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Extension 203

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**Re: Recent Developments in Massachusetts Insurance Law,
First Quarter of 2008**

The following will summarize the Massachusetts decisions which impact the insurance industry for the first quarter of 2008. If you would like to receive these newsletters via email, please send your email address to phowe@lecomtelaw.com.

AUTOMOBILE

***The intervening act of resisting arrest took the claimant police officer's injuries outside of coverage.**

The police officer was injured when a motorist resisted arrest. The officer sought coverage under the motorist's automobile policy which covered "bodily injury arising out of the ...use of an auto." The Court ruled that the motorist's resisting arrest broke the chain of causation between his operation of the covered truck and the officer's injuries. As a result, there was no coverage under the automobile policy.

Bonina et al. v. Marshall et al., 2008 Mass. App. LEXIS 304 (March 26, 2008).

CIVIL PRACTICE

*** Failure to respond to discovery can result in dismissal.**

Plaintiffs' discovery responses were more than seven months overdue and there was no indication that they would have been promptly provided in the near future. Defendant's third motion to compel overdue discovery responses was pending at the time of the dismissal. Most significantly, the plaintiff offered no legitimate excuse for the delay in responding. Plaintiff's counsel argued only his own inexperience, that of his staff and his decision to devote time to his paying clients and not to pro bono cases such as this one.

The Court rejected plaintiffs' argument that they were blameless for the delay. The Court wrote that the First Circuit has consistently "turned a deaf ear" to the plea that the sins of the attorney should not be visited upon the client.

Malloy et al. v. W.M. Specialty Mortgage LLC, 512 F. 3d 23, (1st Circuit, 2008).

*** Failure to file a Motion to Dismiss for defective service of process for over three years will result in a waiver of that defense.**

Even though the defendant raised ineffective service of process in his Answer as an affirmative defense, the Court ruled that the defendant must file the appropriate motion to dismiss "within a reasonable time, prior to substantially participating in discovery and litigating the merits of the case..." The merit of the evidence supporting the late motion to dismiss for ineffective service will not cure the waiver.

Raposo et al. v. Evans, 2008 Mass. App. 2d. 251 (March 13, 2008).

Comment

While the above decisions do not contain coverage issues, they are most significant guidelines for all who litigate in Massachusetts.

MISREPRESENTATION

***A policyholder generally does not have an obligation to answer a question that the insurer has not asked in the application.**

The application for umbrella coverage for an automobile policy asked that the applicant list "ALL MEMBERS OF HOUSEHOLD AND ALL OPERATORS OF VEHICLES/WATERCRAFT AS REQUIRED BY COMPANY."

The applicants identified their nineteen-year-old daughter who lived at home but not their seventeen-year-old son, who also lived at home and had his own truck covered by a separate automobile policy. If the applicants had listed their son on the application, the premium would have been higher.

The Court ruled that there were not grounds for rescission of the policy issued to the parents based on misrepresentations in the application. The Court was persuaded that the policyholders understood the application to ask only for the names of those household members who were driving the automobiles listed in the application. The son did not drive any of those vehicles.

Hingham Mutual Fire Insurance Company v. Mercurio, 2008 Mass. App. LEXIS 1 (January 4, 2008).

POLLUTION EXCLUSION

***The comprehensive general liability policy excluded coverage for release of pollutants from any premises occupied by the insured.**

As a result, there was no coverage for pollution for an oil leak from an underground storage tank owned and used by the policyholder.

Nascimento v. Preferred Mutual Insurance Company, 513 F. 3d 273, 2008 U.S. App. LEXIS 1051 (1st Circuit, 2008).

Please notify us if you would like a copy of any of the above decisions.

Very truly yours,

Philip M. Howe

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