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Massachusetts Supreme Judicial Court Declines to Find Common-Law Duty for Insurer to Cover Mitigation Costs

6 Jan 2023

In *Ken's Foods, Inc. v. Steadfast Insurance Co,* Case No. SJC-13303 (Mass. Jan. 6, 2023), the Supreme Judicial Court of Massachusetts issued an opinion holding that there is no common law duty for insurers to cover mitigation costs incurred by an insured when the terms of the policy at issue are unambiguous and do not provide for such coverage. The Court was asked to address the following certified question from the United States Court of Appeals for the First Circuit: "To what extent, if any, does Massachusetts recognize a common-law duty for insurers to cover costs incurred by an insured party to prevent imminent covered loss, even if those costs are not covered by the policy?"

The matter arose from a malfunction of one of Ken's Foods, Inc.'s ("Ken's Foods") wastewater treatment systems at its operating facility in McDonough, Georgia. The malfunction occurred on December 20, 2018 and resulted in wastewater flowing into a Georgia tributary. Ken's Foods cleaned up the wastewater pollution and also took actions to allow it to continue operations, including installing new equipment in order to implement a temporary wastewater treatment process. However, Ken's Foods wastewater releases still exceeded acceptable levels of contamination and it entered into an agreement with governmental authorities to pay a predetermined schedule of governmental fines. Ken's Foods estimated that it spent $2 million on these preventative measures in order to avoid suspension of its operations. It also alleged it would have lost $10 million per month in expenses and lost profits if it had not taken these mitigation measures.

Ken's Foods sued its pollution liability insurer, Steadfast Insurance Company ("Steadfast"), , in an attempt to recover the $2 million it expended to avoid business interruption. Ken's Foods argued that Coverage H of the Steadfast Policy covered mitigation costs to avoid suspension of its business operations. Coverage H of the Policy provided coverage for losses, such as lost income and expenses to reduce lost income, resulting from a new pollution event that caused a "suspension of operations" at an insured location. "Suspension of Operations" was defined as a "necessary partial or complete suspension of 'operations' at the 'covered location' as a direct result of a 'cleanup' required by a 'governmental authority.'" The Policy also contained a mitigation of loss provision which required that Ken's Foods mitigate loss of business income "as soon as practicable" "in the event of a suspension of operations".

The Court determined that the Policy did not provide coverage for the mitigation costs. The Court observed, "…there was no suspension of operations. Ken's Foods was not ordered to discontinue operations, nor did it do so itself to avoid such an order. Rather, Ken's Foods avoided a 'partial or complete suspension' by implementing process changes allowing for the pretreatment and release of wastewater, and negotiating pollution allowances and accompanying fines with the county authority." The Court further noted that "[t]hese very measures showed that a partial or complete shutdown was not 'necessary,' albeit due to the creative response of Ken's Foods and the flexibility of government regulators. Because there was never a suspension of operations, Steadfast was not responsible for the costs according to the express terms of Coverage H." The Court additionally found that the mitigation loss provision in the Policy was inapplicable because no actual suspension occurred and did not require Ken's Foods to prevent an imminent suspension of operations or require reimbursement of such costs. The Court further relied on the Policy's maintenance exclusion, which excluded coverage for "costs, charges, and expenses of maintenance, upgrades, or 'improvement

of…processes,' 'even if such maintenance, upgrade, improvement or installation is required…[b]y governmental authority;' or… [a]s a result of 'cleanup costs'" to support its holding.

Relying on the plain terms of the Policy, the Court also declined to recognize a common-law duty to reimburse costs of preventing an immanent covered loss. The Court began its analysis by acknowledging that the parties are "sophisticated commercial parties" and that an insurance contract entered voluntarily by two private parties requires "'the benefit of their stated bargain' including their allocation of risks." The Court also acknowledged prior Massachusetts case law which had already established that coverage rights cannot be expanded when a policy is plain and unambiguous. The Court stated that it would "not imply a common-law duty to fill in the gap of coverage" when the Policy only required that Steadfast to pay "costs of a 'necessary' suspension of operations, not one that could be avoided through preventative measures, as was done here; an unnecessary suspension would not have been covered. The Court further noted that "the [P]olicy also required reimbursement of only those mitigation costs incurred after a suspension of operations, showing that increased costs of operation were not intended to be covered." In support of its decision, the Court commented that, "[t]o provide for recovery in these circumstances would be to rewrite the insurance contract and reallocate the risks negotiated by the parties."

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