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Reargument in K2 May Provide the New York Court of Appeals with an Opportunity for a Correction

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Insurance Coverage Alert

By: Sina Bahadoran

In *K2 Inv. Grp., LLC v. Am. Guarantee & Liab. Ins. Co.*, 21 N.Y.3d 384 (N.Y. June 11, 2013), the New York Court of Appeals announced that once an insurer breaches its duty to defend, it loses its right to assert exclusions on indemnity. Essentially, the insurer is penalized for its wrongful denial by having the narrower standard on the duty to indemnify usurped by the liberal standard on the duty to defend. Many in the insurance community are still taken aback. And the reaction by insurers is clear: they are less likely to deny a defense for fear of losing their exclusions.

To many commentators, *K2* stems from a misreading of an earlier decision, *Lang v. Hanover Ins. Co.*, 3 NY3d 350, 356 (N.Y. 2004). In *Lang*, the Court held that an insurance company that disclaims its duty to defend "may litigate only the validity of its disclaimer and cannot challenge the liability or damages determination underlying the judgment." Like other states, *Lang* simply proposes that if an insurer disclaims coverage, it loses its right to assert *liability defenses* to the underlying judgment that it could have asserted had it participated in the defense. This statement was interpreted in *K2*, however, to mean that if an insurer erroneously disclaims a defense, it may not later rely on exclusions affecting indemnity, which is not so much an expansion of the holding as an entirely different proposition.

A correction may be coming. On September 3, 2013, the Court of Appeals granted reargument—though no date has been set. In the meantime, because of the risk, insurers in New York will at least pause before denying a defense, no matter how straightforward.

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