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Report From Counsel

Insights and Developments in the Law

Spring 2006

The “Un” Insurance You Need

By Bruno R. Morasutti

The thought of insurance can conjure up ideas of complicated policies, arcane language, and generally a topic worth avoiding. However, the importance of having enough underinsured and uninsured motorist coverage cannot be overemphasized. Unfortunately, many people do not give automobile insurance the careful consideration it warrants. Instead, because automobile insurance is a requirement, it is often purchased without giving much thought about what the coverage would do in the event of a claim following an accident.¹

When many of us think about automobile insurance, we think in terms of buying protection in the event we are in an accident in which we have caused an injury. This protection means that our insurance company will be responsible for the claim of the injured party for property damage and personal injury up to the limits of the policy. This coverage is generally referred to as liability insurance. Unlike liability insurance, underinsured and uninsured motorist coverage is insurance that covers you, the policyholder, for personal injuries incurred in an accident where the other driver is at fault and either has insufficient liability insurance or no insurance at all.

Connecticut law requires that all motor vehicles carry liability insurance in certain minimum amounts. The minimum mandated is \$20,000 per person and \$40,000 per accident. When its insured has caused an acci-

dent, the insurance company, generally speaking, is obligated to pay to an injured party claimant an amount only up to the limits of the policy. Although the minimum mandated \$20,000 may be enough to compensate someone who is not seriously injured, it quickly becomes inadequate in the case of serious injuries. A trip to the emergency room, x-rays, and other diagnostic tests can add up quickly, and these costs often are only the beginning. The follow-up with a specialist, surgery, physical therapy and other related medical treatment including medicines

can easily exceed \$20,000. Add to the medical bills the time lost from work, the pain and suffering, and a permanent partial disability, and the \$20,000 doesn't come close to being fair and just compensation for the injured victim. Whether it is adequate compensation or not, if that amount is the extent of the other driver's coverage, that is all the insurance company is required to pay. In this case the insurance company has avoided having to pay substantially more for serious injuries

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Medicaid Law Update (Title XIX)

By Kenneth W. Mango

In our winter issue, I reported that the United States Congress was considering several changes to the current Medicaid law, including extending the “look-back” period for gifts and changing the start-date on the penalty period commencement date for gifts made within the “look-back” period. As I said at that time, the proposed changes did not bode well for our senior citizens. Recently the United States Senate passed both changes by a 51 to 50 vote (the Vice-President of the United States breaking the tie in favor of passage). The United States House of Representatives followed suit by a

vote of 216 to 214 in favor of passage. Therefore, the “look-back” period for Medicaid applicants is now five (5) years and the penalty period for gifts made within the five (5) year “look-back” period will now begin to run on the date that one applies for Medicaid, i.e., at the time when the applicant's assets are depleted, rather than from the date the gift was made.

Transfers made more than five (5) years prior to the application for Medicaid benefits are outside the “look-back” period and not penalized. In the

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ADA Protects Employees with Cancer

Now 15 years old, the Americans with Disabilities Act (ADA) protects disabled persons from discrimination in employment settings. When you first think of individuals with disabilities, the millions of Americans who have some history of cancer may not immediately come to mind. But, as the Equal Employment Opportunity Commission (EEOC) discusses in a recently published guide, a cancer victim may well be entitled to the protections afforded by the ADA.

Cancer as a Disability

Cancer is a “disability” within the meaning of the ADA when the cancer itself or its effects substantially limit one or more of a person’s major life activities. The limiting condition needs to be more than just temporary in nature. Just what constitutes a major life activity is difficult to succinctly describe, but an exhaustive list would be a long one. Interacting with others, sleeping, eating, and walking are but a few examples. As with other types of conditions, cancer will be treated as a disability if it does not, in fact, significantly affect a major life activity *but an employer treats the individual as if it does*. This reflects the ADA’s goal of attacking discriminatory stereotypes and assumptions when they motivate an employer’s decisionmaking.

Information Gathering

During the time period before any offer of employment has been made, an employer may not ask an applicant if he or she has (or has had) cancer, or about cancer-related treatments. The employer is permitted to ask if an applicant can perform particular job requirements. If an applicant has volunteered the information that he or she has (or has had) cancer, the employer still may not question the applicant about the cancer or the applicant’s prognosis, but the employer may ask questions about whether the applicant will need an accommodation and, if so, what kind.

Once a job offer has been made, the employer may ask health-related questions and require a medical exam, as long as the employer treats all applicants for the same type of position in the same manner. The discovery that an applicant has (or has had) cancer cannot be used to withdraw a job offer if the applicant can perform safely all of a job’s fundamental duties, with or without reasonable accommodation. When an offer has been accepted, the employer can ask questions about the employee’s health or require a medical exam only when it has a legitimate reason to believe that the cancer may be affecting the employee’s ability to do the job, and to do it safely. With a few exceptions, an employer must keep confidential any medical information learned about an applicant or employee.

Reasonable Accommodation

Within reason, the ADA requires employers to make adjustments or ac-

commodations to enable people with disabilities to enjoy equal employment opportunities. An employer is not required to subject itself to undue hardship (that is, significant expense or difficulty) in order to accommodate someone. Nor must an employer remove an essential function from a job, although it may choose to do so. As for cancer-related disabilities, some individuals may need, and are entitled to, reasonable accommodations because of the cancer itself, the effects of cancer medication and treatment, or both. A request is necessary to trigger the duty to make a reasonable accommodation, but no “magic words” are required and, in fact, the request may come from someone acting on behalf of the disabled person. The guidance is available on the EEOC’s website at www.eeoc.gov/facts/cancer.html.

Social Security Number Verification for Employers

The Social Security Number Verification Service (SSNVS), set up by the Social Security Administration (SSA), allows employers to use the Internet to match their records of employee names and Social Security numbers with those of the Government’s before preparing and submitting W-2 forms. You can access the SSNVS at www.socialsecurity.gov/bsowelcome.htm. This is a faster and easier method to use than submitting requests to the SSA by other means, including the telephone verification option.

Verification of data is important for both the employer and its employees. Correct names and numbers are critical to successful processing of wage reports, and unmatched records can cause additional processing costs for the employer. From the employees’ standpoint, verified names and numbers allow the Government to properly credit employees’ earnings records. Any uncredited earnings can adversely affect future eligibility for Social Security’s retirement, disability, and survivors programs.

Medicaid Update

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past, I have concentrated on having our healthy clients consider a transfer of the family home beyond the “look-back” period. I was not so concerned with savings and investments because retention of liquidity was important to our clients, and gifts of those assets could be properly timed since the penalty period began on the date the gift was made. Therefore, the client had ample time before the application for Medicaid benefits needed to be filed. That has changed. Since the new law provides that the penalty period for all gifts made within the “look-back” period does not begin to run until the application for Medicaid benefits is filed, presumably at a time when the applicant has few assets left, a delay in receiving those benefits would have a disastrous effect on the applicant and his or her family. Consequently, I am now advising our clients to consider a transfer of some of their savings and investments beyond the “look-back period” as well. This approach now requires careful planning for the funds that are transferred. The use of carefully crafted trust funds and family agreements as to the use of those funds is very important. In addition, long-term care insurance that covers a client during the five (5) year “look-back” period is now more important than ever. By using long-term care insurance, one can make a substantial gift and if long-term care is needed within the “look-back” period, the insurance would pay for it. Once beyond the “look-back” period, the client can apply for Medicaid benefits without penalty.

The new law also places limits on the amount of home equity that one may have in order to be eligible for Medicaid benefits. This may well mean that one who owns a house with

equity above the limit would be required to sell the house before being eligible for Medicaid benefits. I am now advising that you consider a home equity line of credit, even if you don’t need to access it immediately. Most lenders are more than willing to grant a home equity line of credit to a qualified, healthy individual with equity in a home. That may not be the case if you wait until you are ill or institutionalized. By having the credit line in place, you can draw on it at any time and thereby reduce your equity to acceptable Medicaid limits. When you pay the line down at the appropriate time, it is not considered a gift and therefore will not result in the imposition of a

penalty period at the time that application is made for Medicaid benefits.

The new Medicaid law presents a multitude of challenges. It raises more questions than it answers. There are also some serious constitutional questions. In the days ahead, there will be many test cases and challenges to the law as attorneys, judges and fair-hearing officers grapple with the issues raised by the new law. At Luby Olson, P.C., we are confident in our ability to meet those challenges.

Editor’s note: Attorney Mango, Managing Partner of Luby Olson, P.C., is a member of the Elder Law Section of the Connecticut Bar Association.

New 401(k) Investment Option

As of January 1, 2006, employers are able to offer a new retirement savings option, the Roth 401(k). The new account allows the features of a Roth IRA to be incorporated into the setting of a 401(k) account, but without the income restrictions that limit a Roth IRA. Contributions will be made with after-tax dollars, but the account will grow tax-free, and withdrawals taken in retirement will also be tax-free, assuming an individual is at least 59-1/2 years old and has held the account for at least 5 years.

Roth 401(k) accounts will be subject to the same contribution limits as regular 401(k)s. In 2006, this means a contribution limit of \$15,000, or \$20,000 for individuals 50 and over. The contribution limits apply to regular and Roth 401(k) plans combined, so, for example, an individual could not put \$15,000 in a regular 401(k) and

\$15,000 in a Roth 401(k). Still, the opportunity to put more money into a retirement account that will have tax-free withdrawals will be enhanced, given that in 2006 the contribution limits for a regular Roth IRA will be \$4,000, or \$5,000 for those 50 or older. If an employer matches the employee’s contributions to a Roth 401(k), the matches will be made with pre-tax dollars in a regular 401(k) account that will be taxed as ordinary income at withdrawal.

Although it is only now becoming available, the Roth 401(k) originated in a big piece of tax legislation that was enacted in 2001, with a sunset provision to take effect in 2010. Thus, it remains to be seen whether over the long run the Roth 401(k) will be seen as an option that was available in a small window of time, or a permanent fixture in retirement planning.

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

Insurance

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caused by its insured. Unless the injured innocent claimant has protection, that is all the injured party will recover.

This is where underinsured and uninsured motorist coverage comes to the rescue. Like liability insurance, the law requires that each automobile liability policy provide underinsured and uninsured motorist coverage in at least the same minimum amounts as the liability coverage. The following example will illustrate how underinsured motorist coverage works:

Suppose you are seriously injured in a car accident through no fault of your own. The injuries you sustain require immediate emergency surgery followed by a short stay in the hospital. Following the surgery there are months of rehabilitative physical therapy, and during this time you are not able to work. In the end the medical bills total \$70,000, and you have lost significant income from being out of work. A year or so after the accident, after all the treatment is over, you are still not fully recovered. You are left with a permanent partial disability that among other things causes pain and prevents you from many of the activities you enjoyed prior to the accident. Before you start thinking that this scenario is far-fetched, it is almost identical to a case I have and typical of accidents that occur regularly.

In the above example assume the driver responsible for the accident carries more than the minimum liability insurance. Instead of \$20,000 he or she has a \$100,000 policy. Assume further that you also carry \$100,000 of liability insurance and \$100,000 of underinsured motorist coverage. The severity of the injury you sustained is evidenced by the amount of your medical bills, time out of work, residual pain, and a permanent disability. In this case the other driver's insurance company pays you \$100,000. Does that compensate you for all you have been through and lost? As a lawyer who handles many accident cases, my answer is no. Unfortunately, you cannot recover

more under the underinsured provisions of your policy because the law does not consider the other driver underinsured when your own policy does not have a greater amount of coverage than the other driver's policy.

Now assume that in the example used, you have a policy that provides \$300,000 worth of liability and underinsured motorist coverage. In this case the law says the other driver is underinsured because you have a policy for your protection that is \$200,000 more than that other driver. Therefore, there is an additional \$200,000 from which a claim by you could be paid. The amount you can claim under your underinsured policy is an amount up to the difference between the amount of liability insurance the other driver has and the amount of underinsured coverage you have. So if you carry only the minimum insurance necessary, or at least not more than the other driver who injures you in an accident, there is no recovery over and above the limits of the other driver's policy.

There is an exception if you have purchased something called "conversion" coverage. Conversion coverage is an option your insurance company must offer its policyholders. In a nutshell, conversion coverage mandates that the underinsured motorist coverage will not be reduced because of payment by or on behalf of the person responsible for the accident. In the example above where the negligent driver and the injured driver both have \$100,000 coverage, if the injured driver had conversion coverage and his or her injuries were determined to be worth \$150,000, he or she could collect an additional \$50,000 even though the conversion coverage amount is equal to the amount of liability insurance the negligent driver has. In effect, carrying conversion coverage enhances the benefit of having underinsured motor vehicle coverage.

What is our best advice? Review your automobile insurance coverage. However, the laws that deal with underinsured and uninsured motorist insurance can create results that are complex and not always apparent to individual

policyholders. If you think you may not be adequately covered, speak with your insurance agent and consult with your attorney. We at Luby Olson, P.C. are available to assist you in choosing the best alternative for you and your family.

Editor's note: Attorney Morasutti is a partner in the law firm of Luby Olson, P.C. His practice is concentrated in the areas of personal injury, municipal law and family law.

Endnote

¹ There is a large and growing body of statutes and case law on this subject with which an advisor must be familiar in order to provide accurate and comprehensive advice. The reader should consult with a lawyer or insurance agent to review his or her particular situation rather than rely on the general principles discussed in this article.

Current Events

Through the years, members of the law firm of Luby Olson, P.C. have been actively involved in the activities of the Meriden Boys Club (now the Meriden Boys & Girls Club). The founding members of the firm, Attorneys Bob Luby and Gary Olson, served on the Club's Board of Directors. Attorneys Ken Mango, Dennis Gaffney and Tom Luby also became members of the Board. Attorneys Olson, Mango and Gaffney each served as President of the Board.

With this background, it was fitting that Attorney Gaffney act as Master of Ceremonies at the recent retirement dinner for Gary "Tex" Burt, the Executive Director of the Club for many years. "Tex" followed in the enormous footsteps of Joe Coffey and did a great job in teaching sportsmanship, teamwork and good citizenship to thousands of youngsters. Best of luck in your retirement, "Tex"!