Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

NO. SJC-11897

SUFFOLK COUNTY

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
PLAINTIFF-APPELLANT,

v.

GREAT NORTHERN INSURANCE COMPANY,
DEFENDANT-APPELLEE.

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE *AMICUS CURIAE*
MASSACHUSETTS DEFENSE LAWYERS ASSOCIATION

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STATEMENT OF THE INTEREST OF THE *AMICUS CURIAE*

The Massachusetts Defense Lawyers Association ("MassDLA"), *amicus curiae*, is a voluntary, non-profit, statewide professional association of trial lawyers who defend corporations, individuals and insurance companies in civil lawsuits. Members of the MassDLA do not include attorneys who, for the most part, represent claimants in personal injury litigation. The purpose of the MassDLA is to improve the administration of justice, legal education and professional standards, and to promote collegiality and civility among all members of the bar.

To promote its objectives, MassDLA participates as *amicus curiae* in cases raising issues of importance to its members, their clients and the judicial system. The MassDLA believes that this is such a case and that its perspective can assist the Court in resolving the important issues raised by this appeal.

The MassDLA urges the Court to reject the Selective Tender Doctrine in Massachusetts and answer "No" to the certified question.

STATEMENT OF THE ISSUES PRESENTED

The United States Court of Appeals for the First Circuit has certified the following question:

> Where two workers' compensation insurance policies provide coverage for the same loss, may an insured elect which of its insurers is to defend and indemnify the claim by intentionally tendering its defense to that insurer and not the other and thereby foreclose the insurer to which tender is made from obtaining contribution for the insurer to which no tender is made?

Ins. Co. of Pennsylvania v. Great N. Ins. Co., 787 F.3d 632, 638 (1st Cir. 2015).

STATEMENT OF THE CASE

The MassDLA, as *amicus curiae*, adopts the plaintiff-appellant's statement of the case regarding the prior proceedings.

STATEMENT OF THE FACTS

The MassDLA, as *amicus curiae*, adopts the plaintiff-appellant's statement of the facts.

SUMMARY OF THE ARGUMENT

The MassDLA urges the Court to reject the selective tender doctrine's application in Massachusetts and answer "No" to the certified question. The selective tender doctrine which is followed to some degree in only three states, is not

consistent with Massachusetts law. The selective tender doctrine is inconsistent with Massachusetts law with regard to the application of notice provisions contained in insurance policies, as well as G.L. c. 175, § 112. This Court has recently held that notice to an insurer, whether directly or by a third party, effectuates a tender of defense and indemnity to the insured. *See Boyle, supra.* *Boyle* is the most recent in a long line of cases in which the Court has found that an insurer has an obligation to defend and potentially indemnify its insured upon notice of a claim which triggers a duty to defend. This line of cases and G.L. c. 175, § 112 are inconsistent with the selective tender doctrine which, if applied, would require an insured to take steps in order to selectively tender a claim to a targeted insurer. *See* Argument I.A.1. at pages 10 to 16. Similarly, the selective tender doctrine is inconsistent with Massachusetts case law regarding the obligations of the insured to cooperate with the insurer and instead giving the insured a right to select and de-select an insurer in the defense and indemnity of the insured at any time and for any reason. *See* Argument I.A.2. at pages 16 to 18.

The selective tender doctrine eliminates equitable contribution among insurers with concurrent obligations to a common insured. This is inconsistent with Massachusetts law supporting equitable contribution and further Massachusetts' courts' equitable powers to insure that a determination is just and appropriate in the circumstances, including the impact on third parties such as claimants/ plaintiffs, as well as insurers and insureds. The selective tender doctrine would overrule this authority and replace it with the decision of the insured, regardless of the basis of the decision (if any) and without regard to its impact on the other parties (insurer and claimant/plaintiff) as well as the legal system. *See* Argument I.A.3. at pages 18 to 20.

Massachusetts courts have long applied "other insurance" clauses to determine the order of payment between concurrent insurance policies. The policies at issue here both contain such clauses, which should be applied as required by *Mission Ins., infra,* and its progeny. It is unnecessary and ill advised to adopt the foreign doctrine of selective tender, when

existing case law determines the outcome. *See* Argument I.A.4. at pages 21 to 23.

A plaintiff that has attained the position of judgment creditor has existing rights under Massachusetts statutes and case law to reach and apply the defendants' insurance proceeds. The selective tender is in violation of those rights and inconsistent with current law. *See* Argument I.A.5. at pages 23 to 28.

Finally, the selective tender doctrine is bad public policy and should be rejected. The selective tender doctrine hurts insureds by creating additional obligations with regard to tender, and failure to comply with these obligations could result in forfeiture of coverage, thereby hurting both the insured and the claimant/plaintiff. Further, insurers are unable to predict their obligations and ascertain the risk insured, potentially leading to increases in premium and/or departure of insurers from the Massachusetts market. Additionally, the selective tender doctrine if adopted in Massachusetts would create great uncertainty for all regarding its impact on resolution of claims/suits against insureds, the obligations of selected and non-selected insurers

under a variety of statutory and common law, the application of multiple policy limits, self-insured retentions, deductibles and wasting policies, and the impact of the same on out of court resolution of matters as well as the application of the Massachusetts Unfair Claims Handling Act, G.L. c. 176D, and the Massachusetts Unfair Trade Practices act, G.L. c. 93A. *See* Argument B. at pages 28 to 38.

ARGUMENT

I. SELECTIVE TENDER DOCTRINE SHOULD NOT BE ADOPTED IN MASSACHUSETTS.

The MassDLA respectfully urges the Court to decline to adopt the Selective Tender Doctrine in Massachusetts. The Selective Tender Doctrine has only been adopted by a small minority of states (Illinois, Montana, and Washington)[1] and has been recently

[1] *See, e.g., Hartford Acc. & Indem. Co. v. Gulf Ins. Co.,* 776 F.2d 1380, 1383 (7th Cir. 1985)(applying Illinois law)(insured's tender of defense is required to trigger duty to defend, not mere knowledge of a suit provided by a third party); *Casualty Indem. Exch. Ins. Co. v. Liberty Nat'l Fire Ins. Co.,* 902 F.Supp. 1235, 1239 (D.Mont.1995)(holding "where the insured has failed to tender the defense of an action to its insurer, the latter is excused from its duty to perform under its policy or to contribute to a settlement procured by a coinsurer"); *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.,* 164 Wash.2d 411, 423, 191 P.3d 866 (2008)(holding "selective tender"

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rejected by Utah. *Workers Comp. Fund v. Utah Bus. Ins. Co.*, 296 P.3d 734 (Utah 2013). As stated in COUCH ON INSURANCE:

> A minority of jurisdictions have adopted what is commonly referred to as the "selective tender" rule. Pursuant to the selective tender rule, an insured has the exclusive right to determine whether to trigger coverage under an available policy and may, therefore, make a "selective tender" of its claim to one of several potential insurers.[] In other words, when several insurance policies are available to the insured, the insured has the right to choose or knowingly forego an insurer's participation in a particular claim.[] If the insured does in fact make a selective tender, the selected insurer has the sole responsibility to defend and indemnify the insured and is foreclosed from making a claim for equitable contribution from other insurer.[] However, the selective tender rule is only applicable to concurrent insurance coverage and not consecutive, primary or excess coverage policies where other primary coverage is available.[]

14 COUCH ON INS. § 200:37 (June 2015 supp.)(notes omitted). The selective tender doctrine has at its core a requirement that the insured provide a formal tender selecting an insurer to defend and indemnify it with regard to a claim. This is inconsistent with

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rule barred claim by settling insurers against co-insurer where insured did not tender claim to co-insurer).

Massachusetts law, as is the Selective Tender doctrine.

Further, the selective tender doctrine has been criticized in Illinois:

> Almost as soon as the *Burns* court adopted targeted tender, some judges urged against reading the doctrine expansively. Concurring in *CHRPP*[] and in *American National Fire Insurance Co. v. National Union Fire Insurance Co. of Pittsburgh, Pa.*,[] Justice Quinn expressed concern that targeted tender made it harder for insurers to determine the extent of their insured risks, blurred the distinction between primary and excess coverage, and possibly even violated the state constitution by interfering with freedom of contract.

Richard J. VanSwol, *Shrinking the Target New Developments in "Targeted Tender"*, 103 Ill. B.J. 30, 32 (2015) (notes omitted). *See Chicago Hospital Risk Pooling Program v. Illinois State Medical Inter–Insurance Exchange,* 325 Ill.App.3d 970, 987 (2001) (Quinn, J., concurring) (stating "[i]n the vast area of legal jurisprudence, there are undoubtedly many instances where being the first, or only, jurisdiction to grant rights to persons or entities may rightly be a source of pride. While it is still very early, the doctrine of 'selective tender' does not appear ... to be one of those instances"); *American National Fire Insurance Co. v. National Union Fire Insurance Co. of*

Pittsburgh, 343 Ill.App.3d 93, 109 (2003) (Quinn, J., concurring)(suggesting that the selective tender rule be tailored in a manner that "will not blindside the insurer" and "should be limited to instances involving parties which are additional insureds under concurrent primary policies"); *see also Kajima Const. Servs., Inc. v. St. Paul Fire & Marine Ins. Co.,* 368 Ill. App. 3d 665, 672 (2006).

California has refused to adopt the selective tender doctrine, finding it incompatible with California law.

> We are unpersuaded that a Washington case on which ASIC relies (*Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*...) should apply here. In that case, the court's analysis was heavily dependent on the so-called "selective tender" rule, which appears to bar a participating insurer from seeking contribution from a nonparticipating insurer based solely on whether the insured elected to tender to the nonparticipating insurer. "The selective tender rule has had little traction outside of Illinois" ... and the rule appears inconsistent with California law that "the right to equitable contribution exists *independently* of the rights of the insured ... [and] where multiple insurers ... share equal contractual liability for the primary indemnification of a loss or the discharge of an obligation, the selection of which indemnitor is to bear the loss should *not be left to the often arbitrary choice of the loss claimant.*" ... Because *Mutual of Enumclaw* turned principally on rules that

> appear incompatible with California law, we ascribe no significance to its analysis.

Am. States Ins. Co. v. Nat'l Fire Ins. Co. of Hartford, 202 Cal. App. 4th 692, 706 n.8 (2011) (citations omitted).

The selective tender doctrine is inconsistent with Massachusetts law regarding (1) tender and notice as recently stated by this court in *Boyle v. Zurich American Insurance Company*, ___ Mass. ___ (Sept. 14 2015); (2) application of cooperation clauses contained in insurance policies; (3) the availability of equitable contribution among insurers; (4) the enforcement of "other insurance" clauses in concurrent insurance policies; and (5) a claimant's rights to reach and apply an insured's policy. Each of these are discussed below.

A. Selective Tender Doctrine is inconsistent with Massachusetts law

1. Selective Tender Doctrine is inconsistent with Massachusetts law regarding tender and notice as recently stated by this court in *Boyle v. Zurich American Insurance Company*, ___ Mass. ___ (Sept. 14, 2015).

Just last month this court rejected that concept that an insured must affirmatively request a defense from the insurer before the duty to defend is

triggered in *Boyle v. Zurich American Insurance Company*, ___ Mass. ___, 36 N.E.3d 1229 (Sept. 14, 2015) ("*Boyle*"). The Court specifically rejected Zurich American Insurance Company's ("Zurich") suggestion (and supporting decisions from several other jurisdictions) that the duty to defend is not triggered unless the insured affirmatively requests that a defense be provided. *Id.* at 1238 n.13. *See also* G.L. c. 175, § 112.[2]

Instead, the *Boyle* decision affirmed *Johnson Controls Inc. v. Bowes,* 381 Mass. 278 (1980) *("Johnson Controls*") and its progeny, which stand for the proposition that an insurer has a duty to defend despite late notice, unless it has been prejudiced by the late notice. *Boyle*, *supra*, at 1236-38. Further, the *Boyle* Court noted that in both *Johnson Controls* and *Darcy v. Hartford Ins. Co.,* 407 Mass. 481 (1990) ("*Darcy*"), which "reaffirmed and fortified the rule of *Johnson Controls*, the insurer was not notified of the

[2] G.L. c. 175, § 112 states, in part, "An insurance company shall not deny insurance coverage to an insured because of failure of an insured to seasonably notify an insurance company of an occurrence, incident, claim or of a suit founded upon an occurrence, incident or claim, which may give rise to liability insured against unless the insurance company has been prejudiced thereby."

claim by the insured, but rather received the information from a third party. *See Boyle*, *supra*, at 1237-38 and n.9. The *Boyle* Court stated:

> We have not seen cause to revise our holdings in *Johnson Control* and its progeny. ... The reasoning of those decisions, described earlier, remains compelling today.[] Indeed, similar rules have been adopted by a large majority of other States. See, e.g., *Prince George's County v. Local Gov't Ins. Trust,* 388 Md. 162, 182–188, 879 A.2d 81 (2005), and cases cited; Couch on Insurance § 199:135, at 199–187 to 199–189 (3d ed. 2005).[]
>
> Accordingly, C & N's failure to notify Zurich of the complaint brought by the Boyles did not, standing alone, excuse Zurich of its duty to defend C & N. Instead, upon learning from the Boyles' attorney that a lawsuit was pending against C & N for an occurrence covered by the policy, Zurich was required to defend against that suit unless C & N's breach of its notice obligation prejudiced Zurich, by depriving it of an opportunity to mount an effective defense.

Id. at 1238 (citations and notes omitted). Note 13 further states:

> Zurich American Insurance Company (Zurich) cites decisions from several other jurisdictions for the proposition that the duty to defend is not triggered unless the insured affirmatively requests that a defense be provided.... Other courts do not impose this condition.... As we have indicated in *Johnson Controls, ...* and *Darcy v. Hartford Ins. Co.*, ... we subscribe to

> the latter school of thought. See note 9, *supra.*

Id. at 1238 n.13 (citations omitted).[3]

Pursuant to *Boyle*, there is no distinction between notice and tender, in that an insurer once it has actual notice of a covered claim against its insured must defend or be in violation of its contractual obligations to the insured. The exception to this, pursuant to *Johnson Controls*, *Darcy, Boyle*, and G.L. c. 175, § 112, is when the insurer is prejudiced by the delay. *Id.*

Further, the only Court to address any sort of selective tender under Massachusetts law found it to be in conflict with G.L. c. 175, § 112 and Massachusetts case law requiring that an insured be prejudiced in order to avoid coverage. In *Connolly Bros., Inc. v. Nat'l Fire & Marine Ins. Co.*, No. CIV. A. 06CV11673-NG, 2008 WL 5423198, at *6-7 (D. Mass.

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[3] In the referenced note 9, the *Boyle* decision states:

> Because the insured in *Johnson Controls* never provided notice of the claim against him, Zurich is incorrect in suggesting that the analysis adopted in that case is restricted to instances in which the insured did eventually, if belatedly, provide notice of the suit against it....

Id. at 1236 n.9 (citations omitted).

Dec. 30, 2008)(Gertner, J.)(attached in Addendum hereto), the United States District held that an insurer's "Election of Insurance Carrier for Defense" Endorsement was contrary to both Massachusetts statute (G.L. c. 175, § 112) and case law (*Johnson Controls*, *Darcy, supra). Id.* The *Connolly Bros.* Court went on to state:

> National claims this policy provision simply relieves National of its duty to defend if the insured has sought a defense from "another responsible insurer." ... National may be correct that the statute itself does not plainly speak to the election clause at issue; ... National's election clause ... seeks to guarantee that, where National is required to defend an action, no other insurer has already been asked to supply a defense....
>
> Despite this distinction, the interests underlying M.G.L. c. 175, § 112 and inscribed in Massachusetts common law plainly apply to the election clause and bar its enforcement at this stage of the proceedings. These interests reach beyond the terms of the statute itself.... Faced with insurance policy provisions like the election clause here, the Massachusetts courts have regularly "modified the common law in this area by adding prejudice requirements in the contexts of notice provisions." ... National's ... election clause is very much concerned with notice: the moment another insurer has been notified of a claim and a defense requested, National disclaims any duty to defend the insured. The resulting forfeiture is inconsistent with the "recent trend to eschew such technical forfeitures of insurance coverage unless the insurer has been materially

> prejudiced by virtue of late notification." ... The Court has little doubt that National's election clause fits squarely within the logic and the letter of the prejudice requirement imposed at common law.

Id. at *6-7 (citations omitted).

Further, the law of the state of Illinois, which created the selective tender doctrine and has been primarily responsible for its scope and application, does not require prejudice in order defeat coverage due to late notice. *See, e.g., W. Am. Ins. Co. v. Yorkville Nat. Bank*, 238 Ill. 2d 177, 185 (2010)("An insured's breach of a notice clause ... by failing to give reasonable notice will defeat the right of the insured to recover under the policy.") and cases cited. Rather, under Illinois law, prejudice is merely one of five factors considered in determining whether notice was within a reasonable time. *Id.*

Boyle, supra, and the line of cases it reaffirms (*Johnson Controls* and its progeny) are inconsistent with the selective tender doctrine, which is based on a formal tender by the insured specifically directed to one insurer and not to another. Further, the selective tender doctrine is inconsistent with G.L. c. 175, § 112, as discussed in *Connolly Bros., supra*. For both these reasons, the selective tender doctrine

is not appropriate for Massachusetts and this Court should decline to join the three states that currently apply the selective tender doctrine.

2. The Selective Tender Doctrine is inconsistent with the lengthy line of Massachusetts cases regarding cooperation clauses.

Massachusetts law provides:

> [T]he violation of a policy provision should bar coverage only where the breach frustrates the purpose underlying that provision. Notice, consent-to-settlement, and cooperation provisions share a common purpose ... to give an insurer the opportunity to protect its interests. ... Accordingly, we held that an insurer seeking to disclaim liability because of a breach of one of these provisions must demonstrate that the breach actually prejudiced the insurer's position.

Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 123 (1991), citing *Darcy, supra,* at 489-491; *see also MacInnis v. Aetna Life & Cas. Co.*, 403 Mass. 220, 223 (1988); and *Johnson Controls, supra,* at 280-282. The prejudice requirement has been added to prevent forfeiture. *See Johnson Controls* and *Darcy, supra.*

In adding the prejudice requirement, in addition to breach of the contract, in *Darcy, supra,* the Court stated:

> Like notice and consent-to-settlement clauses, cooperation clauses are designed

> primarily to protect the insurer's interest in avoiding payment on claims which it cannot adequately defend. When that interest has not been jeopardized by the insured's breach, in the sense that the insured's infraction does not seriously impair the insurer's investigation or defense of the action, there is no persuasive reason to permit the insurer to deny coverage under the policy. We now join the considerable authority throughout the country, ... which requires a showing of prejudice by the insurer. We do so "to afford to affected members of the public-frequently innocent third persons - the maximum protection possible consonant with fairness to the insurer." ... We hold that an insurer seeking to disclaim liability on the grounds of an insured's breach of a cooperation provision may do so only upon making an affirmative showing of actual prejudice resulting from that breach.

Id. at 490-91 (citations omitted). The selective tender doctrine creates a class of insurers (the insurers not selected by the insured), which may be called upon at any time (at the whim of the insured) to take over the defense, that are prejudiced. These non-selected insurers' "interest in avoiding payment on claims which [they] cannot adequately defend" is prejudiced by selective tender. Further, by essentially eliminating notice and cooperation provisions as applied to the non-selected insurer, the selective tender doctrine allows the insured to pick and choose which provisions of the policy to follow,

with limited or any consequences, even if there is prejudice to the insurer. Selective tender is inconsistent with Massachusetts law and should be rejected.

3. Selective Tender Is Also Inconsistent With The Lengthy Line Of Massachusetts Cases Supporting Equitable Contribution Among Insurers.

Further, the Selective Tender doctrine is contrary to equitable contribution which is recognized in Massachusetts.[4] Massachusetts law supports

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[4] *See also United States Fire Ins. Co. v. Peerless Ins. Co.*, No. 00-5595, 2001 WL 1688368, at *5 (Gants, J.) (Mass. Super. Dec. 20, 2001), stating:

> Massachusetts appellate courts have recognized the right of an insurer to pursue an action for equitable contribution against a co-insurer....
>
> "... In the insurance context, the right to contribution arises when several insurers are obligated to indemnify or defend the same loss or claim, and one insurer has paid more than its share of the loss or defended the action without any participation by the others.... Equitable contribution permits reimbursement to the insurer that paid on the loss for the excess it paid over its proportionate share of the obligation, on the theory that the debt it paid was equally and concurrently owed by the other insurers.... The purpose of this rule of equity is to accomplish substantial justice by equalizing the common burden shared by co-insurers, and to prevent one

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equitable contribution by an insurer that defends and/or indemnifies the insured against other insurers that did not participate in the defense and/or indemnification of their common insured. *See, e.g., Boston Gas Co. v. Century Indem. Co.*, 454 Mass. 337, 365 (2009) ("Boston Gas"); *Travelers Ins. Co. v. Aetna Ins. Co.,* 359 Mass. 743, 743 (1971)(rescript)(holding insurer that settled claim was entitled to contribution from co-insurer); *Rubenstein v. Royal Ins. Co. of Am.,* 44 Mass.App.Ct. 842, 852 (1998)("Of course there is no bar against an insurer obtaining a share of indemnification or defense costs from other insurers under the doctrine of equitable contribution").[5]

> insurer from profiting at the expense of others."

Id. at *5 (citation omitted).

[5] *See also Boston Gas Co. v. Century Indem. Co.,* No. CIVA 02-12062-RWZ, 2006 WL 1738312, at *2 (D. Mass. June 21, 2006)(stating "Even if Century [insurer] is held jointly and severally liable, it may seek equitable contribution from other insurers, ... and it may also be able to obtain contribution under the "other insurance" clauses in its policies...", relying on *Rubenstein,* 44 Mass.App.Ct. at 852 and *Mission Ins. Co. v. United States Fire Ins. Co*., 401 Mass. 492, 499 (1988).

In *Boston Gas* one of the bases for the Supreme Judicial Court's determination that *pro rata* allocation amongst numerous insurers was appropriate was due to its judicial efficiency by eliminating future equitable contribution actions among insurers which would necessarily follow if a single insurer was obligated to pay the entire amount. *Id.* at 365, relying on *EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd's,* 156 N.H. 333, 345 (2007), and *Olin Corp. v. Insurance Co. of N. Am.,* 221 F.3d 307, 323 (2d Cir. 2000).

Further, in *MacInnis v. Aetna Life & Cas. Co.*, 403 Mass. 220 (1988), the Court looked to whether an insurer's "subrogation and repayment rights" were prejudiced in determining whether the insured's breach of the consent-to-settlement provision resulted in forfeiture of coverage. *Id*. at 223. It is these very rights that the selective tender doctrine eliminates in that it eliminates equitable contribution.

The MassDLA urges the Court to affirm the line of cases supporting equitable contribution among insurers and decline to adopt the selective tender doctrine.

4. The Selective Tender Doctrine Is Contrary To Massachusetts Law Regarding The Enforcement Of "Other Insurance" Clauses In Concurrent Insurance Policies.

Massachusetts enforces "other insurance" clauses in determining payment obligations between concurrent insurers to the extent that they don't conflict. *Mission Ins. Co. v. United States Fire Ins. Co.,* 401 Mass. 492, 492–493 (1988). Further, under Massachusetts law, when they "other insurance" clauses conflict, then the Court divides the liability equally among insurers. *Id.*

Both policies at issue here include "other insurance" provisions.[6] Both policies contemplate a situation as is presented here where more than one policy applies. As recently stated in *Boston Gas*:

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[6] See Great Northern's "other insurance" provision at JA48, and the Massachusetts Standard Workers Compensation And Employers Liability Insurance Policy WC 00 00 00 A (in effect at time of accident at issue here) and WC 00 00 00 B (currently in effect) both provide for all applicable policies to pay equal shares. *See* MASSACHUSETTS WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE MANUAL (eff. January 1, 2008) https://www.wcribma.org/mass/ToolsAndServices/UnderwritingToolsandForms/Manuals/MA%20Manual/MA_Manual_CurrentVersionForLinking/MA_Manual_current.pdf, Rule I, B. Standard Policy, at R-1 (requiring that all workers compensation insurance be provided pursuant to the "standard policy").

> [T]he "other insurance" clauses simply reflect a recognition of the many situations in which concurrent, not successive, coverage would exist for the same loss.[] For example, we resolved a conflict between "other insurance" clauses in *Mission Ins. Co. v. United States Fire Ins. Co.*, ... where one insurer issued an umbrella liability policy to the lessor of a vehicle involved in a motor vehicle accident and another insurer issued a liability policy to the lessee. The "other insurance" clauses were implicated in that case because the policies were concurrent and thus, in the absence of other insurance, each policy would have provided coverage for the losses from the accident.

Boston Gas, 454 Mass. at 361-362 (citations and note omitted). Earlier this year, the Massachusetts Appeals court discussed the case law involving application of "other insurance" provisions in *Moroney Body Works, Inc. v. Cent. Ins. Companies*, 87 Mass.App.Ct. 774 (2015), stating:

> "'Other insurance' clauses, clauses designed to establish a policy's relationship with other policies covering a loss, were first developed in the real property fire insurance field in order to prevent owners from overinsuring." *Mission Ins. ...* Such clauses apply where there are two or more concurrent policies that "insure the same risk and the same interest, for the benefit of the same person, during the same period."[] *Boston Gas Co. v. Century Indem. Co.*, 454 Mass. 337, 361 n. 36, ... "It is generally held that in order for an other insurance clause to operate in the insurer's favor, there must be both an identity of the insured interest and an identity of risk."[]

Id. (citations and notes omitted).

A non-“selected” policy would be “collectible” and “available” insurance with regard to an “other insurance” provision. *See, e.g., U.S. Fire Ins. Co. v. Worcester Ins. Co.*, 62 Mass.App.Ct. 799 (2005) (determining that exhaustion of a policy resulted in it not being “other collectible insurance available to the ‘Insured’.”); *Gulezian v. Lincoln Ins. Co.*, 399 Mass. 606, 609-610 (1987)(indicating that a policy of an insolvent insurer was not “collectible” in the context of an “other insurance” clause).

This case is one where each of two concurrent policies contain “other insurance” clauses which determine the order of payment among said policies. Both policies contemplate such a potential occurrence and plan for it accordingly, as does the law of Massachusetts. These provisions have been enforced under Massachusetts law and when the policies’ provisions are mutually repugnant the courts have applied a *pro rata* allocation. Here, both policies include “other insurance” clauses. *See* note 6, *supra.* The policies’ “other insurance” clauses and applicable law should be applied to determine the parties’ obligations. It is not necessary nor consistent with Massachusetts law to apply the foreign doctrine of

selective tender which has only been adopted by three states since its creation twenty-four years ago. The selective tender doctrine should be rejected.

5. Selective Tender Doctrine Is Inconsistent With Massachusetts Law Regarding A Claimant's Rights To Reach And Apply An Insured's Policy.

Massachusetts law provides that a judgment creditor has a lien which can be enforced directly by the judgment creditor against the judgment debtor's insurer. G.L. c. 175, § 112; *John Beaudette, Inc. v. Sentry Ins. A Mut. Co.*, 94 F. Supp. 2d 77, 119 (D. Mass. 1999). "Thus, the injured party can have the insurance money of the judgment debtor applied to satisfy his judgment against the insured/judgment debtor and is given a temporary lien upon the insurance money which he may enforce "by the usual remedies of a judgment creditor ... or by G.L. c. 214, § 3." *John Beaudette, supra*, 94 F. Supp. 2d at 119, citing *Lunt v. Aetna Life Insurance Company,* 253 Mass. 610 (1925). "All of the relevant statutes, [G.L. c. 175] sections 112 and 113 and section three of chapter 214, authorize the judgment creditor to reach and apply the proceeds of the judgment debtor's liability policy to satisfy the judgment 'to the

extent [the judgment] embraces covered claims.'" *Id., citing Palermo v. Fireman's Fund Insurance Company,* 42 Mass.App.Ct. 283 (1997).

Further, where an insurer does not defend its insured in a civil action which results in a finding of liability on several counts – some of which are covered under the policy and some of which are not covered – the insurer will be liable in a reach and apply action by the judgment creditor for the covered claims. *Palermo v. Fireman's Fund Ins. Co.,* 42 Mass.App.Ct. 283 (1997). The insurer also then bears the burden of proving the apportionment of the judgment between covered and uncovered claims, and its failure to do so results in the insurer's liability for all of the claims, both covered and uncovered. *Id.*[7] This rule, originating in *Polaroid Corp. v. Travelers*

[7] "An insurer who unjustifiably refuses or fails to defend its insured, even in good faith, assumes the consequential risks of that breach of its insurance contract. Those risks not only include liability for the amount of the judgment reflecting claims covered by the policy, but also extend to bearing the burden of proof with respect to apportionment of a judgment between claims that were covered by the policy and claims that were not covered." *Palermo v. Fireman's Fund Ins. Co.*, 42 Mass.App.Ct. 283, 290 (1997) and cases cited.

Indem. Co., 414 Mass. 747, 764 (1993),[8] was recently affirmed and applied in *Peabody Essex Museum, Inc. v. U.S. Fire Ins. Co.*, No. 13-1528, __ F.3d __, 2015 WL 5172841, at *2 (1st Cir. Sept. 4, 2015) (attached in Addendum hereto), which affirmed the *Polaroid* burden-shifting rule and the district court's application of it requiring the insurer that wrongfully failed to defend to bear the burden of proving no coverage, once the insured had produced credible evidence demonstrating that an occurrence took place during the term of the insurance policy. *Id.*

Further, "the insurance company (and the plaintiff) will be bound by the result of the underlying action as to all matters decided therein that are material to recovery by the plaintiff against the insurer.... This is true whether the insurer defended in that action or refused to do so without legal justification." 48 Mass. Prac. Collection Law § 11:38 (4th ed.) (supp. Sept 2105), citing *Saragan v. Bousquet*, 322 Mass. 14 (1947).

[8] *Polaroid Corp., supra,* states: "an insurer that wrongfully declines to defend a claim [must bear] the burden of proving that the claim was not within its policy's coverage". *Id.* at 764.

Massachusetts statutes and case law regarding reach and apply actions and the underlying plaintiff's status as a judgment creditor and the long history of the application of the statutes to both insurer and plaintiff are inconsistent with the selective tender doctrine. As discussed above, an insurer that does not defend is bound by the facts in the underlying action, and yet if it is the insured's choice for an insurer not to defend, rather than the insurer's decision, the insurer has no ability to participate in the action which will then be binding against it. Further, as the plaintiff/judgment creditor in a reach and apply action has the rights of the insured, it would appear that the plaintiff could select a different insurer than the one selected by the insured, even after the judgment. *See* note 9, *infra.* This would result in an insurer being obligated to defend a reach and apply action with regard to an underlying action in which said insurer was allowed to have no role. This is true, under the doctrine of selective tender, whether or not the insurer raised any reservations regarding coverage.

The selective tender doctrine is inconsistent with Massachusetts statutes and case law regarding a

claimant's rights to reach and apply an insurance policy once it has become a judgment creditor of the insured. The MassDLA urges the Court to decline to adopt the selective tender doctrine.

B. The Selective Tender Doctrine Is Bad Public Policy Because It Hurts Insureds/Defendants, It Hurts Claimants, It Hurts Insurers, It Creates Uncertainty And It Likely Increases Costs To All.

Just as it is inconsistent with Massachusetts law, as discussed above, adoption of the selective tender doctrine is also bad public policy, for each of the reasons discussed below.

A Justice of the Appellate Court of Illinois has criticized the selective tender doctrine, stating:

> Apparently, Illinois is the only state that recognizes this "right." The *raison d' etre* for this right has been explained thusly: "The insured may choose to forgo an insurer's assistance for various reasons, such as the insured's fear that premiums would be increased or the policy cancelled in the future, and this ability to forgo assistance should be protected."... The insured may base the exercise of this "right" on any reason or no reason at all. When an insured exercises this "right", the targeted insurer is precluded from obtaining equitable contribution from other insurers who insure the same risk. This makes it much more difficult for insurers to determine the extent of the risk they potentially face in every policy they issue.

Chicago Hosp. Risk Pooling Program v. Illinois State Med. Inter-Ins. Exch., 325 Ill. App. 3d 970, 985 (2001) (Quinn, J. concurring)(citation omitted).

The selective tender doctrine is not a good fit for Massachusetts and is bad public policy, for the reasons discussed below.

1. The Selective Tender Doctrine Is Bad Public Policy Because It Hurts Insureds/Defendants, It Hurts Claimants, It Hurts Insurers, And It Likely Increases Costs To All.

First, the selective tender doctrine eliminates equitable remedies, e.g. equitable contribution, recognized under Massachusetts law. These remedies give Massachusetts courts the power to act according the justice and equity required in the circumstances. The selective tender doctrine ties the courts' hands.

Second, the selective tender doctrine puts weight on insured's "choice" without determining whether the insured made a "choice" with knowledge or intent or if the reasons for doing so were valid. The insured's "right" to choose which policy defends and indemnifies is often given as a reason for accepting this doctrine, but the doctrine doesn't require or even look to evidence of (1) the basis for the insured's

decision, (2) whether such a decision is advantageous to the insured in that particular case, or overall, or (3) whether the doctrine negatively impacts on insureds through higher premiums due to increased costs of insurers who even if not participating in the defense are likely waiting in the wings for possible future involvement.

Third, the selective tender doctrine brings into question how insurers are to respond to a notice from an insured, which this Court has determined is the same as tender. *See Boyle, supra*.[9]

Fourth, the selective tender doctrine brings into question how insureds selectively tender a defense and what the impact of that tender is, and does so without

[9] Illinois law, which is the only state to have developed any breadth of case law regarding the selective tender doctrine, clearly distinguishes between notice and tender, providing that an insured has the sole right to tender the defense to his/her insurer. Illinois law also provides that the insured can "deactivate" its tender and this can be done even after settlement. Settlement of the underlying suit against the insured does not end an insured's ability to deactivate its previous tender and activate a tender against another insurer, under Illinois law. *See Richard Marker Associates v. Pekin Ins. Co.*, 318 Ill. App. 3d 1137, 1144 (2001)(allowing insured architect, not its carrier, to withdraw tender to one professional liability insurer after the insured paid a settlement and to target another exclusively); *see also* Richard J. VanSwol, *supra,* at 33.

providing any guidance to an insured, sophisticated or not, as to the costs and benefits of such a determination.

Fifth, the selective tender doctrine makes it "much more difficult for insurers to determine the extent of the risk they potentially face in every policy they issue." *See Chicago Hosp. Risk Pooling Program supra*, 325 Ill. App. 3d at 985 (Quinn, J. concurring). It is unclear what result the selective doctrine may have on premiums or other costs for insureds that exercise a selective tender and/or the premiums applicable to all insureds, which will apply whether or not an individual insured is ever in a position to exercise a selective tender (e.g. if they have no claims against which they would trigger defense or indemnity during a particular policy period).

Sixth, as discussed further below, the selective tender doctrine creates uncertainty with regard to individual cases, as well as the obligations of insurers, insureds, and the application of the law. One example of this uncertainty is the potential for the insured's defense and indemnity to be switched from one insurer to another at any point during the

life of the claim. Under Illinois' selective tender doctrine an insured has the right to select which insurer to defend and indemnify it, and the insured maintains the right to change that selection, even after settlement of the action. *See* note 9, *supra*. This right of the insured to "activate" and "deactivate" the defense and indemnity of a claim creates uncertainty and confusion among the parties involved in the matter and their respective responsibilities over the course of litigation. The selective tender doctrine changes the dynamic with regard to case handling and potential outside of court resolution. *See, e.g., Alcan United, Inc. v. W. Bend Mut. Ins. Co.,* 303 Ill. App. 3d 72, 83-84 (1999); s*ee also Legion Ins. Co. v. Empire Fire & Marine Ins. Co.,* 354 Ill. App. 3d 699, 703-04 (2004).

Application of the selective tender doctrine in Illinois has also resulted in an insured's loss of coverage, a result which Massachusetts courts seek to avoid. In *American Country Insurance v. Kraemer Bros.,* 298 Ill.App.3d 805, 812 (1998) the Illinois Appellate Court considered the effect of a policy provision requiring the insured to "Promptly tender the defense of any claim made or 'suit' to any other

insurer which also has available insurance for a loss which we cover...." The *American Country Ins.* Court held that by selectively tendering the defense only to the insurer with the policy requiring notice to other insurers that also cover the loss, the Court found that the insured "clearly breached the terms of the ... policy and is not entitled to a defense or indemnity" under the only policy the insured had notified. *Id.* at 812.

Massachusetts precedent and case law protects the insured (and innocent third parties) against forfeiture of coverage for technical violations of policy terms. *See Johnson Controls, Darcy, et al.,*[10] *supra.* In addition to protecting insureds against forfeiture, Massachusetts courts also look to protect innocent third parties. *See, e.g., Darcy, supra*, at 490 (requiring a showing of prejudice "'to afford to

[10] *See Johnson Controls, supra*, at 281 (stating "Courts have also been influenced to adopt a more liberal approach to the notice question because the classic contractual approach involves a forfeiture"; noting that allowing forfeiture of coverage without prejudice to insurers is "unfair to insureds".) and *Darcy,* 407 Mass. at 486, citing G.L. c. 175, § 112 (1988 ed.), (As "previously expressed by both the Legislature and this court, ... forfeitures [of coverage] should occur only upon a showing of actual prejudice to an insurer's interests.").

affected members of the public-frequently innocent third persons-the maximum protection possible consonant with fairness to the insurer.’”) (citation omitted). Further, *Boyle, supra*, makes it clear that in Massachusetts an insurer’s receipt of actual notice of a claim, whether directly from the insured or not, serves as a tender of defense and indemnity. The selective tender doctrine is not consistent with Massachusetts law and should be rejected.

2. The Selective Tender Doctrine Creates Uncertainty For Defendants, Insurers, Claimants, And Counsel.

The selective tender doctrine injects a variable into a situation that is currently adequately addressed by Massachusetts case law and the policies at issue. Further, this new variable – the insured’s selection of which insurer to be involved in the action – is subject to change at any time for any reason that the insured sees fit. As a result, the selective tender doctrine prevents certainty, predictability and uniformity of result.

The current law provides rules known to insurers and insureds which require insureds to put their insurers on notice in a timely manner and cooperate

with their insurers, so as to not prejudice the insurers' ability to defend cases and thereby protect both themselves and their insureds. Further, insurers know that Massachusetts law applies policies' "other insurance" provisions and can determine their risk based on the law and the provisions contained in their policies and the marketplace. This allows insurers to assess the risk and make the necessary determinations regarding their policy language and premiums, in conjunction with the Commissioner of Insurance and Massachusetts statutes, regulations and case law. Further, insureds can shop for an "other insurance" clause that is consistent with their needs and wants and know how Massachusetts law will apply it. This provides some level of certainty to insurers, insureds, and claimants, as well as provides predictability as to the obligations of the parties with regard to certain policies and facts.

There is no certainty as to the obligations of insurers when more than one insurer is involved and an insured has selected only one insured. The selected insurer does not know if it will continue to defend the case through conclusion and potential indemnification or if the insured will change its mind

in the middle of the litigation and “deactivate” the first insurer and “activate” the second insurer.

In the context of selective tender and Massachusetts law, it is unclear what the obligations and available options are for an insurer and the insured, and the impact on claimants/plaintiffs. Many questions come to mind:

- How and when is a selective tender effected?
- What are the notice obligations of the insured to the non-selected insurer?
- What are the obligations of the non-selected insurer? Does the non-selected insurer have a duty to investigate?
- Is non-selected carrier entitled to information regarding the underlying action? Is that information protected by the tri-partite relationship?
- Can the plaintiff seek a settlement from the non-selected insurer? If so, is the non-selected obligated to respond to the settlement demand?
- What is the outcome if the selected policy has lower policy limits than the non-selected policy?
- How, when and by what means is a second policy selected?
- Can a plaintiff/judgment creditor choose which policy to reach and apply? Can a plaintiff/judgment creditor reach and apply multiple policies?

- How and when can an insured select/activate and de-select/deactivate an insurer's obligations to defend and/or indemnify?

- What is the impact of the exhaustion of the selected policy on other non-selected policies? Does the non-selected policy have to be formally activated?

- Does the current law apply requiring applicable primary type policies to be exhausted before an insured's excess/ umbrella policies apply?

- What is the result if one of the policies is a so-called "wasting" policy, in that its policy limits diminish with the payment of defense costs?

- How are deductibles and Self Insured Retentions ("SIR") applied within a policy that is not selected? And within a policy that is selected?

- Does the selective tender doctrine apply to different types of coverages (e.g. general liability coverage and directors and officers liability coverage) that apply to all or a portion of the same claim/suit? If so, how is it applied?

- What are the rights and obligations of insurers, claimants and insureds with regard to G.L. c. 93A and G.L. c. 176D?

Further, all parties will have difficultly determining how to proceed without clarity of the law on these issues and further, with the insured having the right to switch carriers at any time. This uncertainty will impact on the parties' ability to

reach out of court resolution of cases and accordingly impact on judicial resources.

The selective tender doctrine creates uncertainty for defendants, insurers, claimants, and counsel and is inconsistent with Massachusetts law. The MassDLA urges the Court to reject the selective tender doctrine in Massachusetts and answer "No" to the certified question.

CONCLUSION

For the reasons set forth above, the *amicus curiae*, MassDLA, respectfully requests that this Court refuse to adopt the selective tender doctrine in Massachusetts and answer "No" to the certified question.

Respectfully submitted,

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ADDENDUM

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United States District Court,
D. Massachusetts.

CONNOLLY BROTHERS, INC., Plaintiff,
v.
NATIONAL FIRE & MARINE
INSURANCE COMPANY, Defendant.

Civil Action No. 06cv11673-
NG. | Sept. 30, 2008.

Attorneys and Law Firms

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MEMORANDUM AND ORDER RE: MOTION FOR SUMMARY JUDGMENT

NANCY GERTNER, District Judge.

I. *INTRODUCTION*

***1** Defendant National Fire & Marine Insurance Co. ("National") has moved for summary judgment on Plaintiff Connolly Brothers' ("Connolly Bros.") claim for indemnification and its claim under M .G.L., c. 93A, §§ 2, 11 for unfair and deceptive practices (document # 14). The litigation stems from National's refusal to defend or indemnify Connolly Bros., a general contractor, under an insurance policy held by its subcontractor, Exterior Designs, Inc. ("Exterior"), in which the Plaintiff is named an "additional insured." The parties do not dispute the facts.

For the reasons discussed below, the Defendant's Motion for Summary Judgment (document # 14) is **GRANTED** in its entirety.

II. *FACTS*

This dispute arose when Paul LeBlanc ("LeBlanc"), an employee of United Finishers Co. ("United"), was injured while working on a Connolly Bros. construction project in Stoneham, Massachusetts. According to his complaint (document # 16-9), LeBlanc was injured when he fell from a scaffolding in May 2004 due to unsafe equipment and Connolly Bros.' negligent supervision of the work site. Connolly Bros. had subcontracted with Exterior to perform drywall work on the project, which in turn had sub-subcontracted a portion of that work to United, LeBlanc's employer. Pursuant to the Connolly-Exterior subcontract (document # 16-3), Exterior was required to add Connolly Bros. as an "additional insured" to its insurance policy with National (document # 16-2), which it did in March 2004 when the subcontract was signed.

In addition to any coverage as an additional insured under the National policy, Connolly Bros. was insured under its own policy issued by Ohio Casualty Insurance Co. ("Ohio Casualty") (document # 16-5). Thus, when Connolly Bros. became aware of the potential LeBlanc claim-but before any suit was filed-it notified Ohio Casualty, requesting a defense on June 1, 2004. On October 26, 2004, after investigating the claim and other potential sources of coverage, Ohio Casualty demanded that National provide Connolly Bros .' with a defense and indemnification in the LeBlanc action. Letter from James E. Kelley, Ohio Casualty Group to Mike Dion, President, Exterior Designs, Inc. (Oct. 26, 2004), Ex. B to Pierce Aff. (document # 21).

On November 22, 2004, LeBlanc filed suit against Connolly and Exterior Designs, as well as two other of Connolly's subcontractors, Matrix Drywall Construction, Inc. and Wilson Painting Co., Inc. That suit, the LeBlanc action, is proceeding in Massachusetts court. Connolly is being defended by Ohio Casualty under a reservation of rights.

On February 4, 2005, National responded to Ohio Casualty's October 2004 letter requesting that National take over Connolly's defense. It denied any obligation to defend Connolly, stating that the Exterior Designs-United Finishers subcontract was not an "insured contract" within the ambit of National's policy. It also stated that to the extent its policy was involved at all, it was to be excess over any other insurance, including the Ohio Casualty insurance. Letter from Alan Sladek, National, to James E. Kelley, Ohio Casualty Group (Feb. 4, 2005), Ex. C to Pierce Aff. (document # 21). Subsequent demands upon both Exterior and National have produced the same result, as National again declined to

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assume Connolly Bros.' defense. [1] This lawsuit followed, in which Connolly Bros. seeks a judgment compelling National to pay for its defense and indemnification in the LeBlanc action.

1 In January 2005, Richard Neumeier, counsel for Exterior Designs, entered an appearance in the *LeBlanc* action. Shortly thereafter, Connolly sent the first in a series of letters to Neumeier demanding that Exterior Designs assume Connolly's defense. Letter from Robert R. Pierce, Pierce & Mandell, P.C., to Richard L. Neumeier, Morrison Mahoney LLP (Jan. 19, 2005), Ex. D at 1 to Pierce Aff. (document # 21). In August and September 2005, Connolly made three more demands on Exterior Designs to assume Connolly's defense pursuant to the subcontract and the National policy on which Connolly was named as an additional insured. *See* Letter from Robert R. Pierce, Pierce & Mandell, P.C., to Richard L. Neumeier, Morrison Mahoney LLP (Sept. 1, 2005), Ex. D at 5 to Pierce Aff. (document # 21) (referring to letters sent on August 9 and August 16).

III. *JURISDICTION*

***2** Connolly Bros. is a Massachusetts corporation with its principal place of business in Massachusetts, and National is a Nebraska corporation with its principal place of business in Nebraska. Compl. ¶¶ 1-2 (document # 1). While the amount Connolly Bros. seeks in legal fees and indemnification is unclear, it may well pass the $75,000.00 threshold and the Plaintiff has not challenged the Court's jurisdiction. Diversity jurisdiction therefore exists. *See Stewart v. Tupperware Corp.*, 356 F.3d 335, 338 (1st Cir.2004).

IV. *ANALYSIS*

National has now filed for summary judgment based on the terms of its policy with Exterior and Connolly Bros.' separate policy with Ohio Casualty. In its papers, the Defendant raises a laundry list of defenses, many of which rely on a strained reading of the insurance policies at issue. Nonetheless, National is entitled to summary judgment based on a plain construction of the National policy and the Exterior-United subcontract. While Exterior did add Connolly Bros. as an "additional insured" on the National policy, as it was obliged to do, the contract that Exterior entered into with its subcontractor (and LeBlanc's employer), United, failed to meet the indemnification requirements that would bring LeBlanc's action within National's coverage. Summary judgment is warranted on this ground alone. Even if this were not the case, National would owe Connolly Bros. coverage only in excess of the primary coverage afforded by its Ohio Casualty policy.

A. *Legal Standards*

The case is before the Court on the Defendant's motion for summary judgment, so all facts must be taken in the light most favorable to the Plaintiff, the non-moving party. Fed.R.Civ.P. 56(c); *Mariasch v. Gillette Co.*, 521 F.3d 68, 71 (1st Cir.2008). The interpretation of the policy at issue, however, is purely a matter of law. *See, e.g., Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 439 Mass. 387, 394, 788 N.E.2d 522 (2003). While the Plaintiff bears the initial burden of proving that it is covered under National's policy, National does not contest that Connolly Bros. has met that burden. Instead, the case turns entirely on exclusions to National's insurance contract. *See* Def. Br. at 3-4 (document # 15).

The analytical touchstone of insurance policy interpretation under Massachusetts law is "what an objectively reasonable insured, reading the relevant policy language, would expect to be covered." *McGregor v. Allamerica Ins. Co.*, 449 Mass. 400, 402, 868 N.E.2d 1225 (2007) (quoting *Hazen Paper Co. v. U.S. Fid. & Guar. Co.*, 407 Mass. 689, 700, 555 N.E.2d 576 (1990)) (internal quotation marks omitted). The plain language of the contract controls unless it is ambiguous. *E.g., Somerset Savs. Bank v. Chicago Title Ins. Co.*, 420 Mass. 422, 427-28, 649 N.E.2d 1123 (1995). Where the contractual terms are ambiguous, the parties may submit extrinsic evidence of the terms' meaning, but ultimately ambiguities-including those in exclusions-are to be resolved against the insurer. *Preferred Mut. Ins. Co. v. Gamache*, 426 Mass. 93, 94, 686 N.E.2d 989 (1997).

***3** Under Massachusetts law, an insurer has a broad duty to defend that arises whenever a complaint is "reasonably susceptible" of being interpreted to state a claim within the policy's terms. *E.g ., Metro. Prop. & Cas. Ins. Co. v. Fitchburg Mut. Ins. Co.*, 58 Mass.App.Ct. 818, 819-20, 793 N.E.2d 1252 (2003). However, no duty to defend exists when a claim is specifically excluded from coverage. *Id.* at 820, 793 N.E.2d 1252. The insurer must prove that the exclusion applies. *Id.*

The case turns on the scope of the coverage for Connolly Bros. as an "additional insured" under the Exterior-National insurance contract. National asserts that several different exclusions in the policy forestall any obligation to defend or indemnify Connolly Bros. The Court addresses each in turn.

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B. ***Exterior's Failure To Comply With The National Policy***
National argues that its insurance does not apply to the LeBlanc action because Exterior failed to meet mandatory indemnification conditions in its subcontract with United, LeBlanc's employer. In particular, the National Policy states:

> This insurance does not apply to "bodily injury," "property damage," or "personal or advertising injury" arising out of operations performed for you by independent contractors or sub-contractors unless:
>
> 1. Such independent contractors or sub-contractors agree in writing to defend, indemnify, and hold harmless you and your affiliates, subsidiaries, directors, officers, employees, agents, and their representatives from and against all claims, damages, losses, and expenses attributable to, resulting from, or arising out of the independent contractor's or sub-contractor's operations performed for you, caused in whole or in part by any act or omission of the independent contractor or sub-contractor, or any one [sic] directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by you; and
>
> 2. Such independent contractors or sub-contractors carry insurance with coverage and limits of liability equal to or greater than those carried by you, including commercial general liability, workers' compensation and employers' liability insurance.

National Pol., Endorsement M-5095 (document # 16-2). The National Policy further provides that "[t]hroughout this policy the 'you' and 'your' refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy." National Pol., Com. Gen. Liability Cov. Form at 1 (document # 16-2). Under these provisions, then, the National Policy would not apply to any claims arising from United's work, unless United (1) indemnified Exterior against "all" such claims caused in part by its agents and (2) carried its own insurance in an amount equal to National's limits of liability. These limits were fixed at $1 million for each occurrence and a $2 million aggregate limit. National Pol. (document # 16-2).

***4** The Exterior-United subcontract, however, indemnifies Exterior only for those claims based upon "a determination that United Finishers Co. or any of its employees, is or are employees of Exterior Designs, Inc." Exterior-United Contract, Art. 7 (document # 16-4). Moreover, the subcontract provides limits of only $500,000 .00 per occurrence and $1 million aggregate. Neither of these provisions satisfy the indemnification requirements of National's policy with Exterior. In effect, United agreed to indemnify Exterior only for a subset of claims-where it or its employees were determined to be Exterior "employees"-and only up to liability limits half that provided by National's policy. As a result, Exterior, the Named Insured, failed to satisfy the mandatory conditions for coverage of bodily injury claims arising out of United's work-injuries such as Paul LeBlanc's claim. *Cf. Fireman's Fund Ins. Cos. v. Blais*, 14 Mass.App.Ct. 254, 438 N.E.2d 360 (Mass.App.Ct.1982) (voiding coverage where insured failed to satisfy condition requiring that it maintain primary liability limits); *Charles, Henry & Crowley Co. v. Home Ins. Co.*, 349 Mass. 723, 726, 212 N.E.2d 240 (1965) (finding mandatory condition precedent where requirement "relates essentially to the insurer's intelligent decision to issues the policy"). *See generally Krause v. Equitable Life Ins. Co.*, 333 Mass. 200, 204, 129 N.E.2d 617 (1955) (stating that if "conditions ... were not satisfied no contractual duty under the policy ever arose").

Although this Court finds a certain inequity in voiding Connolly Bros.' coverage on account of Exterior's failure to meet the conditions required by its policy, Connolly Bros. has presented no cases and the Court finds no basis for setting aside this requirement. *Cf. Kosior v. Continental Ins. Co.*, 299 Mass. 601, 13 N.E.2d 423 (1938) (denying coverage to an innocent co-insured where policy exclusion was triggered by the other insured's conduct). To be sure, Connolly Bros. may have a cause of action against Exterior, which promised both to provide coverage under the National policy and to indemnify Connolly Bros. itself. Connolly-Exterior Subcontract (document # 16-3). But the terms of the National policy are unambiguous. As the Massachusetts courts have frequently stated, the provisions of an insurance contract, "if unambiguous, are to be construed according to their plain meaning." *Money Store/Massachusetts, Inc. v. Hingham Mut. Fire Ins. Co.*, 430 Mass. 298, 300, 718 N.E.2d 840 (1999); *see also Somerset Sav. Bank v. Chicago Title Ins. Co.*, 420 Mass. 422, 427, 649 N.E.2d 1123 (1995); *Central Mut. Ins. Co. v. Boston Telephone, Inc.*, 486 F.Supp.2d 180, 183 (D.Mass.2007). Accordingly, the National policy does not apply to the LeBlanc action and summary judgment on Counts 1 and 2 is warranted.

National raises a number of alternative grounds for summary judgment, which are addressed below.

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C. *Primary And Excess Coverage*

As an "additional insured," Connolly Bros. has only excess coverage under Exterior's policy with National-a fact that is not disputed by the parties. *See* National Pol., Endorsement M4685a (document # 16-2).[2] Indeed, Connolly Bros. concedes that the National policy's "Other Insurance" clause "provides that its coverage is excess over *any other* insurance available to Connolly Brothers." Pl. Opp. Br. at 5 (document # 20) (emphasis added). The question is, what is the type of coverage provided by the Ohio Casualty policy and what is the resulting relationship between the coverage offered by the two policies. In particular, Connolly Bros. argues that the Ohio Casualty also provides only excess coverage and, therefore, that the policies are "mutually repugnant" under Massachusetts law. Pl. Opp. Br. at 5 (document # 20). Under such circumstances, insurers must contribute equally to the cost of defending a claim. *Id.* (citing *United States Fidelity and Guaranty Co. v. Hanover Ins. Co.*, 417 Mass. 651, 654, 632 N.E.2d 402 (1994)).

2 That provision states in pertinent part:

> If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:
>
> a. This insurance is excess over any other insurance whether the other insurance is stated to be primary, pro rata, contributory, excess, contingent, or on any other basis; unless the other insurance is issued to the Named Insured shown in the Declarations of this Coverage Part and is written explicitly to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.
>
> b. When this insurance is excess, we will have no duty under Coverage A or B to defend the insured against any 'suit' if any other insurer has a duty to defend the insured against that 'suit.'

***5** While Connolly Bros.' reading of the law is correct, its reading of the Ohio Casualty policy is not. That policy's "Other Insurance" provision clearly states that its coverage shall be *primary* unless one of several exceptions apply, in which case coverage shall be excess. In this instance, none of those exceptions are availing:

> Other Insurance
>
> If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:
>
> Primary Insurance
>
> a. This insurance is primary except when b. below applies ....
>
> b. This insurance is excess over:
>
> ... (2) Any other *primary* insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

See Commercial General Liability Form at 10 (document # 16-7) (emphasis added). The National policy specifies, and the Plaintiff admits, that National owes only *excess* coverage to Connolly Bros. as an additional insured. Accordingly, the National policy does not constitute "primary insurance"-which implies, in turn, that Section 4(b)(2) of the Ohio Casualty "Other Insurance" provision does not apply. Instead, in the absence of any exception, Ohio Casualty's coverage is governed by Section 4(a) and must be considered primary insurance, not excess.

On these terms, the National and Ohio Casualty policies are not "mutually repugnant" under Massachusetts law as Connolly Bros. claims; in fact, they may be readily reconciled. The National policy says it shall be excess over "any other insurance," while the Ohio Casualty policy says it shall be excess only over "[a]ny other *primary* insurance." Otherwise, Ohio Casualty itself affords primary coverage. There is no conflict for the Court to resolve. The respective "Other Insurance" provisions do not present an instance of two incompatible excess coverage policies, each providing that it is excess over the other. Rather, as the Ohio Casualty provision states in Section 4(a), its coverage in this case "is primary." *See* Commercial General Liability Form at 10 (document # 16-7). This reading is consistent with the principles applied by Massachusetts courts when interpreting "other insurance" clauses: "We follow the majority approach which seeks, whenever possible, to reconcile [potentially] conflicting policy clauses based on the sense and meaning of the terms in an effort to effectuate the language of the insuring agreements." *U.S. Fidelity and Guar. Co. v. Hanover Ins. Co.*, 417 Mass. 651, 656, 632 N.E.2d 402 (1994) (citing *Mission Ins. Co. v. United States Fire Ins. Co.*, 401 Mass. 492, 495-96, 517 N.E.2d 463 (1988)); *see also id.* at 497, 517 N.E.2d 463

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(noting "the general rules that language in insurance policies should be given its ordinary meaning"). In effect, Connolly Bros. possessed primary coverage via its own policy with Ohio Casualty; it acquired further excess coverage when it required Exterior to include it as an additional insured under the subcontractor's policy with National. No mutual repugnancy arises as a result.

***6** Because National's coverage is excess over Ohio Casualty's, it had no duty to defend Connolly Bros. in the LeBlanc action and it is not liable for half those costs. *See* National Pol., Endorsement M-4685a (document # 16-2).

D. ***The National Policy's Election Clause***

Separately, National argues that it owes Connolly Bros. no duty to defend and is entitled to summary judgment because Connolly Bros. first requested a defense from Ohio Casualty. *See* Def. Br. at 4 (document # 15). National relies on the "Election of Insurance Carrier for Defense" Endorsement contained in its policy, which provides in relevant part:

> If any Insured believes that more than one insurance company may have the duty to defend a 'suit' for which coverage is provided under this Policy, that insured must elect in writing either to request [National] to defend the insured or to request one or more other insurance companies to defend the insured with regard to that 'suit.'
>
> [National] ha [s] the option, but not the duty, to defend any 'suit' if any insured has requested another insurance company or companies to defend the 'suit' in whole or in part, regardless of whether such request has been accepted or accepted under a reservation of rights.

National Pol., Endorsement M-5077 (document # 16-2). As above, the facts are not disputed: Connolly Bros. concedes that it first requested a defense from Ohio Casualty on June 1, 2004, nearly five months before it approached National about its duty to defend the Leblanc action. Pl. Opp. Br. at 2 (document # 20). Connolly Bros. argues instead that the election clause violates M.G.L. c. 175, § 112, which provides that "No insurance company shall deny insurance coverage to an insured because of failure of an insured to seasonably notify an insurance company of an occurrence, incident, claim of a suit founded upon an occurrence, incident or claim, which may give rise to liability insured against unless the insurance company has been prejudiced thereby." While it is a close question whether the election clause falls within the scope of the statute itself, a broader application of Massachusetts common law, described below, voids the clause insofar as it does not require a showing of actual prejudice. Accordingly, the Court does not deem National's "Election of Insurance Carrier for Defense" Endorsement a valid and separate ground for summary judgment.

National argues that M.G.L. c. 175, § 112 does not apply to the election clause at all because Endorsement M-5077 is not the type of seasonable notice provision targeted by the statute. Def. Reply Br. at 2 (document # 24). Instead, National claims this policy provision simply relieves National of its duty to defend if the insured has sought a defense from "another responsible insurer." *Id.* National may be correct that the statute itself does not plainly speak to the election clause at issue; it prohibits insurance carriers from denying coverage where delayed notification of an incident or claim does not actually harm the carrier's ability to defend. National's election clause has a slightly different aim: it seeks to guarantee that, where National is required to defend an action, no other insurer has already been asked to supply a defense. The purpose, one must presume, is to prevent multiple carriers from undertaking a defense, where such efforts would be either duplicative or, more likely, prejudicial to National's own ability to defend.

***7** Despite this distinction, the interests underlying M.G.L. c. 175, § 112 and inscribed in Massachusetts common law plainly apply to the election clause and bar its enforcement at this stage of the proceedings. These interests reach beyond the terms of the statute itself. *See Johnson Controls, Inc. v. Bowes*, 381 Mass. 278, 282, 409 N.E.2d 185 (1980) ("[W]here an insurance company attempts to be relieved of its obligations under a liability insurance policy *not covered* by G.L. c. 175, s 112, on the ground of untimely notice, the insurance company will be required to prove both that the notice provision was in fact breached and that the breach resulted in prejudice to its position.") (emphasis added). Faced with insurance policy provisions like the election clause here, the Massachusetts courts have regularly "modified the common law in this area by adding prejudice requirements in the contexts of notice provisions." *Darcy v. Hartford Ins. Co.*, 407 Mass. 481, 490, 554 N.E.2d 28 (1990) (cooperation provisions); *see Johnson Controls*, 381 Mass. 278, 409 N.E.2d 185 (notice provisions); *MacInnis v. Aetna Life & Casualty Co.*, 403 Mass. 220, 526 N.E.2d 1255 (1988) (consent-to-settlement provisions). National's protests notwithstanding, its election clause is very much concerned with notice: the moment another insurer has been notified of a claim and a defense requested, National disclaims any duty

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to defend the insured. The resulting forfeiture is inconsistent with the "recent trend to eschew such technical forfeitures of insurance coverage unless the insurer has been materially prejudiced by virtue of late notification." *Johnson Controls*, 381 Mass. at 280, 409 N.E.2d 185. The Court has little doubt that National's election clause fits squarely within the logic and the letter of the prejudice requirement imposed at common law.

The rule adopted by Massachusetts courts recognizes insurers' legitimate interests in seeing that their ability to investigate and defend claims is not compromised. But they will enforce such notice provisions only up to that threshold. By contrast, the National election clause would eliminate the insurer's duty to defend as soon as the insured has so much as notified another carrier and sought a defense. As written, this provision is unmistakably overbroad; its strict enforcement in favor of the insurer would exceed the limits laid out by the Massachusetts courts. Indeed, in precisely this way, the rule also recognizes the "true nature of the relationship between insurance companies and their insureds"-one in which the terms are primarily dictated by the insurer. Accordingly, the courts bar an insurer from denying the bargained-for coverage if it cannot show that its ability to defend has actually been impaired. *Darcy*, 407 Mass. at 489, 554 N.E.2d 28.

In this case, National has made no such showing; in fact, it has not submitted any facts that even tend to show prejudice.[3] Rather, National disclaims all duty to defend[4] based simply on the face of the election clause and Connolly Bros.' earlier notice to Ohio Casualty. The Court declines to grant summary judgment on this ground.

3 Moreover, the courts have refused to presume prejudice even where the delay, as an amount of time, appears "extreme." *See Darcy*, 407 Mass. at 485-86, 554 N.E.2d 28 (rejecting a presumption of prejudice where notice to the insurer had been delayed by more than five years).

4 Importantly, even if National did not have a duty to defend Connolly Bros. on account of the election clause, it might still have a duty to indemnify. Generally, where there is no duty to defend there is also no duty to indemnify. *See, e.g., Herbert A. Sullivan, Inc.*, 439 Mass. 387, 394, 788 N.E.2d 522 (2003). Contrary to National's claims, however, the reasoning behind that principle does not apply to any election clause waiver. The duty to defend, which turns on the facts and claims alleged in a third-party complaint, is necessarily wider than the duty to indemnify, which rests on those facts and claims *proven. See id.* Thus, if there is no reasonable possibility that the liability claim falls within the scope of the insurance coverage, there can be no duty to defend and, in turn, no duty to indemnify. Here, by contrast, National claims it has no duty to defend simply on account of an endorsement purporting to release National from that specific obligation. Even if the election clause were enforceable, the *LeBlanc* action could still fall within the scope of National's policy; it has no bearing on National's duty to indemnify.

E. *Claims Based On Connolly's General Supervision*

***8** National further disclaims any duty to defend because its policy excludes coverage for claims that are not based on Connolly Bros.' general supervision of the project. In particular, National argues that LeBlanc's action is grounded in non-supervisory acts of negligence by Connolly Bros. and is therefore excluded. This argument fails on the face of the LeBlanc complaint.

To be sure, the National policy excludes claims for bodily injury "arising out of any acts or omissions of the additional insured(s) or any of their 'employees', other than the general supervision by the additional insured(s) of your ongoing operations." National Pol., Endorsement CG 2009 (document # 16, exh. 1). But the LeBlanc complaint plainly alleges that Connolly Bros. failed to perform its general supervisory duties, attributing liability to "the negligence of the defendant, Connolly Brothers, Inc., in its control, joint control, *supervision, inspection and superintendence* on said project .... " LeBlanc Compl. at ¶ 16, (document # 16-9) (emphasis added). Simply because the complaint goes on to specify *how* Connolly Bros. allegedly failed to supervise the construction work does not void National's coverage under the exclusion. *Cf. Hakim v. Massachusetts Insurers' Insolvency Fund*, 424 Mass. 275, 282, 675 N.E.2d 1161 (1997) ("Exclusions from coverage are to be strictly construed, and any ambiguity in the exclusion must be construed against the insurer.") (internal quotations omitted). Summary judgment will not stand on this ground.

F. *The Connolly-Exterior Subcontract Is Not an "Insured Contract"*

Finally, as an additional ground for summary judgment, National argues that it has no duty to defend or indemnify Connolly Bros. because the National policy does not cover liability for "bodily injuries" that Exterior assumed in its subcontract with Connolly. When Connolly Bros. and Exterior formed the subcontract, they provided that

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Connolly Bros. would be protected from liability in two ways: (1) through insurance, by adding Connolly Bros. as an "additional insured" on Exterior's policy with National; and (2) contractually, by Exterior's separate agreement to indemnify Connolly Bros. itself. Connolly-Exterior Subcontract, § 2T (document # 16-3). The Court has already addressed the former, concluding that the National policy does not cover liabilities arising from the LeBlanc action, even as to an additional insured such as Connolly Bros.

The layer of contractual protection raises a separate issue, because it suggests a separate avenue of recovery. Namely, National fears that it could be forced to cover Connolly Bros. not as an additional insured, but based on Exterior's contractual assumption of liability. In that case, National's liability would arise from *Exterior's* promise to pay. In particular, in the event of an employee's injury at the worksite, Connolly Bros. might be found liable in tort but, under the subcontract, that liability would be passed on to Exterior. As Exterior's insurer, National fears that it would be forced to cover those assumed liabilities. It now seeks to preempt any recovery by Connolly Bros. on this secondary basis, arguing that the Connolly-Exterior subcontract is not an "insured contract" under its policy.

***9** The National policy contains an exclusion aimed precisely at this type of contractually-assumed liability. Unless a contract qualifies as an "insured contract" as defined in the policy, [5] National excludes liabilities resulting from " 'bodily injury' or 'property damage' for which the insured is obligated to pay damages *by reason of the assumption of liability in a contract or agreement.*" National Pol., Coverage A, Exclusion b (document # 16-2) (emphasis added). [6] Importantly, on the facts here, *Exterior* is the "insured" referred to by the exclusion, having agreed to indemnify Connolly Bros. in the subcontract. [7] The parties do not dispute that Exterior agreed to indemnify Connolly Bros. for claims of bodily injury arising out of Exterior's work. Connolly-Exterior Subcontract (document # 16-3, § 2T). [8] The only question is whether the Connolly-Exterior subcontract is an "insured contract" covered by the National policy; under the policy's terms, it plainly is not.

5 In effect, liabilities assumed in certain types of contracts-called "insured contracts"-are covered whereas all other contractual liabilities are not. An "insured contract" is defined as any contract for the lease of premises, sidetrack agreement, easement or license agreement, obligation required by a municipal ordinance, or elevator maintenance agreement. National Pol ., Endorsement CG 2139 (document # 16-2). The Connolly-Exterior subcontract does not fall within any of these categories.

6 Generally speaking, these provisions seek to limit an insured's ability to assume new liabilities-and thus the insurer's exposure to new risks-after the carrier has issued its policy.

7 As National itself points out, any liability borne by Connolly Bros. as a result of the LeBlanc action lies in *tort*, and was not assumed by contract; therefore, the exclusion in Subsection B(2) (a), excluding liabilities that the additional insured has assumed by "contract or agreement," is not relevant. National Pol., Endorsement 2009 (document # 16-2); *see* Def. Reply Br. at 5-6 (document # 24).

8 This provision states:

> [T]he Subcontractor shall indemnify and hold harmless the Contractor ... against all claims, damages, losses, and expenses ... arising out of or resulting from the performance of the Subcontractor's Work under the Contract Documents, provided that any such claim, damage, loss or expense (a) is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself), including the loss of use resulting therefrom, and (b) is caused in whole or in part by any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by him or anyone for whose acts he may be liable, regardless of whether it is caused in part by a party indemnified hereunder...."

Indeed, National is correct that its coverage does not extend to liabilities assumed by Exterior in the Connolly-Exterior subcontract. That agreement is not an "insured contract," *see supra* n. 5, and therefore is expressly excluded under the policy. National Pol., Endorsement CG 2139 (document # 16-2). Thus, Connolly Bros. cannot claim coverage from National via the indemnification clause in the Connolly-Exterior subcontract. Put differently, Connolly Bros. cannot recover from National derivatively, as Exterior's insurer, based on Exterior's promise to pay for bodily injury claims such as LeBlanc's. Importantly, this finding has no bearing on the primary claim raised in the Complaint and addressed in the sections above: National's duty to indemnify Connolly Bros. *directly* as an additional insured under the National policy. The two theories of recovery should not be conflated

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or confused; the Court treats them separately because both must be answered to resolve this motion in National's favor.

Since the subcontract is not an "insured contract" under the National policy, Exterior's agreement to indemnify does not by itself trigger National's duty to defend or indemnify Connolly Bros.

G. *Chapter 93A Claims For Unfair and Deceptive Business Practices*

Connolly Bros. has also lodged a claim for unfair and deceptive business practices under M.G.L. c. 93A and 176D. Because the Court finds that National is entitled to summary judgment on Counts 1 and 2 based on a plain reading of the insurer's policy, the Defendant is likewise entitled to summary judgment on Connolly Bros.' Chapter 93A claim. Even where an insured prevails against an insurer in a coverage dispute, Chapter 93A will only apply where the insurer has offered an implausible interpretation of its policy or otherwise acted in bad faith. *See Gulezian v. Lincoln Ins. Co.,* 399 Mass. 606, 613, 506 N.E.2d 123 (1987) ("An insurance company which in good faith denies a claim of coverage on the basis of a plausible interpretation of its insurance policy is unlikely to have committed a violation of G.L. c. 93A."); *Pediatricians, Inc. v. Provident Life and Acc. Ins. Co.*, 965 F.2d 1164, 1173 (1st Cir.1992) ("Liability under c. 176D and 93A does not attach merely because an insurer concludes that it has no liability under an insurance policy and that conclusion is ultimately determined to have been erroneous."). Where, as here, the insurer has in fact *prevailed* on at least one of the grounds for denying coverage, its interpretation cannot be labeled implausible nor an instance of bad faith. Accordingly, National's denial of coverage does not constitute an unfair or deceptive business practice, Chapter 93A is not implicated, and National is entitled to summary judgment.

V. *CONCLUSION*

***10** For the foregoing reasons, the Defendant's Motion for Summary Judgment (document # 14) is **GRANTED** in its entirety. Judgment entered for the Defendant.

SO ORDERED.

All Citations

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United States Court of Appeals,
First Circuit.

PEABODY ESSEX MUSEUM, INC.,
Plaintiff, Appellee/Cross–Appellant,
v.
UNITED STATES FIRE INSURANCE COMPANY, Defendant/Third–Party Plaintiff, Appellant/Cross–Appellee,
v.
Century Indemnity Company,
Third–Party Defendant, Appellee.

Nos. 13–1528, 13–1602. | Sept. 4, 2015.

Synopsis

Background: Insured property owner brought state court action against its comprehensive general liability insurer, alleging that insurer breached its contractual duties to investigate and defend against private and public claims arising from subsurface oil pollution, and that it violated state consumer protection laws and common law duties owed to insured. Insurer removed action to federal court and filed a third-party complaint for equitable contribution from another of insured's insurers. The United States District Court for the District of Massachusetts, Nancy Gertner, J., 2010 WL 3895172, entered an order finding that start date for allocation period was first day of insured's policy. Subsequently, the District Court, Nathaniel M. Gorton, J., 2011 WL 3759728, entered summary judgment for insured on its claim under consumer protection laws, and entered a separate order finding that insured was not entitled to one-third of cleanup costs incurred by an environmental consultant, 910 F.Supp.2d 321. Appeal was taken.

Holdings: The Court of Appeals, Howard, Chief Judge, held that:

[1] insurer breached its duty to defend;

[2] insurer's indemnity obligation was subject to pro rata allocation;

[3] fact-based method of allocation applied; and

[4] insurer's delay in paying unreimbursed defense costs was not actionable under Massachusetts' unfair trade practices act.

Affirmed in part,

Attorneys and Law Firms

Thomas M. Elcock, with whom Mitchell S. King and Prince Lobel Tye LLP were on brief, for appellant/cross-appellee.

Martin C. Pentz, with whom Jeremy A.M. Evans and Foley Hoag LLP were on brief, for appellee/cross-appellant.

Brian G. Fox, with whom Siegal & Park was on brief, for third-party defendant, appellee.

Before Howard, Chief Judge, Selya and Stahl, Circuit Judges.

Opinion

HOWARD, Chief Judge.

***1** Some decades ago, a substantial oil spill occurred on the Salem, Massachusetts property of plaintiff Peabody Essex Museum ("the Museum"). That pollution eventually migrated to the land of a down gradient neighbor, Heritage Plaza, which discovered the subsurface contamination in 2003. Heritage Plaza notified the Museum in late 2003, and the Museum gave prompt notice to both the state environmental authorities and its insurer, defendant United States Fire Insurance Company ("U.S. Fire"). In 2006, the Museum filed a coverage suit against U.S. Fire and eventually secured a sizable judgment in 2013. The parties now challenge numerous district court rulings, and several of the insurance issues are governed by state law under *Boston Gas Co. v. Century Indemnity Co.*, 454 Mass. 337, 910 N.E.2d 290 (2009), a decision which rejected joint and several liability in progressive pollution cases in favor of pro rata allocation of indemnity, including for self-insured years on the risk.

After careful review, we affirm the challenged rulings related to insurance coverage but reverse a finding of Chapter 93A liability against U.S. Fire under Massachusetts law.

I.

The surrounding facts are well-rehearsed in the district court orders below. *See, e.g., Peabody Essex Museum, Inc. v. U.S.*

Fire Ins. Co., 623 F.Supp.2d 98 (D.Mass.2009); *Peabody Essex Museum, Inc. v. U.S. Fire Ins. Co.*, No. 06–11209–NMG, 2012 WL 2952770, at *1 (D.Mass. July 18, 2012). A brief synopsis is enough to set the stage.

The principal parties share a contractual relationship under a comprehensive general liability policy which, as pertinent here, had a policy period that extended from December 19, 1983 to December 19, 1985. Generally speaking, the policy covered property damage occurring during that two-year period as long as the damage arose out of a sudden and accidental discharge of pollutants.[1] Under the policy, U.S. Fire also promised to defend the Museum from any suit seeking damages against it on account of any covered property damage and to investigate any claim as it deemed expedient.

Once the Museum received notice of the pollution damage from Heritage Plaza in 2003 ("the private demand"), it retained the Ropes & Gray law firm as legal counsel and ENSR International as an environmental consultant. The Museum confirmed the existence of subsurface oil pollution on its property and immediately notified the Massachusetts Department of Environmental Protection of the pollution. The Department, in turn, issued the Museum a Notice of Responsibility in early 2004 ("the public claim"), and ENSR continued its site investigation work throughout 2004. In its Initial Site Investigation Report completed that November, ENSR identified several isolated spills that had occurred on the Museum's property over the years. ENSR concluded, however, that the likely cause of the pollution involved one or more of three oil storage tanks or their pipelines previously buried on the Museum's property: a 10,000–gallon tank had been installed in the early 1960s and removed in 1973, and two 10,000–gallon tanks had been installed in 1973 and removed in June 1986.

***2** Meanwhile, the Museum notified U.S. Fire of both the private demand, in October 2003, and the public claim, in February 2004. U.S. Fire denied a duty to defend for the private demand but accepted defense for the public claim with a reservation of rights. Despite tendering both legal and environmental consultant bills to U.S. Fire in April 2005, the Museum received no payment for the defense of the public claim—the one that U.S. Fire had agreed to defend. In June 2006, the Museum filed a four-count complaint against U.S. Fire in state court, alleging that U.S. Fire had breached its contractual duties to investigate the pollution claims and to defend and indemnify the Museum in connection with both the private demand and the public claim (counts I and II). The Museum also alleged that U.S. Fire had violated state consumer protection laws, Mass. Gen.Laws ch. 93A, § 2, and certain common law duties owed to its insured (counts III and IV). At the behest of U.S. Fire, the case was removed to federal court where it filed a third-party complaint for equitable contribution against another of the Museum's insurers, ACE Property & Casualty Insurance.

The extensive, multi-phase litigation included several rounds of summary judgment proceedings and a jury trial resolving indemnity issues. About midway through the litigation, the Massachusetts Supreme Judicial Court ("SJC") decided *Boston Gas Co.*, 910 N.E.2d 290, to which the district court moored its decision on allocation of liability between U.S. Fire and the Museum as self-insured on the risk after December 19, 1985.[2] In the end, the district court's 2013 judgment required U.S. Fire to pay the Museum over $1.5 million, including punitive damages under Chapter 93A, attorney's fees, costs, and statutory interest.

Our review of the various rulings on appeal is largely de novo, and we abide by the well-established summary judgment standards. Fed.R.Civ.P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). We are not restricted by the district court's analyses and may affirm on any independent ground made manifest in the record. *See Jones v. Secord*, 684 F.3d 1, 5 (1st Cir.2012). Where appropriate, we identify other review standards along the way.

II.

U.S. Fire first appeals the district court's 2007 order that it breached its duty to defend against the public claim, and thus state law required it to bear the trial burden of proving no coverage. *See Polaroid Corp. v. Travelers Indem. Co.*, 414 Mass. 747, 610 N.E.2d 912, 922 & n. 22 (1993) ("[A]n insurer that wrongfully declines to defend a claim [must bear] the burden of proving that the claim was not within its policy's coverage" including, in pollution cases, "the existence or nonexistence of a sudden and accidental discharge."). Following this *Polaroid* burden-shifting rule, the district court set forth the anticipated trial procedure in which the Museum was expected to produce credible evidence demonstrating that an occurrence took place during the term of the insurance policy, and then U.S. Fire would bear the burden of proving no coverage. Electronic Order

(Gertner, J., Dec. 19, 2007); *see Peabody Essex Museum*, 623 F.Supp.2d at 106–10 (clarifying how the *Polaroid* burden-shifting rule applies in the summary judgment context). [3]

***3** U.S. Fire attacks this summary judgment order on several fronts, all aimed at foreclosing application of the *Polaroid* burden-shifting rule. This is understandable in light of the cascade of practical effects that *Polaroid* had throughout this litigation, especially given the dearth of evidence showing how the polluting event occurred. However, the district court's breach ruling—grounded in U.S. Fire's categorical failure for approximately two years to make any payment for defense costs—is unassailable on this record. Only a few snapshots of the undisputed facts are necessary to show why. [4]

U.S. Fire agreed in March 2004 to honor its contractual duty to defend the public claim under a reservation of rights and then paid nothing to its insured until cornered by the Museum through its October 2007 motion for summary judgment. From the outset, U.S. Fire protested the hourly rate charged by Ropes & Gray but failed to pay even a partial payment despite repeated requests for some measure of payment. For example, in 2005, the Museum sent U.S. Fire the billing invoices from both Ropes & Gray and ENSR and, soon after, provided further detail for the ENSR bills. [5] Still, no money came. Then, U.S. Fire remained silent when directly asked in an August 2005 email whether it had paid any defense costs to date. According to the record, about a year passed before U.S. Fire informed the Museum that it was unable to confirm whether it had ever received any billing for defense costs.

The Museum filed suit against U.S. Fire in June 2006 and again sent copies of the Ropes & Gray bills to the insurer. The Museum also sent U.S. Fire additional legal bills at the end of 2006. Yet, another six months passed before U.S. Fire informed the Museum, in June 2007, that it had lost the billing information and asked for additional copies. The Museum promptly complied. After another three-month lapse without any payment in hand, the Museum filed a motion for summary judgment to enforce U.S. Fire's defense obligation. Finally, in conjunction with its objection, U.S. Fire sent its first payment to the Museum totaling $611.41. This amount represented what U.S. Fire considered to be a fair portion of the Ropes & Gray bills for the public claim: it unilaterally reduced the charged attorney's fees rate to $200 per hour, and further reduced to 40% [6] the revised total legal bills. No payment was offered for any of the 2004 ENSR bills which totaled roughly $70,000.00 at that time. [7]

U.S. Fire's persistent failure to make any payment toward defense costs despite having nominally accepted that duty may be treated as a wrongful refusal to defend upon receipt of notice of a claim. The SJC has said explicitly that "[a]n insurer which reserves its rights and takes no action in defense of its insured, when it knew, or should have known, of a covered claim, or which fails to investigate diligently, despite repeated claims of coverage and requests for a defense from an insured facing demands for immediate action, could be found to have committed a breach of the duty to its insured."*Sarnafil, Inc. v. Peerless Ins. Co.*, 418 Mass. 295, 636 N.E.2d 247, 253 (1994); *accord Chi. Title Ins. Co. v. Fed. Deposit Ins. Corp.*, 172 F.3d 601, 604–06 (8th Cir.1999) (holding that the insurer's failure to pay even what it had considered to be a reasonable sum for defense costs, despite having nominally accepted the tender of defense, constitutes a breach of the duty to defend).

***4** None of the factual issues identified by U.S. Fire are material to the breach question here. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). First, it is immaterial that the individual employee who was managing the public claim does not recall ever having *personally* received the packet. U.S. Fire does not contest the validity of the Federal Express receipt signed by an employee of its third-party claims administrator and dated April 11, 2005, which indisputably shows that the 2005 billing packet was actually received by U.S. Fire's agent. *See Bockser v. Dorchester Mut. Fire Ins. Co.*, 327 Mass. 473, 99 N.E.2d 640, 642 (1951) (noting that a principal is generally bound by the actions of its agents); *Chow v. Merrimack Mut. Fire Ins. Co.*, 83 Mass.App.Ct. 622, 987 N.E.2d 1275, 1279–80 (2013) (same). Moreover, other undisputed documents show that the same individual claims adjuster did receive follow-up information about the ENSR bills that the Museum had sent that same summer. In short, any failure on the part of the company serving as U.S. Fire's third-party administrator for the public claim does not bear on the legal dispute between the insurer and its insured. *Cf. Palermo v. Fireman's Fund Ins. Co.*, 42 Mass.App.Ct. 283, 676 N.E.2d 1158, 1163 (1997) (emphasizing that proof of good faith has no relevance to the *Polaroid* burden-shifting rule).

The reasonableness of the Ropes & Gray hourly rate also is immaterial. It is U.S. Fire's prolonged failure to pay *any* portion of its acknowledged responsibility that gives rise to

the breach here. *See, e.g., Chi. Title Ins. Co.*, 172 F.3d at 604–06. Thus, any quibbling about the hourly rate simply relates to damages that are owed to the Museum.

U.S. Fire's plaint about the divisibility of the ENSR bills between defense and indemnity costs is similarly immaterial. U.S. Fire tacitly acknowledged in its 2007 papers (and also before us now) that *some* portion of the ENSR bills relating to the 2004 site work constitutes recoverable defense costs. [8] Yet, as with the legal fees, U.S. Fire made no attempt to pay a single cent, nor is there any record evidence that it made any effort to resolve the sizable remuneration issue.

U.S. Fire's apathy stands in sharp contrast to the Museum's multiple requests for some measure of contractual defense benefits in 2004 and 2005; its request for clarification in August 2005 of what "defense expenditures [its insurer may have paid] to date [and] on what terms"; and its express reminder about the ENSR bills in its November 2006 correspondence. *Cf. Vt. Mut. Ins. Co. v. Maguire*, 662 F.3d 51, 56–58 (1st Cir.2011) (holding as a matter of law that the insurer's diligent investigation efforts and readiness to comply negated allegations of breach, especially when compared to the insured's lackadaisical conduct).

We also reject U.S. Fire's attempt to transform its acknowledged duty to defend into a duty only to reimburse reasonable fees and costs. According to U.S. Fire, as soon as the Museum opted to retain control of its own defense for the public claim, the insurer no longer had a duty to defend and thus its subsequent conduct cannot amount to a defense breach triggering *Polaroid's* burden-shifting rule. But this newly minted theory was not presented to the district court and, so, it "cannot be surfaced for the first time on appeal."*Goldman v. First Nat'l Bank of Bos.*, 985 F.2d 1113, 1116–17 n. 3 (1st Cir.1993) (internal citation and quotation marks omitted).

***5** In any event, the state cases that U.S. Fire cites in support of its transformation theory address only how an insurance company satisfies its duty to defend after the insured opts to maintain the defense due to the insurance company's reservation of rights. *See, e.g., Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 439 Mass. 387, 788 N.E.2d 522, 528 (2003); *N. Sec. Ins. Co. v. R.H. Realty Trust*, 78 Mass.App.Ct. 691, 941 N.E.2d 688, 691 (2011); *Watts Water Techs., Inc. v. Fireman's Fund Ins. Co.*, 22 Mass. L. Rptr. 659, 2007 WL 2083769, at *6, *9–10 (Mass.Super.Ct.2007). While it is true that an insurance company's obligation to pay defense costs may in some circumstances stem from its contractual duty to indemnify, rather than its duty to defend, any contractual framework to that effect is dictated by the mutually agreed upon language in the policy or other comparable evidence. *See, e.g., Liberty Mut. Ins. Co. v. Pella Corp.*, 650 F.3d 1161, 1168–71 (8th Cir.2011); *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1218–19 (2d Cir.1995); *Shapiro v. Am. Home Assurance Co.*, 616 F.Supp. 906, 910–11 (D.Mass.1985); *Health Net, Inc. v. RLI Ins. Co.*, 206 Cal.App.4th 232, 141 Cal.Rptr.3d 649, 660, 670–71 (2012). The record does not suggest this to be the nature of the agreement between the parties here. [9] Moreover, the summary judgment record contains numerous internal documents authored by U.S. Fire and evidence of its communications with others plainly showing that it understood the defense costs question to be tethered to its contractual duty to defend the public claim, even after the Museum chose to remain with Ropes & Gray. On the whole, U.S. Fire's silence below on this transformation argument forecloses further indulgence.

Lastly, U.S. Fire argues that application of the *Polaroid* burden-shifting rule is foreclosed here by the lack of evidence that the Museum suffered any prejudice due to the delay in U.S. Fire's payment of the de minimis defense costs owed as of October 2007. The SJC's *Polaroid* holding does not require proof of prejudice, however. In adopting a new bright-line rule regulating the burden of proof where a defense default has occurred, the SJC examined the natural consequences that ordinarily flow from such a breach. For example, the state court explained that a delay in honoring defense obligations may cause an insured to accept greater liability due to a lack of financial resources to defend itself, or that delay may hinder the insured's ability to later prove coverage. *Polaroid Corp.*, 610 N.E.2d at 922. The SJC did not then search for evidence of actual prejudice in order to discern whether the new burden-shifting rule applied to the case before it. *Id.* Indeed, it appears that the insured in that case may very well have had the financial wherewithal to pay for its own defense. *See id.*(remarking that the insured had "the benefit of controlling the defense").

To cinch the matter, later Massachusetts cases provide no indication that application of the *Polaroid* rule first requires a showing of prejudice. *See, e.g., Highlands Ins. Co. v. Aerovox Inc.*, 424 Mass. 226, 676 N.E.2d 801, 804 n. 6 (1997); *Liquor Liab. Joint Underwriting Ass'n v. Hermitage Ins. Co.*, 419 Mass. 316, 644 N.E.2d 964, 968, 969 & n. 6 (1995); *Utica Mut. Ins. Co. v. Fontneau*, 70 Mass.App.Ct. 553, 875

N.E.2d 508, 513 (2007); *Swift v. Fitchburg Mut. Ins. Co.*, 45 Mass.App.Ct. 617, 700 N.E.2d 288, 293–94 (1998); *Palermo*, 676 N.E.2d at 1163.

***6** A cautionary tale to be sure. The full amount of the Ropes & Gray bills that were pending in October 2007 for the public claim was fairly modest. However, the dollar amounts of the ENSR bills—mostly left ignored by U.S. Fire in its advocacy—numbered in the tens of thousands as of January 2005. Even still, U.S. Fire's breach of its duty to defend does not rest on calculations, but on its wholesale apathy towards its contractual defense obligation that it owed to its insured—and that it had affirmatively accepted as of March 2004.

[1] Given the undisputed facts, the district court properly faulted U.S. Fire as a matter of law for breaching its duty to defend. Accordingly, we uphold the court's 2007 decision on defense breach and, thus, the insurance company must swallow *Polaroid's* bitter pill.

III.

The principal parties next appeal discrete aspects of the district court's allocation decision, which is woven out of portions of the court's September 2010 and August 2011 orders. *See Peabody Essex Museum, Inc. v. U.S. Fire Ins. Co.*, No. 06CV11209–NG, 2010 WL 3895172 (D.Mass. Sept. 30, 2010) (Gertner, J.); *id.*, 2011 WL 3759728 (D.Mass. Aug. 24, 2011) (Gertner, J.). Under attack are the court's rulings that: (i) the pro rata allocation rule under *Boston Gas* applied in this case; (ii) the appropriate start date for the allocation period was the first day of U.S. Fire's 1983–1985 policy period, i.e., December 19, 1983; (iii) the fact-based approach, rather than time-on-the-risk, governed the allocation calculus; and (iv) defense costs were not subject to pro rata allocation. [10] We review de novo the district court's interpretation and application of state law, and for abuse of discretion the court's understanding of the jury's verdict and selection of allocation method. *See Salve Regina Coll. v. Russell*, 499 U.S. 225, 231–234, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991); *Boston Gas Co. v. Century Indem. Co.*, 708 F.3d 254, 259–66 (1st Cir.2013).

The proceedings following the court's 2007 order on defense obligations included a 2008 pre-trial summary judgment order resolving certain indemnity issues, a 2009 jury trial establishing indemnity liability, and then, the 2010 and 2011 post-trial summary judgment orders resolving the allocation of indemnity as between U.S. Fire and the Museum's self-insured portion. We note four aspects of these proceedings that help inform the analysis.

First, the competing evidence. An estimated release of ten thousand gallons [11] caused a significant subsurface oil plume, a portion of which polluted the Heritage Plaza property. The Museum's expert blamed the underground storage tanks or associated piping on the Museum's property that, he asserted, may have begun releasing oil no later than 1979. By contrast, U.S. Fire's expert tied the pollution to a compromised fuel line that was damaged on the Museum's property during reconstruction activities in 1987, more than one year after the conclusion of the 1983–1985 policy period.

***7** Second, the indemnity rulings and findings. The district court ruled in March 2009 that because of the "scant evidence" on how the oil release occurred, U.S. Fire could not prove, pursuant to its burden under *Polaroid*, that any oil release from the underground storage tanks or piping was not sudden; "[t]here is simply no evidence on this issue, either way."*Peabody Essex Museum, Inc.*, 623 F.Supp.2d at 106–11 (noting that the parties did not dispute whether the oil release was accidental). Then, with respect to the timing of the contamination, in June 2009 a jury found that U.S. Fire had not proven that the pollution first began *after* the policy period. This finding triggered indemnity. The jury also found that U.S. Fire further failed to prove any date on which the pollution had first begun. [12]

Third, the *Boston Gas* decision. As noted earlier, the SJC issued its decision in *Boston Gas* about one month after the 2009 indemnity trial in this case but before the district court had resolved allocation questions.*Boston Gas* rejected the joint and several liability approach for indemnity in progressive pollution cases, instead adopting a pro rata allocation rule that applies even for pollution years in which the property owner is self-insured. 910 N.E.2d at 299–311, 315–16 (holding depends on the policy language at hand). The SJC further held that, while a fact-based method of allocation is "ideal," time-on-the-risk serves as a default approach absent sufficient evidence that may allow for a more accurate estimation of the quantum of property damage during the risk period. *Id.* at 312–16.

Fourth, the post-trial procedural posture. Whittled down, the parties' pleadings show that they ultimately agreed that the district court could decide the *Boston Gas* allocation issues without the aid of a second jury trial.

Add. 13

With this grounding, we turn to the appellate arguments.

A.

The Museum contends that U.S. Fire's failure to prove when the pollution first began forecloses the insurer from relying on *Boston Gas* to prorate the indemnity costs that it owes to its insured. Essentially, the Museum advocates for a joint and several liability approach in this case. We conclude, however, that the district court properly presaged the SJC's approach when it declined to adopt the insured-friendly position urged by the Museum. *See Boston Gas*, 708 F.3d at 264 (explaining federal court's duty to "make an informed prediction" as to state court's probable decision if it faced the state law question).

No doubt the allocation issue is complicated in this case by the absence of a factual finding from the jury that marks a definite start date. But a dearth of evidence is no anomaly where long-term pollution has gone undetected for decades. Even so, as the district court explained, limited evidence on the timing of known pollution in a given case may display a range of possible allocation periods, any of which would result in less than 100% indemnity from a particular insurer. In such circumstances, the principles of *Polaroid* and *Boston Gas* would not countenance full indemnity based on failure of proof alone.

***8** In both *Polaroid* and *Boston Gas*, the SJC rejected proposed legal rules that would have enabled insureds to receive windfall judgments that extended indemnity beyond the contractual limits set forth in the operative policies. *See Boston Gas*, 910 N.E.2d at 299–312 (rejecting joint and several allocation for progressive pollution cases as incongruous with both the policy language and important public policy objectives); *Polaroid Corp.*, 610 N.E.2d at 920–22 (declining to automatically impose full indemnity liability for a breach of the duty to defend as incongruous with both the policy language and important public policy objectives). Instead, the SJC has opted for a balanced approach that affords indemnity coverage only up to the extent secured by the policy contract between the parties, even where factual circumstances may muddy the evidentiary waters. *See, e.g.*, *Boston Gas*, 910 N.E.2d at 293, 301, 312, 314, 317 (noting absence of evidence for proving timing of property damage in progressive pollution cases, while still endorsing a fact-based calculus where plausible).

[2] Accordingly, we hold that the district court correctly ruled that *Boston Gas* applies to this case such that the "start and end dates [must be] construed against the party with the burden of proof, so long as they are consistent with the jury's verdict" and the trial record. *Peabody Essex Museum*, 2010 WL 3895172, at *7. This approach comports with *Polaroid* by holding U.S. Fire responsible for the problems of proof that were presumptively caused by its breach of the duty to defend. *See Polaroid Corp.*, 610 N.E.2d at 922.

B.

With that understanding of *Polaroid* and *Boston Gas*, we turn to the district court's selection of the beginning of the 1983–1985 policy period as the start date for the allocation period. U.S. Fire contends that the court misconstrued the jury's findings and that 1979 should be the start date in order to align with the testimony of the Museum's expert and trial concessions. We are unpersuaded that there was any reversible error.

The verdict form that was presented to the jury posed three questions that addressed the timing of the pollution for purposes of both triggering coverage and marking a start date for an allocation period. Question 1 essentially asked whether U.S. Fire had proven its factual theory that the 1987 oil spill was the source of the pollution, rather than the older underground storage tanks or pipelines. Question 2 asked whether U.S. Fire had proven the date on which the release of oil first caused property damage, to be answered only if the jury disbelieved U.S. Fire's theory about the 1987 spill. Question 3 then asked the jury to select a proven beginning date from a list of ranges in the event that it answered Question 2 affirmatively. The jury answered the first two questions in the negative and did not answer the third.

In light of the trial template, the district court discerned that these jury findings, particularly in answer to Question 2, meant either that the jurors had accepted the Museum's expert evidence on the source and timing of the pollution relating to the older underground storage tanks, or that the jury had discredited the evidence presented by both parties. After all, pursuant to *Polaroid*, the Museum only bore the burden of producing credible evidence to trigger indemnity; it had no burden to proffer any evidence of a definitive start date for the oil release(s), much less to prove it. And, so, to determine a start date from this verdict ambiguity, the

district court returned to the *Polaroid* burden-shifting rule: given U.S. Fire's failure of proof, the court "construe[d] the jury's findings to mean that the allocation period begins on the first day of U.S. Fire's policy" as "the least favorable date for an insurer that could not meet its burden of proof" while still remaining "broadly consistent with the jury's verdict."*Peabody Essex Museum,* 2010 WL 3895172, at *8.

***9** U.S. Fire protests this construction. According to U.S. Fire, "the jury was never asked to determine the start date."U.S. Fire reasons that because it "never attempted to prove a release prior to December 19, 1985," it necessarily could not have proven by a preponderance of the evidence the date on which the release of fuel oil first caused property damage. Thus, it says, the jury's negative answer to Question 1 (rejecting the 1987 spill theory) *automatically* required a negative answer to Question 2 (a lack of a start date), without any further deliberation. This position, however, is out of step with the language of the verdict form, the jury instructions, and the context of the litigation.

The verdict form plainly prompted the jury to decide Question 2 *only* if it answered the first question in the negative, a point that the court included in its instructions to the jury. [13] The court also instructed the jurors to answer "no" to Question 2 if they found the evidence was "insufficient to make a decision one way or the other" or could not "figure out the date" of a pre-December 1983 oil release.

Moreover, the district court had abundantly forewarned the parties that the indemnity trial likely would serve as staging for potential allocation issues given the pending status of *Boston Gas* pre-trial. The court requested, and received, proposed allocation instructions from the parties. And colloquies with counsel during trial show that U.S. Fire expressly assented to a start date question tethered to the underground oil tanks as the possible pollution source, in order to avoid a potential second trial for allocation.

In short, U.S. Fire's self-chosen trial strategy of focusing the jury's attention on the 1987 event in order to avoid indemnity does not alter the trial realities that the start date question was directly posed to and answered by the jury, with U.S. Fire bearing the burden of proof. [14]

We also reject U.S. Fire's contention that the district court erred in failing to select 1979 as the start date in keeping with the Museum's expert's testimony. As noted, the Museum was not required to prove any definitive start date at all. Nor did the Museum's counsel concede that a negative answer to Question 1 meant that the jury necessarily found that the pollution began no later than 1979. Indeed, the Museum's summation at the close of trial expressly belies U.S. Fire's current supposition. To the extent that U.S. Fire relies on principles of equity to advance a 1979 start date, it provides no basis for holding that the district court abused its discretion in rejecting this position. *See Boston Gas,* 708 F.3d at 259–64.

[3] In the end, we acknowledge as anyone must that the December 19, 1983 start date has a make believe quality. Lean evidence has been the nemesis of this case from the inception of the litigation. But the district court did not abuse its discretion, on this record, in construing the jury's findings in a manner that maximizes U.S. Fire's indemnity exposure in line with its burden under *Polaroid.*

C.

***10** U.S. Fire next argues that the district court erred in opting to apply a fact-based method for allocation rather than the default time-on-the-risk method. In so deciding, the court adopted the Museum's post-trial revised expert report which projected that 9,000 square feet of soil damage occurred during the two-year policy period. *See Peabody Essex Museum,* 2011 WL 3759728, at *1. This calculation relied on the assumption that the 10,000–gallon oil release began on December 19, 1983, the start date selected by the court, and definitively ceased in June 1986 when the oil tanks were removed from the ground. [15]

U.S. Fire contends that the revised report cannot support a fact-based allocation because the December 19, 1983 start date is purely fictional. It also faults the district court for considering U.S. Fire's indemnity burden under *Polaroid* when assessing whether the report's estimation of the spread of oil warranted a fact-based approach. Again, we are not persuaded of any reversible error. [16]

[4] In deciding *Boston Gas,* the SJC granted trial courts considerable leeway in selecting between time-on-the-risk and fact-based allocation in progressive pollution cases. *Boston Gas,* 910 N.E.2d at 316. Courts face this choice in complex cases in which the factual events are already thickly clouded by evidentiary uncertainty, *see id.* at 300–02, 305; the ultimate decision requires a careful review of the intricacies of the case as well as equitable considerations, *see id.* at 316; *see also New Eng. Insulation Co. v. Liberty Mut. Ins.*

Co., 83 Mass.App.Ct. 631, 988 N.E.2d 450, 454 (2013). The SJC emphasized that it favors a fact-based approach as more reflective of the parties' contractual obligations, explaining that this method should be applied where the record contains "evidence more closely approximating the actual distribution of property damage" than time-on-the-risk calculations. *Boston Gas*, 910 N.E.2d at 293. Thus, fact-based allocation should apply when "a more accurate estimation" of the quantum of property damage that took place during the triggered policy years is "feasible." *Id.* at 314, 316.

As we have noted, mooring the start of the property damage to the commencement of the policy period on December 19, 1983 indeed bears a fictional quality. The revised report, however, adopted that start date as previously determined by the district court in its 2010 order, which was generally based on the evidence and on the jury's findings. Although the *Polaroid* burden-shifting rule also influenced the start date finding, that date is no less a factual finding under the circumstances of this case. No more is required under *Boston Gas*. *Cf. Boston Gas*, 708 F.3d at 259, 260 (holding that the trial court's decision to apply time-on-the-risk was "reasonable" because the record would not allow a factfinder to specify damages "in time and degree with *any* level of certainty" (emphasis added)).

***11** Neither did the district court err in considering U.S. Fire's burden under *Polaroid* when evaluating the estimation of the spread of the oil plume. The court faced the allocation method question in a case not only rife with the normal problems of proof in progressive pollution cases, *see Boston Gas*, 910 N.E.2d at 316, but also couched in an atypical legal setting in which the insurance company had controlled the evidentiary template during the indemnity trial. [17] In short, we cannot say that it was error for the district court to hew to the *Polaroid* rule, which compels insurance companies to shoulder the indemnity share that is associated with proof problems when that company defaulted on its duty to defend.

[5] In the final analysis, the district court judge—who had presided over the entirety of the litigation through the August 2011 order—confronted two somewhat unsatisfactory factual situations in selecting the appropriate allocation method. [18] After a careful scrutiny of the complexities, we see no sound reason for disturbing the court's discretionary decision that fact-based allocation aligned closer to the evidence and the equities in this case. [19]

D.

As a final allocation matter, U.S. Fire contends that the district court erred in ruling that defense costs for the public claim are not subject to time-on-the-risk proration under *BostonGas*. U.S. Fire acknowledges that the SJC did not reach the question of whether or how defense costs should be prorated, and its argument on appeal is not robust. *See Powell v. Tompkins*, 783 F.3d 332, 348–49 (1st Cir.2015) (explaining appellate waiver). We go only so far as the argument takes us, which is not far enough to divvy up defense costs here.

U.S. Fire briefly offers two "significant indicators" from *Boston Gas* to support its pitch that defense costs should be prorated: the SJC's citation to case law that applies time-on-the-risk proration to both defense costs and indemnity, [20] and the SJC's decision to apply proration principles to self-insured retentions which, U.S. Fire points out, generally include defense and indemnity. These supposed indicators, however, appear diminutive next to long-standing state precedent on the broad and formidable contractual duty to defend that heavily favors insureds and that stands apart from indemnity obligations. *See, e.g.*, *GMAC Mortg., LLC v. First Am. Title Ins. Co.*, 464 Mass. 733, 985 N.E.2d 823, 827 (2013); *Doe v. Liberty Mut. Ins. Co.*, 423 Mass. 366, 667 N.E.2d 1149, 1151 (1996); *see also Dryden Oil Co. of New England, Inc. v. Travelers Indem. Co.*, 91 F.3d 278, 282 (1st Cir.1996) (noting that under Massachusetts law, "[t]he duty to indemnify is defined less generously [than the duty to defend] as it depends on the *evidence*, rather than an expansive view of the complaint" (internal citation omitted)). And duty to defend protection is all-encompassing. *See GMAC Mortg., LLC*, 985 N.E.2d at 827 (explaining the "in for one, in for all" or "complete defense" rule that applies to insurers in the general liability insurance context); *Deutsche Bank Nat'l Ass'n v. First Am. Title Ins. Co.*, 465 Mass. 741, 991 N.E.2d 638, 641–42, n. 10 (2013); *see also Liberty Mut. Ins. Co. v. Met. Life Ins. Co.*, 260 F.3d 54, 63–64 (1st Cir.2001) (reviewing Massachusetts law on allocation of defense costs generally); *Chi. Bridge & Iron Co. v. Certain Underwriters at Lloyd's, London*, 59 Mass.App.Ct. 646, 797 N.E.2d 434, 444–45 (2003) (refusing to allocate defense costs where the litigation relating to contamination sites covered under the policy also resolved liability questions for sites that were not).

***12** Even narrowing our view to *Boston Gas* itself, we observe that the SJC carefully circumscribed its decision to the indemnity allocation questions that were before it. *See*,

e.g., 910 N.E.2d at 301, 311 n. 38.[21] And, in its allocation analysis—including the self-insured retention discussion—the state court placed significant weight on the specific language embodied in the *indemnity* provisions of the policy before it. *Id.* at 304–09, 315–16.

[6] In short, we decline U.S. Fire's invitation to extend the *Boston Gas* allocation holding to defense costs in this case, particularly where the insurance company has made no attempt to address its own policy language on the duty to defend. *Cf. id.* at 306 n. 33 (referring to cited policy language that expressly provided for proration of defense costs). After all, U.S. Fire pursued removal of this case from state court to federal court, and "[w]e have warned, time and again, that litigants who reject a state forum in [favor of] federal court under diversity jurisdiction cannot expect that new state-law trails will be blazed" by the federal court. *Carlton v. Worcester Ins. Co.*, 923 F.2d 1, 3 (1st Cir.1991) (internal quotation marks and brackets omitted).

Accordingly, we affirm the district court's September 2010 and August 2011 allocation rulings that the parties have challenged on appeal.

IV.

U.S. Fire appeals the district court's Chapter 93A ruling that it knowingly and willfully failed to effect a fair settlement for the unreimbursed defense costs after the court issued the 2007 order on its defense default. *See Peabody Essex Museum, Inc.*, 2011 WL 3759728, at *2; *see also*Mass. Gen.Laws ch. 93A, §§ 2, 11. The court's ruling was grounded in the business-to-business provision under Chapter 93A, § 11, as the Museum had pitched its claim. After reviewing the litigation record[22] and governing state law, we conclude that reversal is required because the court's decision rests on a legal error and the record does not, as a matter of law, support a finding of unfair settlement conduct actionable under Chapter 93A. *See Fed. Ins. Co. v. HPSC, Inc.*, 480 F.3d 26, 34 (1st Cir.2007); *Ahern v. Scholz*, 85 F.3d 774, 797 (1st Cir.1996).

[7] Chapter 93A precludes "unfair or deceptive acts or practices in the conduct of trade or commerce" and penalizes "willful or knowing" violations with awards of multiple damages. Mass. Gen.Laws ch. 93A, §§ 2, 9, 11; *see Barron Chiropractic & Rehab. v. Norfolk & Dedham Grp.*, 469 Mass. 800, 17 N.E.3d 1056, 1065–66 (2014) (describing pertinent factors). To be actionable, the challenged misconduct must rise to the level of an "extreme or egregious" business wrong, "commercial extortion," or similar level of "rascality" that raises "an eyebrow of someone inured to the rough and tumble of the world of commerce."*Baker v. Goldman Sachs & Co.*, 771 F.3d 37, 49–51 (1st Cir.2014); *Zabin v. Picciotto*, 73 Mass.App.Ct. 141, 896 N.E.2d 937, 963 (2008). The core inquiry focuses on "the nature of challenged conduct and on the purpose and effect of that conduct."*Mass. Emp'rs Ins. Exch. v. Propac–Mass, Inc.*, 420 Mass. 39, 648 N.E.2d 435, 438 (1995).

***13 [8] [9]** In the insurance context, business misconduct that is actionable under Chapter 93A may include unfair settlement practices that are defined under Chapter 176D, § 3. Hallmarks of such misconduct generally involve the "absence of good faith and the presence of extortionate tactics."*Guity v. Commerce Ins. Co.*, 36 Mass.App.Ct. 339, 631 N.E.2d 75, 77–78 (1994). Such circumstances include withholding payment from the insured and "stringing out the process" by using shifting, specious defenses with the intent to force the insured into an unfavorable settlement. *Commercial Union Ins. Co. v. Seven Provinces Ins. Co.*, 217 F.3d 33, 40 (1st Cir.2000) (providing examples under Massachusetts law). By contrast, neither a good faith dispute over billing, nor the mere failure to settle a claim when another reasonably prudent insurer would have done so, establishes Chapter 93A liability. *See id.* at 43; *see generally Hartford Cas. Ins. Co. v. N.H. Ins. Co.*, 417 Mass. 115, 628 N.E.2d 14, 17–18 (1994).

Rather than apply these Chapter 93A standards, the district court solely relied on an unfair settlement practice provision under Chapter 176D as the litmus test for finding Chapter 93A, § 11 business-to-business liability. *See*Mass. Gen.Laws ch. 176D, § 3(9)(f) (proscribing the failure "to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear"). However, unlike consumer claims under Chapter 93A, § 9, a violation of Chapter 176D constitutes only probative evidence, not per se proof, of egregious business misconduct for a Chapter 93A, § 11 business-to-business claim. *See Polaroid Corp.*, 610 N.E.2d at 917; *Transamerica Ins. Grp. v. Turner Constr. Co.*, 33 Mass.App.Ct. 446, 601 N.E.2d 473, 477 (1992). The district court did not recognize this well-established legal distinction under state law. *See*Mass. Gen.Laws ch. 93A, § 9(1); *see also Hopkins v. Liberty Mut. Ins. Co.*, 434 Mass. 556, 750 N.E.2d 943, 950 n. 12 (2001) (explaining 1979 amendment to Ch. 93A, § 9 consumer-to-business claims). Accordingly, its ruling on Chapter 93A, § 11 liability contains a legal error.

Moreover, the record does not display the type of egregious settlement malfeasance that may be actionable under Chapter 93A, § 11. The district court targeted, albeit through the Chapter 176D lens, two aspects of U.S. Fire's conduct: its fractional payment as of June 2009 (about $9,000) of significant defense costs then-incurred by the Museum and its subsequent failure to reach a fair settlement on the remaining amount, forcing the Museum to continue to litigate defense costs. The district court's view of the record, however, is too constricted.

In fact, U.S. Fire immediately pursued mediation for defense costs after the court's December 2007 decision, which had left open pertinent surrounding issues. [23] But the Museum resisted, desirous of a global settlement despite the fact that no expert evidence on the indemnity issues had yet been procured at that point. After discovery, the parties participated in two significant efforts for formal mediation throughout 2009, and U.S. Fire continued taking active steps to resolve the defense costs issue in the midst of a variety of entangled disputes. *See Premier Ins. Co. of Mass. v. Furtado,* 428 Mass. 507, 703 N.E.2d 208, 210 (1998); *Duclersaint v. Fed. Nat'l Mortg. Ass'n,* 427 Mass. 809, 696 N.E.2d 536, 540 (1998). On the whole, the unreimbursed defense costs issue was shuffled into the broader panoramic of on-going, complex litigation which included the potential legal responsibility of the Museum's other insurers. *See Cullen Enters., Inc. v. Mass. Prop. Ins. Underwriting Ass'n,* 399 Mass. 886, 507 N.E.2d 717, 723 (1987); *Waste Mgmt. of Mass., Inc. v. Carver,* 37 Mass.App.Ct. 694, 642 N.E.2d 1058, 1061 (1994).

***14** There is simply no evidence that the delay in paying unreimbursed defense costs was attributable to nefarious leveraging conduct or motives on U.S. Fire's part. *See Boston Symphony Orchestra, Inc. v. Commercial Union Ins. Co.,* 406 Mass. 7, 545 N.E.2d 1156, 1160 (1989); *cf. N. Sec. Ins. Co.,* 941 N.E.2d at 692. In fact, at one point, when U.S. Fire challenged the Museum's calculation of interest for unreimbursed defense costs in 2009, the Museum averred "futility [in] submitting further bills" given U.S. Fire's oversight, years earlier, with respect to the first billing packet that the Museum had sent in 2005. When efforts toward global settlement ultimately failed, U.S. Fire offered the Museum a significant sum to settle the unreimbursed defense costs and associated issues, which apparently went unanswered. Then, in June 2011, the Museum spotlighted—for the first time—U.S. Fire's post–2007 settlement conduct as the primary impetus for Chapter 93A, § 11 liability and punitive damages. U.S. Fire's conduct under these circumstances is not the kind that the SJC has condemned as egregious settlement misconduct that is actionable under Chapter 93A. *Cf. R.W. Granger & Sons, Inc. v. J & S Insulation, Inc.,* 435 Mass. 66, 754 N.E.2d 668, 678–79 (2001) (holding that the surety's conduct of unexplained delay, hollow settlement effort, and groundless legal stance comprised culpable unfair business conduct under Chapter 93A).

By no means do we endorse some of the gamesmanship that laces the protracted litigation. But the Museum's own posturing is not unimportant to the Chapter 93A inquiry. *See Parker v. D'Avolio,* 40 Mass.App.Ct. 394, 664 N.E.2d 858, 864 n. 9 (1996) (emphasizing in the Chapter 93A context that good faith is a reciprocal responsibility between an insurer and an insured); *see also Ahern,* 85 F.3d at 798 (noting that the Chapter 93A calculus considers "the equities between the parties, including what both parties knew or should have known").

Even if some measure of U.S. Fire's conduct may have been ill-advised, and perhaps even violative of Chapter 176D, we hold that this record does not invoke the potent weaponry of Chapter 93A. [24] Additionally, we deem waived the Chapter 93A theories set forth in the 2006 complaint that the Museum failed to pursue in its 2011 pleadings. Finally, any continued reliance on U.S. Fire's failure to pay defense costs *prior to* the December 2007 order also fails as a matter of law since the record fails to show that the insurance company's conduct, while amounting to a contractual breach, was purposed by the kind of nefarious leveraging that may give rise to Chapter 93A, § 11 liability. *Cf. N. Sec. Ins. Co.,* 941 N.E.2d at 692–93; *Mass. Emp'rs Ins. Exch.,* 648 N.E.2d at 438.

[10] Accordingly, we reverse the district court's decision that U.S. Fire violated Chapter 93A, § 11 and vacate the award of punitive damages, fees, costs and statutory interest associated with the Chapter 93A claim. Our holding obviates any need to address the punitive damages issues debated by the parties pursuant to *Rhodes v. AIG Domestic Claims, Inc.,* 461 Mass. 486, 961 N.E.2d 1067 (2012) and *Auto Flat Car Crushers, Inc. v. Hanover Ins. Co.,* 469 Mass. 813, 17 N.E.3d 1066 (2014).

V.

***15** Two final miscellaneous matters go nowhere. First, the Museum appeals the district court's decision declining to award it attorney's fees for litigating the scope of defense obligations after the 2007 summary judgment order. Its appellate arguments depend on the success of its Chapter 93A claim and, thus, are rendered moot by our reversal of the district court's decision. To the extent that the Museum attempts to pursue arguments unrelated to its Chapter 93A success below, we deem them waived for insufficient briefing. *See Powell,* 783 F.3d at 348–49.

Second, U.S. Fire appeals the district court's decision denying its motion to amend its 2006 third-party complaint against ACE. U.S. Fire's 2009 motion sought to transform the original single-count complaint into a five-count complaint enforcing an alleged express or implied contractual agreement for sharing defense costs between the two insurance companies. We detect no abuse of discretion in the district court's decision given that the 2006 third-party complaint had already failed on the merits months earlier. [25] Additionally, U.S. Fire's 2009 pitch of newly discovered facts is undermined both by its own express allegations in the original complaint and by its apparent failure to pursue timely discovery from the inception of that 2006 third-party complaint. *See Lombardo v. Lombardo,* 755 F.3d 1, 3–4 (1st Cir.2014); *Steir v. Girl Scouts of the USA,* 383 F.3d 7, 12 (1st Cir.2004).

VI.

To summarize, we ***affirm*** the district court's December 2007 ruling that U.S. Fire breached its duty to defend and its September 2010 and August 2011 allocation rulings that are challenged on appeal. We ***reverse*** the district court's August 2011 finding of Chapter 93A liability and ***vacate*** its associated award of punitive damages. We also ***vacate*** the award of attorney's fees, costs, and statutory interest and ***remand*** for appropriate recalculation consistent with this opinion. ***Parties to bear their own appellate costs.***

1 The 1983–1985 policy excluded coverage for all property damage arising out of the discharge, dispersal, release or escape of pollutants into the ground. But an exception to that exclusion reserved coverage for "sudden and accidental" discharges. *SeePeabody Essex Museum,* 623 F.Supp.2d at 102–03. A subsequent U.S. Fire policy incorporated an absolute pollution exclusion provision and, thus, is not relevant to this litigation.

2 The parties agree that the operative language in the U.S. Fire policy does not meaningfully differ from that at issue in *Boston Gas.*

3 The district court held in abeyance the issue of whether U.S. Fire also had a duty to defend on the Heritage Plaza private demand. *See* Electronic Order (Gertner, J., Dec. 19, 2007). Eventually, the Museum settled the private demand for $300,000. The district court subsequently determined that while the *Polaroid* burden-shifting rule applied to the settlement figure, an open question remained on whether the private demand letter triggered U.S. Fire's duty to defend during the period of time after U.S. Fire received the private demand but before it received the public claim. *See* Electronic Order (Gertner, J., June 19, 2009). No issue on the duty to defend the private demand has surfaced on appeal.

4 The 2007 summary judgment record is robust and includes communications among the various players from 2004 through 2007 as explained by, inter alia, the deposition testimony of the thirdparty claims administrators for both U.S. Fire and ACE. The material facts regarding U.S. Fire's breach involve the interactions between the Museum and U.S. Fire, including their agents.

5 The legal bills related to work for both the private demand and the public claim but some invoices clearly identified the public claim work.

6 U.S. Fire and ACE purportedly agreed to a 40/60 split of the defense cost bills for the public claim. ACE had agreed to defend both the private demand and the public claim. In any event, the apportionment agreed to by the insurers was not binding on the insured.

7 The precise dollar figure for the ENSR billings on the public claim that were provided to U.S. Fire in 2005 is unclear in the record. Still, the tens of thousands of dollars for the site work that ENSR largely conducted in 2004 was in excess of $66,000.00 but less than $85,000.00. As explained, U.S. Fire's breach does not depend on the exact calculation.

8 Appropriately so. *See, e.g., Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.,* 177 F.3d 210, 223–24, 225 n. 20 (3d Cir.1999); *Endicott Johnson Corp. v. Liberty Mut. Ins. Co.,* 928 F.Supp. 176, 183–84 (N.D.N.Y.1996); *Siltronic Corp. v. Emp'rs Ins. Co. of Wausau,* No. 3:11–CV–1493–ST, 2014 WL 901161, at *7 (D.Or. Mar. 7, 2014).

9 The policy provides that U.S. Fire "shall have the right and duty to defend any suit against the insured seeking

damages on account of such ... property damage, even if any of the allegations of the suit are groundless, false or fraudulent, ... but the company shall not be obligated ... to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements."

10 One of the many legal rulings that neither party appeals is the district court's conclusion that language in the U.S. Fire policy is most consistent with an injury-in-fact trigger. *See Peabody Essex Museum,* 2010 WL 3895172, at *11–12.

11 While the record is not entirely consistent, the parties eventually seemed to settle on this estimated calculation.

12 Explication of trigger and allocation of indemnity in Massachusetts is provided in *Boston Gas Co.,* 910 N.E.2d at 300–01. Of note, proration in progressive injury cases requires setting a start and end date for the pollution in order to devise an allocation period. *See, e.g., Peabody Essex Museum,* 2010 WL 3895172, at *6–12. In this case, knowing that certified questions were pending before *Boston Gas,* the district court required counsel to submit proposed jury instructions for addressing allocation issues in order to aid the post-trial resolution of the scope of indemnity. Neither party appeals the court's denial of the joint request for bifurcation.

13 Beginning after Question 1, the pertinent part of the verdict form provides:

> **If your answer is "Yes," there is no coverage and you should not go on.**
> 2. If you answered "No" to Question 1, has U.S. Fire proven, by a preponderance of the evidence, the date on which the release of fuel oil first caused property damage?
>
> (Bolded format is in the original.)

14 U.S. Fire did not object to the jury instructions, nor to the format of the verdict form in relation to the start date question. *See Palermo,* 676 N.E.2d at 1162 n. 7, 1163. Thus, U.S. Fire's opportunity for challenging the framing of the verdict form as "improperly drafted" has long since passed.

15 The parties agreed that oil migration continued to cause property damage after the tanks were removed from the ground.

16 While the district court relied on two expert reports proffered by the Museum, U.S. Fire's appeal relates only to the report that we discuss.

17 Tellingly, U.S. Fire remained silent in the face of the Museum's post-trial accusation that the insurer had never pursued any discovery on the duration of contamination respecting the underground oil tanks.

18 Two district court judges presided over the lengthy litigation. Judge Gertner resolved the bulk of the merits while presiding from 2006 through August 2011, and Judge Gorton resolved the tail-end of the matter such as the inevitable motions for reconsideration, modification of judgment, attorney's fees, and prejudgment interest.

19 U.S. Fire's assorted complaints about the district court's "silence" respecting the revised report's "series of assumptions" ring hollow. Its assertions fail to account for the court's implicit adoption of the Museum's responsive pleadings and exhibits, recapitulate the "artificial" start date argument, and otherwise ignore the trial testimony including that of its own expert.

20 U.S. Fire identifies just one case cited in *Boston Gas,* which is readily distinguishable from the circumstances at hand. In *Insurance Company of North America v. Forty–Eight Insulations, Inc.,* the Sixth Circuit prorated defense costs to avoid a troublesome scenario in which the insured manufacturer, "which had insurance coverage for only one year out of 20[,] would be entitled to a complete defense of [about 1,300 different] asbestos actions the same as a manufacturer which had coverage for 20 years out of 20."633 F.2d 1212, 1225 (6th Cir.1980); *cf. GMAC Mortg., LLC,* 985 N.E.2d at 827 (noting that the complete defense rule typically applies for claims asserted in the same lawsuit).

21 We are aware that at least one district court decision appears to have interpreted *Boston Gas* as endorsing allocation of defense costs. *See Graphic Arts Mut. Ins. Co. v. D.N. Lukens, Inc.,* No. 11–CV–10460, 2013 WL 2384333, at *7 (D.Mass. May 29, 2013) (Hillman, J.). That decision does not, however, address the robust, contrary state law precedent on the contractual duty to defend. And U.S. Fire does not rely on *Graphic Arts* for this argument.

22 We have considered the materials that both parties provided to the district court, mindful that U.S. Fire does not press before us the evidentiary objection about the settlement documents that was raised below.

23 The open defense costs issues included, for example, the reasonableness of the hourly rate charged by Ropes & Gray, the relationship between the public claim and the Heritage Plaza private demand, and the division between defense costs and indemnity respecting ENSR's then-completed work.

Add. 20

24 Our analysis assumes, without deciding, that in certain instances settlement conduct during the course of ongoing litigation may give rise to Chapter 93A liability. *Compare Morrison v. Toys "R" Us, Inc.*, 441 Mass. 451, 806 N.E.2d 388, 391 (2004), *with Commercial Union Ins. Co.*, 217 F.3d at 41 n. 5.

25 In its March 2009 summary judgment order, the district court granted ACE's motion for summary judgment due to U.S. Fire's insufficient proof that the oil release was "sudden and accidental" under ACE's 1980–1983 policy. *See Peabody Essex Museum*, 623 F.Supp.2d at 112.

All Citations

--- F.3d ----, 2015 WL 5172841

Add. 21

CERTIFICATE OF COMPLIANCE PURSUANT TO MASS. R. A. P. 16(k)

I, Laura Meyer Gregory, counsel for the Massachusetts Defense Lawyers Association ("MassDLA"), *amicus curiae*, hereby certify, in accordance with Mass. R. App. P. 16(k), that the brief of the MassDLA complies with the rules of court that pertain to the filing of briefs, including but not limited to Mass. R. App. P. 16(a)(6); Mass. R. App. P. 16(e); Mass. R. App. P. 16(f); Mass. R. App. P. 16(h); Mass. R. App. P. 18 and Mass. R. App. P. 20.

/s/ Laura Meyer Gregory

Laura Meyer Gregory

CERTIFICATE OF SERVICE

I, Laura Meyer Gregory, counsel for the Massachusetts Defense Lawyers Association ("MassDLA"), *amicus curiae*, hereby certify that I have served two (2) true copies of this *amicus brief* on all counsel of record:

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/s/ Laura Meyer Gregory
Laura Meyer Gregory

NO. SJC-11897

INSURANCE COMPANY OF
THE STATE OF PENNSYLVANIA,
PLAINTIFF-APPELLANT,

v.

GREAT NORTHERN INSURANCE COMPANY,
DEFENDANT-APPELLEE.

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE *AMICUS CURIAE* MASSACHUSETTS DEFENSE LAWYERS ASSOCIATION

SUFFOLK COUNTY

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