

Q&A With Anderson Kill's John Nevius

Law360, New York (May 02, 2013, 12:54 PM ET) -- John G. Nevius is a shareholder in the New York office of Anderson Kill & Olick PC and chairman of the firm's environmental law group. He has litigated a variety of legal and technical matters, most of which involve insurance coverage, and has experience trying or arbitrating complex disputes in the following areas: environmental, real estate, construction, power generation, mining, electronics, petrochemical, telecommunications and workplace safety.

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

A: The Queenstake case involved a combination of complex coverage and environmental issues in an international arbitration proceeding combined with high-stakes federal litigation. Moreover, the case played out against a backdrop of competing local political interests and serious compliance issues raised by both state and federal environmental regulators as well as the U.S. Department of Justice.

We ultimately settled favorably on the eve of arbitration and went on to negotiate new closure and reclamation coverage essential to the company's ability to continue operating. I then went on to assist new owners through the federal and state compliance and other business issues.

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

A: The world has moved on from tapping decades-old general liability insurance policies to offset environmental liabilities. We have all grown accustomed to pursuing cleanup funds under the newer, more tightly underwritten environmental insurance products. Not only is the coverage more tightly underwritten but pollution and other exclusions have proliferated.

However, many of the same coverage disputes still arise, including over the duty to defend, directors and officers liability and abuse of pollution exclusions to deny coverage in ways that were never intended. The "absolute" pollution exclusion is based upon language taken from the Comprehensive Environmental Response, Compensation and Liability Act, the Superfund law, and was intended to be used only in the context of Superfund types of cleanup.

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

A: The present case I am working on, in which an insurance company is using engineering subterfuge to deny a claim that should have been paid from the outset, may have implications for the development of law in New York on bad faith and the recovery of attorney fees in the coverage context. The insurance companies delayed denying the claim for almost two years before suing their policyholder in New York after conducting an investigation focused on ways to avoid the claim.

The case involves not only the scope of so-called all-risk coverage but also traditional boiler and machinery principles as well as issues involving “resulting loss” and mitigation. It is the kind of case where the insurance companies’ efforts to avoid coverage are transparent. Policyholders are well served when the courts act to deter such behavior by means beyond merely ordering recovery of policy proceeds.

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

A: Gene Devine [at Arthur J. Gallagher & Co.] is a friend and colleague who is also a Pace Law School alumnus. He is an environmental insurance broker who really knows his stuff and has always impressed me with his knowledge and personable nature. I turn to Gene routinely to get a sense of the broker side of things as well as the general scope of coverage, especially under the newer environmental products.

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

A: A client was frustrated by the pace of the coverage litigation and the lack of a substantial recovery. At one point, the client's discouragement rubbed off on me to a certain extent. However, we did work through that rough patch, and to date, we have recovered more than \$30 million. Coverage litigation is about sticking to your guns and building a detailed narrative while covering every necessary element. It also is about understanding how the insurance industry works, including from both an internal accounting and regulatory perspective.

I learned a long time ago from Gene Anderson how to use internal insurance communications and brochures from our firm’s databases on summary judgment. Even though the other side often vehemently disclaims any direct knowledge of these types of documents and challenges a client’s reliance thereon, insurance companies are in the business of making promises. They must not be allowed to escape the broad intent of these promises or their own public pronouncements describing their products and services.

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