

## Duane and Rajbanshi Represent Insurer at Massachusetts' Highest Court Concerning Whether the Insurer Must Prosecute the Insured's Counterclaim for Damages

### Partners

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### By Peabody & Arnold on December 6, 2016

James J. Duane, III and Scarlett M. Rajbanshi recently appeared before the Massachusetts Supreme Judicial Court on behalf of the firm's client, an insurer who issued an employment practices liability policy to a Massachusetts manufacturing company. The case was before the SJC on three certified questions from the U.S. Court of Appeal for the First Circuit concerning whether the insurer was required to prosecute the insured's counterclaim for damages as part of the insurer's duty to defend. The insured was sued for age discrimination by a former employee. The insured alleged that the former employee was fired for poor job performance, insubordination, and suspected misappropriation of company funds. The insured requested that the insurer, the firm's client, fund the prosecution of a counterclaim against the former employee that would seek to recoup the funds misappropriated. The insurer, who agreed to defend the insured against the employee's age discrimination suit without a reservation of rights, declined to fund the prosecution of the counterclaim because the language of the insurance policy did not require the insurer to prosecute claims on behalf of the insured, and because Massachusetts law does not require an insurer to prosecute claims on behalf of the insured as part of the insurer's duty to defend. The insured disagreed with the insurer's position, arguing that the counterclaim was necessary in order to provide a "full defense" to the employee's age discrimination claim.

Duane and Rajbanshi had previously prevailed on behalf of the insurer at the U.S. District Court for the District of Massachusetts (Gorton, J.). In granting the insurer's summary judgment motion, the District Court held the following:

The Court agrees that an insurer ought not to bear any obligation to prosecute affirmative counterclaims asserted by the insured. Such a holding finds support in the language of the Policy, which only provides coverage for claims first made against [the insured]. Forcing [the insurer] to fund [the insured's] affirmative counterclaims seeking monetary damages for the alleged misappropriation by [the former policy] would fundamentally rewrite the Policy. The Court declines to do so.

The insured appealed the District Court's judgment in favor of the insurer to the First Circuit, which then certified the case to the SJC. Oral argument was held on December 5, 2016 and the parties are awaiting the SJC's decision.