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Q&A With Duane Morris' Max Stern

Law360, New York (July 02, 2009) -- Max H. Stern is a partner with Duane Morris LLP in the firm's San Francisco office and co-head of the firm's insurance litigation division. He devotes most of his practice to litigation and counseling services for the insurance industry.

Stern has handled matters in various lines, including general liability, specialty liability, professional liability, excess liability, workers' compensation, property and personal accident. He has extensive experience in insurance-related litigation at trial and on appeal, including coverage, bad faith, subrogation and contribution, reinsurance, and regulatory disputes.

Q: What is the most challenging case you've worked on, and why?

A: A pollution coverage trial in Portland, Ore., that was the first trial on which I was co-lead for our client. Right before trial, all of the other primary insurers settled out, and the demand to us went up more than 500 percent.

The two-week court trial and three-month jury trial that followed were beset by adversity, with one of the two remaining co-defendants settling out right before its CEO was to testify, the other so upsetting the jury that jurors later asked the judge why they weren't given the chance to award punitive damages, and plaintiff's counsel singling me out personally for alleged improper actions.

In the end, the jury gave us a win on our issue, several jurors made the specific comment that "Mr. Stern didn't do anything wrong," and we obtained such a favorable post-verdict allocation award that a group of Oregon manufacturers lobbied for and obtained a statutory change in the allocation law.

It was an uphill battle all of the way, and it was very gratifying to come out ahead.

Q: What accomplishment as an attorney are you most proud of?

A: My first case for what has become a very good client involved whether it had to defend all of its many California policyholders against a particular type of claim that was being asserted in case after case.

The client's prior coverage counsel believed it was unlikely to win, but I disagreed, so when a class action was filed on behalf of all California policyholders, I got the case.

We sought judgment on the pleadings immediately, won twice in the trial court, and then won an affirmance in the appellate court, all without the cost and delay of discovery.

I am proud of showing the client that it could win without excessive cost, and also of validating the client's trust in me and my firm, as well as the relationships that developed from that case.

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

A: The "bad faith setup" in exchange for a covenant not to execute.

Certain states allow a policyholder being defended by the insurer to nevertheless settle directly with the claimant for a stipulated amount or agreement to default, assigning most or all rights to the claimant, in exchange for a covenant not to execute against the policyholder's noninsurance assets.

Where the insurer is defending, such direct settlements undermine the basics of the insurer-policyholder relationship in liability insurance; the policyholder offered a covenant not to execute no longer has any reason to defend its actions or limit damages.

Collusion is rampant in these "setups," but must be litigated in collateral actions. The trumped up claim values and collateral litigation increase costs for all liability insurance generally.

Jurisdictions allowing such "setups" should follow the lead of states like California and Texas in establishing bright-line limits on direct settlements behind the back of a defending insurer.

Q: Where do you see the next wave of cases in your practice area coming from?

A: The next wave of insurance coverage cases typically follow the latest wave of injury or business tort liability cases. New or expanded theories of liability create the unanticipated issues that lead to coverage disputes.

Right now, “climate change” theories of liability are being developed by creative plaintiffs, and we will have to wait and see if that becomes a wave that flows through to insurance coverage cases.

Q: Outside your own firm, name one lawyer who's impressed you and tell us why.

A: Barack Obama. Barack was a law school classmate, who immediately impressed all of our group of very bright and motivated law students with his intelligence, poise and humanity.

No lawyer has all of the right answers, but I think we are in good hands with someone who can ask the right questions.

Our choice of president says a lot of good things about the often-maligned electorate in this country.

Q: What advice would you give to a young lawyer interested in getting into your practice area?

A: Give a lot of thought to the firm and lawyers with who you choose to start practicing.

Like a rookie quarterback, the young partner-to-be needs a chance to see how the game is played by the pros, and which pros you learn from makes a real difference.

Even in tough times, when positions seem scarce, you make choices that determine who will be your mentor(s) and the breadth of skills you will learn. Coverage work is mostly immune from economic cycles, so you're entering a relatively stable field; make your choices wisely.

I was very fortunate to learn from incredibly analytical, ethical and creative partners at the former Hancock Rothert & Bunshoft firm, which specialized in coverage work, and that training made my career possible.