

3RD QUARTER '07

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Ohio's *Boone* Decision Highlights the Importance of Choice-of-Law Analyses

by Keith Meyer



Because the business of insurance is regulated by each state and many states have their own unique rules governing insurance coverage disputes, choice-of-law issues often turn into an intense battle between insurers and policyholders. Certain states have adopted unique laws favorable to policyholders that should not be overlooked in either a choice-of-law

analysis or a decision on where to file suit.

One of the more recent and lesser-known rules arises from a jurisdiction that has not often been thought of as a source of favorable policyholder decisions — the Supreme Court of Ohio. In *Boone v. Vanliner Ins. Co.*, 744 N.E.2d 154, 158 (Ohio 2001), the Ohio Supreme Court held that “in an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage.” The Supreme Court reasoned that “claims file materials that show an insurer’s lack of good faith in denying coverage are unworthy of protection.”

Thus, under Ohio law, an insured need only *allege* that the insurer engaged in bad faith conduct, and the *Boone* decision requires the insurer to produce all otherwise privileged attorney-client communications that “cast light” upon the insurer’s bad faith in the handling of the claim that were generated prior to the denial of coverage.

Two years after the *Boone* decision, an Ohio court of appeal extended the *Boone* rationale to insurers’ work-product materials. In *Garg v. State Auto. Mut. Ins. Co.*, 800 N.E.2d 757, 763 (Ohio Ct. App. 2003), the court permitted a policyholder alleging bad faith to discover documents withheld as attorney work product: “Neither the attorney-client privilege nor the work product doctrine protects materials withheld in a claims file, created prior to the denial of the claim, that may cast light on whether the insurer acted in bad faith in handling an insured’s claim.”

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An American Policyholder in King Arthur's Court

by: Robert P. Jacobs

"Well, it was a curious country, and full of interest."¹



Many liability insurance policies sold through the London and Bermuda markets include arbitration

provisions that specify that any dispute arising under the policy must be resolved through arbitration. As a result, it is very possible that large American corporations, which are frequent customers of those markets, will at some point find themselves facing the prospect of an English arbitration to resolve a dispute with an insurer. Regardless of how

In that regard, the following are a few points for any American policyholder that finds itself in the position of having to journey across the pond to enforce its rights to insurance coverage.

A. Creating The Tribunal.

The first task after an arbitration proceeding has been initiated is for the parties to create a tribunal, which is a panel of three arbitrators. This process begins with each party appointing one member of the tribunal, referred to generally as its "party arbitrator." An American policyholder should consider choosing an American

law will govern the procedural issues). Therefore, it could help to have a member of the tribunal who better understands how to read and apply American law. Second, an American jurist may better understand the nature of the policyholder's underlying liability such as, for example, the settlement of a class action lawsuit.

Once the two party arbitrators are chosen, they then must choose the neutral member or "chairman". Both the policyholder and the insurer undoubtedly will be working behind the scenes with their party arbitrator, going over lists of suitable candidates to serve as the chairman (until the chairman is selected and the tribunal is established, *ex parte* communication with one's party arbitrator is allowed). Before proposing a list, each side will have conducted its due diligence with respect to potential chairman candidates. The policyholder's list most likely will include candidates who are known to previously have served on tribunals that ruled in favor of coverage (or that at least did not rule against coverage). Likewise, the insurer's list will include the opposite - candidates that are known to have served on tribunals that have supported a denial of coverage.

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accomplished or sophisticated an American policyholder may be at litigating in U.S. courts, that policyholder certainly will find an English arbitration to be a very different experience.

jurist to serve at its party arbitrator for the following reasons. First, the law of a U.S. jurisdiction, such as New York, probably will apply to the substantive issues governing the dispute (English

¹ A Connecticut Yankee in King Arthur's Court, Mark Twain (1889).

Insurance Recovery Grows On Trees: Decision Tree Analysis Improves Attorney-Client Communication and Results

by: John Wyckoff, Evy Wild, and Robert Martin¹



Attorneys must often communicate to their client a case's strengths and weaknesses, the chances that the client will prevail, and the range in possible outcomes. In insurance recovery litigation, this communication is made more difficult due to the complexity of: 1) the claim process, which involves pre-



claim analysis, claim valuation, and claim allocation; and 2) the multi-party dispute resolution process often involving dual tracks of litigation and settlement.

Decision tree analysis is a valuable tool because it can be used in all three phases of the claim process as well as in litigation and settlement. This article reviews the concepts of decision tree analysis and presents a hypothetical tree that explains potential insurance allocation outcomes. While this article presents the use of a decision tree for the purposes of allocation, it is hoped that

the reader will see the power of decision trees and how they can be used in the other claim process phases and throughout the dispute resolution process.

Decision Tree Diagram—A picture is worth a thousand words:

Simply put, decision trees graphically depict the relationships between decisions or events and the outcomes that result from them. The best feature of decision trees is their intuitive and visual nature, which allows attorneys and clients to understand the hierarchy of decisions or the chronology of events, the assumptions regard-

ing the probabilities of decisions or events, and the impacts of the decisions or events on the outcome. Figure 1 is a hypothetical allocation decision tree. It shows the hierarchy of decisions from left to right and the application of discounts to cost and coverage and the impacts of different allocation theories (Pro-Rata vs. All Sums) on the outcome.

Cutting The Tree Down Branch By Branch From The Tips To The Trunk:

The branches of the tree (decisions or events) are weighted by probabilities assigned by the user.

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Case Highlights

by Kyle Cohen

These summaries are not intended to be an exhaustive analysis of legal developments in the insurance field. Rather, they are an overview of recent "highlights" of developments in selected states. Should the need arise, Howrey is able to assist its clients in a more detailed analysis of recent legal developments pertaining to insurance coverage in any state.



NEW YORK

Insurer's obligation to advance defense costs not precluded by insured versus insured exclusion.

Trustees of Princeton Univ. v. National Union Fire Ins. Co. of Pittsburgh, No. 650202/06, 2007 N.Y. Misc. LEXIS 2350 (N.Y. Sup. Apr. 10, 2007).

The Supreme Court of New York found that an insurer was required to advance defense costs to the policyholder and rejected the insurer's argument that coverage was precluded on the basis of the "insured v. insured" exclusion.

The Robinson Foundation ("Foundation") was established to fund and support the graduate programs of the Woodrow Wilson School of Public and International Affairs at Princeton University. The Foundation was governed by a seven member board of trustees consisting of three family appointed trustees ("Family Appointed Trustees") and four university appointed trustees ("University Appointed Trustees"). The Family Appointed Trustees, among others, sued Princeton, the Foundation, and the University Appointed Trustees alleging that Princeton and the University Appointed Trustees abused their majority interest, breached their fiduciary duties, and misappropriated the Foundation's assets.

Princeton sought reimbursement from its D&O insurer, National Union, for the costs incurred

in defending the underlying claims. The policy at issue required National Union to "advance ... Defense Costs prior to the final disposition of a Claim." National Union refused to advance defense costs because, it argued, coverage was precluded based on the insured v. insured exclusion in the policy.

The Supreme Court of New York held that the insured v. insured exclusion did not relieve National Union of its duty to advance defense costs to Princeton because the exclusion "only applies to claims explicitly brought on behalf of the Robinson Foundation against the individual insureds." Therefore, the court found that, out of the twelve claims brought in the underlying suit, only the two derivative claims were excluded from coverage based on the insured v. insured exclusion. Because Princeton's expenditures had already exceeded the limit of liability, and the insured v. insured exclusion only applied to two claims in the underlying action, the court stated that any apportionment between the covered and uncovered claims was "unlikely to affect the insurer's ultimate financial obligation."

CALIFORNIA

Coverage for asbestos claims arising before and during the policy period.

Flintkote Co. v. General Accident Assur. Co., No. C 04-01827 MHP, 2007 U.S. Dist. LEXIS 17400 (N.D. Cal. Mar. 9, 2007).

Embracing a continuous trigger theory, the United States District Court for the Northern District of California found that an insurer had a duty to defend and indemnify asbestos claims arising from exposure to asbestos before and during the policy period.

The plaintiff, Flintkote Company ("Flintkote"), formerly mined and sold asbestos and asbestos based products. Flintkote sought coverage under

a commercial general liability policy in effect from 1958 to 1961 issued by predecessors to Aviva Insurance Company of Canada (“Aviva”). Flintkote sought a declaratory judgment that Aviva had a duty to defend and indemnify Flintkote for all past, present, and future asbestos claims.

Because the parties agreed that exposures to asbestos taking place during the policy period were covered by the policy, the only issue remaining for the court to decide on Flintkote’s motion for summary judgment was “whether injuries arising from pre-1958 exposures that manifested during the policy period are covered by the policy.” Flintkote argued that the court should adopt a “continuous trigger theory” and find that the policy would cover both injuries arising from exposures to asbestos during the policy period, as well as injuries resulting from exposures before the policy period that manifested during the policy period.

The court agreed with Flintkote’s analysis and held that the policy covered bodily injuries resulting from pre-1958 exposures that manifested during the policy period. The court found that the reasonable expectations of the insured supported this result and stated that “[t]he progressive nature of asbestos related injuries suggests that a continuous trigger theory — whereby a policy is triggered on a claim if it was in effect at exposure, at the time of manifestation, or during the latency period — is the most reasonable.”

ILLINOIS

Insurer obligated to indemnify policyholder for costs incurred during SEC investigation.

National Stock Exchange v. Federal Ins. Co., No. 06 C 1603, 2007 WL 1030293 (N.D. Ill. Mar. 30, 2007).

The United States District Court for the Northern District of Illinois found that an insurer was required

to indemnify the policyholder for attorneys’ fees and costs incurred related to an investigation of its officers and directors by the SEC upon the SEC’s issuance of the formal investigative order.

Plaintiff, the National Stock Exchange (“NSE”), purchased an insurance policy from Federal Insurance Company (“Federal”) that covered any “loss” the NSE incurred in indemnifying its directors and officers. On October 22, 2003, the NSE received a letter from the SEC stating that it would be conducting a preliminary investigation. The SEC issued an order directing a private investigation and designating officers to take testimony on February 5, 2004. It was not until May 19, 2005 that the SEC filed a complaint against one of the NSE’s officers.

In its motion for summary judgment, Federal argued that its policy required it to provide coverage only as of May 19, 2005 because, prior to that point, there was not a valid claim against any insured person. According to the NSE, Federal was obligated to pay for loss incurred beginning October 22, 2003, or at least by February 5, 2004, when the SEC issued the formal investigative order.

The court agreed with the NSE and determined that the policy required Federal to pay attorneys’ fees and costs incurred upon the SEC’s issuance of the formal investigative order on February 5, 2004. The court found that the language of the policy indicated that a formal investigation was intended to be included in the policy’s definition of the term “Claim.” Federal’s argument that the investigatory order did not constitute a claim because it did not identify any particular insured director or officer under investigation was also rejected because the court found that the scope of the investigation included the NSE’s directors and officers and “the policy does not require the SEC to name specific individuals as the target of its proceedings.”

The policyholder also should be aware that the insurer may very well be ahead on the knowledge curve with respect to picking the tribunal. Indeed, while any given American policyholder may engage in an English arbitration only once in a great while, insurers with policies that include English arbitration provisions probably engage in such proceedings on a fairly regular basis. Accordingly, they also undoubtedly have their “short list” of preferred arbitrator candidates to which they regularly refer. Given that, the policyholder should at least confirm that a chairman candidate has never served as the insurer’s *party arbitrator* in any previous arbitration. It should be possible to obtain this information by simply putting this question the candidate directly.

B. Pleading Your Case— Formulating Strategies Early.

In English arbitrations, the parties typically are expected to set forth details regarding their cases much earlier than would be typical in traditional U.S. litigation. In an English arbitration, a party’s failure to provide detailed allegations supporting its theories could hamper discovery efforts and could even result in a foreclosure of evidence at some later point.

For example, if a policyholder is alleging in its opening pleading that multiple related claims should be combined, or “batched” into a single claim under the policy, the policyholder should think ahead as to what it will need to prevail on that issue. If the policyholder will need discovery of such things as claims-handling manuals, or if it will need an insurance expert as a witness, the policyholder should include allegations in its opening pleading that will serve as a foundation for the evidence that it needs. For example, such allegations may relate to the insurance industry’s “custom and practice” with respect to handling the types of claims at issue. In other words, the policyholder should allege in its opening pleading that, pursuant to custom and practice, the insurer’s claims handler would have batched those related claims.

As explained below, such allegations may help the policyholder gain access to, and proffer at the substantive hearing, some valuable interpretive evidence.

C. Discovery Is Not Necessarily More Streamlined.

One of the misconceptions about arbitrations is that they are more streamlined and efficient because discovery is not as extensive as it is in litigation. As far as English arbitrations are concerned, the only area where it can definitely be said that discovery is more limited, is with respect to depositions — there are usually no depositions in English arbitrations. With that one exception, there is no guarantee that an arbitration will result in less discovery for the policyholder.

• Document Discovery.

In English arbitrations, the parties are obligated to produce relevant documents without being asked for specific documents. Typically, the party is obligated to disclose all documents in its possession that are supportive not only of its affirmative case but of the other side’s case as well. As in U.S. litigation, the insurer can continue to request additional documents until it is satisfied either that it has all of the information that it could possibly need or that the policyholder has been sufficiently distracted by the process. While a policyholder may seek relief from the tribunal if it believes that the disclosure process is being abused, any policyholder involved in a high stakes coverage dispute should not assume that it will have to produce a volume of documents that is any less than the volume that it would have had to produce if it was involved in U.S. litigation.

• Written Discovery.

The policyholder should expect to have to answer interrogatory-style questions that are known simply as “Requests for Information.” Many of these Requests will be akin to what are known as “contention interrogatories” in U.S. litigation. In U.S. litigation, questions which seek a party’s position on issues are not as common and often can be delayed until after the facts have been developed through discovery. In contrast, in an English arbitration, the policyholder may be asked to set forth its legal positions shortly after the opening pleadings, thereby forcing it to settle on details of its ultimate strategy at an earlier

stage than it otherwise would in U.S. litigation. Also, as with the document disclosures, the policyholders should not assume that this process will be any less burdensome than in answering interrogatories in U.S. litigation. In fact, given the lack of depositions in English arbitrations, there is a heightened reliance on gaining information through such Requests.

D. Interpretive Evidence.

In U.S. litigation, it would be standard for a policyholder to seek the production of what generally is referred to as “interpretive materials.” These are materials that shed light on the meaning that the insurer, itself, gave to its own policy language. These materials include underwriting manuals, claims-

a policyholder has included such allegations, it may be able to convince a tribunal that the insurer should disclose such materials not necessarily because they are interpretive in nature but, rather, because they are reflective of the “custom and practice” in the insurance market with respect to a particular issue.

E. Witness Statements – Again, Early Strategy Formulation Is Necessary.

In addition to having no depositions, one of the more curious aspects of the English arbitration is that witnesses do not provide direct testimony on the witness stand. Rather, they submit a statement, similar to an affidavit, that sets forth what would otherwise constitute their direct testimony. These

The submission of the witness statements months in advance of the hearing is an example of how an English arbitration can be less flexible than U.S. litigation.



handling manuals, and documents generated during the drafting of the policy language (the “drafting history”), among other things. In an English arbitration, the insurer almost definitely will refuse to produce such materials without the tribunal ordering it to do so. Further, if the policyholder chose to challenge the insurer’s refusal with the tribunal, it could find that obtaining access to such materials is an uphill battle.

This is because, under English practice, the interpretation of how the policy’s language is meant to operate is considered to be a pure legal question solely within the domain of the tribunal’s expertise. Simply put, in the tribunal’s view, it does not need extrinsic materials– including expert testimony – to assist it in construing policy language; it can figure that out for itself.

It is for that reason that the “custom and practice” allegations mentioned above may come in handy. If

statements typically are submitted many months in advance of the substantive hearing. At the hearing, the witness appears and is immediately offered for cross examination by the other side.

The submission of the witness statements months in advance of the hearing is an example of how an English arbitration can be less flexible than U.S. litigation. The direct testimony of a witness in an English arbitration becomes set in stone at a point in which the policyholder’s ultimate strategy may still be a work in progress. Although it may be possible to submit a second or modified witness statement after the original one is submitted, the other side will already have seen the original statement and can still cross examine the witness with respect to that original statement. Accordingly, the policyholder must have its strategy fairly well settled at the time it submits its witness statements.

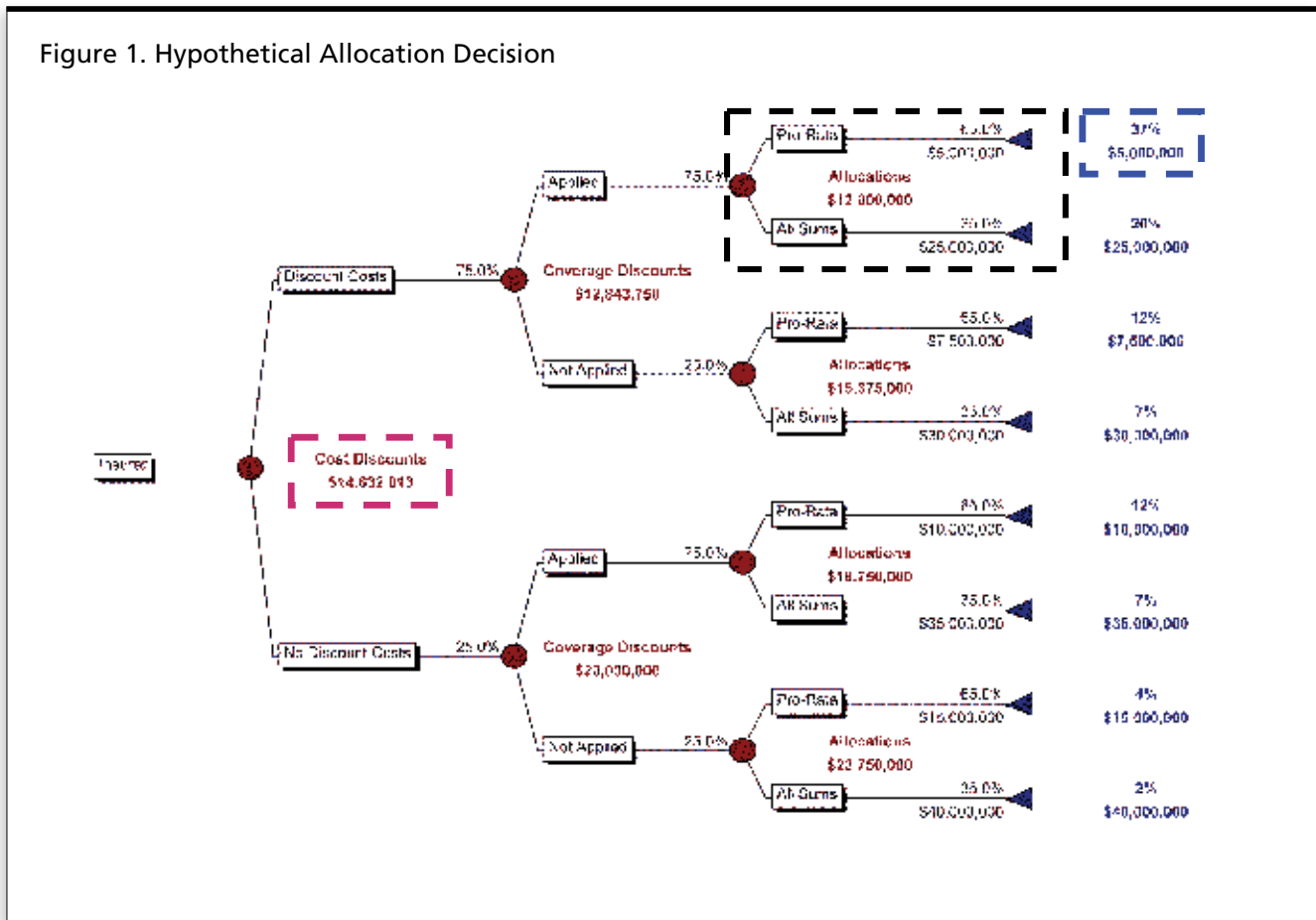
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The branch probabilities reflect the user’s assumptions about whether or not cost discounts will be applied, whether or not coverage discounts will be applied, and the user’s thoughts regarding which allocation theory, Pro-Rata or All Sums will be applied. At the end node, represented by the triangles at the “branch tree tips” the probability and associated outcome - the recovered cost - are shown for the different branches. The branches with the higher outcome probability imply that their associated recoveries are more likely to occur than those recoveries associated with lower probabilities. For example, the branch that has the highest overall probability of 37% has an associated recovery of \$5 million (see Figure 1 blue dashed box) and this outcome is considered most likely. Similarly the second most likely outcome is the \$25 million with 20% probability. These recoveries reflect the application of discounts (cost and coverage) and

the effect of different allocations. The \$5 million or lower recovery amount reflects the application of Pro-Rata allocation theory versus the \$25 million All Sums allocation. Almost twice the probability was assigned to the Pro-Rata allocation (65%) compared to the All Sums allocation (35%). This assumption favors the carriers’ position. If, on the other hand, the user felt that the All Sums was the theory choice by law, then the All Sums branch could be weighted with a higher probability and the Pro-Rata allocation branch assigned a lower probability. Regardless, the probabilities assigned to the branches extending from a single node must add to 100%.

In this case, the dollar amounts at the branch tip are linked to: 1) a spreadsheet containing assumptions regarding discounts and their impact on both past and future defense and indemnity costs; 2) a spreadsheet containing different percentages

Figure 1. Hypothetical Allocation Decision



for coverage discounts to address discounts for late notice, occurrence wording, pollution exclusion, missing policies, and insolvencies; and 3) a spreadsheet generated from an allocation model using discounted and non discounted cost and coverage inputs.

Each branch is connected to a node (round circles) and at each node there is a dollar value which represents the expected value (EV) at that node. The expected value is the probability-weighted cost for the node based on the values and probabilities to the right. For example the expected value for the branch with the highest probabilities is \$12 million (see black-dashed box in Figure 1). This is probability weighted value based on the cost at each branch multiplied by its assigned probability and summed. (e.g., EV \$12 million = (65% x \$5 million) + (35% x \$25 million)). Using this same process and tracing each branch to the trunk will produce the expected value for the entire tree or \$14.6 million (see Figure 1 red dashed box).

Trees Provide A Powerful Dynamic Tool For Litigation And Settlement Negotiations

Using a Microsoft Excel add-in computer program, such as Palisades Decision Analysis Software, allows the user to construct decision trees (Precision Tree) and link the tree to linked Excel spreadsheets containing: 1) cost information (past and future indemnity and defense costs); 2) cost discount information; 3) insurance discount information; and 4) allocation models. Changes in the underlying costs, discounts, or allocation models can cascade via the spreadsheet links to the inputs on the tree branches. Similarly, the probabilities on the decision tree branches can be changed to reflect different scenarios. The linking of the cost, discount, and model inputs to the decision trees provides the user the ability to conduct “what if scenarios” on the fly and see the results immediately. Attorneys and clients appreciate this functionality and it provides them with a dynamic model to analyze the underlying legal and cost variables, the effect of uncertainty, and what drives the outcome.

The linking of the cost, discount, and model inputs to the decision trees provides the user the ability to conduct “what if scenarios” on the fly and see the results immediately.



Lastly, the ability to define the most likely outcome (cost with the highest probability), the least likely outcome (cost with the lowest probability) and the expected value (cost probability weighted value) provides attorneys and clients the ability to establish negotiation targets. These targets may include an amount to initiate settlement negotiations versus an amount which is considered the lowest target settlement amount. It would also be helpful to understand what would be considered a “successful high settlement result” versus a “successful low settlement result” so as to manage attorney-client expectations. Using the what-if-scenarios and the outcome values defined above, attorneys and clients can hone their strategies and maximize the outcome.

HOWREY^{LLP} INSURANCE IN THE NEWS

Speaking Engagements

Mary Craig Calkins (Los Angeles) was a panelist on the topic of “Is D&O Liability on the Horizon, and Will It Be Covered?” at the Mealey’s Global Warming Insurance Litigation Conference, June 2007, San Francisco, CA.

Ms. Calkins was also a panelist on the topic: “Controlling The Defense – When May Insurers Use The Guidelines?” at the Mealey’s Litigation Management Conference, New York, NY, May 2007.

Ty Childress (Los Angeles) spoke at the Risk & Insurance Management Society (RIMS) Annual Meeting on the subject “Additional Insureds, Indemnitors and Insurers: Who Owes Whom What?”, New Orleans, LA, May 2007.

Jill B. Berkeley (Chicago) presented “Allocation & Trigger: Dilemma and Doctrine” at the DRI Insurance Coverage and Claims Institute conference, Chicago, IL, April 2007.

Ms. Berkeley also gave a presentation on “Products Liability and Coverage” at the Chicago International Trade Commissioners Association (CITCA)’s Service Provider Roundtable,” in Chicago,

IL, April 2007.

Mary Craig Calkins (Los Angeles) presented “The Limits of Permissible Guidelines,” at the Mealey’s Litigation Management Guidelines conference, New York, NY, April 2007.

Awards and Honors

In May 2007, Howrey partners **Joanne Caruso** (Los Angeles) and **Mary Craig Calkins** (Los Angeles) have been named to the *Los Angeles/San Francisco Daily Journal’s* list of Top Women Litigators of 2007.

Christine Davis (Washington, DC) was named a Fellow for American Bar Association Tort & Insurance Practice.

Yuri Mikulka (Irvine), **Don Erlandson** (Los Angeles), and **Will Um** (Los Angeles) were named Super Lawyers Rising Stars by *Law & Politics* magazine, July 2007.

Chambers USA: America’s Leading Lawyers for Business recently published rankings of firms and attorneys considered leaders in their field. *Chambers* gave the Insurance Recovery Group of Howrey LLP a top national ranking and highlighted a number of the group’s partners.

➤ **Jill Berkeley** (Chicago) is recognized as a “capable and responsive” attorney who “is creative in her problem solving and excellent in negotiating.”

➤ **Robert Shulman** (Washington DC) was highlighted as “tremendously resourced” and as having “the facility for handling high-profile cases.”

➤ **Dave Steuber** (Los Angeles) is described as a lawyer with a long-standing reputation who “approaches coverage from an analytical rather than overly impassioned point of view.”

➤ *Chambers* identifies **Mary Craig Calkins** (Los Angeles) as “very capable” and “very supportive” to her clients.

➤ **Ty Childress** (Los Angeles) is described as “intelligent, presents well and has earned his peers’ respect.”

➤ **Curtis Porterfield** (Los Angeles) is characterized by the publication as “extremely knowledgeable.”

News Coverage

On May 14, 2007 **Keith Meyer** (Los Angeles) was interviewed and featured in a *Los Angeles Daily Journal* article, “Client Conflicts Drive Attorney to Howrey.”

Howrey congratulates
Joanne Caruso and Mary Craig Calkins
on being named Top Women Litigators of 2007
by the *Daily Journal*.

Understandably, insurers faced with bad faith claims under Ohio law have been scrambling to avoid the impact of the *Boone* and *Garg* decisions. One insurer tried to argue that because it had never really denied coverage to the insured, *Boone* was inapplicable. In *Unklesbay v. Fenwick*, 855 N.E.2d 516, 521 (Ohio Ct. App. 2006), the policyholder alleged that the insurer engaged in bad faith through its claim-processing procedures and general foot dragging, but conceded that payments by the insurer were eventually made. The court held that although the insurer never denied coverage, *Boone* was still applicable based on the insured's allegations of bad faith. Moreover, the court held that the *Boone* discovery extended all the way to the date in which benefits were paid. The court reasoned that under *Boone*, the critical issue is whether the otherwise privileged materials “cast light” on whether the insurer exercised good faith in the handling of the claim, not on whether the insurer technically denied the claim.

Other insurers have tried to argue that under *Boone*, only those materials maintained in the actual “claims file” are subject to the *Boone* rule. This analysis appears flawed because the Ohio Supreme Court did not identify the “claims file” to include only those documents maintained in a particular folder. Instead, it was using the term to refer to any documents relating to the handling of the claim. In addition, such a rule

would simply encourage insurers to evade the *Boone* rule by hiding their privileged documents in different files. Under *Boone*, the scope of the bad faith exception to the attorney-client privilege is dictated by the nature of the insured's claims, not the organization of the insurers' files.

Still, some insurers faced with bad faith claims in federal court have successfully limited the scope of *Boone*. They have argued that although *Boone* applies to attorney-client communications, which are substantive in nature and governed by state law, work product protection is a procedural rule, which is governed by federal law. See *In re Powerhouse Licensing, LLC*, 441 F.3d 467, 472 (6th Cir. 2006) (“In a diversity case, the court applies federal law to resolve work product claims and state law to resolve attorney-client claims”). Thus, a policyholder seeking *Boone* discovery will likely obtain greater discovery in a state court proceeding than in federal court.

Regardless of the court in which the case is brought, the benefit of the *Boone* rule is two-fold. Not only does it permit a policyholder to access otherwise privileged materials to support its bad faith claim, but the potential release of such materials creates an enormous incentive for the insurer to settle the case. Similar rules developed by other states should not be overlooked when considering where to file suit or when addressing the nearly inevitable choice-of-law disputes.

F. Your Lead Counsel Should be Part Trial Lawyer, Part Appellate Advocate.

One of the common misconceptions about an arbitration is that the tribunal is merely a small jury. The truth is, while the tribunal does make findings of fact, the experience before a tribunal is much more akin to appearing before an appellate panel. The tribunal may frequently interrupt the proceedings to ask questions, including questions of law. Accordingly, the policyholder's lead attorney should be one who not only is effective at cross examining witnesses but who also is skilled at appellate-style legal arguments and is comfortable being asked frequent questions.

G. The Cost of Losing.

Another distinguishing aspect of English procedure, is that the prevailing party in an English proceeding is entitled to recover its reasonable costs from the losing party including reasonable attorneys fees, expert witness fees, the tribunal's fees, and other expenses. This is an important factor that the policyholder should consider in its overall strategy, particularly if it has any settlement opportunities. A policyholder that is not comfortable with this practice can, however, attempt to negotiate the American Rule (each side pays its own costs) into the case management order governing the arbitration (called the “Directions” in English arbitration parlance).

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