SJC-13303

KEN'S FOODS, INC. vs. STEADFAST INSURANCE COMPANY.

Suffolk. November 4, 2022. - January 6, 2023.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Environment, Environmental cleanup costs. Insurance, Coverage, Amount of recovery for loss. Common Law.

Certification of a question of law to the Supreme Judicial Court by the United States Court of Appeals for the First Circuit.

Lawrence G. Green (Gregory S. Paonessa also present) for the plaintiff.

Jeffrey E. Dolan for the defendant.

The following submitted briefs for amici curiae:

Michael S. Levine, Nicholas D. Stellakis, & Janine A. Hanrahan for United Policyholders.

Mary-Caitlin Ray for Complex Insurance Claims Litigation Association & others.

KAFKER, J. After a wastewater treatment system at its manufacturing facility malfunctioned, Ken's Foods, Inc. (Ken's Foods), sought recovery from Steadfast Insurance Company (Steadfast) for various costs it incurred, claiming coverage

under its pollution liability policy. Ken's Foods's policy covered necessary cleanup costs, including "emergency expenses" incurred to avoid "actual imminent and substantial endangerment to the public health or welfare or the environment." Steadfast paid the costs of cleaning up the illegal wastewater discharge. The policy also covered business interruption losses resulting from a covered pollution event, including mitigation expenses incurred to reduce the costs of the business interruption. No such costs were paid here, as there was no business interruption.

In dispute are costs Ken's Foods incurred that were not cleanup costs or costs necessary to avoid imminent endangerment to public health or welfare or the environment, but were necessary to avoid a business interruption. These costs included a temporary wastewater treatment process that involved ongoing reprocessing of water from the stormwater pond and pretreatment before releasing the water, and agreed-upon fines for such releases, as they still exceeded acceptable levels, although they apparently did not rise to the level of a danger to public health or welfare or the environment. These costs were less than the losses that Ken's Foods would have sustained if it had experienced a business interruption.

On appeal from the United States District Court for the District of Massachusetts, the United States Court of Appeals

for the First Circuit certified the following question to this court: "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?" Ken's Foods, Inc. v. Steadfast Ins. Co., 36 F.4th 37, 38-39 (1st Cir. 2022). See S.J.C. Rule 1:03, as appearing in 382 Mass. 700 (1981) (requirements for certification).

We conclude that the costs at issue are not recoverable. A pollution liability insurance policy is a contract between two private parties that should be interpreted according to its plain terms, which reflect the benefit of the bargain struck by the parties, including their allocation of risk. The costs at issue here fit within neither of the relevant coverages in the insurance policy. They were not cleanup costs or costs necessary to prevent imminent endangerment to public health or welfare or the environment, and they were not the result of a business interruption, as business was never suspended. Nor were they mitigation necessary to reduce the costs of business interruption, as, again, there was no business interruption whatsoever. The mitigation provision also did not require incurring expenses necessary to prevent a business interruption. And finally, the costs appear to fall within the policy's exclusion for costs, charges, and expenses associated with

maintenance and process improvements, which expressly excluded from coverage the costs, charges, and expenses of maintenance and process improvements, even if such maintenance and process improvements were required by a government authority as a result of a cleanup. In sum, the plain language of the insurance policy controls, and consequently, there is no basis to impose a common-law duty inconsistent with the coverages and exclusions contained in the policy.[1]

Background. We recite the facts as stated by the certifying court, supplemented by the parties' joint appendix. As the certifying court stated: "Because summary judgment was entered against Ken's Foods, we 'view the entire record in the light most hospitable' to Ken's Foods, 'indulging all reasonable inferences in [its] favor.'" Ken's Foods, Inc., 36 F.4th at 39 n.1, quoting Quinn v. Boston, 325 F.3d 18, 23 (1st Cir. 2003).

Ken's Foods operates a manufacturing facility in McDonough, Georgia. On December 20, 2018, its wastewater treatment system malfunctioned.[2] As a result, the facility's storm water pond overflowed and wastewater flowed into a Georgia tributary.

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[1] We acknowledge the amicus briefs submitted by United Policyholders and by Complex Insurance Claims Litigation Association, American Property Casualty Insurance Association, and Massachusetts Insurance Federation.

[2] Specifically, the "continuous stirred tank reactor" in the new "anaerobic waste water treatment plant" experienced a "process failure" due to a design defect in the new system.

Ken's Foods cleaned up the wastewater pollution, incurring around $1 million in cleanup costs and containing the pollution source by February 2019.

In addition, Ken's Foods took actions to allow it to continue operating the facility despite the faulty wastewater treatment system. Ken's Foods implemented a temporary wastewater treatment process that involved ongoing reprocessing of water from the stormwater pond with newly installed equipment, and pretreatment before releasing the water. As these releases still exceeded acceptable levels, Ken's Foods also agreed to pay a predetermined schedule of fines via a settlement with the county. Ken's Foods alleges that it spent $2 million on these measures, which allowed it to avoid a suspension of operations that would have otherwise cost it over $10 million per month in expenses and lost profits.

Ken's Foods sued Steadfast in the Federal District Court for approximately $3 million in unpaid insurance claims ($1 million in cleanup costs and $2 million in business interruption prevention costs). The parties cross-moved for summary judgment on the issue "whether Ken's Foods can recover from Steadfast the costs that it says it incurred to avoid suspending its operations after the pollution discharge." The Federal District Court judge ruled that the costs incurred to prevent the business interruption were not recoverable, because no

Massachusetts cases were on point and because the judge construed this court's recent decision in Mount Vernon Fire Ins. Co. v. VisionAid, Inc., 477 Mass. 343, 349 (2017) (Mount Vernon), as standing for the proposition that "insurance contracts are bargained-for exchanges limited to their express terms and not generally supplemented by the common law."[3]

After moving for reconsideration, which was denied, Ken's Foods appealed. On appeal, the First Circuit determined that there was no controlling Massachusetts precedent and that sister jurisdictions are split on the issue. Ken's Foods, Inc., 36 F.4th at 41-43. Consequently, it certified the question to this court.

Discussion. The interpretation of an insurance contract is a pure question of law. Vermont Mut. Ins. Co. v. Poirier, 490 Mass. 161, 164 (2022). "We interpret the words of the standard policy in light of their plain meaning, . . . giving full effect to the document as a whole[,] . . . consider[ing] 'what an objectively reasonable insured, reading the relevant policy language, would expect to be covered' . . . [and] interpret[ing] the provision of the standard policy in a manner consistent with

[3] The judge dismissed Ken's Foods's claims under G. L. c. 176D, § 3 (9), and G. L. c. 93A that Steadfast's denial of coverage was unreasonable or unfair. The parties also agreed to dismiss all claims for nonmitigation losses; thus, the First Circuit appeal concerned only Ken's Foods's claim of coverage for the costs of preventing a business interruption.

the statutory and regulatory scheme that governs such policies." Mount Vernon, 477 Mass. at 348, quoting Golchin v. Liberty Mut. Ins. Co., 466 Mass. 156, 159-160 (2013).

1. Policy terms. Two coverage provisions in Ken's Foods's insurance policy are most relevant here. First, Coverage C obligated Steadfast to pay "[r]easonable and necessary" "cleanup costs" associated with a "new pollution event" at an insured location during the policy period. In addition to the costs of remediating contamination and legal claims arising from the pollution event, "cleanup costs" included "emergency expense[s]," that is, "costs, charges and expenses incurred to avoid an actual imminent and substantial endangerment to the public health or welfare or the environment." Steadfast paid Ken's Foods at least $857,730.75 for expenses that met this definition. It reimbursed the costs of removing wastewater that had escaped the retention pond and preventing more wastewater from overflowing, paid the fines resulting from the initial discharge, and retained counsel for employees who were subjected to a county enforcement action.

Ken's Foods does not contend that the $2 million it spent to maintain operations could be covered as "reasonable and necessary" cleanup costs under this provision. Indeed, the policy contained an express exclusion for

> "Any costs, charges or expenses for maintenance, upgrade or improvement of, or installation of any control to, any property or processes on, at, within or under a 'covered location' even if such maintenance, upgrade, improvement or installation is required:
>
> "1. By 'governmental authority'; or
>
> "2. As a result of 'cleanup costs,' 'loss,' 'natural resource damages' or 'other loss' otherwise covered under the policy."

Here, Ken's Foods incurred costs, charges, or expenses via fines and changes to its wastewater treatment process as required by the county authority to allow the company to continue operations. Steadfast referenced this exclusion in its response to Ken's Foods's claims, and apparently Ken's Foods did not contest its applicability to the $2 million in expenditures during the claims resolution process, at least in regard to Coverage C.

Rather, Ken's Foods claims that the $2 million in expenditures was recoverable as a mitigation cost to avoid the suspension of operations. Under Coverage H, Steadfast was required to pay losses (including lost income and expenses to reduce lost income)[4] resulting from a new pollution event that caused a "suspension of operations" at an insured location

[4] Steadfast was required to reimburse "loss of business income" and "expenses necessarily and reasonably incurred to reduce 'loss of business income' to the extent such expenses do not exceed the amount of 'loss of business income' that otherwise would have been payable."

during the policy period. More specifically, a 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'" (emphases added). The policy further provided that Steadfast was only responsible for losses sustained four days after notification of a suspension and before Ken's Foods could resume operations.

In the instant case, 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.[5] 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. These 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.

[5] The policy also excluded coverage for a "[k]nowingly wrongful act" or "[d]eliberate non-compliance" with a government authority.

The mitigation of loss provision in Coverage H was also inapplicable, according to its express terms. It, too, required a suspension of operations. This provision required Ken's Foods to mitigate loss of business income, complete cleanup, and resume operations "as soon as practicable" "[i]n the event of a suspension of operations" (emphasis added). Again, no such suspension occurred.

The mitigation provision also did not require Ken's Foods to prevent an imminent suspension of operations or require reimbursement of such costs. Grebow v. Mercury Ins. Co., 241 Cal. App. 4th 564, 574, 578 (2015) ("mitigation clause is unambiguous" that it applies only after insured loss; "absent a provision that provides for reimbursement, the insurer has no obligation to reimburse an insured for costs to prevent an imminent insurable occurrence from occurring").[6]

[6] The parties dispute whether Ken's Foods could have purchased pollution insurance to recover for expenses incurred to avoid a business interruption. Based on the record and arguments before us, it appears that commercial general liability policies may include expenses that an insured incurs to avoid a suspension of operations, but that pollution liability policies with coverage for the costs of preventing a business interruption may be unavailable. The case law also suggests that this type of coverage may commonly appear in sue-and-labor clauses in other types of insurance policies. See Grebow, 241 Cal. App. 4th at 575 n.3, quoting Abraham, Peril and Fortuity in Property and Liability Insurance, 36 Tort & Ins. L.J. 777, 797 (2001) ("Sue and Labor clauses tend to cover the insured against the cost of preventing imminent loss, to the extent that such a loss would have been covered by the policy if it had occurred").

2. Common-law right. Recognizing that the express terms of the insurance policy do not cover the claims, Ken's Foods argues that nevertheless there is a common-law right for reimbursement of the costs of preventing an imminent covered loss. As discussed supra, in its certified question to this court, the First Circuit posed this issue as follows: "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?" (emphasis added).

This is an issue that has not been addressed by this court and has divided other jurisdictions and commentators. Compare McNeilab, Inc. v. North River Ins. Co., 645 F. Supp. 525, 529 (D.N.J. 1986); Grebow, 241 Cal. App. 4th at 578 ("absent a provision that provides for reimbursement, the insurer has no obligation to reimburse an insured for costs to prevent an imminent insurable occurrence from occurring"); W.M. Schlosser Co. v. Insurance Co. of N. Am., 325 Md. 301, 311 (1992); and Note, Allocation of the Costs of Preventing an Insured Loss, 71 Colum. L. Rev. 1309, 1316 (1971) ("Most courts . . . have not allowed an insured to recover prevention costs from the insurer without an express recovery provision"), with Demers Bros. Trucking, Inc. v. Certain Underwriters at Lloyd's, London, 600 F. Supp. 2d 265, 274 (D. Mass. 2009) ("the common law also

recognizes the right of the insured to seek compensation from the insurer for the costs of mitigation"); Leebov v. United States Fid. & Guar. Co., 401 Pa. 477, 481 (1960) ("It is folly to argue that if a policy owner . . . makes a reasonable expenditure and prevents a catastrophe he must do so at his own cost and expense," when he would have been able to recover more from defendant if he had not made expenditure); S. Plitt, D. Maldonado, J.D. Rogers, & J.R. Plitt, Couch on Insurance 3d § 168:11 (rev. ed. 2017) (recognizing insured's "duty to mitigate an insured loss" and "corresponding common-law right to recompense from the insurer for the cost of these efforts"); and id. at § 168:12 (costs are reimbursable if "incurred to prevent or minimize a covered loss, thus benefiting the insurer").

Although the certified question regarding a common-law duty is posed in general language, we decline to answer the question abstractly, as opposed to in reference to the specific policy language at issue, including the coverage provisions, the exclusions, and, finally, the term that the policy does not contain that we are essentially asked to incorporate. We conclude that in the instant case, the plain, unambiguous language of the coverage provisions and exclusions are controlling. A "common law doctrine cannot displace the clear provisions of the [p]olicy, . . . particularly when the [p]olicy directly addresses and circumscribes the applicability of the

doctrine." ALPS Prop. & Cas. Ins. Co. v. Keller, Reynolds, Drake, Johnson & Gillespie, P.C., 2021 MT 46, ¶ 20.

In determining the obligations arising out of an insurance policy, including any supplementary common-law duties, we begin with the recognition that an insurance policy, particularly in a voluntary line of insurance, is a contract between two private parties. The parties are therefore entitled to the "benefit of their stated bargain," including their allocation of risk. Rawan v. Continental Cas. Co., 483 Mass. 654, 666 (2019), quoting Great Divide Ins. Co. v. Lexington Ins. Co., 478 Mass. 264, 268 (2017). See Mount Vernon, 477 Mass. at 349. In the instant case, the contracting parties are also sophisticated business entities. When dealing with "sophisticated commercial parties," we have been especially hesitant to reconsider "contractual risk allocation." H1 Lincoln, Inc., v. South Washington St., LLC, 489 Mass. 1, 26 (2022). See Rawan, supra.

In evaluating the allocation of risk and the obligations of the respective parties, the plain language of the particular insurance policy directs our analysis. Mount Vernon, 477 Mass. at 348. Our decision in Mount Vernon is instructive in this regard. In that case, which also involved a certified question, we were asked to decide whether an insurance policy provision setting out a "duty to defend" included a duty to bring affirmative counterclaims as well. We concluded that the duty

to defend did not include a duty to bring affirmative claims. Id. at 354. We emphasized that such a reading was inconsistent with the plain language of the provision. Id. at 351.

In so concluding, we also addressed previous decisions of the court applying the "in for one, in for all" rule, which "requires that, where an insurer is obligated to defend an insured on one of the counts alleged against it, the insurer must defend the insured on all counts, including those that are not covered." Id. at 351. We rejected application of that rule to affirmative counterclaims, stating that "[w]hile the 'in for one, in for all' rule did expand the class of actions that an insurer is obligated to defend, it did not change the meaning of the word 'defend.'" Id. at 352. Where the language of the insurance policy is plain and not ambiguous, this court has declined to extend coverage to matters not covered by the policy.[7]

As discussed in detail supra, the preventative costs at issue are outside the scope of the plain, express terms of the reimbursement and mitigation provisions. Steadfast was only

[7] The dissent in Mount Vernon also emphasized the importance of plain language and the requirement of ambiguity to go beyond a plain language interpretation. It just concluded that there was ambiguity in the contested language, and that such ambiguity should be read in favor of the insured, as provided elsewhere in our insurance jurisprudence. Mount Vernon, 477 Mass. at 355 (Gants, C.J., dissenting), citing Boston Symphony Orch., Inc. v. Commercial Union Ins. Co., 406 Mass. 7, 12 (1989).

required 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 policy 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.

The policy's maintenance exclusion further supports the conclusion that the parties did not intend to insure the costs at issue. The policy expressly 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' . . . or 'other loss' otherwise covered under the policy." The alternative wastewater treatment process that Ken's Foods developed to continue operations, and the accompanying costs, charges, and expenses it incurred, appear to fall within this express exclusion. For all these reasons, the $2 million in expenses to prevent a suspension of operations was for Ken's Foods to bear.[8]

[8] Ken's Foods argues that the lack of this duty creates an asymmetry: if the company had not taken preventative measures, Steadfast would have argued that it had failed to mitigate under the policy. However, this is an asymmetry created by the text

In sum, Ken's Foods seeks reimbursement that is not allowed by the plain, express terms of the policy, in both the coverage provisions and the exclusions. Here, we are also dealing with "sophisticated commercial parties" capable of, and responsible for, their own contractual risk allocation. H1 Lincoln, Inc., 489 Mass. at 26. See Rawan, 483 Mass. at 666. Given the express allocation of risk and the sophisticated parties that contracted to allocate this risk, we decline to imply a common-law duty to fill in the gap in coverage.[9]

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of the contract itself. See Mount Vernon, 477 Mass. at 349, quoting 11 R.A. Lord, Williston on Contracts § 31:5, at 455 (4th ed. 2012) ("[T]he question whether a bargain is smart or foolish, or economically efficient or disastrous, is not ordinarily a legitimate subject of judicial inquiry"). The policy only allowed recovery for a "necessary" suspension of operations. As explained supra, if the suspension of business could have been avoided by incurring certain expenses, and was thus unnecessary, the recovery of business interruption losses would not be allowed. Asymmetrical duties are not evidence that we have misinterpreted the policy. Indeed, during the first four days of a suspension, Ken's Foods is under a duty to mitigate its losses even though there is no corresponding right to reimbursement.

[9] In reaching this decision, this court is not adopting a minority rule, as Ken's Foods suggests. Although some courts appear more willing to allow recovery of costs incurred to prevent a covered loss, they do not do so in the face of plain language in insurance policies to the contrary. See Demers Bros. Trucking, Inc., 600 F. Supp. 2d at 274 (allowing recovery of mitigation costs where there was no "insurance policy provision to the contrary"). Likewise, we do not interpret the Couch on Insurance treatise to suggest a different approach. Although the treatise sets out the parameters of particular common-law duties, including the duty of an insured to prevent imminent covered loss and the duty of an insurer to reimburse those costs, such common-law duties are effectuated and

Conclusion. We answer the certified question as follows. There is no common-law duty for insurers to cover costs incurred by an insured party to prevent imminent covered loss, when the plain, unambiguous terms of the insurance policy at issue speak directly to the question of mitigation and reimbursement and do not provide coverage, and the costs are otherwise excluded by other provisions of the policy. To provide for recovery in these circumstances would be to rewrite the insurance contract and reallocate the risks negotiated by the parties.

The Reporter of Decisions is directed to furnish attested copies of this opinion to the clerk of this court. The clerk in turn will transmit one copy, under the seal of the court, to the clerk of the United States Court of Appeals for the First Circuit, as the answer to the question certified, and will also transmit a copy to each party.

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delimited by the language used in a particular policy. See ALPS Prop. & Cas. Ins. Co., 2021 MT 46, ¶ 20. The common law summarized by Couch on Insurance may provide a default in the absence of a particular contract term, but only where the policy permits the implication. See Restatement (Second) of Contracts § 5 comment b (1981) (common law supplies "implied terms of an agreement," which "may be varied by agreement of the parties"). Here, the policy's express provisions requiring mitigation and reimbursement do not apply to the costs at issue and an express exclusion does.