# AN ANALYSIS OF MASSACHUSETTS LAW ON KEY ISSUES AFFECTING INSURANCE COVERAGE FOR LIABILITIES UNDER M.G.L. CHAPTER 21E

Nancer Ballard, Esq.

## I. Introduction

Environmental loss and liability exposure pursuant to actions under the Comprehensive Environmental Response, Compensation, and Liability Act and Massachusetts' version of CERCLA -- Chapter 21E -- as well as private party "environmental suits" has increased dramatically in recent years. There is valuable insurance coverage available for the costs incurred in the defense of claims under these private actions and environmental statutes as well as the cleanup of contaminated sites. The focus of this article is the state of the law of Massachusetts with regard to the availability of insurance coverage for costs incurred under Mass. Gen. Law ch. 21E.

There are seven or eight major issues that are raised and highly debated in most environmental insurance coverage cases. State courts have not been uniform in their resolution of these issues and, in fact, in some states the highest court of that state has not even ruled on one or more of the issues. As described below, Massachusetts courts have resolved the majority of these issues in favor of insureds.

### A. The "As Damages" Clause

General liabilities provide that the insurer promises to pay "all sums that an insurer becomes legally obligated to pay as damages because of bodily injury or property damage...". Insureds contend that Superfund cleanup costs are not "damages". Insureds in courts that adopt the insurers' position

are not able to recover any of their environmental response costs. The Massachusetts Supreme Judicial Court has expressly found that Superfund cleanup costs are damages. Hazen Paper Co. v. United States Fidelity & Guaranty Co., 457 Mass. 689, 555 N.E.2d 576 (1990).

B. Whether Cleanup Costs Are Incurred Because of "Property Damage"

Insurance companies frequently argue that contamination of property is not "property damage" within the meaning of general liability insurance policies. The Massachusetts Supreme Judicial Court has expressly rejected this position. *See* Hazen Paper Co. v. United States Fidelity & Guaranty Co., 457 Mass. 689, 555 N.E.2d 576 (1990). *See also* Trustees of Tufts University v. St. Paul Fire & Marine Insurance Co., 415 Mass. 844, 616 N.E.2d 68 (1993) (contamination of soil and groundwater by release of hazardous material involves property damage); Donaldson v. Aetna Casualty & Surety Co., C.A. No. 88-6690 (Mass. Super. Ct., March 23, 1990) (contamination of groundwater beneath insured's property constitutes "property damage" covered by the insurance policy).

C. The Pollution Exclusion Which Limits Pollution to "Sudden and Accidental" Discharges of Pollutants

The standard form "limited" pollution exclusion included in most policies issued between 1972 and 1985 excludes from coverage discharges or releases of pollutants that are not "sudden and accidental". Insureds argue that escapes of pollutants that are unexpected and unintended (*i.e.*, a surprise) are sudden and accidental. Insurance companies contend that "sudden and accidental" releases must be abrupt and short lived as well as unexpected and unintended.

In Lumbermens Mutual Casualty Co. v. Belleville Industries, Inc., 407 Mass. 675, 555 N.E. 2d 568 (1990), the

Supreme Judicial Court held that in order for a release of pollutants to be "sudden" it must be abrupt as well as unexpected and unintended. However, the Court noted that the duration of a release of pollutants was not the critical element, but rather the nature of the commencement of the release of pollutants.

In Goodman v. Aetna Casualty & Surety Co., 412 Mass. 807, 593 N.E.2d 233 (1992), the Supreme Judicial Court confirmed that the length of time that a pollutant is released into the environment and the length of time a pollutant migrates through the environment, are not the critical factors in determining whether the release is covered by policies with a "sudden and accidental" pollution exclusion.

In Liberty Mutual Insurance Co. v. SCA Services, Inc., 412 Mass. 330, 588 N.E.2d 1346 (1992), the Court addressed the application of the pollution exclusion to a non-Massachusetts site, the Tusten landfill in New York, where the insured was alleged to have brought barrels of waste to the landfill. The Court determined that the insurer had no duty to defend because the underlying complaint alleged that pollution arose out of "continuous waste disposal practices occurring over a protracted period of time as a concomitant part of a regular business activity". The complaint had alleged that the contents of barrels of waste were emptied into open trenches or dumped into the trenches and flattened with a bulldozer. The Court found that such pollution was not "sudden and accidental" because the complaint detailed "routine business activity lasting over several months".

In Polaroid Corp. v. The Travelers Indemnity Co., 414 Mass. 747, 610 N.E.2d 912 (1993), the Court ruled that the assessment of whether a release of pollutants is "accidental or "sudden" is to be viewed from an objective point of view, rather

than from the insured's perspective.[1] *Id.* at 752. Even if a third person discharged a pollutant intentionally, the pollution exclusion denies coverage.

In Landauer, Inc. v. Liberty Mutual Insurance Co., 36 Mass. App. Ct. 177 (1994), the appeals court ruled that summary judgment cannot be averted even if an insurer cannot show that there is no possibility that each release of pollutants was sudden and accidental. The fact that any single discharge may have been sudden and accidental does not give rise to coverage where the allegations in the complaint state that pollution was the result of regular business practices over an extended period of time. *Id.* at 181. *See also* Lumbermen's Mutual Casualty Co. v. Belleville Industries, Inc., 938 F.2d 1423 (1st Cir. 1991) ("Belleville II").

It is important to note that policies issued before 1973 generally do not contain any form of pollution exclusion. Since environmental problems associated with most of the Massachusetts sites are largely attributable to operations that took place long before the pollution exclusion was added to general liability policies, the law on "sudden and accidental" is not applicable to assessing the prospects of recovery for parties with liabilities at Massachusetts sites.

### D. Which Policies are "Triggered" by Ongoing Releases or Continuing Migration in Groundwater that Takes Place in Multiple Policy Periods?

Insurance companies often argue that the only policy that must respond to ongoing property damage is the policy in effect when environmental damage is "discovered" or "manifested". Potentially responsible parties contend that each policy in effect when property is injured or migration continues must respond. The Massachusetts Supreme Judicial Court rejected the insurers'

---

[1] According to the opinion, Polaroid had conceded that the discharges were not abrupt.

coverage limiting "manifestation" position in Trustees of Tufts University v. St. Paul Fire & Marine Insurance Co., 415 Mass. 844, 616 N.E.2d 68 (1993).[2]

Recently, a Middlesex County superior court judge following the Tufts decision and held that an allegation of continued pollution caused by migrating contaminants that was happening during Aetna Casualty & Surety Company's policy period triggers the insurer's duty to defend its policyholder. Eastern Enterprises v. Aetna Casualty & Surety Co., C.A. No. 93-1458 (Mass. Super. Ct., June 3, 1994).

E. Is Administrative Action by a Federal or State Agency a "Suit" Within the Meaning of a General Liability Policy Which Obligates the Insurer to Defend?

Insurers argue that they have no duty to defend a policyholder that received a notice of potential responsibility ("PRP letter"), and that their obligation to defend arises only upon the filing of a formal lawsuit against the policyholder. In Hazen Paper Co. v. United States Fidelity & Guaranty Co., 457 Mass. 689, 555 N.E.2d 576 (1990), the Massachusetts Supreme Judicial Court expressly rejected this position.

The breadth of the duty to defend under Massachusetts law and the requirement that insurance companies protect their insureds in administrative actions was confirmed in Holyoke Card & Paper Co. v. Aetna Casualty & Surety Co., C.A. No.

---

[2] In Trustees of Tufts University, the Supreme Judicial Court also held that a policy in effect before the underlying tort claimant purchased the property which allegedly was damaged would have to respond to allegations that the insured was liable. The Court noted that if the insurers intended to exclude coverage whenever an underlying plaintiff did not own the property at the time of the occurrence, the insurers could have expressed such an exclusion.

89-303253-F, *slip op.* (D. Mass. April 15, 1992) (Ponsor, U.S.M.J.). In Holyoke, the insured sought defense costs incurred as a result of its PRP status at the Re-Solve Superfund site in North Dartmouth, Massachusetts. The Court held that: (1) in view of Hazen and the extremely broad scope of the duty to defend in Massachusetts, the insurance company had a duty to defend until it could demonstrate "with conclusive effect" that no part of the claim against the insured was within coverage, regardless of the possibility that some releases at Re-Solve may not have been sudden and accidental; and (2) the insured's claim for extra-contractual damages based on the insurer's refusal to defend was cognizable and could go forward for trial.

F. The "Owned Property" Exclusion

Insurers claim that contamination in groundwater beneath a facility that has been owned or operated by an insured, or contamination emanating from such a facility, is excluded by the "owned property" exclusion found in most general liability policies. In Trustees of Tufts, *supra*, the Supreme Judicial Court implicitly rejected the position that property damage emanating from an owned facility would not be covered and found that an insurance company did have a duty to defend an insured against liability for environmental damage emanating from the insured's property.

Although the Supreme Judicial Court has not directly addressed the issue of coverage for groundwater beneath an insured's property, lower court decisions uniformly have held that such costs are covered. *See, e.g.*, C.K. Smith & Co., Inc. v. American Empire Surplus Lines Insurance Co., C.A. No. 85-32950, *slip op.* (Mass. Sup. Sept. 27, 1989) (court held that "owned property" exclusion did not bar recovery of cleanup costs where environmental contamination on the insured's property presented danger to property of another); Stupp v. Taylor and Murphy, Inc., C.A. No. 90-4093 (Mass. Sup. 1991) ("owned property" exclusion in a general liability policy does not bar

recovery for cleanup of town's soil and groundwater); Allstate Insurance Co. v. Quinn Construction Co., 713 F. Supp. 35 (D. Mass. 1989) (vacated due to settlement) ("owned property" exclusion does not bar recovery for the cost of cleaning up contamination which presented a demonstrated danger to the property of another).

### G. Does an Insurer Have to Show that it was Prejudiced by a Policyholder's Late Notice of a Claim in Order for the Court to Deny Coverage Based on Late Notice?

Insurers argue that untimely notification by a policyholder operates as an automatic bar to coverage under general liability policies. The Massachusetts Supreme Judicial Court has expressly rejected this position on several occasions. *See, e.g.*, Darcy v. The Hartford Insurance Co., 407 Mass. 481, 554 N.E.2d 28 (1990); Johnson Controls Inc. v. Bowes Inc., 381 Mass. 278, 409 N.E.2d 185 (1980).

In Darcy v. The Hartford Insurance Co., the Supreme Judicial Court ruled that "an insurer carries the burden of proving that a delay in notice materially prejudices its interest". *Id.* at 485. The Supreme Judicial Court refused to adopt a rebuttable presumption that a five-year delay notification would be prejudicial to an insurer. The court noted that "before a denial of coverage by an insurer is justified, a delay in notice must be accompanied by a showing of some other facts or circumstances (such as, for example, the loss of critical evidence, or testimony from material witnesses despite diligent good faith efforts on the part of the insurer to locate them) which demonstrates that the insurer's interests have been actually harmed". *Id.* at 486. *See also* Donaldson v. Aetna Casualty & Surety Co., C.A. No. 88-6690 (Mass. Sup. March 23, 1990) (even if plaintiffs' notice was late, the court will not find prejudice unless defendants' investigation was thwarted).

*But see* Fireman's Fund Insurance Co. v. Valley Manufactured Products Co., Inc., 765 F. Supp. 1121 (D. Mass. 1991), *aff'd without op.*; Fireman's Fund Insurance Co. v. Valley Screw Products, Inc., 960 F.2d 143 (1992) (since insured's duty to notify insurer arose prior to effective date of statute requiring prejudice, insurer need only establish untimely notice to preclude recovery).

H. Does a Subjective Standard Apply to the Determination on Whether There has been an "Occurrence" Within the Meaning of a General Liability Policy (*i.e.*, Where the Property Damage is Unexpected and Unintended)?

Insurance companies argue that if a "reasonable" person in the insured's position would have "expected" property damage, then coverage is barred. This position applies an "objective" standard to the determination of whether property damage is expected or intended. If the court examines whether the insured actually expected or intended the damage, then the court is applying a pro-policyholder subjective standard in determining whether property damage is expected or intended.

In Quincy Mutual Fire Insurance Co. v. Abernathy, 393 Mass. 81, 469 N.E.2d 797 (1984), the Supreme Judicial Court adopted a "subjective" standard for determining whether an occurrence had taken place. Specifically, the Court stated:

> Our cases have concluded that an injury is not accidental only where the result was actually, not constructively, intended -- *i.e.*, more than recklessness (citation omitted). This standard requires a showing that the insured knew to a substantial certainty that bodily injury would result. Thus, we conclude that the word "expected" brings no change to our well-defined concept of accident.

*Id.* at 86 (emphasis added). *See also* Hanover Insurance Co. v. Talhouni, 413 Mass. 781, 604 N.E.2d 689 (1992).

### I. Are Multiple Policy Limits Available for a Single Site?

Insurance companies claim that a policyholder is only able to collect the policy limits of a single year even though property damage may have continued during multiple years. Policyholders argue that they should be able to recover multiple limits if property damage takes place in multiple policy periods. Although the Massachusetts courts have not directly addressed this issue in the context of environmental contamination, in United States Fidelity & Guaranty Co. v. Munroe, No. 93-3545 (Mass. Super. Ct., Middlesex Cty., January 21, 1993, *as clarified* Feb. 8, 1993), the court permitted four consecutive liability policies issued by single insurer to be "stacked" to provide the injured claimant with four times the amount of coverage afforded by any single policy for injuries arising from lead paint. It was undisputed that the claimant's injuries stemmed from continued exposure to the same lead paint over the terms of all four policies.

## II. Massachusetts Case Law on Other Issues Which Sometimes Bear on an Insured's Right of Recovery

In addition to the major coverage issues described above, a number of other issues can affect an insured's recovery in certain contexts. Several of these are described below.

### A. The Scope of an Insurance Company's Duty to Defend

In Sterilite Corp. v. Continental Casualty Co., 17 Mass. App. Ct. 316, 318, 458 N.E.2d 338 (1983) *review denied* 391 Mass. 1102 (1984), the Massachusetts Appeals Court adopted a broad interpretation of the insurance companies' duty to defend

stating, "if the allegations of a complaint are 'reasonably susceptible' of an interpretation of the state or adumbrate, a claim covered by the policy terms, the insurer must undertake the defense."

In Boston Symphony Orchestra v. Commercial Union Insurance Co., 407 Mass 7, 545 N.E.2d 1156 (1989), the Supreme Judicial Court stated that a duty to defend can arise not only from facts alleged in the complaint, but also from extrinsic facts which are known by the insurance company or provided to the insurance company by an insured.

In Rubenstein v. Liberty Mutual Insurance Co., No. 90-1687 (Mass. Super. Ct., Suffolk Cty. Oct. 3, 1991), the insurance company was required to defend its policyholder where the underlying complaint did not exclude the possibility that releases were "sudden and accidental". The court noted that the insurance company may not deny defense and sit back to see what evidence develops. *See also* Holyoke Card & Paper, *supra*.

Finally, in Aetna Casualty & Insurance Co. v. Sullivan, 33 Mass. App. 154, 597 N.E.2d 62 (1992), the Massachusetts Court of Appeals held that an insurance company cannot tender its policy limits to extinguish its defense obligation.

B. Voluntary Payments

In Augat v. Liberty Mutual Insurance Co., 410 Mass. 117, 571 N.E.2d 357 (1991), the Supreme Judicial Court held that an insured that had entered a consent judgment and spent significant sums without notifying or obtaining the consent of its insurance company breached the "voluntary payments" prohibition in its policy and could not recover.

C. Estoppel

Policyholders in jurisdictions such as New Jersey have argued that insurance companies are estopped to deny coverage where they have previously represented that the coverage provided by their insurance policies is broader than they assert it is when claims are brought against them. In Jetline Services, Inc. v. American Employers Insurance Co., 404 Mass. 706, 537 N.E.2d 107 (1989), the Massachusetts Supreme Judicial Court held that an insured's reasonable reliance on conduct that the insurance company knew or should have known would induce the insured to purchase an insurance policy prevented an insurance company from relying on a restrictive interpretation of its policy that would preclude coverage.

## III. Massachusetts Law on First Party Property Coverage

Massachusetts coverage law under first party property policies for environmental property damage to an insured's own property is favorable to insureds. In Jussim v. Massachusetts Bay Ins. Co., 33 Mass. App. Ct. 235, 597 N.E.2d 1379 (1992), *aff'd*, 415 Mass. 24, 610 N.E.2d 954 (1993), the Massachusetts Appeals Court ruled that the pollution exclusion in first party policies is inapplicable where the cause of release of contamination is the negligence of a third party.[3]



---

[3] Many first party policies and some third party general liability policies contain a suit limitation provision which requires that any suit or action be commenced within 12 months of the loss. In Stupp v. Murphy, C.A. No. 90-4093 (Mass. Sup., Dec. 21, 1991), the court held that a suit limitation period would not begin to run until the policyholder's legal liability had finally been determined in the underlying action. This decision, along with the Massachusetts Appeals Court's construction of the pollution exclusion in Jussim, indicates that policyholders in Massachusetts that own, or have previously owned, Superfund sites have better access to insurance coverage under their first party policy than most of the rest of the country.