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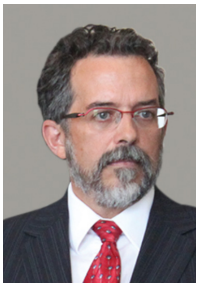
Insurers joint and severally liable for all defense costs

BLS judge reverses course in 'long-tail' asbestos case

■ **Pat Murphy**

Two comprehensive general liability insurance carriers were jointly and severally liable for all costs incurred in the defense of "long-tail" asbestos exposure claims and, therefore, could not seek reimbursement from their insureds for those costs attributable to uninsured periods, a judge in the Superior Court's Business Litigation Session has ruled in granting a motion for reconsideration.

The ruling addressed the allocation of defense costs arising from claims brought by individuals alleging injury due to exposure to asbestos in products made and sold by the corporate predecessor of Crosby Valve, LLC. The plaintiff insureds include Crosby Valve and certain affiliates.



Judge Kenneth Salinger

In a Feb. 22 decision, Judge Kenneth W. Salinger ruled that defendants National Union Fire Insurance Co. of Pittsburgh and Argonaut Insurance Co. were jointly and severally liable — up to their CGL policy limits — for the entire cost of defending any underlying lawsuit for which they had a duty to defend.

He further held that the plaintiff insureds were required to proportionately share in defense costs to the extent allocable to any periods when Crosby's predecessor was uninsured.

The plaintiffs filed a motion for reconsideration regarding Salinger's holding that an insurer jointly and severally liable for all defense costs could seek reimbursement from Crosby to the extent allocable to uninsured periods based on a so-called "time-on-the-risk allocation."

Under the time-on-the-risk method, liability coverage is prorated among all insurers for the years an insured's operations allegedly incurred liability.

In a decision issued on July 19, Salinger concluded that his earlier ruling was in error.

"The Court's prior ruling that Plaintiffs must share in defense costs, with respect to periods when they were not insured, was incorrect," Salinger wrote. "It is inconsistent with the contractual obligation of National Union and Argonaut to provide a complete defense with respect to claims covered by their policies."

The four-page decision is *Crosby Valve, LLC, et al. v. OneBeacon America Insurance Company, et al.*, Lawyers Weekly No. 09-079-22.

FAITHFUL TO 'BOSTON GAS'

Boston attorney Robert J. Gilbert represents the plaintiff insureds.

When read together, Gilbert said, Salinger's February and July rulings hold that every comprehensive general liability insurer that is "on the risk" for long-tail asbestos liability claims is obligated to provide a complete defense on a joint-and-several basis.

"This means that Crosby Valve can obtain 100 percent of its reasonable defense costs from any single insurer, leaving that insurer obligated to pay the policyholder and then pursue contribution from other insurers that might also have one or more triggered policies," Gilbert said. "This is a crucial win for policyholders, as they are now entitled to immediate payment of 100 percent of defense costs, without having to wait for insurers to come to an agreement — which they often do not or cannot — on the proper allocation of defense costs between the insurers."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The decision on the motion for reconsideration clarifies that insurers cannot seek to hold the policyholder responsible for any portion of reasonable defense costs, Gilbert said.

Martin C. Pentz, an insurance recovery litigator in Boston, said the decision is in line with the Supreme Judicial Court's longstanding "holistic" approach to the obligation to provide a defense under liability insurance policies.

"The promise is to defend, not just to reimburse defense costs allocable to the covered portions of claims," Pentz said. "As Judge Salinger recognized, it is difficult to reconcile proration of the defense obligation with the established 'in for a penny, in for a pound' rule requiring insurers to defend an entire lawsuit even if only some of the claims have potential to give rise to a duty to indemnify."

The SJC in *Boston Gas Co. v. Century Indemnity Co.* — a 2009 case involving insurance coverage for environmental contamination generated by a power plant's operations over the course of 61 years — adopted the time-on-the-risk method of prorating the liability of insurers.


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According to Pentz, Salinger's decision on reconsideration is faithful to Boston Gas and other SJC precedents confining proration to the duty of indemnification while giving a broad reading to the insurer's duty to defend.

"As other courts have also recognized, the signals the SJC has sent on this issue to date do not suggest that Boston Gas allocation will be extended to defense costs," Pentz said. "If such a significant change in Massachusetts law is to be made, it should be made by the SJC."

Salinger's decision in February was somewhat "surprising" in terms of how defense costs were treated, according to Kyle E. Bjornlund, a toxic tort and insurance litigator in Boston.

"In Massachusetts, the duty to defend has always been something that has been available to the insured without an allocation-type approach," he said. "The July 19 analysis by Judge Salinger is exactly how insureds and insurers have been approaching the defense cost issue for some time."

Vincent N. DePalo, a toxic tort litigator in Boston, said the decision on reconsideration affirms the principle that the courts will show "great deference" to insureds regarding coverage issues.

"The reconsideration decision highlights the distinct divide between how coverage for indemnity versus defense costs are allocated by the courts," DePalo said. "The rules that govern the allocation of defense costs are just different from the rules for allocation of indemnity costs."

Counsel for the defendant insurance companies did not respond to requests for comment.

CGL INSURANCE COVERAGE DISPUTE

Salinger explained that the case before him concerned so-called "long-tail claims" in which "occurrence-based liability insurance coverage may be triggered by the filing of claims decades after the insurance policy period, and 'progressive injuries' from toxic exposure over a period of years, during which multiple occurrence-based liability policies were in effect — with resultant need to allocate liability across insurers."

The plaintiffs sought coverage of the asbestos claims against them under five comprehensive gen-

eral liability policies issued to Crosby Valve by National Union and one CGL policy issued by Argonaut.

The plaintiffs sought a declaratory judgment resolving: (1) whether the two insurers had joint and several liability for the cost of defending any underlying asbestos lawsuit that triggered a duty to defend up to their respective policy limits; and (2) whether National Union was liable for 100 percent of indemnity costs covered under its most recent policy — up to policy limits — on the basis that the policy's non-cumulation language was inconsistent with a pro rata allocation of indemnity costs.

In his Feb. 22 decision, Salinger ruled that National Union and Argonaut were jointly and severally liable for the entire cost of defending any underlying lawsuit that triggered their duty to defend, up to their policy limits.

However, he took the additional step of ordering the plaintiffs to proportionately share in defense costs to the extent allocable to any periods when Crosby's predecessor was uninsured.

The plaintiffs filed a motion for reconsideration of that portion of the Feb. 22 decision.

CROSBY VALVE, LLC, et. al. v. ONEBEACON AMERICA INSURANCE COMPANY, et. al.

THE ISSUE: Could comprehensive general liability insurance carriers that were jointly and severally liable for all costs incurred in the defense of "long-tail" asbestos exposure claims seek reimbursement from their insureds for those costs attributable to uninsured periods?
DECISION: No (Suffolk Superior Court/ BLS)
LAWYERS: Robert J. Gilbert of Latham & Watkins, Boston (plaintiff insureds)
Michael S. Batson of Hermes, Netburn, O'Connor & Spearing, Boston (defendant National Union Fire Insurance Co. of Pittsburgh)
Nora Rose Adukonis of Litchfield Cavo, Lynnfield (defendant Argonaut Insurance Co.)

CORRECTION OF COURSE

In addressing the plaintiffs' motion for reconsideration, Salinger recited Massachusetts precedent that a liability insurer's duty to defend "is independent from, and broader than, its duty to indemnify" and that if "one claim in the underlying action triggers a duty to defend, then 'the insurer must defend the insured on all counts, including those that are not covered.'"

The judge concluded that his February ruling was contrary to those basic principles.

"Since an insurer with a duty to defend one claim among many must pay all defense costs, and may not allocate any of them to the insured with respect to uncovered claims, it follows that the insurer similarly may not allocate costs of defending long-tail claims to the insured with respect to uninsured periods," Salinger wrote.

He concluded that his prior decision missed the mark by "misapplying" an allocation rule governing the allocation of liability for long-tail claims.

"When making a pro rata allocation of indemnity costs based on time-on-the-risk, any costs allocated to periods when the policyholder had no insurance coverage and thus was self-insured are allocated to the policyholder, not to the insurers that provided coverage for other periods," Salinger wrote. "But that allocation rule does not apply to defense costs, because liability insurers are required to provide a complete defense even when they may end up with only a partial or even no obligation to indemnify [their] insureds for any liability in the underlying actions."

Accordingly, he ordered that upon entry of final judgment in the case, the plaintiffs would be entitled to declarations that: (1) they are entitled to recover up to 100 percent of defense costs from any one or more insurers having a duty to defend triggered by the underlying asbestos suit; and (2) insurers jointly and severally liable for all defense costs could not obtain reimbursement from the plaintiffs for defense costs fairly allocable to any uninsured periods.

In addition, he found that National Union's 1989-1990 policy was subject to "all sums" rather than pro rata allocation of indemnity costs due to inclusion of a "non-cumulation" clause in that policy.