

WISCONSIN COURT OF APPEALS RULES IN FAVOR OF OCHD'S CLIENT

On July 3, 2007 the Wisconsin Court of Appeals issued a decision in favor of OCHD's client, Mitsubishi Heavy Industries America, Inc., in an appeal of a case arising out of the construction of Miller Park, home of the Milwaukee Brewers. That case involved the issue of which of Mitsubishi's insurers, Federal Insurance Company or Travelers Property Casualty Company of America, had the obligation to pay the attorney and expert fees incurred by Mitsubishi in defending the 2002 lawsuit filed against it by the Southeast Wisconsin Professional Baseball Park District.

In the lawsuit filed by the Baseball Park District against Mitsubishi, the Baseball Park District sought \$50 million in damages from Mitsubishi for Mitsubishi's alleged negligent design and erection of the stadium's retractable roof. Mitsubishi denied that the roof contained any defects caused by its design or erection, and filed a counterclaim against the Baseball Park District seeking additional costs incurred by Mitsubishi in erecting the roof due to material changes made by others to the roof's design after Mitsubishi bid the job. The case ultimately settled in 2005, with Mitsubishi paying nothing on the Baseball Park District's claims and receiving \$18 million on its counterclaim.

Following that settlement, Federal Insurance Company requested that the trial court order Travelers Property Casualty Company of America to reimburse it approximately \$28 million which Federal paid to Mitsubishi and two other insureds for attorney and expert fees incurred by them in litigation the underlying lawsuit. The trial court ruled in Federal's favor.

In rejecting Travelers' appeal of the trial court's ruling, the Court of Appeals held that Travelers, as the primary insurer on the project, and not Federal, as the excess insurer on the project, should have paid the attorney and expert fees of Mitsubishi and the two other insureds, and that Travelers was not entitled to a reduction of its obligation in that regard. In its decision, the Court of Appeals held that:

- "The trial court, on three occasions over nearly thirteen months, ruled repeatedly that Travelers had a duty to defend Mitsubishi... . Each time, Travelers refused to undertake the defense."
- "In the context of Travelers' repeated refusal to undertake any defense, the trial court repeated this finding on several subsequent occasions, and ultimately found that Travelers breached its duty to defend as to all three insureds. Still, Travelers did not

undertake the defense of any party.”

- “We perceive no good policy reason to reward Travelers ... for its repeated refusal to defend — even after being repeatedly told it had a contractual duty to do so — by reducing the amount the trial court has determined it owed. Such reduction would reward a primary carrier for a wrongful refusal to defend and create something akin to a litigation expense game of ‘chicken’ — with offsets going to the obligated primary insurer who breached its duty. Travelers is not entitled either by contract or equitable principles to reduce its obligations because an excess carrier, Federal, performed a duty that belonged to Travelers but which Travelers refused to honor.”

Mitsubishi will receive approximately \$3.5 million as a result of the Court of Appeals’ decision.