merrimack Mut. Fire Ins. Co.*, 83 Mass. App. Ct. 622, 624 (2013).

The number of cases addressing the duty of reasonable care to maintain heat varies across jurisdictions, as does the analysis of such provisions. Some of these approaches are highlighted below.

Massachusetts

Where an insurance policy imposes a duty of reasonable care on the insured, Massachusetts courts apply ordinary principals of negligence to determine whether this duty of care has been met. *Chow*, 83 Mass. App. Ct. at 627. Whether an insured used reasonable care to maintain heat in the covered building may depend on a number of factors. *Compare Evangelista v. Hingham Mut. Fire Ins. Co.*, No. 034587, 2005 WL 705840 (Mass. Super. Feb. 14, 2005) *with Palmer v. Pawtucket Mut. Ins. Co.*, 352 Mass. 304 (1967).

In *Evangelista*, the court found that the insureds did not take reasonable care to maintain heat in their summer home while it was unoccupied for the winter. 2005 WL 705840 at *1-3. There, the pipes burst and caused significant damage after the heat stopped functioning. *Id.* at *1-2. Although the insureds left the thermostat at 63 degrees before leaving the home for the winter, they never checked in on the home nor asked anyone else to do so despite record low temperatures in the area and indications from their power providers that no electricity was used in the home during December and January. *Id.* Additionally, the home was not equipped with any alarms to detect low heat and the home's boiler, which should have been serviced annually, had not been serviced in nine years. *Id.*

In contrast, the Supreme Judicial Court in *Palmer* considered whether the insureds "exercised due diligence with respect to maintaining heat" by installing antifreeze into the hot water system of a summer home which was then left unheated and unoccupied for the winter. 352 Mass. at 305-06. The court held that the insureds exercised due diligence – despite their failure to heat the home – by consulting a licensed heating contractor and, on his advice, hiring him to implement the use of antifreeze *Id.* Additionally, the court noted that this was the custom practice in the community and that it was adopted at the insured premises for multiple winters without incident. *Id.*[3]

Additionally, the Appeals Court considered in *Chow* whether the negligence of a person entrusted by the insured to

[3] Note that the policy required "due diligence *with respect to maintaining* heat," a provision deemed "somewhat ambiguous" by the SJC. While such due diligence may exist absent actual efforts to maintain heat, a duty of "reasonable care *to maintain* heat" would likely require such an effort.

maintain heat in the covered building should be imputed to the insured. 83 Mass. App. Ct. at 623. Where the insured delegates the responsibility to maintain heat to a servant/employee or to an independent party over whom the insured retains a sufficient level of control, that person's negligence will be imputed to the insured under the doctrine of respondeat superior. *Id.* at 627-28. Such delegation *by itself* will not satisfy the policy's requirement for "reasonable care." However, where the insured delegates this responsibility to an independent party and does not retain control over *how* that person maintains heat in the building, the insured's duty of reasonable care to maintain heat will likely be met so long as the insured reasonably believes that the individual is suitable for the position. *Id.*

Connecticut

The Connecticut courts have noted that the determination of whether an insured's actions constitute "reasonable care to maintain heat" is typically a matter of fact reserved for the jury as "[r]easonableness inherently is a difficult issue to resolve on summary judgment." *Fusaro v. Safeco Ins. Co. of Am.*[4] Nonetheless, some superior court decisions offer guidance as to what factors must be considered when making such a determination.

In *Bordiere v. Utica First Ins. Co.*,[5] the insured sought coverage for water damage to a two-level, two-family house occurring after the water pipes froze and burst. The insured owned the property and rented out the two levels separately, though only the second story was occupied on the date of loss. When the tenant of the second story turned down her heat and traveled out of state for 11 days, the pipes located between the two levels froze and burst. The insurer concluded that reasonable care was not taken to maintain heat in the building and denied coverage.

As part of the tenancy agreement, the tenant was required to supply heat to the apartment and had done so in the past. Although the bottom floor was vacant for roughly 18 months, freezing was never an issue so long as the second floor was sufficiently heated. Moreover, the tenant never notified the insured that she was going out of town or that she had turned down the heat in the apartment. Finding that the insured was not responsible for anticipating such actions by the tenant, the court concluded that coverage applied.

In contrast, the court in *McCartney v. Pawtucket Mut. Ins. Co.*[6] found that the insured did not use "reasonable care to main heat" and that no coverage applied. There, the insured had vacated her home while it was up for sale. The house was heated by oil and after the tank was filled in May, the insured canceled her automatic oil delivery. When the house remained on the market, the insured had the oil checked in November, at which time the tank was full. However, she was unable to have the tank checked again until January 23rd, at which point the pipes had frozen. Noting that temperatures commonly drop below freezing in December and January in Connecticut, the court found that reasonable care required that the insured at least have someone check the tanks and maintain adequate oil levels during those months.

[4] No. FSTCV116009015S, 2014 WL 4056712 (Conn. Super. Ct. July 2, 2014).

[5] No. HHBCV095011086S, 2011 WL 783614 (Conn. Super. Ct. Feb. 8, 2011).

[6] No. 301572, 1994 WL 723056 (Conn. Super. Ct. Dec. 23, 1994)

Finally, the duty to use reasonable care to maintain heat typically applies when the property is vacant, a term that may be deemed ambiguous if not defined in the policy. In *New London County Ins. Co. v. Zachem*[7] the insurer denied coverage relying on an exclusion for vandalism and theft occurring while the dwelling has been vacant for over 30 days. The insurer argued that the home was vacant because no one was living there in the 30-day period preceding the loss. Acknowledging that no lived there at the time, the insured argued that the house was not vacant because it was visited daily by a remodeler. The court found that the term "vacant," which was undefined under the policy, was susceptible to more than one meaning and, therefore, was ambiguous. Construing the ambiguity in favor of the insured, as required under Connecticut law, the court determined that the home was not vacant, despite its being unlived in, so long as it was visited with sufficient frequency.

[7] No. CV09-4009267, 2011 WL 1030640 (Conn. Super. Ct. Feb. 18, 2011)

WINTER HAZARDS!

Lastly, we want to remind you all to be careful as we get through this eventful winter season. These historic storms present various hazards, including ice dams pictured below. Use caution and take preventative measures to avoid the potential injuries and property damage that can result.

SLOANE AND WALSH LLP
ATTORNEYS AT LAW
THREE CENTER PLAZA
BOSTON, MA 02108
T: 617-523-6010
F: 617-227-0927
WWW.SLOANEWALSH.COM

RHODE ISLAND OFFICE:
127 DORRANCE STREET, 4th Floor
PROVIDENCE, RI 02903-2828
T: 401-454-7700
F: 401-454-8855

CONNECTICUT OFFICE
100 PEARL STREET, 14TH FLOOR
HARTFORD, CT 06103
T: 860-249-758

NEW HAMPSHIRE OFFICE
1 TARA BOULEVARD, SUITE 200
NASHUA, NH 03062
T: 603-324-7134