

Insurance Group Of The Year: Cohen Ziffer

By **Ganesh Setty**

Law360 (February 13, 2024, 2:39 PM EST) -- Cohen Ziffer Frenchman & McKenna's attorneys won a rare, pro-policyholder reversal in COVID-19 insurance litigation and secured an even rarer reversal of a jury verdict in a dispute over coverage for a settlement of Medicaid fraud claims, landing the firm a spot among Law360's 2023 Insurance Groups of the Year.

Unlike other firms, Cohen Ziffer is a boutique dedicated solely to litigating insurance coverage issues, founding partner Adam Ziffer told Law360, adding that with more than 30 practitioners, the firm is one of the largest policyholder-side insurance recovery groups in the country. Though the firm is only 3 years old, the founding partners have collectively worked with one another for 20 years or so, he said.

But perhaps what most distinguishes the firm from others is a willingness to go to trial, which insurance attorneys are not usually inclined to do, founding partner Robin Cohen said.

"We have a reputation of being more creative, a little more strategic and certainly [have] a reputation of loving to go to trial. And being a trial firm certainly maximizes the leverage for our clients against the insurance industry," she said.

Being prepared to go to trial in difficult, complex cases against insurers is often what it takes to get a good recovery for policyholders, said Ken Frenchman, another founding partner, echoing Cohen. He said it pushes insurers to take more reasonable positions with their insureds.

Representing health services company Conduent State Healthcare LLC in a coverage dispute with AIG and other insurers over underlying claims of Medicaid fraud, firm attorneys last February prevailed in their motion to set aside a pro-insurer jury verdict. After Conduent's \$236 million settlement of Medicaid fraud claims brought by the Texas attorney general, the company's insurers then accused Conduent in Delaware state court of defrauding them into providing coverage for the settlement.

Although the court had already ruled the insurers had a duty to defend Conduent against the underlying claims, AIG "inaccurately and improperly argued that AIG never had any coverage obligation to Conduent," Judge Mary M. Johnston wrote in her opinion reversing the verdict. And contrary to



"several" rulings, "AIG's counsel repeatedly referred to the jury a press release that had been unequivocally deemed inadmissible," she added.

"In almost 20 years on this bench, I have never set aside a jury verdict," she said, but the circumstances of the trial warranted such a decision, she found.

"You usually don't get a reversal, and so it was a very exciting decision for our firm," Cohen said, adding that the win was the result of a collaborative effort among several Cohen Ziffer attorneys.

In October, the firm won the reversal of a California trial court's finding that JRK Property Holdings Inc. did not adequately plead direct physical loss or damage to its property as it sought to secure coverage for COVID-19 related losses.

A three-judge panel said it recognized that "most" California appeals courts have ruled that losses stemming from the alleged presence of COVID-19 do not meet the direct physical loss or damage requirement in policies. But JRK still adequately pled claims that aligned with other pro-policyholder state appeals court rulings regarding COVID-19 coverage, the panel found, noting a "split of authority."

JRK, which owns and manages housing and apartments, also held communicable disease coverage, Cohen said, adding that litigation over those policy provisions will go through discovery and possibly trial regardless of the physical loss question. The California Supreme Court has since agreed to answer whether the presence of COVID-19 fulfills a policy's physical loss or damage requirement for property insurance coverage, and further agreed in December to review the JRK case.

The firm recently litigated COVID-19 coverage issues before New York's and Rhode Island's highest courts, as well, Cohen said.

Cohen Ziffer also notched a win in the directors and officers, or D&O, coverage space, in a case of first impression in Delaware over whether a company that merges with a special-purpose acquisition company, or SPAC, is entitled to coverage under policies the SPAC had purchased.

Last February, a Delaware state judge ruled that after Clover Health Investments Corp. merged with a SPAC called Social Capital Hedosophia Holdings Corp., directors and officers of Clover qualified as "insured persons" under the SPAC's D&O policy.

The insurance industry has had a "very strong reaction" to Clover Health's summary judgment win and has since started to revisit how firms will insure SPACs going forward, Cohen said.

"There are many cases that we have where we know that it's an extremely meaningful case and will be a landmark case no matter which way it's decided," Frenchman said. "I think for Robin and I, Clover Health wasn't really on our radar as one of those."

"We knew that SPACs obviously are a big issue, a big talking point, but we actually were very confident going into that motion that we were just right and the carriers were trying to make it into something more complicated than it is. And they still very much feel that way," he continued. "Of all the decisions out there, it's one of those that gets their goat more than anything else, and I personally think it's a straightforward policy interpretation case."

The partners all agreed that D&O issues will continue to be an active area of insurance law this year as corporate policyholders face larger securities claims.

"Typically, big securities class actions historically have had carrier towers partnering with their policyholders to get those cases settled without coverage litigation. And we're starting to see a lot more resistance. It's become a lot more challenging to do that on a nonlitigated basis," Ziffer said.

--Editing by Linda Voorhis.

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