

## ALERT

# Motion for Reargument Filed in New York High Court Concerning Insurer's Indemnity Obligations Following a Breach of Its Duty to Defend

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July 17, 2013

Last week, an insurer filed a motion for reargument concerning the recent decision by the New York Court of Appeals in *K2 Investment Group, LLC v. American Guarantee & Liability Insurance Co.*, — N.E.2d —, 2013 WL 2475869 (N.Y. June 11, 2013). As it currently stands, the *K2* decision brings about a significant change in New York law concerning an insurer's obligations to indemnify an insured where the insurer is found to have breached its duty to defend. More specifically, the New York high court stated that an insurer disclaiming coverage "is well advised to seek a declaratory judgment concerning the duty to defend or indemnify the purported insured" because an insurer that breaches its duty to defend "may not later rely on policy exclusions to escape its duty to indemnify the insured for a judgment." In addition to the insurer's motion, the Complex Insurance Claims Litigation Association (CICLA) and the American Insurance Association (AIA), represented by Wiley Rein LLP, filed an *amicus curiae* brief in support of reargument.

The briefs of the insurer and *amici* CICLA and AIA each maintain that reargument before the New York high court is necessary, noting the absence of any prior focus in this case on the potential that a breach of the duty to defend could negate the insurer's reliance on any policy exclusions on indemnity. In particular, the motion for reargument highlights that the court misinterpreted *Lang v. Hanover Insurance Co.*, 3 N.Y.3d 350 (2004), upon which it relied in reaching its result in *K2*. Further, the insurer and *amici* CICLA and AIA each stress that the court failed to address prior New York precedent concerning

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an insurer's breach of its duty to defend as set forth in *Servidone Construction Corp. v. Security Insurance Co.*, 64 N.Y.2d 419, 424 (1985). In *Servidone*, the New York Court of Appeals permitted an insurer to raise policy exclusions to limit its obligation to contribute toward a settlement even though it previously had incorrectly denied a defense obligation. The court refused to "enlarge[] the bargained-for coverage as a penalty for breach of the duty to defend."

As CICLA and AIA also note in their *amicus* submission, on the very same day that the Court of Appeals handed down its decision in *K2*, the United States Court of Appeals for the Second Circuit, applying existing New York precedent that includes *Servidone*, held that an insurer's breach of its duty to defend "does not entail an obligation to pay the settlement amount in the absence of a duty to indemnify." See *CGS Indus., Inc. v. Charter Oak Fire Ins. Co.*, – F3d –, 2013 WL 2476998, at \*7 (2d Cir. June 11, 2013).

The motion for reargument remains pending at this time.