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## Life, Health & Disability e-Report First Circuit

Fall 2018

### Life, Health, Disability and ERISA Litigation Group:



#### Joseph M. Hamilton

Joe co-authored the Life Insurance chapter for the ABA's recently published "Resolving Insurance Claim Dispute Before Trial."



#### Joan O. Vorster

Joan attended the DRI's Life, Health, Disability and ERISA conference in Boston this past spring.

*Welcome to the Fall 2018 edition of Mirick O'Connell's Life, Health and Disability e-Report - First Circuit. This newsletter provides a summary of decisions rendered by the First Circuit Court of Appeals, the United States District Courts within the circuit, and state appellate courts within the same geographic area. We hope the newsletter will be beneficial to you.*

*For your convenience, we have included hyperlinks with direct access to the full decision for each case. Decisions reproduced by permission of Westlaw.*

*Should you wish to learn more about Mirick O'Connell's Life, Health, Disability and ERISA Litigation Group, please visit our website at [www.mirickoconnell.com](http://www.mirickoconnell.com), or contact [Joseph M. Hamilton](#), [Joan O. Vorster](#) or [J. Christopher Collins](#).*

### FIRST CIRCUIT AND DISTRICT COURT ADDRESSES REMAND, ATTORNEY MISCONDUCT, PREJUDGMENT INTEREST, AND ATTORNEY'S FEES IN ERISA ACTION

In [Gross v. Sun Life Assurance Company of Canada](#), 880 F.3d 1 (1st Cir. 2018), the court addressed a number of procedural issues that arise in ERISA cases.

The case has a long history, including multiple rulings by the district court, and two appeals to the First Circuit. In 2013, the First Circuit found that Gross's medical evidence supported a finding of total disability but the record raised an issue regarding the significance of surveillance evidence obtained by Sun Life. As a result, the court remanded the claim to Sun Life for further proceedings. After additional administrative proceedings, Sun Life again denied the claim and Gross again challenged the denial in the district court. The district court ruled in Gross' favor and this appeal followed.

Sun Life appealed the district court's judgment in favor of Gross. It also claimed the district court abused its discretion by failing to impose sanctions on Michael Grabhorn, one of Gross' attorneys. Gross cross appealed, asserting that the district court erred in its award of prejudgment interest and attorney's fees.



**Elizabeth L.B. Greene**

Applying the de novo standard of review, the First Circuit upheld the district court's ruling that Gross was entitled to disability benefits. Of note, the court stated that where a claimant's credibility is a central factor in the disability determination, the impressions of examining doctors may be given more weight than those who look only at paper records. In a concurring opinion, Justice Kayatta argued that because Gross bore the burden of proof on whether she was disabled, he would find that she failed to do so. Justice Kayatta noted that Gross never showed the surveillance video to her own physicians and instead tried to muzzle Sun Life's IME physician.



**David L. Fine**

The court then moved on to addressing whether the district court appropriately refused to sanction, Michael Grabhorn. During the remand proceedings, Grabhorn wrote several times to the physician retained by Sun Life to conduct an IME of Gross. In the last letter, Grabhorn threatened to sue the physician if he failed to "correct" his medical opinion and included a draft complaint alleging claims of negligence, defamation, and fraud, and seeking punitive damages. The First Circuit found Grabhorn's threat to be "troubling, particularly given that it was not an aberration." Sun Life provided the court with at least three instances in which Grabhorn had been sanctioned by other courts. While the First Circuit upheld the district court's decision not to sanction Grabhorn, primarily because it did not find Sun Life had been disadvantaged by Grabhorn's conduct, the First Circuit did conclude that Grabhorn's threat was "worthy of reproach." Therefore, it directed its clerk to send a copy of the opinion to the Kentucky Office of Bar Counsel for whatever action it deemed appropriate.



**J. Christopher Collins**

Chris spoke in May at the Eastern Claims Conference on litigation team dynamics.

The court next addressed prejudgment interest. The district court awarded interest using the Treasury Bill rate set by 28 U.S.C. §1961(a). Gross sought prejudgment interest equal to the greater of the Massachusetts statutory rate for breach of contract (12%) or Sun Life's earning percentage for the time period at issue. Because the district court did not explain its rationale for its interest award, the court remanded to the district court for a reassessment or explanation of its interest rate determination.

Lastly, the court addressed the award of attorney's fees. It found the hourly rate of \$500 for Gross's local counsel appropriate, noting that Boston's hourly legal fees are among the highest in the country. It upheld the district court's decision to deny Grabhorn \$500 per hour and instead award him his "normal hourly rate" in Kentucky of \$375 per hour.



**Kevin Kam**

Kevin attended the DRI's Life, Health, Disability and ERISA conference in Boston this past spring.

The First Circuit increased the amount of the award for the preparation of the attorney's fees petition, noting that given the history and length of the case, additional time was appropriate. It also upheld the district court's reduction in the attorney hours allowed for summary judgment work, noting that many of Gross's arguments were not successful, but decreased the reduction from 50% to 25%. On remand to the district court, the issue of interest and attorney's fees was addressed. See, 2018 WL 3193225 (D. Mass. 2018).

The district court first addressed prejudgment interest. The court noted the First Circuit's instructions that in awarding interest, the court was to consider making the plan participant whole and preventing unjust enrichment. Based on that, the court increased the interest rate from the federal rate it had previously applied to 12%, the Massachusetts statutory rate for contract actions.

The court then addressed the amount of post-remand fees to be awarded to Attorney Grabhorn, noting that the First Circuit had deemed Grabhorn's actions during the case "worthy of reproach." Accordingly, the court reduced the number of compensable hours. While noting that Grabhorn did not bill for the specific misconduct in question, the court made a deduction for phases of the litigation "infected by that misconduct and related misrepresentations."

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NEWSLETTER**

**COURT ORDERED DISABILITY BENEFITS CASE BROUGHT**

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## **BY KANSAS RESIDENT IN MASSACHUSETTS TRANSFERRED TO KANSAS**

In [Rosenthal v. Unum Group](#), 2018 WL 1250483 (D. Mass. 2018), the U.S. District Court of Massachusetts allowed the defendants' motion to transfer a case filed in Massachusetts to the U.S. District Court of Kansas.

Rosenthal was insured under an individual disability policy issued by Provident Life and Accident Insurance Company in 1992 while she resided in Pennsylvania. She moved to Kansas in 1999. In 2014, she filed a claim for disability benefits.

Rosenthal was approved for benefits for a period of time and then benefits were discontinued. All benefits were sent to Rosenthal in Kansas where she lived. She also worked nearby in Missouri and received all of her medical treatment in Kansas or reasonably close thereto.

Rosenthal filed suit in Massachusetts. The defendants moved to transfer the case to Kansas pursuant to 28 U.S.C. §1404(a).

While noting that there was a strong presumption in favor of the plaintiff's choice of forum, the court also noted that if that choice has little or no connection to the operative facts of the case, the court may afford less weight to it.

While conceding that almost all witnesses and documents resided in Kansas, or within the subpoena power of the U.S. District Court of Kansas, Rosenthal argued that because current or former employees of the defendants who handled her claim lived or worked in Massachusetts, the case should remain there. The court was not persuaded, noting that most of the company witnesses identified by Rosenthal were still employed by the company and therefore could be secured to testify in Kansas.

Ultimately, the court was persuaded by its analysis of which state had a more significant relationship with the case. The court found that Kansas would have the greater interest in the resolution of the claim given that the alleged breach occurred in Kansas and Rosenthal lived there.

The court granted the motion transferring the case to Kansas.

**Joseph M. Hamilton and Kevin Kam of Mirick O'Connell represented Unum Group and Provident Life and Accident Insurance Company.**

## **COURT DENIES MOTION TO TRANSFER ERISA CASE**

In [Ovist v. Unum Life Insurance Company of America](#), 2018 WL 3853739 (D. Mass. 2018), a United States Magistrate Judge made a Report and Recommendation that Unum Life's motion to transfer the case from the District of Massachusetts to the Middle District of Florida be denied. The district court adopted the Report and Recommendation.

The plaintiff, Ovist, was a Florida resident who was covered by an employee benefit plan issued by her employer, a college in Florida. Ovist filed her claim for benefits while living in Florida, the claim arose there, she received all of her medical treatment there, and benefit payments were sent to her there.

For reasons that were unclear, other than her attorney practiced in Massachusetts, Ovist filed her claim for LTD benefits in Massachusetts. Unum Life has a claims operation in Massachusetts, but Ovist's claim was not administered there.

Unum Life moved pursuant to 28 U.S.C. §1404(a) to transfer the case to the Middle District of Florida, where Ovist resided. The district court referred the motion to a magistrate for a Report and Recommendation.

The court analyzed the factors established for a motion to transfer pursuant to §1404(a). The court noted that because the case facts had little connection to Massachusetts, the ordinary presumption in favor of the plaintiff's choice of forum did not apply. The court also noted that while Unum Life maintained an office in Worcester, the existence of that office, absent a meaningful connection to the case, did not trigger a presumption in Ovist's favor. Thus, the magistrate concluded that Ovist's choice of forum weighed only "slightly" against transfer.

Because the case was governed by ERISA, the magistrate found that the convenience of witnesses, access to proof and the location of documents favored neither side. The magistrate also held that the location of Ovist's counsel was a non-factor, as well as the applicable law. The magistrate also held that the issue of docket congestion did not weigh strongly in either party's favor.

With respect to the convenience of the parties, the court held that weighed in favor of transfer. The court held that Ovist had not argued that litigating the case in Florida would inconvenience her in any way. The court also found that Florida's relationship to the action was more significant than Massachusetts, and also weighed in favor of transfer.

However, inexplicably, after reviewing those factors the magistrate labeled the issue to be a "toss-up" and noting that the moving party bears the burden of showing that the factors strongly favor transferring the case, recommended that the motion be denied.

While Unum Life filed a vigorous objection to the Recommendation and Report, the district court, without opinion, adopted it.

Joseph M. Hamilton and Kevin Kam of Mirick O'Connell represented Unum Life Insurance Company.

## **LTD BENEFITS AWARDED FOR FIBROMYALGIA CLAIM UNDER DE NOVO REVIEW**

In [Rodriguez-Lopez v. Triple-S Vida, Inc.](#), 2018 WL 637397 (D. Puerto Rico 2018), the U.S. District Court of Puerto Rico, applying the de novo standard of review, found Rodriguez to be totally disabled from any occupation due to fibromyalgia.

The case had previously been heard by the district court under the arbitrary and capricious standard of review, 2015 WL 5792621, and the court had upheld the termination of benefits. On appeal, the First Circuit determined that the district court should have applied the de novo standard of review, 850 F.3d 14 (1st Cir. 2017). Thus, the case was returned to the district court.

Rodriguez had been paid 24 months of benefits under the mental illness provision of the ERISA plan. After those benefits were exhausted, Triple-S reviewed the claim for a physical disability and denied benefits.

Applying the de novo standard of review, the court found that Rodriguez had met her burden of demonstrating that she was disabled from any gainful occupation. The court primarily relied on the opinion of Rodriguez's treating physician, who had treated her for over 10 years. During that time the treating physician had provided three functional capacity estimates, all of which found that Rodriguez was totally disabled. The court placed significant weight on the treating physician, not only because he had treated Rodriguez for over a decade, but also because, in the court's view, diagnosing fibromyalgia

depended on knowledge and long-term observation of subjective evidence, such as the patient's pain. The court found the treating physician's consistent diagnosis of fibromyalgia since 2004 based on physical examinations and clinical testing and consistent observations of physical manifestations of her condition constituted objective medical evidence of Rodriguez's condition and her inability to perform the duties of an occupation.

The court rejected one of the independent medical evaluations performed on behalf of Triple-S, finding that physician inappropriately did not give sufficient merit to Rodriguez's subjective evidence and based his analysis on dated information. The court also rejected a vocational assessment because it relied on the independent physician's medical evaluation, which the court had rejected. While Triple-S had another evaluation of Rodriguez's medical records performed, the court held it gave greater weight to the opinion of the treating physician given that he had conducted a multi-year and in-person assessment of Rodriguez's conditions.

Rodriguez had also obtained Social Security disability benefits. The court upheld Triple-S's rejection of that determination because it was based on a combination of both physical and mental impairments. The court also rejected Rodriguez's conflict of interest argument finding that she had provided no evidence that Triple-S was influenced by the conflict.

The court awarded Rodriguez total disability benefits retroactive to the date of denial.

## **COURT DENIES DISCOVERY IN ERISA CASE, INCLUDING DOCUMENTS PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE**

In [Libby v. Unum Life Insurance Company of America](#), 2018 WL 1662183 (D. Mass. 2018), the U.S. District Court of Massachusetts essentially denied the claimant's motion to conduct discovery in an ERISA case and to expand the scope of the administrative record.

Libby's claim for disability benefits was closed due to her refusal to cooperate with the investigation of her claim, including submitting appropriate proof of loss and an authorization to obtain her medical records. Suit followed.

Libby brought a motion to conduct discovery, including a request for Unum Life's internal guidelines, training manuals, and internal rules; documents withheld by Unum Life under the attorney-client privilege; and documents regarding the compensation and qualifications of in-house medical personnel.

Prior to the motion being filed, Unum Life had offered to produce its claim manual. The court agreed that the production of the claim manual was appropriate and otherwise denied Libby's request as being overly broad given that they were not relevant to the basis of Unum Life's decision to close her claim.

With respect to the attorney-client privileged documents, the court held, applying the fiduciary exception, that the critical inquiry with regard to maintaining the privilege was whether the interests of the claimant and the plan had diverged such that it was warranted for the plan to obtain confidential advice from its counsel. While noting that courts frequently look to whether the communication occurred before or after a final decision on the merits of the claim, the court held that the benefit decision need not be final for the interests of the claimant and the plan to diverge.

In this case, the privileged documents were generated after the initial decision to close the claim, but before the administrative appeal was decided. Nevertheless, after reviewing the documents in-camera, the court, with the

exception of one page, found the documents sought legal advice for Unum Life's own benefit and therefore maintained their privileged status.

Lastly, the court denied Libby's request to obtain documents regarding the personnel that had handled her claim. Libby sought those documents on the ground that Unum Life had a structural conflict of interest. While acknowledging that conflict, the court found that Libby had presented no case-specific allegations that supported the conclusion that Libby had been impacted by an actual conflict of interest.

**Joseph M. Hamilton and Kevin Kam of Mirick O'Connell represented Unum Life Insurance Company of America.**

## **COURT SEVERELY LIMITS PROPOSED ADDITIONS TO THE ADMINISTRATIVE RECORD**

In [Prokhorova v. Unum Life Insurance Company of America](#), 2018 WL 1913801 (D. Mass. 2018), the U.S. District Court of Massachusetts addressed the plaintiff's request to add material to the administrative record in an ERISA benefits case.

Prokhorova, a pediatrician, claimed ongoing disability based on a diagnosis of a herniated disc in the thoracic spine. After paying benefits for a number of years, based upon updated medical records, including MRIs, and an IME, Unum Life concluded that Prokhorova could return to work. Benefits were discontinued and suit followed.

Prokhorova sought to enlarge the administrative record by adding portions of Unum Life's claims manual, its criteria for quality compliance, and vocational resource materials.

With respect to the claims manual, the court denied Prokhorova's request to add excerpts from the manual that addressed topics such as functional capacity and occupational demands, occupational evaluations, frequently asked questions, medical information and resources, and independent assessments on the grounds that Prokhorova had failed to overcome the presumption against supplementing the administrative record. With respect to the portion of the claims manual that addressed evaluation of subjective symptoms, the court allowed that material to be added to the administrative record on the grounds that the document directed claims handlers on how to evaluate a disability that depended to a large extent on subjective claims, which Prokhorova argued was at issue in her case.

The court also rejected Prokhorova's request that quality compliance criteria from Unum Life be added, finding that there was no evidence that a quality compliance review had been undertaken in her claim.

Finally, the court allowed Prokhorova's motion to the extent that the administrative record be enlarged to add the vocational resource materials that were cited in vocational assessments performed during the course of her claim. However, the court rejected any attempt by Prokhorova to add new vocational resource material to the administrative record, noting that reconfiguring the record would distort judicial review, especially where the arbitrary and capricious standard of review was being applied, and noted that a claimant does not have the right to supplement the record to add a more detailed or claimant-friendly job description when the information that was used by the plan was available to the claimant prior to a decision on the administrative appeal.

**Joseph M. Hamilton and Kevin Kam of Mirick O'Connell represented Unum Life Insurance Company of America.**

## **CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS DISMISSED FROM ERISA SUIT**

In [Weddle v. Life Insurance Company of North America](#), 2018 WL 2376358 (D. Mass. 2018), a Magistrate Judge issued a Report and a Recommendation that Weddle's claim for intentional infliction of emotional distress be dismissed. The District Court adopted the Magistrate Judge's Report and Recommendation. See 2018 WL 2376323.

Weddle was covered by a long-term disability plan provided by her employer and funded by a policy issued to the employer by Life Insurance Company of North America ("LINA"). After multiple efforts to schedule an IME for Weddle, LINA terminated the claim on the grounds that she had failed to cooperate in the administration of her claim. Weddle filed an administrative appeal, but LINA upheld its decision. Suit followed.

Weddle's complaint included a claim for benefits pursuant to ERISA. She also included a state common law claim for intentional infliction of emotional distress. She argued that LINA engaged in extreme and outrageous conduct beyond the bounds of decency by scheduling the IME on a day Weddle was unavailable due to a family illness and refusing to reinstate her benefits following her appeal.

The Magistrate Judge held that Weddle's claim arose from two different allegations. The first, that LINA terminated Weddle's benefits and then refused to reinstate them following her appeal knowing it would cause her emotional distress. The Magistrate Judge held that portion of the claim related to an employee benefit plan and therefore was preempted by ERISA.

The Magistrate Judge, however, held that the allegation that LINA inflicted emotional distress on Weddle when it scheduled the IME for times that LINA knew Weddle would not be available and then refused to schedule the exam at a time when she would be available was an allegation of tortious conduct separate and distinct from any claim regarding LINA's administration of the plan, and held that portion of the claim would not be preempted by ERISA because it would not require the court to evaluate or interpret the terms of the ERISA plan.

The Magistrate Judge went on to then assess that claim pursuant to the standard for a motion to dismiss, that is whether that conduct, if true, rose to the level of extreme and outrageous conduct that would be utterly intolerable in a civilized society. The Magistrate Judge found that it would not and therefore failed to state a valid claim for intentional infliction of emotional distress.

Lastly, given that it had dismissed the state common law claim, the Magistrate Judge held that Weddle would not be entitled to a jury and recommended that her jury demand be stricken.

## **COURT UPHOLDS DENIAL OF LIFE INSURANCE BENEFITS FOR FAILURE TO SUBMIT EVIDENCE OF INSURABILITY**

In [Schwartz v. Keolis Commuter Services](#), 2018 WL 1411202 (D. Mass. 2018), the U.S. District Court of Massachusetts held that an employee's failure to submit evidence of insurability as required by the benefit plan prevented her beneficiaries from obtaining supplemental life insurance benefits.

Sofiya Schwartz was employed by Massachusetts Bay Commuter Railroad Company ("MBCR"). In that capacity, she received basic life insurance coverage under a plan provided by MBCR and funded by a group policy issued by Unum Life Insurance Company of America ("Unum Life"). The benefit plan also provided a mechanism for additional life benefits but required the

employee to submit evidence of insurability to Unum Life. Schwartz attempted to obtain such benefits in 2008 but was denied due to her history of myelopathy.

In 2014, the Commonwealth of Massachusetts transferred the contract to operate its commuter rail system from MBCR to Keolis Commuter Services ("Keolis"). A provision in that transfer required Keolis to offer positions to those employees who had been working for MBCR. It also required Keolis to provide those employees with similar benefits that had been offered by MBCR. To that end, MBCR, Keolis and Unum Life executed an assignment of the group policy.

Subsequent to the transfer, Keolis offered its employees enrollment in Keolis' various benefit plans, including the life insurance plan. Schwartz submitted an application to Keolis to obtain coverage for four times her salary. Keolis then began deducting premium from Schwartz's paychecks. At no time did Keolis request that Schwartz provide evidence of insurability and at no time was one submitted to Unum Life.

Schwartz died ten months after submitting her application for additional benefits to Keolis. Unum Life paid the basic benefit but denied the supplemental benefits on the grounds that it had never approved Schwartz for those benefits. Suit followed.

Schwartz's beneficiaries brought claims for the benefits pursuant to 29 U.S.C. §1132(a)(1)(B) and breach of fiduciary duty claims pursuant to 29 U.S.C. §1132(a)(3).

The court made short work of the benefits claim. Applying the arbitrary and capricious standard of review, the court noted the plan's requirement that evidence of insurability be submitted for the supplemental coverage. Finding that there was no evidence that Schwartz ever submitted evidence of insurability when she applied to Keolis in 2014, the court held Unum Life's determination was neither arbitrary nor capricious.

With regard to the breach of fiduciary duty claims, the court first addressed the allegations against Unum Life. The court agreed with Unum Life's contention that summary judgment was warranted because the Administrative Record contained no support for the beneficiaries' allegations that Unum Life allowed Schwartz to enroll for the supplemental benefits or that Unum Life accepted premiums from Schwartz. The court noted that premiums were paid by Keolis in the aggregate without identifying the individual plan participants and there were no communications between the parties suggesting that Unum Life was aware premiums were being deducted from Schwartz.

Regarding Keolis, the court found that Keolis failed to satisfy its fiduciary responsibilities by neglecting to send Schwartz's application to Unum Life or to obtain evidence of insurability from Schwartz. However, the court also found that any reliance by Schwartz that she was insured for the additional life benefits was not reasonable. Schwartz knew that Unum Life had previously required her to submit evidence of insurability and had denied her. In addition, Schwartz was suffering from cancer at the time that she applied for benefits, and the cancer would ultimately cause her death.

Finally, the court rejected the beneficiaries' claim for surcharge against Keolis. Holding that a fiduciary can be surcharged only upon a showing of actual harm, the court held that it was speculative that Schwartz would have sought or obtained other life insurance in lieu of the coverage under the plan, especially where she had been diagnosed with cancer.

The court entered summary judgment on all counts in favor of Unum Life and Keolis.

**Joseph M. Hamilton and Kevin Kam of Mirick O'Connell represented Unum Life Insurance Company of America.**



## **NO CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY FOR MINISTERIAL ACTS**

In [Trovato v. Prudential Insurance Company of America](#), 2018 WL 813368 (D. Mass. 2018), the U.S. District Court of Massachusetts held that the act of providing notice of a conversation privilege was a ministerial act that did not constitute and could not be the basis of a claim for breach of fiduciary duty under ERISA.

Trovato's husband was a participant in a life insurance plan provided by his employer. After the husband became ill in early 2016, he was asked by the employer to stop coming to work. Subsequently, his coverage under the life insurance plan ended. The plan was funded by a policy issued by Prudential.

The husband died several months after coverage ended. Trovato contacted Prudential and was advised to apply for life insurance benefits. She did so but the claim was denied because the coverage had ended and the husband had failed to convert his coverage under the plan.

Trovato sued raising a number of claims against Prudential and the employer. Prudential sought summary judgment with regard to the claim of breach of fiduciary duty under 29 U.S.C. §1132(a)(3).

Trovato first argued that Prudential breached its fiduciary duty by failing to give her husband notice of conversion rights. Prudential argued providing that notice was a ministerial act, not a fiduciary act, and thus could not be the basis of a claim under §1132(a)(3). The court agreed, citing the First Circuit's decision in [Livick v. The Gillette Co.](#), 524 F.3d 24 (1st Cir. 2008).

Trovato also argued Prudential's advice that she should apply for benefits was a breach of fiduciary duty. The court also dismissed this allegation, noting that nothing in Trovato's complaint made any allegation that Trovato suffered harm as a result of Prudential's advice to apply for benefits. The court held that Trovato had not alleged facts sufficient to show a breach of fiduciary duty related to Prudential's advice.

Finally, the court denied Prudential's motion insofar as it sought to dismiss Trovato's failure to investigate claim. Prudential argued it should be dismissed because Trovato had also brought a claim for benefits pursuant to §1132(a)(1)(B). The court noted that the First Circuit has not decided whether a plaintiff could bring alternative claims under §1132(a)(1)(B) and §1132(a)(3) and therefore denied summary judgment as to that claim.

## **SUMMARY JUDGMENT MOTION ON STATUTE OF LIMITATIONS GROUNDS DENIED FOR BREACH OF FIDUCIARY DUTY CLAIM**

In [Erb v. Javaras](#), 2018 WL 3431959 (Mass. Super. 2018) a Superior Court in Massachusetts denied Javaras's motion for summary judgment based upon disputed issues of fact.

Javaras, an insurance agent, also served as a trustee of an irrevocable trust established by DiGeronimo. After Javaras was replaced as a trustee, the new trustee, Erb, alleged that Javaras had engaged in a churning scheme by repeatedly buying unnecessary, unsuitable, and expensive life insurance policies in order to increase his commissions. Erb brought claims of breach of fiduciary duty, fraud, negligence and violations of Chapter 93A.

Javaras brought a motion for summary judgment relying, in part, on the statute of limitations. The court held that the standard to be applied was that where a fiduciary relationship exists, the failure to disclose the facts that would give rise

to knowledge of a cause of action would constitute fraudulent conduct and is equivalent to fraudulent concealment. Thus, the running of the statute of limitations would not begin until the plaintiff had actual knowledge of the wrong committed by the fiduciary.

In opposing the motion for summary judgement, Erb claimed that the trust did not have actual knowledge of the unsuitability of the insurance policies until he replaced Javaras as trustee. The court held that if the jury credited that testimony, the statute of limitations would not have begun to run until 2013, which would mean that all the claims asserted in the case were timely.

Javaras also sought summary judgment due to a release that had been issued by the trust to the insurer and its affiliates. While noting that an earlier decision in the case could be interpreted that Javaras was an affiliate of the insurer and therefore protected by the release, the court also held that if the jury found that Javaras was acting in a fiduciary capacity, the release would not apply without a full disclosure of the facts by Javaras to the trust. Thus, an issue of fact existed as to this claim.

Finally, the court rejected Javaras's motion to dismiss a collateral policy which had been obtained for the trust. The trust claimed that the policy should have been a term life policy instead of a whole life policy. Javaras claimed that because the trust received the product purchased he was entitled to summary judgment. The court disagreed. It held that an insurance broker who holds himself as possessing skill in obtaining appropriate insurance has a duty to exercise that skill and may be held liable if he recommends an inappropriate policy. Thus, summary judgment was denied on that issue as well.

## **CASE REMANDED TO STATE COURT AFTER FRAUDULENT JOINDER ARGUMENT REJECTED**

In [Torruella v. Transamerica Life Insurance Co.](#), 2018 WL 1902595 (D. Puerto Rico 2018) the U.S. District Court of Puerto Rico remanded a case removed to that Court after finding a lack of diversity.

The case had a somewhat tortured procedural history. Torruella originally brought the case in the trial court for the Commonwealth of Puerto Rico. He sued both Transamerica and its agent, Global Insurance Agency. The suit arose from Torruella's claim that he was promised that his insurance premium would not increase over the life of the policy.

Transamerica removed the case to federal court and argued that the complaint stated no actionable claim against Global (a citizen of Puerto Rico) and therefore Global had been fraudulently joined. The district court agreed and denied Torruella's motion to remand the case to state court.

After Torruella unsuccessfully attempted to amend his complaint, he dismissed the federal court case. However, less than a month later Torruella filed a new complaint in the Commonwealth of Puerto Rico, again naming Transamerica and Global as defendants but also adding claims against the estate of the individual agent, Bruno, that had handled the sale of the policy.

In a flurry of activity prior to Transamerica again removing the case to federal court, Torruella obtained an order from the Puerto Rico Superior Court imposing a preliminary injunction against Transamerica and Global and making a series of findings of fact regarding the relationship of Transamerica, Global and Bruno to the transaction.

After Transamerica again removed the case to federal court, Torruella moved to remand.

Relying heavily on the findings made by the Puerto Rico Superior Court, the district court allowed Torruella's motion to remand the case. The court noted the additional claims made by Torruella in the new complaint as well as the findings made by the Puerto Rico Superior Court that Global and Bruno were agents of Transamerica, that they made assurances to Torruella that the policy met his required specification, and that there was a substantial likelihood that Torruella could establish that Transamerica waived various provisions of the policy. Therefore, the district court held that Torruella had cleared the hurdle of establishing a reasonable possibility of prevailing against Global and/or Bruno under Puerto Rico law.

The case is interesting for several other reasons. First, Torruella is a justice of the First Circuit Court of Appeals. Secondly, Torruella successfully managed to have the Superior Court issue a preliminary injunction and make detailed findings against the defendants without waiting for any response to the injunction from the defendants. Those findings were in large part the basis under which the district court allowed the motion to remand.

## **DID YOU KNOW?**

Did you know that Mirick O'Connell's Life, Health, Disability and ERISA Litigation Group represents clients throughout New England? With offices in Boston, Westborough and Worcester, our attorneys are within an hour of all the major Courts in Massachusetts; Hartford, Connecticut; Providence, Rhode Island; and southern New Hampshire. In addition, our attorneys are admitted to practice not only in Massachusetts, but in Connecticut, New Hampshire and Rhode Island as well. We have repeatedly and successfully represented our clients in each of these jurisdictions. So remember, we are not here for you just in Massachusetts; think New England!

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