

Wiley Rein Helps Persuade New York Appeals Court In Key Insurance Ruling

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Wiley Rein, representing two leading trade associations of property and casualty insurers, helped persuade New York's highest court to reverse its earlier ruling in a precedent-setting coverage appeal. The case is *K2 Investment Group v. American Guarantee & Liability Insurance Co.*

The New York State Court of Appeals yesterday vacated its June 2013 decision that had departed from longstanding New York law concerning an insurer's obligations to indemnify an insured where the insurer is found to have breached its duty to defend. In last year's ruling, the court held that an insurer that breached its duty to defend a policyholder in a malpractice lawsuit could not rely on policy exclusions to avoid indemnifying the policyholder for a \$3 million judgment.

Yesterday's reversal echoed several points that Wiley Rein had advanced in an *amicus curiae* brief authored on behalf of the Complex Insurance Claims Litigation Association (CICLA) and the American Insurance Association (AIA). A team led by Laura A. Foggan, chair of Wiley Rein's Insurance Appellate Group, had filed the brief in support of American Guarantee & Liability. The *amicus* brief noted that last year's ruling in *K2-1* was at odds with the weight of authority in New York and nationwide.

The reversal means that insurers don't have to worry about losing their ability to assert policy exclusions separately, no matter how they posture themselves on defending policyholders, *Law360* reported yesterday in an article that quoted Ms. Foggan.

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“This is a majority view around the country,” Ms. Foggan told *Law360*. “The court has righted the ship, so to speak, and has set it back on course.”

In yesterday’s opinion, the New York high court explicitly noted that a 1985 decision in *Servidone Construction Corp. v. Security Insurance Co.* represents a majority rule—a point Wiley Rein stressed in the *amicus* brief. The court also stated that the Servidone rule has not been found unworkable and that insurers and insureds should be entitled to assume that the law will remain unchanged unless the legislature decides otherwise. These were also key arguments Wiley Rein made in the AIA and CICLA *amicus* submission, which stressed that, in the instances of a wrongful breach of the duty to defend, adequate remedies exist to protect the policyholder and that certainty plays a critical role in the insurance system.

The court’s reversal of its 2013 decision is a victory for insurers. It makes clear that breach of a duty to defend will subject an insurer to normal contract damages, not an extra-contractual penalty of an automatic duty to indemnify the policyholder. “Insurance, like any contract, is subject to contract construction rules,” Ms. Foggan told *Law360*.

The *amicus* brief Wiley Rein filed on behalf of CICLA and AIA can be found [here](#).