White and Williams LLP

Massachusetts Business Court Addresses Defense Cost Allocation and Non-Cumulation Provisions in Long-Tail Context

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A business court in Massachusetts has weighed in on two key issues affecting allocation of insurance coverage for long-tail liabilities in Massachusetts. Specifically, in *Crosby Valve LLC et al. v. OneBeacon America Insurance Company, et al.*,[1] involving asbestos bodily injury claims, Judge Kenneth Salinger of the Suffolk County Business Litigation Session addressed:

- whether defense costs in long-tail cases were subject to the same pro rata allocation scheme the Supreme Judicial Court (SJC) adopted to govern successively triggered insurers' indemnity obligations in *Boston Gas Company v. Century Indemnity Company*,[2] and
- whether "non-cumulation" provisions, like those addressed by the New York Court of Appeals in *Matter of Viking Pump*,[3] were consistent with this pro rata allocation methodology.

As to the first issue — i.e., allocation of defense costs — Judge Salinger declined to follow *Boston Gas,* and found the SJC's holding in that case was limited to an insurers' *indemnity* obligations. The SJC in *Boston Gas* had focused on the language of the policy insuring agreement, saying "[t]his policy applies to … property damage … which occurs anywhere *during the policy period*." The SJC had also pointed to the policy definition of "occurrence" as "an accident, including injurious exposure to conditions, which results, *during the policy period*, in property damage neither expected nor intended from the standpoint of the insured." [4]

Judge Salinger, by contrast, did not rest on the insurers' policy language. Instead, he relied on judicial decisions outside the long-tail context, finding the duty to defend is "independent from, and broader than, its duty to indemnify." As a result, he said, the defense obligations of consecutively triggered insurers should be governed by different principles:

> If multiple CGL policies give rise to a duty to provide a complete defense to the entire action, then the insurer that issued each policy must be jointly and severally liable to pay for the full cost of the defense, subject to any policy limits (such as … provisions … that terminate defense obligations if any when the maximum indemnity limit has been paid out).

But — significantly softening the impact of the ruling — Judge Salinger went on to hold that an insurer that found itself obligated to pay more than its pro rata share of defense costs would ultimately be entitled to equitable contribution from the insured, as well as other triggered insurers, based on a time-on-the-risk allocation.

The practical effect of the ruling, then, is that (a) insureds should continue to bear a pro rata share of defense costs, corresponding to "periods of no insurance, self-insurance, or insufficient insurance,"[5] and (b) multiple insurers jointly and severally liable for defense costs are entitled to contribution from each other up to their respective pro rata shares.

The second issue addressed in *Crosby* — i.e., the effect of non-cumulation provisions — is equally significant. One of the *Crosby* insurers had issued a policy with a provision that barred stacking of limits for multiple triggered policies:

> If this coverage form and any other coverage form or policy issued to you by us or any company affiliated with us apply to the same 'occurrence,' the maximum limit of insurance under all the coverage forms or policies shall not exceed the

highest applicable limit of insurance available under any one coverage form or policy...

Following the New York Court of Appeals' holding in *Viking Pump*,[6] Judge Salinger found this language "would be superfluous had the drafter intended that damages would be allocated among insurers based on their respective time on the risk." [7] Thus, he held, "when a non-cumulation or other provision is inconsistent with pro rata allocation of indemnity costs based on time-on-the-risk [principles], all sums allocation (and not pro rata allocation) will apply to that policy."

Before reaching these rulings, Judge Salinger also rejected arguments by certain insurers that the insured's declaratory judgment claims were premature, and not ripe for adjudication, and could not be decided without a threshold ruling on what trigger of coverage applied. In dictum, he observed that the trigger question appeared to turn on the language of the individual policies at issue, and suggested it might vary from insurer to insurer; but he ultimately declined to reach the issue, finding it had not been adequately briefed or argued: "For the purposes of deciding whether there is an actual controversy ... it is sufficient that ... indemnity coverage is triggered under" either of several possible triggers that might be adopted.

An appeal of the ruling seems likely. White and Williams (which represented a former party in the case) will continue to monitor developments.

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

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

[2] 454 Mass. 337 (2009).

[3] 27 N.Y.3d 244 (2016)

[4] 454 Mass. at 357-58.

[5] 454 Mass.at 353 (quoting J.M. Seaman and J.R. Schulze, Allocation of Losses in Complex Insurance Coverage Claims, § 4.3[c], at 4-21 (2d ed. 2008).

[6] 27 N.Y.3d 244 (2016).

[7] Citing *Chicago Bridge & Iron Co. v. Certain Underwriters at Lloyd's, London*, 59 Mass. App. Ct. 646, 656 (203).