

Q&A With Kasowitz's Robin Cohen

Law360, New York (March 21, 2013, 2:48 PM ET) -- Robin L. Cohen, chairwoman of Kasowitz Benson Torres & Friedman LLP's insurance recovery litigation practice group, focuses her practice on representing insureds in complex insurance coverage matters. Cohen has litigated insurance coverage cases in matters including asbestos, product liability, toxic tort, environmental, directors and officers, first-party, employee dishonesty and employment.

Q: What is the most challenging case you have worked on and what made it challenging?

A: One of the most challenging cases I have ever tried was, not coincidentally, also one of the largest, for a Fortune 500 company facing underlying environmental liabilities at more than 25 sites nationwide. What made it particularly challenging is that it was the early days for many of the key issues that controlled the coverage question, including the question of when, under New York law, the policyholder could lose coverage on the ground that it had provided late notice to its carriers or that it expected and intended the damages.

We also had to struggle with the fact that there, the insurance companies had hired "investigators" to speak with our employees without notifying us and without disclosing to the employees either that there was a coverage lawsuit or that the investigators were working for the other side. And then there was just the simple logistics, which happens often in a complex insurance matter, of having 10 or more law firms arrayed against you, representing dozens of insurers against a single policyholder. When your coverage litigation involves a multiyear, multi-insurer coverage program, it's not just David against Goliath — it's David against the whole Philistine army!

The trick to dealing with all of that was to divide and conquer. We obtained favorable rulings from the court on the notice and expected and intended issues and used those to settle with significant numbers of carriers. We made sure that the court knew what the investigators for the few remaining insurers were doing and used the judge's wrath to force several more settlements. In the end, we were able to go to trial against a much more manageable horde on a greatly reduced set of issues — and with an enhanced "war chest" provided by the pretrial settlements.

Q: What aspects of your practice area are in need of reform and why?

A: I think the biggest area in need of reform is for courts to actually be willing to enforce bad faith claims and damages against insurers. Too often, especially in mass tort coverage claims such as those involving environmental or asbestos liabilities, there is a tremendous incentive for insurance companies to litigate rather than pay as the "time value" of the money far exceeds the costs of coverage litigation. In fact, in recent years, we have seen entities that have taken over insurance companies, such as Berkshire Hathaway, publicly endorse delay of payment and taking advantage of the resulting "float" as a business model.

Most jurisdictions provide for bad faith and consequential damages or awards of attorneys' fees to a prevailing policyholder, all of which are designed to act as a disincentive to that business model. Too often, however, courts are reluctant to enforce those protections, seeing coverage actions involving corporate policyholders as simply large business disputes between evenly matched foes.

The reality is that in mass tort or other "bet your company" litigation, the policyholder often needs immediate access to insurance just to survive, which places it at the mercy of its insurers. In such cases, bad faith claims provide the only leverage some policyholders have to counter the insurance company's incentive to "hold the money."

Q: What is an important issue or case relevant to your practice area and why?

A: I think the most important issue facing policyholders is the attempt by the insurance industry to take away a policyholder's right to a jury in coverage suit. Policyholders almost invariably fare better in jury trials than in bench trials — a fact not lost on insurance companies. Preserving the constitutional right to a jury trial needs to be one of the factors that drives any coverage action from the outset, including the choice of jurisdiction and the way in which the claims are framed.

Policyholders also have to challenge the assertion, which insurance companies increasingly use as a wedge against jury trials, that their coverage action raises issues that are too "complex" for a lay jury to consider or understand. While complexity should never be a valid ground for taking away the right to a jury in any event, the fact is that at heart, most coverage actions can be tried and presented in a way that makes them no more complex than any other commercial dispute.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: Dane Butswinkas from Williams and Connolly, who was an adversary of mine in one of the first large coverage cases to go to trial. Even as a young associate, he was particularly effective in the courtroom and lulled witnesses into a false sense of security before he demolished them on the stand.

Q: What is a mistake you made early in your career and what did you learn from it?

A: I once bowed to the urging of a trial judge and agreed to allow him to act as our settlement "facilitator" prior to trial. Never again. The insurance company, which ultimately had no real interest in settling, used the ex parte communications that the process allowed as a means to lay out their theory of the case to the person who would be making the calls on relevance and admissibility at trial.

Worse still, when settlement efforts fail in that situation, the judge is likely going to blame one party or another for that failure, however unconsciously. In our case, he chalked up the lack of a settlement to his belief that our client's demands were unreasonable. Judges are only human; when they've decided that one side bears the "fault" for the fact that the case actually has to be tried, it shows in every ruling and even in their demeanor before the jury. The use of third parties to try to fashion settlements is always a good idea, but I will never again allow that third party to be my trial judge.

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