Chapter 7: Insurance Law

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CHAPTER 7

Insurance Law

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§7.1. Unfair or deceptive acts or practices: Exhaustion of administrative remedies. In the 1972 Survey year the Massachusetts Supreme Judicial Court held, in Gordon v. Hardware Mutual Casualty Co.,\(^1\) that the remedies under the provisions of the Massachusetts Consumer Protection Act\(^2\) are not independent of the action of state administrative agencies. Essentially the effect of the decision was that a plaintiff seeking money damages because the defendant insurer had discontinued a rate deviation without notice, in violation of the Consumer Protection Act, was required to seek relief through the Commissioner of Insurance before resorting to the chapter 93A remedy. The decision has been criticized on a number of grounds.\(^3\)

In the 1973 Survey year, the Legislature took action to eliminate the defense used in Gordon of failure to exhaust administrative remedies. According to chapter 939 of the Acts of 1973, this defense is no longer available and the court must now decide a chapter 93A petition unless presented with evidence that a finding for the plaintiff would "disrupt or be inconsistent with" a regulatory scheme or that the agency has "a substantial interest" in review prior to judicial action and "power to provide substantially the relief sought by the petitioner" and his class.

It would seem that had such a provision existed at the time of the Gordon case, the decision—though perhaps not the final result—would have been different. The provision aids plaintiffs in litigation by placing the burden on the defendant to articulate a rationale for review by an administrator, such as the Commissioner of Insurance, prior to judicial decision of the case. This in turn requires that any administrative relief granted in such cases be meaningful to a plaintiff rather than merely "adequate" in a theoretical sense.

§7.2. Automobile insurance: Coverages. Several major legislative actions affecting auto insurance coverages were taken during the 1973

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2. G.L. c. 93A.

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Survey year. One of them, chapter 953 of the Acts of 1973, is an obvious response to public criticism of the fact that, under the provisions of the Property Protection Insurance Act of 1971, a deductible of at least $100 applies to every claim for damage to an automobile. This public concern had been met in part by administrative action that first made available a lower deductible of fifty dollars and then allowed insureds to purchase an optional "waiver" of any deductible in certain limited instances in which it could be shown clearly that the other party to an accident was at fault. Despite these actions, there continued to be considerable criticism of the application of the deductible and this motivated legislative action.

In the new Act two new optional coverages are set up with a requirement that insurers make them available to their customers upon request. The first of the new options would waive the effect of any deductible in any at-fault situation. It is significantly broader than the previously offered "waiver" in that it will eliminate the deductible in all cases where it can be shown that the insured's damage is the result of the legal fault of another. Comparative negligence will, of course, still apply to limit or deny coverage. The second of the new options takes a further step by eliminating the deductible and any reduction in payment from comparative negligence doctrines so long as the claimant is no more than fifty percent at fault. Without such coverage a driver buying the so-called "Option 2" that has been available receives nothing when fifty percent or more at fault and has his loss cut by the degree of fault less than fifty percent attributed to him. If such a person elects the new coverage, he will be paid in full for his damage in any case where he is not more than 50% at fault. Since comparative negligence is not applied to persons buying "Option 1" coverage, as to them this new option is of no benefit.

Chapter 599 of the Acts of 1973 is more noteworthy for what it eliminates than for what it adds to automobile insurance coverage. Its

§7.2. 1 G.L. c. 90, §340.
2 Regulations to this effect are on file in the Office of the Commissioner of Insurance. The waiver of the deductible would occur only if the damaged vehicle were (1) legally parked, or (2) struck in the rear, or (3) struck by a vehicle driven by a person who either was subsequently convicted of operating under the influence of drugs or narcotics or was driving the wrong way on a one-way street.
3 Acts of 1973, c. 953, §1(a). The new option is significantly broader than that mentioned in note 5 supra in that under the new option any showing of legal fault in another vehicle operator, and not just certain limited types of fault, will operate to waive the deductible.
4 G.L. c. 953, §1(b).
6 An exception to these absolute provisions was made for vehicles damaged under any of the circumstances mentioned in note 5 supra. See G.L. c. 90, §§340(2)(c), (d) and (e).
7 See Acts of 1971, c. 978, §1(1).
first section strikes out the second paragraph of section 113B of G.L. c. 175, a provision first added in 1972,8 which provided for a separate rating classification for persons entitled to recover wage-loss after automobile accidents from a wage continuation plan.9 The classification was designed, presumably, to bring about lower premium charges for those having such other sources of recovery. But neither the title of the Act10 nor any other data gives any explanation for this legislative reversal. Nor does consideration of the rest of the Act suggest any reason for the change. Section 2 merely broadens the insurer’s duty to pay no-fault wage loss benefits11 by requiring “reimbursement” by the automobile insurer to wage continuation programs “which provide for accumulated benefits which can be converted into either cash or additional retirement credit.”

Some wage continuation programs do allow unused “sick leave” to be converted into either cash or extra retirement time. Chapter 599 would prevent the bar of payment on a no-fault basis to persons with wage continuation plans12 from depriving the injured of this added benefit of employment.

Two legislative efforts to solve, or at least ameliorate, the problem of low liability limits for bodily injury were made during the 1973 Survey year. One seeking to increase the minimum amount of coverage required under the compulsory law18 from $5,000 per person/$10,000 per accident, to $10,000 per person/$20,000 per accident, resulted in a veto by Governor Francis W. Sargent.14 The veto message was never acted upon by the Legislature.

The other, which may have significant impact in certain cases, was enactment of chapter 380 of the Acts of 1973 which makes “under-insured motorist coverage” available for the first time in Massachusetts. Chapter 380 establishes the new coverage as an optional coverage “for the protection of persons insured themselves who are legally entitled to recover damages from owners or operators of insured motor vehicles . . . whose policies or bonds are insufficient in limits of liability to satisfy said damages . . . .” The coverage will obligate a policyholder’s own insurer to satisfy any judgment he receives against a third party tortfeasor that cannot be met by the tortfeasor’s automobile liability policy. An insurer

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9 It seems, though, that the duty of the Commissioner of Insurance to establish fair and reasonable classifications of risks (G.L. c. 175, §113B, first paragraph) is such that even after enactment of chapter 599 separate rates for such persons may still be made.
10 “Personal Injury Protection Insurance Fund—Wage Continuation Programs—Reimbursements.”
12 See G.L. c. 90, §34A.
13 Id.
issuing such coverage will obviously have an interest in the proceedings against the third party which are adverse to the interest of its own policyholder. Additionally, the insurer issuing the coverage will expect to be subrogated to its policyholder's rights against the tortfeasor. Thus it seems likely that provisions respecting notice and co-operation of the insured will be added to the coverage defined in chapter 380 before a policy containing such coverage is offered for sale.

Comprehensive coverage has been altered by enactment of section 1, chapter 630 of the Acts of 1978 which sets forth a new definition of the customary contract term requiring payment up to "the actual cash value" of a damaged vehicle. The mandate of the statute is easy to understand but difficult to apply. In brief it precludes reducing the value of the vehicle "to less than the average retail value of that particular vehicle's year and model unless the policy was purchased at a reduced rate due to the mileage and condition of the insured vehicle." Claims adjustors have customarily reduced their offers for damaged vehicles because of excess mileage or poor condition which, in their opinion, made a particular vehicle less valuable than an average one of the same type. For losses covered by comprehensive coverage, this practice will no longer be permitted unless the premium charge offered reflects the adverse conditions. While the idea of the Act is unobjectionable, it remains to be seen whether or not it is practical to refine the rating process further in order to give recognition to all the conditions that may in practice lead to varying values. If, as is likely, it is not feasible to develop such rating schemes, the likely effects of the Act will be to overpay a minority of claimants at the ultimate expense of the majority of the insureds.

§7.3. Automobile insurance: Assigned risks. Possibly the most far-reaching legislative change of 1973 dealing with automobile insurance is represented by chapter 551 of that year's Acts which makes a fundamental change in the method of handling "assigned risks."

One generally ignored but nonetheless critical distinction between automobile insurance in Massachusetts and that found in most other states is that Massachusetts law makes significant coverages easily available to every registered vehicle owner at regular rates. It can be easily demonstrated that one result of this peculiarity is that the majority of accident-free, "average" drivers in Massachusetts pay considerably more for their automobile insurance than they would were a system of surcharged rates for accident-involved drivers in effect. The demonstrated inadequacy of rates for the 200,000 to 300,000 "assigned" or "ex-assigned"
risks has also restricted rate competition in Massachusetts. Massachusetts has also been unique in that it guarantees continued coverage to all its motorists through strict regulation of cancellation and renewal practices.

Chapter 551 of the Acts of 1973 expands the protection given to motorists against cancellation, refusal of coverage and non-renewal and makes the mechanics of handling "assigned" and "ex-assigned" risks quite different from what they have been in the past. The first three sections of the Act clarify what once was a prior jumble of provisions relating to cancellation and non-renewal of coverage.\(^8\) Essentially the effect of the three sections is to prevent either cancellation or non-renewal (that is, the refusal to issue successive policies) except for any one of the following reasons:

1) Non-payment of premiums;\(^4\)
2) Fraud or material misrepresentation in the application for renewal;
3) Suspension or revocation of license or registration of the named insured or resident of the insured's household who customarily operates the vehicle; or
4) Failure to furnish a company with a renewal application at least 30 days prior to expiration of the previous policy.

The crucial change in the law in this area is the elimination of provisions from prior law\(^6\) that permitted cancellation, *without restriction*, during the first 90 days of coverage.

Section 4 of the Act adds to the cancellation and renewal provisions a new affirmative duty on the part of the insurer to issue a policy to any applicant who is not then indebted to another company for auto coverages provided during the "preceding 12 months." An exception to this requirement is made for any person who usually drives the motor vehicle to be insured but does not have, or is ineligible to obtain, a driver's license.

Sections 5 and 6 of the Act build upon the new restrictions on company selection of risks, by adding a new method to apportion among all carriers the losses of risks who would, under the prior system, be considered "assigned" risks. They mandate the creation of a plan which provides for "the fair and equitable distribution of expenses and losses only for the first year he was assigned to a company. The great bulk of persons the insurance companies consider as undesirable risks remain with the insurer to whom they were originally assigned and are termed "ex-assigned" risks.

\(^8\) Apparently by oversight, Acts of 1973, c. 551, §1 eliminates new provisions on refunding of premiums after cancellation that were added in the 1973 session Acts of 1973, c. 408.

\(^4\) Reinstatement is required after a cancellation for non-payment if payment is made pursuant to the provisions of Acts of 1973, c. 405.

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by reinsurance.” Recognizing market realities, the Legislature now requires that the plan must provide for “immediate certification” of an application and payment of a “fair and reasonable commission” to any licensed agent or broker designated by the applicant. The practical result of all this is disclosed in a “Plan of Operation” filed by the Governing Committee of the Reinsurance Facility set up by the statute, with the Commissioner of Insurance, and later approved by him, which sets up a “Reinsurance Facility” in place of the former assigned risk plan. In brief the plan allows any company, agent or broker to accept any applicant upon application and then to “re-insure” the risk by making it a risk which all companies providing automobile insurance in Massachusetts will share. To eliminate “dumping” each insurer can put no more than twenty percent of those to whom he provides insurance in the “reinsured” category. The twenty percent limit does not, however, apply to risks accepted from agents and brokers who did not have an agency relationship with a company providing auto insurance in Massachusetts in 1973 and who were “assigned” to a specific carrier for servicing business. The reason for this exemption is, apparently, to encourage insurers to set up business relationships with those agents and brokers who have, in the past, specialized in assisting assigned risks.

If the overall plan envisaged by chapter 551 operates as expected, an applicant will receive automobile insurance from any company, agent or broker he chooses to deal with. While the agent, broker or underwriter will then decide whether to keep the risk or to “re-insure” it, that decision will not affect the applicant in any way.

§7.4. Fire insurance. A legislative concern over cancellation and non-renewal of coverages which was displayed in the automobile insurance area by enactment of Chapter 551 of the Acts of 1973, was carried over into the fire insurance area in the 1973 Survey year. Chapter 378 of the Acts of 1973 precludes cancellation of policies containing the standard fire insurance policy provisions1 once the policy has been effective for sixty days except for six specified reasons. The second section of the Act requires a forty-five day notice of intention not to renew together with an explanation of the reasons for non-renewal as a condition precedent to a refusal to renew a policy protecting “a dwelling or contents thereof” for loss by reason of fire. No specified reasons are required for non-renewal, but a copy of the notice to the insured must be furnished to the Commissioner of Insurance.

The non-cancellation provisions preclude cancellation except for:

1) Non-payment of premium;
2) Conviction of a crime arising out of acts increasing the hazard insured against;

§7.4. 1 G.L. c. 175, §99.
3) Discovery of fraud or material misrepresentation by the insured in obtaining the policy;
4) Discovery of willful or reckless acts or omissions by the insured increasing the hazard insured against;
5) Physical changes in the property insured which result in the property becoming uninsurable; or
6) A determination by the Commissioner that continuation of the policy would violate or place the insurer in violation of the law.

§7.5. Life insurance. A new attempt has been made in the 1973 Survey year to modify the effect of John Hancock Mutual Life Insurance Co. v. Commissioner of Insurance,\(^1\) a 1965 case which struck down as beyond the power of the State a state statute\(^2\) designed to prevent the termination or lapse of policies for non-payment of premiums during a strike of insurance agents. The Court found that the statute upset the bilateral freedom of collective bargaining intended by Congress under the National Labor Relations Act. It was thus held to be an invalid exercise of the State's police power.\(^3\)

The draftsmen of Chapter 454 of the Acts of 1978 seek to avoid the decision in the John Hancock case by providing that after lapse of an insurance policy for non-payment of the premium during a strike reinstatement will be allowed upon payment of the premium within 31 days of the termination of the strike, without new evidence of insurability. Unlike the statute struck down in John Hancock, Chapter 454 does not encompass all life, non-cancellable disability and hospital expense policies, but applies only to life insurance policies "having non-forfeiture values, which are ineligible for an automatic premium loan." Presumably any test of this statute will raise the argument that there is a significant state concern in protecting persons who do not have premium loan provisions in their policies. Such policies would be primarily "industrial policies" which represent a significant part of the "debit" agent business. A showing that such persons are dependent upon the collection practices to which they have become accustomed might tip the scales in favor of state power over the policy underlying the National Labor Relations Act.

§7.6. Accident and sickness insurance. The 1973 Survey year produced two precedent-making administrative decisions that prodded the Legislature into considering new authority over the contents of health insurance policies and the sale practices of health insurers. In a May 10, 1973 decision, a Deputy Commissioner of Insurance, acting pursuant to the provisions of G.L. c. 175, §§ 108, 8(B), withdrew approval of 154 accident, sickness and disability policies sold by ten different insurance companies. The decision was based on findings that certain provisions

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3 349 Mass. at 402-04, 208 N.E.2d at 524-25.
of the policies concerning elimination periods, renewal guarantees, premium adjustment, pre-existing conditions, the amount of benefits and co-ordination of benefits with Medicare "encouraged misrepresentation" of the policies by insurers to the public. Several appeals from the Deputy Commissioner's decision were taken to the Commissioner of Insurance. In disposing of them, the Commissioner made certain modifications but upheld the disapproval of all but one policy. The Commissioner, however, stayed the effective dates of the disapprovals until July 1, 1974, and announced his intention to seek legislative change to meet the policy provisions problem "in a direct and even-handed manner."

In a related decision the same Deputy Commissioner, on August 28, 1973, promulgated "Rules Governing the Marketing of Health Insurance" pursuant to the authority of G.L. c. 176D, §11. Objections of companies to these rules raised the issue of whether or not they went beyond the limited authority granted by the statute. The Commissioner of Insurance at legislative hearings on the matter again announced his concern over the legal issue.

Chapter 1081 of the Acts of 1973 represents the statutory change the Commissioner sought in order to clarify his powers in these respects. It attacks the policy provisions problem by giving the Commissioner authority to adopt regulations "to establish minimum standards of full and fair disclosure for the form and content" of accident and sickness insurance to bring about:

a) reasonable standardization and simplification of coverages to facilitate understanding and comparisons;
b) elimination of provisions which may be misleading or unreasonably confusing, in connection either with the purchase of such insurance or with the settlement of claims;
c) elimination of deceptive practices in connection with the sale of such insurance;
d) elimination of provisions which may be contrary to the health care needs of the public;
e) elimination of coverages which are so limited in scope as to be of no substantial economic value to the holders thereof.

Once such rules are promulgated, the Commissioner is given further authority to withdraw by written notice past approvals of policies that

§7.6. 1 "Elimination periods" are waiting periods during which benefits which have accrued are not paid out.

2 Appeals from decisions of subordinates of the Commissioner to the Commissioner may be made in accordance with the provisions of G.L. c. 26, §7.

3 The text of the Commissioner's announcement is on file in the office of the Commissioner of Insurance.

4 These rules are on file in the Office of the Commissioner of Insurance.

5 Appeals from these rules, may be made pursuant to G.L. c. 26, §7.
do not meet the standards. The Act also gives the Commissioner direct authority to adopt regulations concerning advertising of accident and sickness policies "to assure that such advertising is truthful and not misleading, in fact or in implication."

Thoughtful use of the new powers given to the Commissioner of Insurance can have considerable influence on the accident and sickness insurance business. An emergency preamble added to the legislation made it effective November 27, 1975, indicating that early use of the powers is expected.

§7.7. Marketing: Mass merchandising of automobile and fire insurance. Chapter 1098 of the Acts of 1975, which took effect on November 28 of that year after a veto by the Governor was over-riden in the Legislature, authorizes the "group marketing" of automobile and homeowner insurance.\(^1\) Adding a new section 1983R to G.L. c. 175, it first defines "group marketing."\(^2\) It then prohibits the provisions of coverage through such plans unless certain conditions are met. The conditions are for the most part desirable in that they continue the State's policy of easy availability of coverage by requiring that all risks be accepted and renewed without individual rating or coverage discrimination.

Restrictions on the type and size of groups, which led to the veto by the Governor, require that at least thirty-five percent of the persons in a qualified group be "insured within one year of the effective date of the plan, such percentage to continue so insured at all times thereafter." If this provision is constitutional, there is evidence that it will lead to a refusal to renew a number of groups that do not reach that level of participation. However, since the provision is likely to engender a constitutional test as to whether or not it is reasonably related to a permissible legislative objective, it seems safe to predict that it will not long remain unchallenged by members of groups who are deprived of the benefits of a plan.

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\(^1\) The Act also contains a re-draft of chapter 555 of the Acts of 1973, dealing with acquisition of minority stock in insurance companies.

\(^2\) "Group marketing" is defined as

any system, design or plan whereby motor vehicle or homeowner insurance is afforded to employees of an employer, or to members of a trade union association, or organization and to which the employer, trade union, association or organization has agreed to or in any way affiliated itself with, assisted, encouraged or participated in the sale of such insurance to its employees or members through a payroll deduction plan or otherwise.