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PLEASE RESPOND TO  
QUINCY OFFICE

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**Re: Recent Developments in Massachusetts Insurance Law,  
Second Quarter of 2012**

The following will summarize the Massachusetts decisions which impact the insurance industry for the second quarter of 2012. If you will send us your email address, we will send you these newsletters via email.

## **AUTOMOBILE**

**\* The driver and his passenger each received \$50,000 in underinsured motorist benefits even though the Policy provided \$100,000 in U.I.M. coverage.**

The driver had \$100,000 in medical expenses and the passenger had \$241,000 in damages. However, the Policy provided that the underinsured motorist benefit was subject to a per person limit of \$100,000 . The driver and passenger had each previously received \$50,000 from the other driver's coverage. As a result, the Court awarded \$50,000 to each of the driver and the passenger for a total of \$100,000 each in order to comply with the \$100,000 limit.

Commerce Insurance Company v. Blackburn, 81 Mass. App. Ct. 519, 964 NE 2d 1005 (Mass. App. Ct. 2012)

### DUTY TO DEFEND

**\*The insurer had no duty to defend an action for violation of the Sherman Anti-Trust Act where such actions were excluded from coverage.**

The professional liability Policy excluded coverage for any claim based on actual or alleged price fixing, restraint of trade, violations of the Sherman Anti-Trust Act, the Clayton Act or any similar state or federal law. The Complaint alleged violations of the RICO and Sherman Anti-Trust Acts.

Saint Consulting Group v. Endurance American Specialty Insurance, 2012 WL1098429 (USDC MA 2012).

### EXCLUSIONS FROM COVERAGE

**THE COURT ENFORCED AN ANTICONCURRENT CAUSE EXCLUSION IN A HOMEOWNER'S POLICY WHERE SURFACE WATER SEEPAGE CAUSED DAMAGE.**

The Massachusetts Supreme Judicial Court ruled that there was no coverage under a homeowner's policy where there had been extensive damage to the policyholder's house from the hidden seepage of surface water from a patio into the wood sills, the floor joists and the studs. The Court ruled that the policyholder had borne her burden of proving that her claimed loss, the deterioration and rotting of the wooden sill plate, adjoining floor

joists and wall studs, fell within the homeowner's coverage under the "hidden seepage" provision.

That provision provided coverage for "wet or dry rot" due to "hidden seepage" where "such seepage or leakage of water...is unknown to all insureds and is hidden within the walls...of a structure." [pages 3-4.]

However the Court further ruled that the insurer then satisfied its burden of "showing the exclusion for damage caused directly or indirectly by surface water" was applicable to the claim. The Policy exclusion provided:

"We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss... Water Damage, meaning: (1) Flood, surface water..." [page 4.]

The Court went on to rule:

"In light of the anticoncurrent cause provision in the exclusion's section of [the policyholder's] policy, where the excluded peril--surface water--was a direct or indirect cause of the damage... [the insurer] was not obligated to provide insurance coverage 'regardless of any other cause or event contributing concurrently or in any sequence to the loss.' "  
[page 6.]

The Court went on to define "surface water" as water derived from falling rain or melting snow or which rises to the surface in springs and is diffused over the surface of the ground while it remains in such a diffused state. The policyholder did not challenge the insurer's expert's opinion that the damage was the result of a moist and wet condition caused by surface water in the form of rain or snow falling on the patio, running down into the

gaps and joints onto the wood framing of the rear wall of the house which was below the grade of the patio. [page 5.]

**BOAZOVA v. SAFETY INSURANCE COMPANY, 462 MA 346, 968 NE2d 385 (May 29, 2012).**

**COMMENT**

This decision bears careful reading as it applies to all exclusions from coverage. The Court did not limit its ruling to homeowner's coverage. Consequently, *Boazova* would seem to apply to life, disability, fire insurance, general liability, accidental death, in short, all manner of coverage which contains exclusions.

If you would like a copy of any of the above decisions, please contact us.

Very truly yours,  
**/S/ Philip M. Howe**  
Philip M. Howe

PMH