

Mass. Court Ruling Reinforces 2 Keys To Pollution Coverage

By **Alexander Bandza** and **Brian Scarbrough**

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The Massachusetts federal district court's decision reinforces two important policyholder concepts in obtaining coverage for environmental contamination. First, a policyholder, faced with a complaint containing general allegations of negligent pollutant releases, need not prove that the “sudden and accidental” exception to the pollution exclusion applies to show that the insurer owes a duty to defend. Second, the “sudden and accidental” exception is highly fact-specific. Here, even though it was undisputed that the dry cleaning operation used perchlorethylene and that it overflowed on several occasions, causing contamination at the site, the court rejected the insurer’s motion for summary judgment, holding it did not meet its burden because the releases could still be considered “sudden and accidental” in this particular context.



Alexander Bandza

In *Plaistow Project LLC v. Ace Property & Casualty Insurance Co.*,^[1] Plaistow Project LLC purchased real property that contained former retail space, part of which had been leased by State Line Laundry Services Inc. After the purchase, chemicals related to dry cleaning were found on the property. Plaistow was investigating and remediating the pollution at the site and sued State Line in Massachusetts state court. State Line, in turn, notified its insurer, ACE Property and Casualty Insurance Company, which declined to defend the suit. Plaistow partially settled for State Line’s insurance rights and later obtained a judgment against State Line for almost \$3 million. Plaistow filed the present action in federal court to obtain damages for ACE’s failure to provide insurance coverage to State Line.



Brian Scarbrough

Plaistow and ACE filed competing summary judgment motions. Plaistow moved for partial summary judgment that ACE breached its duty to defend State Line in the state court action. ACE sought summary judgment that it was not contractually obligated to defend or indemnify State Line. After reviewing the magistrate report and the parties’ objections, the court: (1) partially granted Plaistow’s motion for summary judgment that ACE breached its duty to defend State Line but denied that ACE breached the duty of good faith and fair dealing; and (2) denied ACE’s cross motion for summary judgment.

With regard to Plaistow’s motion as to the duty to defend, ACE did not dispute that, as a general matter, an insurance company’s duty to defend is broader than its duty to indemnify, and that if the allegations of the complaint are reasonably susceptible of an interpretation that they state a claim covered by the

policy terms, the insurer must undertake the defense. Rather, ACE believed that where a complaint contains allegations of negligent pollutant releases, the policyholder has the burden of proving coverage where such general allegations might implicate the “sudden and accidental” exception to the pollution exclusion. ACE relied heavily on *Great Northern Industries Inc. v. Hartford Accident & Indemnity Co.*,^[2] which stated that “if [the ‘sudden and accidental’ exception] was to be made at all, [it] apparently must be made and proved by the insured as part of its burden of establishing coverage.”

The court disagreed for several reasons. First, according to the court, the *Great Northern* reference to burden shifting was not as “unambiguous” as ACE contended because the *Great Northern* court did not specify whether it applied to the duty to defend or the duty to indemnify. Second, the *Great Northern* court relied on several federal cases that concerned the duty to indemnify, not the duty to defend, and thus, according to the court, were inapposite. Third, subsequent Massachusetts decisions confirmed that determining which party has the burden to prove a “sudden and accidental” release for purposes of indemnity depends on whether the insurer met its duty to defend. In sum, “[t]o suggest that an insured, faced with a complaint containing general allegations of negligent releases must first prove a ‘sudden and accidental’ release in order to establish a duty to defend is inconsistent with these carefully crafted distinctions.” As a result, the court rejected ACE’s objections regarding the legal standard for the duty to defend and granted Plaistow’s motion for summary judgment.

With regard to ACE’s motion for summary judgment that the “sudden and accidental” exception did not in fact apply, ACE argued that even accepting Plaistow’s claim that the contaminant at issue resulted from overflows that occurred between 1982 and the end of the period during which the dry cleaning machines were used, the alleged releases were not “sudden and accidental” as a matter of law because State Line knew that prior overflows had occurred. The court first noted that the “sudden” portion of the exception “focuses on the circumstances of the release,” and the “accidental” portion of the exception “relates to expectations and intentions, and this depends on context.” Thus, citing *Highlands Insurance Co. v. Aerovox Inc.*,^[3] “minor spills and mishaps which would clearly be sudden and accidental at an office building housing company headquarters would be commonplace occurrences and not clearly beyond the long-range reasonable expectation of the insured at a toxic waste reclamation facility.”

Here, the undisputed facts were that the dry cleaning machines used perchlorethylene, and on no more than six occasions between 1971 and the early 1980s, after customers cleaned items that were not permitted to be placed in the machines, the machines clogged, and perchlorethylene spilled and puddled on the floor. According to the court, five or six spills over 12 years could not be considered “common.” Nor were the releases intended by the policyholder because the releases occurred only because the policyholder’s customers’ misused the dry cleaning machines. As a result, the court denied ACE’s motion for summary judgment because ACE did not meet its burden of establishing that the releases were not sudden and accidental.

In sum, Plaistow illustrates a recent pro-policyholder outcome as to the interplay of the pollution exclusion and the viability of its “sudden and accidental” exception.

Alexander Bandza is an associate and Brian Scarbrough is a partner at Jenner & Block LLP.

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[1] Plaistow Project LLC v. Ace Property & Casualty Insurance Co., No. 1:16-cv-11385-IT, 2018 U.S. Dist. LEXIS 156438 (D. Mass. May 17, 2018) (Magistrate Report) accepted and adopted, 2018 U.S. Dist. LEXIS 155965 (D. Mass. Sep. 13, 2018) (Opinion)

[2] Great Northern Industries Inc. v. Hartford Accident & Indemnity Co., 40 Mass. App. Ct. 686, 666 N.E.2d 1320 (1996)

[3] Highlands Insurance Co. v. Aerovox Inc., 424 Mass. 226, 676 N.E. 2d 801, 806 n.10 (1997)