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K2 Reversal Adds To Series Of Coverage Flip-Flops

By **Bibeka Shrestha**

Law360, New York (February 19, 2014, 9:03 PM ET) -- The New York Court of Appeals' about-face Tuesday in the closely followed K2 Investment Group LLC insurance dispute highlights the growing power of public outcry to convince top-level courts to back down from their controversial stances on coverage, experts say.

The reversal followed a firestorm over the top New York court's initial holding that an insurance company that violates its duty to cover defense costs could no longer point to policy exclusions to avoid also paying for an underlying judgment.

Insurance groups emphatically argued that the first K2 decision imposed a drastic penalty on insurers and overlooked a precedent that the New York high court established in its 1985 decision in Servidone Construction Corp. v. Security Insurance Co. of Hartford. The state's highest court agreed to reconsider its ruling, and a majority of justices wound up agreeing with insurers that the earlier K2 ruling and Servidone could not be reconciled.

According to Randy Maniloff, a White and Williams LLP attorney and author of insurance newsletter Coverage Opinions, the K2 reversal could serve as a model for other groups to ask for reconsideration.

“This is just going to embolden other groups to continue to make this effort to say, 'The court's word is not the last word,'” Maniloff said.

According to Edwards Wildman Palmer LLP partner Robert DiUbaldo, there's already been a spike in the number of times the New York Court of Appeals has agreed to rethink its holdings. The state's top court only granted reargument once between 2003 and 2011, but it has granted motions for reargument four times in the past two years, DiUbaldo said.

Moreover, the New York Court of Appeals is not alone in retreating from initial decisions, or at least considering doing so.

In August 2012, the Fifth Circuit withdrew its ruling against Ewing Construction Co. in a hotly contested fight over the interpretation of a contractual liability exclusion, after construction trade groups barraged the court with requests to reconsider. It also backpedaled from its 2013 holding that BP PLC was an additional insured for the Deepwater Horizon spill under Transocean Ltd. policies worth $750 million, following protests that the ruling would dramatically shift established industry practices and allow oil companies to “invade” drilling contractors' entire insurance programs.

The Fifth Circuit sent both controversial cases to the Texas Supreme Court, which has since taken an opposite stance in the Ewing case, providing great reassurance to the construction industry.

Meanwhile, in 2012, the Virginia Supreme Court agreed to reconsider its holding that Steadfast Insurance Co. did not have to defend energy company AES Corp. against claims that its greenhouse gas emissions destroyed an Alaskan coastal village by contributing to global warming, though it ultimately stuck to its original ruling.

According to Maniloff, courts are being influenced by the increasing amount of commentary and "noise" created by their rulings, which can be more convincing than complaints from a party that has lost the case.

"It's not a coincidence that all of these have happened over the last few years," Maniloff said. "The Internet and email and news spreading faster … [have] just made it easier for like-minded people to get together and try to do something about a decision that they're not happy with."

The K2 ruling had drawn a great deal of attention from both insurance and policyholder advocates throughout the country, with some vehemently arguing that the case departed from existing law, DiUbaldo said.

"That attention, coupled with the court's prior ruling in Servidone, likely played a role in its decision to reconsider its prior ruling," DiUbaldo said.

However, Jeffrey Schulman, a Dickstein Shapiro LLP partner in New York, said that while the K2, BP and Ewing cases showed that high-level courts are willing to reconsider earlier decisions, these are still such rare occurrences that they don't signify a trend.

"It's certainly easier nowadays to gather amicus support when one side or the other or both think it's appropriate," Schulman said. "[But] I don't think for a second that courts are considering the insurance coverage bar's blog posts and Twitter in ... their decisions."

Courts want to get their rulings right, but they might not always appreciate the broader implications of their decisions until it's brought to their attention through pushes for rehearings, Maniloff said.

Scott Turner, an Anderson Kill attorney who represents the construction industry, said he had observed a trend of courts reversing themselves in his particular arena. The West Virginia Supreme Court overturned three precedents to find that liability policies can cover defective construction in 2013, just months after the North Dakota Supreme Court strayed from a 6-year-old precedent to find that commercial general liability policies can cover faulty construction that damages a policyholder's own product.

Court rulings that have severely restricted coverage for construction-defect coverage have sent some builder groups to state Legislatures, Turner pointed out, a potential factor for courts' willingness to retreat from prior holdings.

"A number of Legislatures overruled their courts, which, I would imagine, the courts hate," Turner said. "Besides the popular outcry, it can be a concern that popular opinion can influence legislation."