The Gavel

Issue 1/2004 December, 2004

A periodic newsletter on legal issues for clients and friends of **David B. Forest, P.C.**
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Check the Website for more Articles

All of the back issues of *The Gavel* are on our website at WWW.FORESTLAW.COM. An index of the previous articles is listed, so if a legal issue comes up, you might want to check the list of articles to see if a article was already written on your topic. Have a question on an employment issue? Wills or trusts? Check the website - it's even been cited as authority in at least two published articles (and it's free!) ***Disclaimer: Nothing in this newsletter is intended to be or is a substitute for legal advice.***

E-Mails - Deleting may not be enough

Almost everyone who has a computer connected to the internet knows what e-mail ("electronic mail") is, and most have sent or received e-mails at work, at home, or wherever. For reasons unknown, many e-mailers seem less inhibited when writing an e-mail than they normally would with a regular letter. But if the e-mail was never printed and both the sender and receiver deleted it from their computers, no harm, right?

Maybe plenty, since deleting the e-mail (or any other document or file from your computer) usually does not eliminate it from your personal computer. Instead, the file is stuck into an unallocated part of the hard drive. The computer retains the information, and a skilled computer searcher in the field of data forensics can still find it.

This is becoming an increasing problem for businesses, especially ones that do not have written policies regarding what the company's computers can be used for (and not used for), as well as a policy regarding deleting files and back-ups.

If the business becomes involved in a lawsuit, this policy (or lack of it) can 'make or break' a case. Soon after a commercial lawsuit starts, the parties engage in discovery. This is a process to learn, or 'discover', facts about the other side's claim or defense. The discovery process can include "documents" in any form, including electronic. Since a lot of a business's documents may be stored on its computers, these are fair game.

How would a company's computer use policy have any effect on this? Because of the possibility for an 'adverse inference' instruction to the jury.

When a party in a lawsuit had some piece of evidence (documents, e-mails, pictures, etc.) and fails to preserve it, a jury is allowed to infer that the evidence must have been damaging to the party that allows the

evidence to be spoiled (destroyed,, lost, etc.). **However**, if the company has a written policy in place regarding how long electronic documents are to be kept before being destroyed, and the employees follow the policy, it cannot be vilified for following its procedure and destroying the 'evidence'. Therefore, a little planning in advance by the IT department can save a lot of legal headaches down the road. *Source: Michigan Bar Journal.*

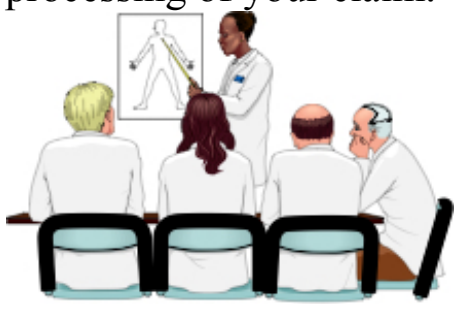
Insurance Claims

(or, Should I trust the Adjuster and Insurance Company Doctors?)

Many insurance companies and their claims adjusters are on the up and up, and try to make a fair determination of what is right when a policy holder makes a claim for insurance payments. The adjuster must determine that the claim is legitimate and within the policy (if it is not, the insurance company will not be in business for very long).

When a claim such as disability is submitted to an insurance company, it is assigned to an adjuster. The adjuster must a determination, and when medical issues are involved, the adjuster will often require the policy holder to appear for an "independent medical examination".

However, aside from the seemingly endless paperwork and red tape that can be so annoying when it comes to filing insurance claims, there can be something more sinister lurking behind the seemingly routine processing of your claim.



There are some insurance companies, adjusters and/or doctors who are not interested in making a fair determination. Rather, they see their role as denying virtually every claim, legitimate or otherwise. If this happens to you, you are not defenseless. The insurance company, and any doctor that is paid by the insurance company to examine you, is still held to reasonable standards, and must satisfy these standards. When they do not, there can be hell to pay.

In a recent federal court case, Western District of Michigan Judge Richard Enslen cut right through the BS. In the case, a woman who had filed a long term disability claim was initially being paid, but later denied after the plan administrator decided to review her claim again and then determined that she was not disabled. She brought suit. The judge's opening words in his opinion is a message we should all be aware of:

"*Caveat Emptor!* This case attests to a promise bought and a promise broken... [the plaintiff had multiple disabilities which prevented her from work of any kind]... The plan and insurance language did not say, but the world should take notice that when you buy insurance like this you are purchasing an invitation to a legal ritual in which you will be perfunctorily examined by expert physicians whose objective is to find you not disabled ... Fortunately, the law,... ,does not allow the purveyor of such empty promises to win the day."

Judge Enslen explained his rationale: "First of all, the claim administration displayed was unprincipled, bias[ed] and craven. As can be seen readily from the claim history, this claim as not selected for review because of questions about the Plaintiff's ability to work.... [but] because Plaintiff had not yet qualified for social security benefits - meaning [Defendant had to pay out more without Social Security to offset some of the payments]. The claim administration was both grossly negligent and driven by financial motives irrespective of the binding contract/benefit language."

And finally: "...there was an independent medical review [in which only one of three reviewing doctors ever met Plaintiff, and then for only five minutes] which unreasonably disregarded the opinions of treating physicians and lacked a rational basis for a finding other than disability." After these words, it was not a surprise that Judge Enslen ruled in favor of the Plaintiff.

Sometimes, the law does a great job of serving and protecting us from injustices like this woman had to endure. If you are facing mistreatment from an insurance company, please let us know if we can help. Loucks

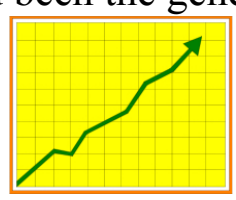
v Liberty Life Assurance Company of Boston.

CASE IN POINT:

Mitigating Damages

When one party to a contract breaches (breaks) a contract, the other party is entitled to receive damages to the extent that the breach caused the damages. In the case of a broken employment contract, the wrongfully terminated employee is to be fairly compensated for the breach. In essence, this equates to the amount of salary and benefits that the employee would have received if the contract had not been broken. Does that mean that the employee can just sit on a couch until the contract was supposed to finish and eat bon-bons?

A recent Michigan Court of Appeals case makes clear that a wrongfully terminated employee has a duty to mitigate (soften or alleviate) the damages, but that duty only goes so far.

Mr. Elder had been the general manager for a Macomb County auto dealership since 1984, and had a written employment 

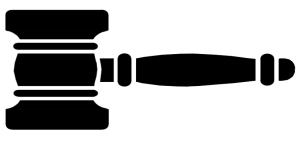
contract that provided that so long as the dealership had gross profits over $150,000 each year, Elder was entitled to 25% of the dealership's gross operating profits. In 2001, the dealership fired him, and Elder sued the dealership for wrongful termination of his employment contract.

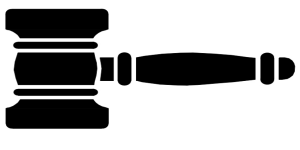
Elder alleged and was apparently able to prove that the Defendant wrongfully breached his 'just cause' contract (the Defendant lost the argument that the relationship was terminable at will). The jury awarded him over $8 million dollars, almost all of which was for lost future earnings.

The dealership appealed, and among other issues, argued that Elder failed to mitigate his damages. The mitigation rule obliges a wrongfully terminated employee to make reasonable efforts to find, and if offered, to accept employment that is substantially similar to the position from which the plaintiff was fired. The factors used to determine "comparable employment" include type of work, hours worked, location, compensation, job security and working conditions. The compensation earned at another job would offset some (or all) of the damages caused by the original employer.

Elder had been contacted by another dealership about becoming its general manager, but turned it down because he felt the pay would have been too low. Specifically, Elder testified that an offer of $90,000 per year and 11% of the dealership's profits was insufficient because the other dealership's profits were "nothing".

Accepting that the other dealership's offer was lower than he was earning at the Defendant, the issue was raised that the judge should have instructed the jury on the "lowered sights" doctrine. Under this doctrine, a wrongfully terminated employee who is unable to find comparable work after a reasonable period of time is required to "lower his or her sights" and consider accepting other available employment even is the pay rate is lower. However, the Michigan Court of Appeals ruled that the "lowered sights" doctrine is not the law in Michigan, and turned down the appeal. The jury's verdict was affirmed. Elder v Mike Dorian Ford.





➥REFERRALS If you are pleased with the **service and professionalism** you have received from our office, it would be greatly appreciated if you passed the good word along. **Referrals are always appreciated and encouraged**, and we look forward to the opportunity to serve your associates and friends. If we cannot immediately service their needs, we will be happy to **refer them to the appropriate attorney specializing** in their specific area of need. However, if you have not been pleased, contact us directly!

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