

Q&A With Faegre Baker's Ernie Summers

Law360, New York (April 29, 2013, 11:51 AM ET) -- Ernie Summers is a partner with Faegre Baker Daniels LLP.

A concentration of Summers' practice is representing insurance policyholders in both counseling and dispute resolution regarding specialty and commercial lines insurance. His practice also includes noninsurance business litigation in antitrust, contracts, torts and other business disputes.

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

A: Of the many challenging cases I have worked on, the comprehensive environmental insurance coverage case for Waste Management Inc. stands out in my mind. The case lasted a decade. It was a very complicated case factually because WMI grew rapidly through acquisitions in the 1970s and 1980s, and each acquired company had its own preacquisition insurance policies in addition to the post-acquisition WMI corporate insurance, and they were involved at different disposal sites.

The case involved hundreds of insured entities, hundreds of insurers, thousands of policies and many underlying lawsuits alleging potential liability in different states. Identifying old corporate histories, finding old policies and assessing the claims against each were very challenging. There were complicated issues of apportioning the alleged underlying liability among multiple parties and then calculating the insurance claims under each triggered insurance policy.

The claims were governed by different state laws, which created more complicated legal issues. I mediated the claims separately against each insurance group for the two months before trial. Each mediation presented unique issues and challenges. Many insurers settled, but some did not.

Adding to the challenges, trial was scheduled to start in New Jersey in September 2001, just across the Hudson River from the World Trade Center. The events of September 11 made it impossible to start trial until the planes were flying again in October, and travel and scheduling also became very challenging in the wake of this tragedy.

It was a very challenging case in many respects but also very satisfying. The result was a very successful insurance recovery. I also worked with some of the best insurer-side lawyers in the country and a very strong policyholder team on our side, both in-house and outside counsel.

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

A: I would eliminate the practice in some jurisdictions of depublishing opinions after the fact. It results in too many cases of first impression and inefficient relitigation of the same issues without the benefit of precedent.

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

A: Illinois has a very strong line of cases regarding an insurer's duty to defend its insured. A landmark case on this issue is the Illinois Supreme Court opinion in *Employers Ins. Co of Wausaw v. Ehlco Liquidating Trust*, which held that "where a complaint alleges facts potentially within the policy's coverage, an insurer taking the position that a claim is not covered cannot simply refuse to defend the suit. Rather, the insurer must either defend the suit under a reservation of rights or seek a declaratory judgment that there is no coverage."

In other words, The Ehlco case made clear that an insurer with a duty to defend its insured cannot passively refuse to defend and leave the policyholder to fend for itself, but rather, the duty to defend imposes an obligation on an insurer who believes there are defenses to coverage to affirmatively defend under reservation of rights or initiate coverage litigation to get a court ruling.

If the insurer does not take one of the actions specified by the Ehlco case, it is a material breach of the duty to defend that can result in preclusion of the insurer from asserting policy defenses. This doctrine is known as the Illinois Estoppel Doctrine and is an important issue in many insurance disputes.

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

A: Pat Heneghan and Ian Fisher at Schopf and Weiss in Chicago impress me because they are organized, efficient, knowledgeable about the law and effective advocates for their clients.

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

A: I think most young lawyers make the mistake at some point in their careers of taking on too many assignments and spreading themselves too thin. I certainly did. When you spread yourself too thin, you are no longer providing the highest level of service and attention to your clients, which is of first importance.

As a result, I learned to know my own limitations, balance priorities and recognize when to delegate or bring in reinforcements. This approach enables me to achieve two of Faegre Baker Daniels' important guiding principles: "clients first" and "high performance."

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