

WRF Represents *Amicus* in Briefing that Leads to Key Victory in Massachusetts High Court

November 20, 2006

The Supreme Judicial Court of Massachusetts, applying Massachusetts law, has refused an effort by policyholder advocates to apply to insurance contract disputes a broad exception to the longstanding American Rule that each side in litigation must bear its own attorneys fees. *Wilkinson, et al. v. Citation Insurance Co., et al.*, SJC-09683 (Mass. Nov. 17, 2006). On behalf of WRF client the Complex Insurance Claims Litigation Association (CICLA), WRF attorneys Laura A. Foggan and John C. Yang filed an *amicus curiae* brief in support of the insurer with respect to the attorneys' fees issue. Many of the arguments made in WRF's brief were adopted by the Massachusetts high court in its important ruling in this case.

In *Wilkinson*, the court first ruled that auto racing equipment damaged in a fire was not used for a "business purpose," and therefore was not subject to a separate, lower coverage limit under a homeowners policy. Having found an indemnity obligation that the insurer had disputed, the court then turned to the question of the policyholders' recovery of attorneys' fees. In a closely-watched case, which the Massachusetts Supreme Judicial Court took for review directly from the trial court on its own motion, the court ruled that policyholders were not entitled to attorneys' fees associated with establishing the insurer's duty to indemnify, even though an exception to the American Rule had been recognized under Massachusetts law for policyholder fees in cases involving litigation of an insurer's wrongful failure to defend a suit against the policyholder.

After affirming the court below on the coverage issue, the Massachusetts high court then reversed the trial court's extension of the exception to the American Rule (under which each litigant bears his own legal expenses) in duty to defend insurance cases to cases

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- Insurance Appellate
- Issues and Appeals
- Litigation

concerning the duty to indemnify. In particular, the court rejected the policyholders' suggestion that they were entitled to attorneys' fees given the "special relationship" between an insurer and its policyholder. The court agreed that litigating to obtain coverage could reduce benefits, but noted that "the converse is also true; an insurer who successfully litigates a decision to deny coverage also loses contract value because of the need to expend funds to keep from paying for coverage it did not agree to provide." The court recognized that, with the application of the American Rule, there is always a chance that "one or both parties will come out less than economically whole."

Further, the Wilkinson court reasoned that, in light of the well-established American rule, an exception in insurance cases would need to rely on a "significant distinction" between insurance and other contracts—a distinction the court could not find. The court rejected the policyholders' contention that bargaining power differences would support such a distinction, observing both that other commercial relationships involved unequal bargaining power and that many insurance transactions involved highly sophisticated buyers. The court also noted the significant statutory and regulatory mechanisms governing insurance transactions and cautioned against judicial modification of these mechanisms. In response to policyholder arguments that, under the American rule, there could be incentives for an insurer to deny coverage where it believed the policyholder would not challenge the decision in court, the court noted that: (1) there were "other statutory and regulatory avenues" available to counter such practices; and (2) most courts confronting the issue had not extended exceptions to the American Rule to actions concerning an insurer's duty to indemnify. It therefore refused to abandon the American Rule for all insurance coverage matters, as policyholders had urged.