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Q&A With Crowell & Moring's Deirdre Johnson

Law360, New York (April 04, 2013, 2:14 PM ET) -- Deirdre Johnson is a partner in the Washington, D.C., office of Crowell & Moring LLP, and she spearheads the firm's work on professional liability matters. She has nearly two decades of experience handling disputes in the U.S., Bermuda, London and European markets in lawsuits and arbitration proceedings arising out of a broad range of claims and virtually all types of insurance and reinsurance agreements. For example, she has represented insurers and reinsurers in coverage disputes involving variable annuity, general liability, surety, product liability, employment discrimination and environmental matters. Johnson has experience representing and advising clients in an array of insurance and reinsurance matters.

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

A: Several years ago, I worked on a very large surety reinsurance arbitration involving completion bonds issued on several Brazilian oil platform construction projects. The reinsurance dispute mainly focused on a $100 million layer of coverage first placed in the international reinsurance market when the construction problems on the underlying projects were coming to a head. The case required an analysis of highly technical engineering documents and a delicate balancing of competing systems of law given that the construction contracts were governed by Brazilian law and the reinsurance agreements were governed by a blend of U.S. and English law.

Perhaps the most challenging aspect of the case was witness preparation. It gave me the opportunity first hand to learn how unique the process is — every individual responded to the pressure in a much different way. Sitting with each witness demonstrated to me how critical it is to understand the nuances of each individual's personality. By far, the biggest surprise was when a key witness took a job with the opposing party two weeks before the hearing started. I became a very quick study in the contours of the attorney/client privilege as applied to former employees and learned an enormous amount about the delicate art of witness preparation under extremely challenging circumstances.

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

A: Arbitrator disclosure of potential conflicts of interest is an issue that has come up more and more frequently in my practice. The risk that parties to a reinsurance arbitration will invest substantial time and money in a proceeding only to have an ultimate award vulnerable to challenge because an arbitrator failed to disclose a connection to either a party or an individual is unpalatable to all concerned.

However, as insurance and reinsurance companies merge, consolidate or otherwise reorganize, it has become increasingly difficult for arbitrators and arbitrating parties to ensure that conflict of interest disclosures are sufficiently complete and thorough. The insurance/reinsurance industry is grappling with ways to address that problem, which is complicated by the inherent tension between the need to disclose information on the one hand and the inherent confidentiality of arbitrations on the other hand.

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

A: Just recently, the New York Court of Appeals issued a highly significant opinion that deals directly with one of the most contentious reinsurance issues — the proper scope of reinsurers' challenges to their ceding companies' allocation of settlement payments on long-tail mass tort claims such as asbestos bodily injury claims. In USF&G v. American Re-Insurance Co., the Court of Appeals tackled USF&G's effort to recover approximately $400 million under an excess of loss reinsurance treaty for its nearly $1 billion settlement payment to its insured, Western MacArthur, on underlying asbestos claims.

In the context of the facts presented in that case, the Court of Appeals swept away a number of arguments frequently asserted by insurers under the follow the settlements doctrine seeking to insulate their allocation decisions from challenge by reinsurers. In that case, the reinsurers argued that USF&G had acted unreasonably in several respects including: 1) allocating no portion of the settlement payment to bad faith claims against it, which were wholly unreinsured and, 2) overvaluing certain categories of claims in order to trigger the excess of loss reinsurance, which had a $100,000 per loss retention but no aggregate limit.

The court accepted both of these challenges, finding that they presented triable issues of fact. As a threshold matter, the court acknowledged that cedents' allocation methodologies are entitled to some deference, but they are not binding on reinsurers under a follow the fortunes analysis if they do not satisfy an "objectively reasonable" standard. The court defined such an allocation methodology as one that insurers and insureds "might reasonably have arrived at in arms' length negotiations if the reinsurance did not exist." Applying this objective standard, the court found that it was arguably unreasonable to take the position, as USF&G had, that the bad faith claims against it were worth no value at the time it settled with Western MacArthur. Also, the court ruled that a fact finder could conclude that the values assigned by USF&G to lung cancer claims covered by the settlement were artificially inflated to ensure that the $100,000 per loss reinsurance retention was exceeded.

A foreseeable result of this opinion is that reinsurers may attempt to mount fact-intensive allocation challenges to settlements of long tail insurance claims entered into by their ceding companies. Also, the objective nature of the test applied by this court to evaluate the reasonableness of the cedent's allocation methodology could lead to a flood of expert evidence in reinsurance disputes, which is counter to a frequently followed approach in the insurance/reinsurance community of entrusting such issues to arbitrators with industry experience.

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

A: Before joining Crowell & Moring, I had the opportunity to practice with John Nonna, who is now at Patton Boggs in New York. Working beside John, I learned how important it is to have a clear objective in mind from the outset of a case, and to keep that objective in mind at every stage of a dispute. Invariably, when a colleague proposed to explore a specific topic during discovery, John would ask for an explanation of why that discovery would help us accomplish our ultimate objective. Efficiency and proportionality were fundamental planks of his litigation strategy, which I have carried forward as I shaped my own.

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

A: Early in my career, I was entrusted with a lead role in the defense of a defamation case filed in Cook County, Ill., by a former employee of our client, an international insurance company. The facts of the case fascinated me and it was my first foray into defamation law. So, I threw myself into drafting motions, researching defenses and crafting arguments based on the First Amendment. After a few months, the partner in charge of the case asked me a simple question — "What does the plaintiff want?" I told her that the complaint included a demand for $5 million. She said, "You're not hearing me. What does the plaintiff really want?" I had never asked opposing counsel that question. When I did, it became obvious that he wanted a modest amount of money. Not surprisingly, the case settled shortly thereafter. That experience taught me to ensure that the fight I believe my client and I are fighting is actually the same one that our adversaries are fighting.

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