

First Circuit Certifies Coverage Question To Massachusetts Supreme Judicial Court (Insurance Law Alert)

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The First Circuit asked the highest court of Massachusetts to address whether the state recognizes a common law duty for insurers to cover the costs incurred by an insured to prevent imminent covered loss in the absence of a policy provision addressing such coverage. *Ken's Foods, Inc. v. Steadfast Ins. Co.*, 36 F.4th 37 (1st Cir. June 7, 2022).

The coverage dispute arose after Ken's Foods discovered an accidental discharge of wastewater at one of its facilities. The company immediately addressed the problem in cooperation with local authorities. According to Ken's Foods, without such measures, it would have been forced to suspend operations entirely or engage specialized contractors, either at a significantly larger cost. Steadfast refused to cover the cost of the prevention efforts, arguing that the policy covered only cleanup costs and business losses resulting from a suspension of operations.

In ensuing litigation, Ken's Foods conceded that the policy "on its face" did not cover such preventative costs, but argued that Massachusetts would nevertheless recognize a common law duty on the part of insurers to reimburse expenses incurred to prevent imminent covered loss. The district court disagreed and granted Steadfast's summary judgment motion.

On appeal, the First Circuit noted the absence of Supreme Judicial Court decisions on point. As the court observed, courts in other jurisdictions have reached conflicting conclusions, with some recognizing such a duty even absent guiding policy language, and others rejecting such an extra-contractual obligation. As such, the First Circuit asked the Massachusetts Supreme Judicial Court to address the following question of law:

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?

We will keep you apprised of any developments in this matter.

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