

## MA Business Court Reverses Itself on Reconsideration; Finds No Right to Defense Cost Contribution From Insureds

By: Eric B. Hermanson and Austin D. Moody  
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This past February, in *Crosby Valve LLC et al. v. OneBeacon America Ins Co et al.*<sup>[1]</sup> Judge Kenneth Salinger of Massachusetts Superior Court, Business Litigation Session, addressed whether the pro rata scheme adopted in *Boston Gas Company v. Century Indemnity Company*<sup>[2]</sup> governed allocation of costs of defending long tail claims. Essentially, Judge Salinger found (1) that *Boston Gas* did not apply; (2) that each insurer with a defense obligation was jointly and severally liable to pay for the entirety of the insured's defense; but (3) an insurer that paid more than its pro rata share of defense was entitled to equitable contribution from the insured — as well as other triggered insurers — based on a time-on-the-risk allocation. We wrote about that previous decision here.

Last week, Judge Salinger vacated his earlier order: granting the insured's motion for reconsideration, and finding insurers have **no** right to seek contribution from insureds for defense costs allocable to uninsured periods.<sup>[3]</sup> (Emphasis added.) In granting reconsideration, Judge Salinger pointed to the general principle that if one claim in the underlying action triggers a duty to defend, the insurer is required to defend the entire action.<sup>[4]</sup>

This ruling is limited to defense cost contribution, and does not change the pro rata allocation of insurers' indemnity obligations under *Boston Gas*.<sup>[5]</sup> Nor does Judge Salinger's ruling affect insurers' right to seek defense cost contribution from other insurers on a pro rata basis. The principal effect of the revised ruling is to exempt the insured from such contribution actions.

Nonetheless, the ruling seems to ignore some of the key principles of *Boston Gas*: for example, the principle that insureds that chose to go without insurance in certain policy periods should bear the consequences of that decision, and should not be treated the same as responsible insureds who do purchase coverage.

Appeal is likely, and Judge Salinger's decision is not likely to be the last word on these issues.

If you have any questions or need more information, please contact Eric Hermanson ([hermansone@whiteandwilliams.com](mailto:hermansone@whiteandwilliams.com), 617-748-5226) or Austin D. Moody ([moodya@whiteandwilliams.com](mailto:moodya@whiteandwilliams.com), 617-748-5206).

[1] 1284 CV 02705 (Mass. Super. Ct. Feb. 22, 2022)

[2] 454 Mass. 337 (2009).

[3] *Crosby Valve LLC et al. v. OneBeacon America Insurance Company et al*, 1284 CV 02705 (Mass. Super. Ct. July 19, 2022).

[4] See, e.g., *Mount Vernon Fire Insurance Company v. VisionAid, Incorporated*, 477 Mass. 343, 351 (2017).

[5] 454 Mass. 337 (2009).

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