Environmental Special Feature

Contact Henriette Campagne at henriette.campagne@lawyersweekly.com

New insurance legislation for residential fuel oil releases

By Susan J. Crane

New legislation offers some welcomed relief to Massachusetts homeowners whose properties become contaminated by home heating oil releases.

Following nearly a decade-long effort by environmental lawyers and consultants, the Massachusetts Department of Environmental Protection, the fuel oil industry and others, Chapter 453 of the Acts of 2008 was signed into law this January.

The new law mandates release prevention devices on residential heating oil systems and requires all homeowners' insurers in Massachusetts to make coverage available to pay for fuel oil cleanups.

More than 300 residential fuel oil spills are reported annually to the DEP. An average soil cleanup costs tens of thousands of dollars; when groundwater is also contaminated, costs can run as high as $250,000 or more.

Due to the increasing prevalence of numerous arcane insurance policy exclusions intelligible only to environmental coverage counsel, homeowners often discover they have little or no coverage for these catastrophic costs, much to their surprise.

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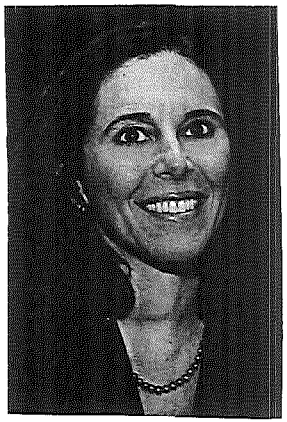

Susan J. Crane practices environmental law in Sudbury and represents insured homeowners. She is a member of the 21E Homeowner Funding Work Group.

Without coverage, many homeowners are left with unsafe or even uninhabitable contaminated properties and depreciated houses that cannot be mortgaged to finance a cleanup.

Some have depleted college or retirement savings to pay for response actions. Others have no financial means to fund cleanups that are critically necessary to protect public health and safety, the environment and their properties' equity.

A 2001 study undertaken by the 21E Homeowner Funding Work Group, spearheaded by Chris Davis of Goodwin Procter, evaluated the frequency and cost of home heating oil releases, concluding that mandatory insurance coverage is the most viable financial solution. The Work Group recommended proactive release prevention measures and a public education campaign to alert homeowners of the importance of preventative action.

Proposed bills reflecting the Work Group's recommendations, including mandatory insurance coverage for residential heating oil releases, were filed in three consecutive legislative sessions, commencing in 2002. Each was passed by the Senate but expired in the House.

The act represents a compromise worked out among Work Group members, the insurance industry and legislators at the 11th hour of the 2008 legislative session, under the primary sponsorship of former Sen. Pam Resor and former Rep. Pat Walrath.

Components of act

The act has three key components. First is release prevention. By July 1, 2010, all older residential fuel oil heating systems must have preventative upgrades installed, consisting of enclosed fuel supply lines and/or automatic shutoff valves on storage tanks. Licensed oil burner technicians will inspect and certify the upgrades.

Second, also by mid-2010, homeowners' insurers doing business in Massachusetts must *make available* coverage to pay for fuel oil cleanups, provided that system upgrades have been certified.

Minimum coverage is $50,000 for first-party property, defined by the act as "response action costs incurred to assess and remediate a heating oil release impacting soil, indoor air or other environmental media on the insured's property" and any resulting personal property damage.

Insurers must offer a minimum of $200,000 for third-party liability, providing a defense to third-party claims and indemnity for response action costs addressing conditions on and off the insured's property arising from a heating oil release on the insured's land that has impacted or is likely to impact groundwater or a third party's property.

Third, the act requires the DEP to prepare and periodically update a fact sheet describing risks posed by heating oil systems, benefits of preventative measures and the availability of insurance coverage.

The act contemplates, but does not mandate, the dissemination of the fact sheet annually to homeowners. This was a concession to the insurance industry in response to logistical concerns about requiring distributions by numerous individual insurance carriers or agents and potential repercussions for slipups.

It is questionable whether owners of residential fuel oil systems will elect to purchase endorsements for fuel oil release risks. This will depend at least in part on the pricing and marketing of such endorsements by insurance carriers offering homeowners coverage in Massachusetts.

Additionally, because the new insurance may not be available for another year-and-a-half, coverage under current homeowners' policies will continue to be important for some time.

Although Massachusetts courts generally interpret homeowners' insurance policies liberally in favor of insureds, ever-evolving environmental insurance caselaw cannot keep pace with insurers' efforts to avoid paying out on these expensive claims.

Absolute pollution exclusions for liability, once the exclusive domain of commercial policies, have quietly crept into some homeowners' policies.

In a long-awaited decision, the Supreme Judicial Court held that an insured should reasonably expect spilled home heating oil to constitute a "pollutant" that falls within the "absolute pollution" exclusion. *McGregor v. Allamerica*, 449 Mass. 400, 403 (2007).

Other insurers have limited their losses on fuel oil claims by including "liquid fuel" endorsements in homeowners' policies with coverage limits far below first- and third-party limits for other types of claims, amounts too meager to fund most cleanups.

Numerous other common exclusions, particularly in first-party property sections covering damage to the insured's property, can preclude coverage for on-site remediation and the insured's damaged home or personal property.

For example, property damage caused by corrosion or wear and tear, frequent causes of releases from aging fuel oil storage tanks or heating system lines, is explicitly excluded. Often, so is impaired soil and water.

The greatest likelihood of triggering insurance coverage is when a cleanup is necessary to prevent or abate contamination on another's property. This is because third-party liability sections universally include "owned property" exclusions, barring coverage for the insured's damaged property.

Although liability sections without pollution exclusions may create indemnity obligations for cleanup costs, expensive, protracted and complex legal and technical wrangling over the extent to which on-site remedial costs are necessary to abate off-site threats or actual migration is almost inevitable.

Environmental coverage cases

Many courts have addressed the owned property exclusion in environmental coverage cases.

In *Hakim v. Mass. Insurers' Insolvency Fund*, 424 Mass. 275, 279 (1997), the SJC held that "coverage is not barred if the cleanup is designed to remediate, to prevent or to abate further migration of contaminants to the off-site property." The exclusion would preclude cleanup costs, however, if incurred "for the sole purpose" of remediating the insured's property. *Id.* at 282.

In *Rubenstein v. Royal Ins. Co. of America*, 44 Mass. App. Ct. 842 (1988), the Appeals Court went one step farther by acknowledging that on-site soil remediation is often conducted in part to prevent the off-site migration of contaminants.

Quoting *Allstate Ins. Co. v. Quinn Constr. Co.*, 713 F. Supp. 35, 41 (D. Mass. 1989), *vacated as a result of settlement*, 784 F. Supp. 927 (D. Mass. 1990), *Rubenstein* concluded that "[i]t would serve no legitimate purpose to assert that soil and groundwater pollution must be allowed to spread over the boundary lines before they can be said to have caused the damage to other people's property which liability insurance is intended to indemnify." 44 Mass. App. Ct. at 848. That would discourage prompt cleanups and "run[] afoul of the general preference within environmental statutes toward preventative action." *Id.*

Consequently, even when contamination is exclusively on the insured's land, the owned property exclusion will not bar the costs for a cleanup designed to prevent or abate off-site migration. This result is particularly important because "prevention can be far more economical than post-incident cure." *Allstate*, 713 F. Supp. at 41.

Despite these cases' clear pronouncements of public policy, Superior courts interpreting them have been all over the map as to when on-site response actions constitute covered third-party liability prevention measures. Most seem to turn on the technical question of whether on-site conditions pose a "significant threat" to off-site property. This drama will continue to be played out in the courtroom, with expert witnesses in a starring role.

Other legal questions frequently arise, such as whether the costs to restore an insured's property after an intrusive cleanup has damaged or destroyed a house are covered if the response action was undertaken to abate a third-party liability or threat. Aggressive insurers are implementing rigid internal policies rejecting restoration costs, despite opposing public policy.

There is still no dispositive caselaw on the issue of whether impacted groundwater underlying an insured's property is owned by the policyholder or the commonwealth. The latter result would clearly trigger liability coverage absent a pollution exclusion.

Finally, query whether soil cleanup costs are covered when incurred to mitigate impacted groundwater at levels below the DEP's cleanup standards. Some carriers refuse to extend liability coverage under those circumstances, counter to well-established science that groundwater almost always has a migration potential.

It remains to be seen whether the act will serve its intended purpose of effectuating system upgrades, decreasing the number of fuel oil releases and providing unlucky homeowners with insurance coverage for fuel oil spills.

The act's success will depend on whether the DEP's education campaign effectively apprises homeowners of the risks, whether fuel oil endorsements and release prevention measures will be deemed affordable by cash-strapped policyholders and, ultimately, whether homeowners with fuel oil systems will voluntarily purchase coverage.

Monitoring the number of system upgrades installed and endorsements sold will be critical to measure the act's effectiveness.

The act is certainly a step in the right direction. Time will tell if another trip back to Beacon Hill seeking mandatory fuel oil release coverage will be necessary. At least in the foreseeable future, environmental coverage lawyers, assisted by skilled environmental consultants, will still have to navigate this legal and technical minefield to advocate for as comprehensive coverage as possible for residential cleanups under existing policies. MLW