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Tort Trial and Insurance Practice Section

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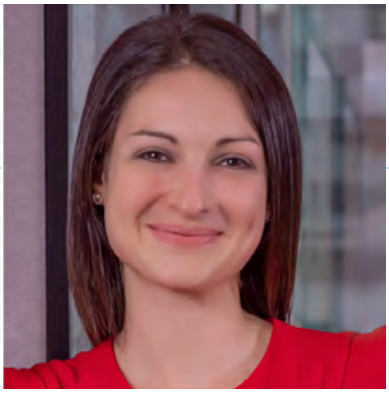
COMMITTEE NEWS

Insurance Coverage Litigation

Perception vs. Reality: Dispelling Myths about Arbitrating Insurance Industry Disputes



Svetlana Gitman
AAA-ICDR

Svetlana Gitman *is the Vice President of the Commercial Division of the AAA-ICDR based in Chicago. She oversees the commercial caseload, panel of arbitrators and outreach for the Midwest, and is a frequent speaker on ADR nationwide.*

As courts continue to face backlogs, the time-and-cost benefits of Alternative Dispute Resolution (ADR), specifically arbitration, to jumpstart stalled litigation become even clearer. However, for those unfamiliar with arbitration, outdated perceptions often inhibit clients and attorneys from considering alternatives to court litigation. The following myth-busters illustrate how ADR can benefit the insurance industry[1] in resolving disputes.

Perception: Litigation is the only avenue for resolving insurance industry disputes.

Reality: Nothing can be further from the truth. ADR, and in particular arbitration, is a tool for resolving insurance industry disputes in a faster, more efficient manner that saves both time and money. Parties sometimes start the dispute resolution process with mediation. Mediation allows parties to learn about each other's needs and interests in hopes of arriving at a facilitated settlement. However if the parties

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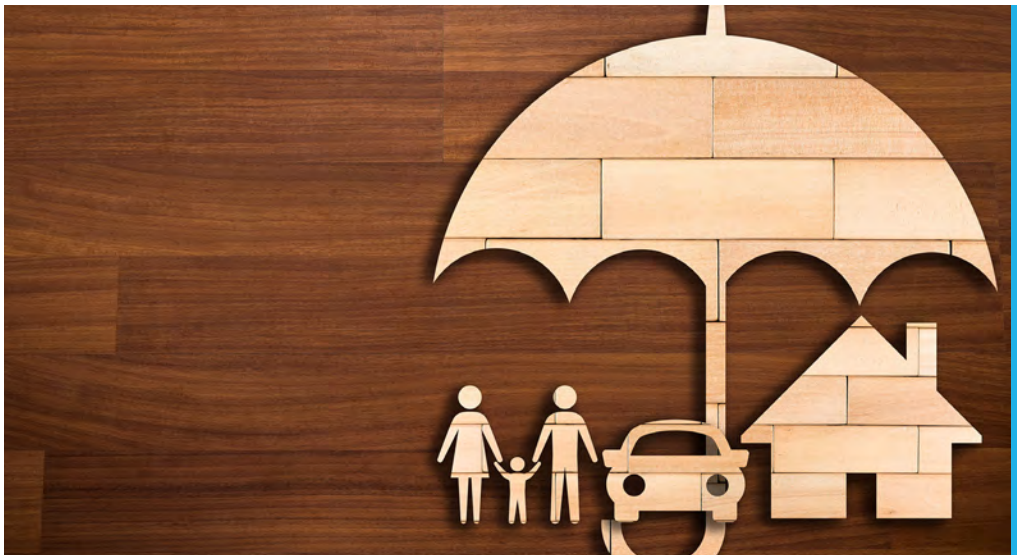

In This Issue

Chair Message

Micalann C. Pepe
Jaburg Wilk

***Micalann Pepe** is a partner at the law firm Jaburg Wilk in Phoenix, AZ. She primarily practices in insurance coverage and bad faith litigation, with a wide range of litigation experience that provides diverse perspectives for the matters she handles. She has been recognized by Super Lawyers, the Litigation Counsel of America, and Best Lawyers: Ones to Watch for her insurance litigation acumen. She has been actively involved in TIPS and the ICLC for over ten years and was selected by TIPS in 2018 to participate in its Leadership Academy. Micalann regularly presents on and contributes to publications addressing emerging insurance coverage litigation issues.*

The ICLC Committee and the newsletter authors and editors are excited to present this Spring's edition of the ICLC Newsletter. In this edition, Keith Marxkors with the State Farm Law Department sat down with ICLC Diversity and Inclusion Vice Chair, Sarah Cornwell, to discuss State Farm's dedication to and advancement of its diversity and inclusion initiatives. Svetlana Gitman, a vice-president of the American Arbitration Association, dispels more myths about the arbitration of insurance coverage disputes and explains some lesser-known advantages of utilizing arbitration to resolve such disputes. Elizabeth McBride, a coverage attorney in the Philadelphia office of McAngus, Goudelock & Courie, discusses, in the context of North Carolina law, the insurance industry standard requiring insurers to provide a reasonable explanation of the facts and law in relation to the denial of a claim, including the pitfalls of just providing a laundry list of potentially applicable policy terms and citing incorrect, inapplicable policy provisions. Ben Boris, an associate in the Chicago office of Neal, Gerber & Eisenberg LLP, discusses the consequences of the application of Illinois' estoppel principle when an insurer wrongfully refuses to defend an insured.

We are also very much looking forward to the upcoming ICLC's 32nd Annual Mid-Year Meeting in a few weeks. The Program Committee, led by Marci Goldstein Kokolas and Jason Reichlyn, have put together an excellent lineup of panels addressing cutting edge issues unique to the insurance coverage litigation world. This year, we will be heading to the beautiful new location of Estancia La Jolla Hotel & Spa in La Jolla, California. The Meeting runs from February 22 to 25, 2024. This program features twelve panels covering topics to include additional insured coverage issues, fraudulent property claims, emerging policy terms, biometric information coverage issues, and more. The program will provide up to twelve hours of CLE credit, including at least one ethics credit. Additionally, attendees will be able to choose one of twelve different Toolbox Lunch Sessions in which to participate, led by our Toolbox Coordinators Steven C. Corhern and Austin Bersinger.

One of the hallmarks of the ICLC throughout its existence, and has certainly been the case as long as I have been involved, is its inclusivity. We strive to provide as many opportunities as we possible to get our members actively involved in the Committee and the Committee's events. Please reach out to anyone in ICLC leadership, including those mentioned in this message, if you are interested in any of the following:

- Newsletter writing and publishing;
- TIPS Annual Survey of Law writing and publishing; and
- IRMI's Select Insurance Law Essentials writing and article submissions.

We would not continue to be one of the most active committees in TIPS without the dedication and involvement of our members. If you wish to join the ICLC, or if you are already a member and wish to become more involved, please contact me at mcp@jaburgwilk.com, or the ICLC's Chair-Elect, Jennifer Meeker at jmeeker@nossaman.com. Thanks for your interest in the ICLC, and see you in beautiful (and warm) La Jolla!

Connect with Insurance Coverage Litigation

website

Stay Connected with TIPS

We encourage you to stay up-to-date on important Section news, TIPS meetings and events and important topics in your area of practice by following TIPS on **Twitter** @ ABATIPS, joining our groups on **LinkedIn**, following us on **Instagram**, and visiting our **YouTube** page! In addition, you can easily connect with TIPS substantive committees on these various social media outlets by clicking on any of the links.

americanbar.org/tips

Editors

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***Taylor Seibel** is a Shareholder at Giometti & Mereness, P.C. in Denver, Taylor has been practicing in the area of insurance law for nearly a decade, primarily representing insurers in both state and federal court. Taylor's practice areas include insurance coverage, as well as bad faith and bodily injury litigation in both the first- and third-party contexts, and related appeals.*

Sarah Cornwell
Dykema Gossett, PLLC.

***Sarah Cornwell** is an insurance coverage litigation associate in the Washington, D.C. office of Dykema Gossett, PLLC. She advices both domestic and international insurers on a wide range of topics involving coverage and extra-contractual risks. She is also the D&I Vice-Chair for ICLC.*

Lorne Hiller
Freeman Mathis & Gary, LLP

***Lorne Hiller** is an attorney in Freeman Mathis & Gary, LLP's Nashville and Denver offices, Lorne represents insurers in complex first- and third-party coverage disputes and related litigation in state and federal courts nationwide. In addition to serving as Co-Editor of the ICLC Newsletter, Lorne is a member of the TIPS' Standing Committee on Outreach to Young Lawyers.*

The Estoppel Principle: An Illustration of Illinois' Unique Doctrine

Ben Boris
Neal Gerber Eisenberg

***Ben Boris** is an associate at Neal Gerber Eisenberg in Chicago, Illinois. He is a member of the firm's Litigation & Disputes practice group and represents policyholders and claimants in insurance coverage disputes.*

Estoppel is a powerful sword for policyholders seeking to enforce their right to a defense under Illinois law. The estoppel principle holds that when an insurer wrongfully refuses to defend an insured, the insurer is estopped from raising any coverage defenses to its duty to indemnify the insured. *Emps. Ins. of Wausau v. Elcho Liquidating Tr.*, 708 N.E.2d 1122, 1134-35 (Ill. 1999). This effectively leaves an insurer with two options when it believes a complaint brought against its insured is ultimately not covered by the policy: (1) defend the underlying lawsuit under a reservation of rights; or (2) seek a declaratory judgment that it owes no duty to defend. *Id.* Since the duty to defend is broader than the duty to indemnify, an insurer that pursues the second option must prove the complaint alleges no facts that could potentially trigger coverage.

It is intuitive that estoppel is widely embraced by policyholders seeking to enforce their rights to insurance coverage in Illinois courts. Insurers, however, also wield the estoppel sword from time to time, and a recent Illinois appellate court decision provides an excellent illustration.

In *Nationwide v. State Farm*,[1] Nationwide appealed a decision from the Circuit Court of Cook County holding that (1) State Farm owed the insured no duty to defend it in the underlying suit and (2) State Farm was not estopped from asserting noncoverage in the present action. The dispute between the two insurers arose out of coverage for a wrongful death lawsuit filed against the insured, Davis Concrete Construction Company (Davis Concrete), among other parties. *Id.* at 1108. An employee of a Davis Concrete subcontractor fatally struck a 13-year-old boy with a dump truck. *Id.*

Davis Concrete tendered its defense of the ensuing lawsuit to State Farm, which neglected to respond to the tendered defense despite three requests from Davis Concrete and a court order to do so. *Id.* at 1110-11. Ultimately, the lawsuit settled for $3.5 million, $400,000 of which was paid by Nationwide on behalf of Davis Concrete. *Id.* at 1111. In the meantime, Nationwide filed a declaratory judgment action against State Farm, demanding that it pay Davis Concrete's legal defense fees, as well as the $400,000 contributed by Nationwide. *Id.*

State Farm agreed to pay the legal defense fees, but refused to indemnify Nationwide for the $400,000 contribution, filing a counterclaim seeking a declaratory judgment that no coverage was triggered by the policy. *Id.* The circuit court agreed with State Farm that the allegations of the underlying complaint precluded coverage under the policy's automotive exclusion and thus concluded that State Farm owed no duty

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North Carolina's UDTPA

Elizabeth A. McBride
McAngus Goudelock & Courie

***Liz McBride** is an associate attorney at McAngus Goudelock & Courie in Philadelphia. She is a part of the firm's insurance coverage practice. Liz is licensed to practice law in both Pennsylvania and New Jersey, and focuses her practice on counseling and defending insurers in coverage litigation.*

Generally, under North Carolina law, to avoid committing a violation of North Carolina's Unfair and Deceptive Trade Practices Act, ("UDTPA") an insurer is required to promptly and reasonably explain its basis for denying insurance coverage. An insurer is typically not held to a high bar in regards to providing a sufficient basis for the denial. As long as the insurer can explain how the specific facts or applicable law relied on for the denial relate to the insurance policy, then a North Carolina court will likely find that the insurer provided a reasonable basis. Some insureds have expressed disagreement over an insurer's basis for its denial, or have asserted that the insurer's basis was incorrect. However, North Carolina courts have consistently held that a mere disagreement over the insurer's basis for denial, or an insurer's incorrect coverage position does not demonstrate a lack of a reasonable basis.

The Fourth Circuit weighed in on this issue in *Denc, LLC v. Philadelphia Indemnity Insurance Company*, 32 F.4th 38, 42 (4th Cir. 2022). In the *Denc, LLC* decision, the court determined that Philadelphia Indemnity Insurance Company ("Philadelphia Indemnity") violated North Carolina General Statute § 58-63-15(11)(n), which also qualified as a violation of the UDTPA, N.C. Gen. Stat. § 75-1.1. *See also Lockhart v. State Farm Fire & Cas. Co.*, No. 1:17CV994, 2018 U.S. Dist. LEXIS 112731 (M.D. N.C. Jul. 6, 2018) ([c]onduct in violation of N.C. Gen. Stat. 58-63-15(11) constitutes a violation of 75-1.1 as a matter of law because such conduct is inherently unfair, unscrupulous, immoral, and injurious to consumers). Insurers should pay close attention to the *Denc, LLC* decision because the court explained why Philadelphia Indemnity's denial letter created confusion, and thus, violated § 58-63-15(11)(n).

In *Denc, LLC* the incident giving rise to the insurance claim involved a breezeway collapse. *Denc, LLC*, 32 F.4th at 44. In response to the claim, Philadelphia Indemnity advised the insured that it would investigate the claim pursuant to a reservation of rights. *Id.* However, two days later, Philadelphia Indemnity indicated that it would be issuing payment. *Id.* Nonetheless, a few weeks later, Philadelphia Indemnity denied the claim without referencing its earlier agreement to issue payment. *Id.* at 45. Philadelphia Indemnity took the position that the insured's damage resulted from long-term water intrusion and deteriorated wood framing. *Id.*

Although Philadelphia Indemnity's denial letter referenced its water-damage findings, the letter also referenced numerous policy provisions, without explaining why they barred coverage. *Id.* In addition, none of the policy provisions referenced in the denial letter used the phrase "water intrusion." *Id.* Those who drafted the denial letter conceded that some of the provisions referenced in the letter were not part of the policy, and some did not apply to the breezeway collapse at issue. *Id.* at 52.

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A Few Questions On Diversity

Keith Marxkors, State Farm Law Department, graciously agreed to be interviewed to discuss State Farm's diversity and inclusion ("D&I") efforts. The interview took place by exchanging questions and answers in writing, and has been edited for clarity. Sarah Cornwell, ICLC's D&I Vice-Chair, posed the questions.

Q: Why is D&I important to State Farm, and why is it important to you?

A: At State Farm, D&I is central to what we do and who we are – in the workplace, in the marketplace by how we interact with our customers and suppliers, and in the community through community service and charitable giving. The State Farm Law Department's D&I efforts are focused on three pillars: embracing a D&I mindset; focusing on recruiting and retention; and advancing diversity in the legal profession. We work to bring these principles to life through the efforts of Department executives, employees, and an active D&I Committee of roughly 100 committed, volunteer department team members.

For me personally, collaborating and working with a diverse group of peers throughout the organization has promoted my personal and professional growth and understanding of issues from multiple lenses. It has allowed me to view our business and the challenges we face within our industry and our company with a broader perspective of the needs and wants of our customers, employees, regulators, and communities. I believe I have become a more effective and successful contributor as a result of my exposure to diverse thought and experiences.

Q: How can organizations embrace a D&I mindset?

A: While I can't speak for others in the industry, the State Farm Law Department is committed to an inclusive environment through education, training, and conversational opportunities, to help all employees feel valued and empowered to bring their full and best selves to work. This starts at the top, with our CEO and our General Counsel. Some ways we demonstrate this commitment is by:

- Encouraging participation in companywide D&I training and programs;
- Having a D&I component in our employee performance goals;
- Providing easy-to-access online resources curated for Law Department employees;
- Keeping a consistent D&I focus in every formal leadership meeting;

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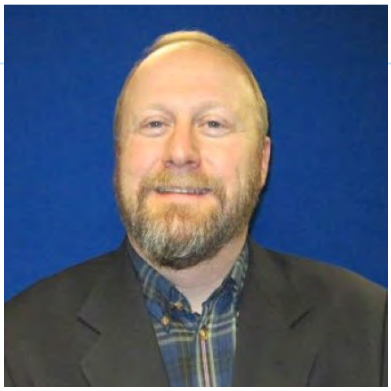

Keith Marxkors
State Farm

***Keith Marxkors** works for State Farm Law Department. He has 35 years' experience with State Farm, in both Claim Operations and as Claim Counsel, and currently advises State Farm's Auto Claim function.*

Member Spotlight

Name and law firm/organization? Emily Hart, Wiley Rein LLP.

Do you represent policyholders, insurers, or both? Insurers.

How did you first become interested in insurance practice?

I did an interesting summer associate project for Wiley's insurance group, which incidentally did not have much to do with insurance coverage issues. Since insurance impacts literally every industry, I realized I could be both a specialist and a generalist at the same time, which was very appealing to me.

What keeps you interested in insurance practice?

For one, I enjoy the constant variety of different issues, both insurance and whatever issues impact the underlying claim, that I get to learn about. I'd also have to say that my favorite class in law school was civil procedure and I am amazed at the issue-spotter civil procedure issues that come up in insurance litigation that keeps things interesting!

What is the most interesting insurance-related issue currently on your desk?

What constitutes a "securities claim."

How long have you been involved with ICLC, and how has membership impacted your practice?

I have been a member for about two years after speaking at an ICLC conference. I've really enjoyed meeting other members and learning about insurance issues outside of the D&O space.

What advice would you offer to young practitioners?

Be open to exploring new areas of the law that don't necessarily sound interesting on paper. I think there is a huge disconnect between what is theoretically interesting in law school and what is interesting in practice.

Outside of the practice of law, what do you like to do?

I discovered in the last six months or so that I really enjoy pilates classes.

Emily Hart
Wiley Rein LLP

Emily Hart *represents insurers in litigation involving professional liability, director and officer liability, and transactional liability insurance issues before state and federal courts and arbitration tribunals nationwide. Emily also advises and serves as monitoring counsel for insurers in connection with directors and officers and other professional liability policies.*

Be open to exploring new areas of the law that don't necessarily sound interesting on paper.

Perception... Continued from page 1

do not reach a settlement, arbitration allows parties to streamline discovery and motion practice, have input over who will decide their dispute, and bring finality to the dispute in an expedited, confidential fashion. In 2021 alone the American Arbitration Association – International Centre for Dispute Resolution (AAA-ICDR) administered insurance industry disputes totaling $881 million in claim amounts, with an average claim of $3.29 million.

Perception: You cannot arbitrate an insurance industry dispute unless the contract has an arbitration clause.

Reality: You can, and many do! Most cases that are arbitrated have a dispute resolution provision in the contract at issue, although the arbitration clause is still sometimes an eleventh-hour item in contract drafting and not always well drafted. Even when a contract does not provide for arbitration, however, parties can mutually agree – after the dispute arises -- to submit their dispute to binding arbitration. This requires agreement from all involved parties to submit the dispute to arbitration and agreement as to the parameters of the arbitration (such as locale, arbitrator selection process, governing law). Because arbitration is a party-driven process, parties can create a post-dispute resolution agreement outlining those agreed parameters and allowing an administering institution's established rules to fill in the rest. For example, parties can agree to the locale, governing law, and substantive law, and rely on institutional rules, like the AAA's Commercial Arbitration Rules, to govern the parameters of number of arbitrators, arbitrator selection process, discovery, dispositive motions, and form of award. Institutional rules, like those of the AAA, are time-tested and have been proven to work over the past 95-plus years.

The insurance industry ought to give more thought to post-dispute resolution programs that utilize arbitration. The AAA has worked with a national carrier to develop an optional post-dispute resolution program to help resolve first-party cases with policyholders. Feedback from both the policyholders and the insurance company highlight the benefit to both sides in resolving the dispute expeditiously through binding arbitration. Not only are these disputes resolved expeditiously, but the efficient resolution helps to preserve the ongoing client relationship between the policyholder and the insurer.

Perception: Arbitrators just split the baby.

Reality: Quite the opposite of some counsel's perception. A 2018 study by the AAA found no propensity for split decisions. In fact, the study concluded that the arbitrator ruled clearly in favor of one side or the other in an overwhelming majority of cases. This research was based on approximately 2,500 administered business-to-business commercial arbitration cases with monetary claims awarded in 2017.

In more than 94% of those cases, the arbitrator awarded amounts outside of the claim midrange, defined as 41-60% of the filed claim amount. A 2016 AAA survey of cases awarded in 2015 found that only 6.75% of awards fell in the midrange, and a 2013 survey of the same determined only 5.34% fell in the midrange.

Perception: Arbitration does not provide for appeal.

Reality: While one of the traditional benefits of arbitration is finality, appeals are possible. For example, the AAA has created a process for appealing awards to an appellate arbitral tribunal through the AAA Optional Appellate Arbitration Rules. The parties can specifically name the Optional Appellate Arbitration Rules in their clause, or they can later agree to use this process. The AAA Optional Appellate Arbitration Rules are designed to provide parties with a streamlined procedure that allows for a higher standard of review of arbitral awards than a court reviewing for vacatur would apply. The appellate arbitration rules anticipate an appellate process that can be completed in just three months –not adding years onto the life of the dispute as appeals often do in court. Pursuant to the rules, the appellate arbitration tribunal will review the award for errors of law that are material and prejudicial as well as determinations of fact that are clearly erroneous.

The following myth-busters illustrate how ADR can benefit the insurance industry in resolving disputes.

Perception: Ad hoc arbitration is cheaper than administered arbitration and will save the client money.

Reality: Possibly, but only if the parties are agreeable at every step of the process and require little administrative work from the arbitrator(s). "Ad hoc" typically refers to the process where the arbitrator, instead of an institutional provider, manages all aspects of the arbitration – handling administrative matters like scheduling and billing, as well as managing the case and deciding the case on the merits. Parties often forget, however, that arbitrators will bill their hourly rate to do administrative tasks, which can quickly add up. More importantly, in ad hoc arbitrations, parties do not have an administrator to handle problems and shield the parties and arbitrator from uncomfortable situations like supplemental disclosures, objections to the arbitrator, or a party's nonpayment of arbitrator compensation. Worse yet, if the parties hit an impasse as to arbitrator selection, they will most likely have to resort to court intervention to get the arbitrator appointed before the arbitration can proceed, defeating the efficiency aspect of arbitration. Last but not least, arbitral institutions are better equipped to provide a platform and protocols for securely handling confidential documents. In summary, providers that administer arbitrations should be thought of as an insurance policy for the arbitration. The providers' administrative fees, which only account for 1-5% of overall costs, ensure that the arbitral process is safeguarded and moving forward and help to protect the enforceability of the award.

Furthermore, what can make administered arbitration less expensive is the parties' commitment to adhere to the spirit of arbitration and not treat it like litigation. In other words, streamline discovery, eliminate motion practice and limit dispositive motions.

Another aspect unique to insurance industry arbitration is the idea that the case must be resolved by three arbitrators. In 2021, approximately 1/3 of the insurance industry cases administered by the AAA-ICDR, with claims of at least one million dollars, had one arbitrator rather than a three-arbitrator panel. Agreeing to use a single arbitrator can dramatically reduce the overall costs of arbitration and save time in bringing the case to conclusion. Parties can also agree to use the AAA Streamlined Three-Arbitrator Panel Option, which allows parties to move through the preliminary and exchange of information stages with a single arbitrator, usually the chair, and have the entire panel participate in the evidentiary hearing and deliberation.

Perception: Emergency or interim relief is not available in arbitration.

Reality: Both emergency and interim relief are available in arbitration. Arbitrators can grant interim relief if the movant meets its burden. Moreover, many arbitral institutions allow a party to request emergency relief under their rules. As long as the arbitration clause does not explicitly say that requests for emergency relief must be brought to court, a party may seek emergency relief in arbitration.[2] Under most provider's rules, such as the AAA Commercial Rule R-38, an emergency arbitrator will be appointed within one business day.

Perception: Most arbitration cases go all the way to award.

Reality: The majority of insurance industry arbitrations settle prior to award. In 2021, less than one-third of the insurance industry cases administered by the AAA went to award. Not only do the majority of cases settle, nearly 20% settled without incurring any arbitrator compensation at all.

Perception: On average, arbitration takes just as long as litigation.

Reality: For AAA-ICDR administered cases, the median time from filing to award in insurance industry cases in 2021 was 422 days, or approximately fourteen months. According to Federal Court Management Statistics, the median time from filing to trial in civil cases in the United States District Courts as of June 2021 was 28.3 months.

Perception: The world of insurance industry ADR faces the same diversity challenges as the world of litigation.

Reality: This one is true to some extent, and it is incumbent on all involved in ADR to work toward greater diversity. As ADR providers continue efforts to recruit diverse arbitrators with insurance industry expertise, parties can also further their D&I initiatives by using the ADR process and committing to selecting a diverse arbitrator. Unlike in the court system, parties in arbitration have input in selecting their arbitrator and can prioritize diversity as one of their selection criteria.

Endnotes

1 "Insurance Industry" includes insurance coverage and reinsurance cases.

2 AAA Commercial Rule R-38(a) states: "Unless the parties agree otherwise, the provisions of this rule shall apply to arbitrations conducted under arbitration clauses or agreements entered on or after October 1, 2013."

The Estoppel... Continued from page 5

to defend. *Id.* at 1112. The circuit court also rejected Nationwide's argument that State Farm was prohibited from raising noncoverage by failing to seek a declaratory judgment in the underlying action. *Id.*

On appeal, the First District Appellate Court of Illinois reversed both of the circuit court's holdings. First, the court found that the underlying complaint alleged facts outside of the automotive exclusion that potentially fell within the CGL policy's coverage. *Id.* at 1114. Namely, the First District concluded that the underlying plaintiff's allegation that Davis Concrete was negligent because it failed "to take adequate precautionary measures to ensure public safety, including the use of a flagman" was not encompassed by the automotive exclusion. *Id.*

Estoppel is a powerful sword for policyholders seeking to enforce their right to a defense under Illinois law.

Second, the First District held State Farm was thus estopped from raising the argument of noncoverage. *Id.* at 1117. The court began by summarizing the estoppel doctrine: "an insurer which takes the position that a complaint potentially alleging coverage is not covered under a policy that includes a duty to defend provision may not simply refuse to defend the insured." *Id.* at 1116. The court continued that if such an insurer fails to either defend the suit under a reservation of rights or seek a declaratory judgment of noncoverage, the insurer will be prevented from raising any policy defenses in a subsequent action if it is later found to have wrongfully denied coverage. *Id.* at 1117. The court emphasized that this is true even where those defenses would have otherwise been successful. *Id.*

Applying the estoppel principle to the facts of the case, the First District noted that State Farm both did not defend Davis Concrete and did not file a declaratory judgment until a year after the underlying case settled, which the court held to be untimely. *Id.* Since the underlying complaint alleged facts outside of the automotive exclusion that potentially fell within the CGL policy's coverage, State Farm's duty to defend was triggered. *Id.* Thus, since State Farm wrongfully failed to defend Davis Concrete in the underlying action, the court held it was estopped from raising noncoverage in the present suit. *Id.* The First District thus reversed the circuit court's decision and ordered State Farm to indemnify Nationwide for the $400,000 it contributed toward the settlement. *Id.*

Endnotes

1 *Nationwide Prop. & Cas. Ins. Co. v. State Farm Fire & Cas. Co.*, 208 N.E.3d 1106 (Ill. App. 2022).

North... Continued from page 6

Accordingly, the court found that the letter placed a burden on the insured to decipher inapplicable policy language that lacked a connection to supporting facts developed as part of Philadelphia Indemnity's investigation. *Id.* The court concluded that § 58-63-15(11)(n), requires that insurers provide a more thorough explanation than simply listing all potentially applicable policy terms alongside facts. *Id.* The court also reasoned that the insured did not need to show actual deception to prove a violation of § 58-63-15(11)(n), but simply had to show that Philadelphia Indemnity's denial letter had the capacity to mislead. *Id.*

Based on the reasoning of this decision, it is important that denial letters cite the correct policy language. The court's finding that Philadelphia Indemnity cited provisions of the policy that were not part of the policy, and had been either deleted or modified by endorsement, greatly influenced the court's determination that Philadelphia Indemnity's letter created confusion and violated § 58-63-15(11)(n). In addition, the court found that the denial letter created confusion because it initially granted coverage, but later denied coverage without adequately explaining why its position had changed. *Id.* at 50.

Insurers should pay close attention to the Denc, LLC decision because the court explained why Philadelphia Indemnity's denial letter created confusion, and thus, violated § 58-63-15(11)(n).

Moreover, insurers should also note that under N.C. Gen. Stat § 75-16, courts must treble damages if a defendant violated the UDTPA. Under North Carolina Supreme Court precedent, treble damages are limited to damages proximately caused[1] by a UDTPA violation, not damages on every claim that arises from a UDTPA violation. *Gray v. North Carolina Ins. Underwriting Ass'n*, 352 N.C. 61 (N.C. 2000). A plaintiff seeking treble damages must show that he or she suffered actual injury as a proximate result of a defendant's deceptive statement or misrepresentation. *Id.*

Under North Carolina law, a plaintiff has a right to treble damage when the same source of deceptive conduct supports both the breach of contract and the UDTPA violation. *Garlock v. Henson*, 435 S.E.2d 114 (N.C. Ct. App. 1993). The purpose of awarding treble damages to a plaintiff is to prevent a defendant from separating the breach of contract action from the conduct which aggravated the breach when the unfair and deceptive trade practices at issue resulted from one continuous transaction. *Johnson v. Colonial Life & Accident Ins. Co.*, 618 S.E.2d 867 (N.C. Ct. App. 2005).

In *Denc, LLC* the lower District Court for the Middle District of North Carolina denied an award of treble damages stating that *Denc, LLC* failed to show that Philadelphia Indemnity's UDTPA violation proximately caused its contract damages. *Denc, LLC*, 32 F.4th at 56. However, the Fourth Circuit found that the Middle District Court erred in evaluating proximate cause under the UDTPA. *Id.* at 53. Although the Middle District Court never addressed whether Philadelphia Indemnity's denial letter constituted a substantial aggravating circumstance accompanying its breach of contract, the Fourth Circuit found that it did. *Id.* at 52. The court stated that Philadelphia Indemnity's deceptive denial letter and related conduct could not be

separated from its breach. *Id.* In other words, the letter represented the denial, and so it was also the breach.

Based on the *Denc, LLC* decision an insurer should note the following key takeaways:

- To avoid a UDTPA violation, an insurer:

  (1) must provide a timely and reasonable explanation for its denial by demonstrating how the specific facts or applicable law relied on for the denial, relate to the insurance policy;

  (2) must provide a more thorough explanation for denying a claim than simply listing all potentially applicable policy terms alongside of facts;

  (3) should, when referencing provisions of the policy in its denial letter, ensure that the letter is citing the correct and applicable provisions; and,

- Lastly, insurers should be aware that a plaintiff has a right to treble damages when the same source of deceptive conduct supports both the breach of contract and a UDTPA violation.

Endnotes

1 Proximate cause is defined as an act from which an injury results as a natural, direct, uninterrupted consequence and without which the injury would not have occurred.

A Few... Continued from page 7

- Utilizing the expertise of Training Department leaders in facilitating difficult conversations;
- Conducting regular department and small group presentations highlighting various topics such as racism, stories of LGBTQ+ acceptance, immigration experiences, anti-bias training, adoption perspectives, caregiving, empowerment, empathy, and volunteerism;
- Encouraging and supporting facilitated conversations on social justice, racial equity, and other compelling D&I issues;
- An Ambassador Program, with an assigned liaison within each unit in the department who shares monthly topics, upcoming events, mentorship, and ongoing D&I education;
- Encouraging employee participation in Employee Resource Groups;
- Hosting presentations by external guests such as Michelle Silverthorn of Inclusion Nation, Executive Coach Sarah Oquist, CEO Leslie Davis of National Association of Minority and Women Owned Law Firms (NAMWOLF), and CEO and Founder Lloyd Johnson of Black In-House Counsel; and
- Actively participating in external D&I panels at conferences, legal association events, and with law schools.

The State Farm Law Department's D&I efforts are focused on three pillars: embracing a D&I mindset; focusing on recruiting and retention; and advancing diversity in the legal profession.

Q: How does State Farm grow D&I in its Law Department?

A: The State Farm Law Department utilizes a recruiting and retention model that introduces diverse candidates to employment opportunities in the department, provides leadership development for diverse associates, and supports a pipeline of new diverse talent in the legal profession. This includes:

- Casting a wide net for top talent through diverse job boards, external diversity organization job fairs, professional networks, and Historically Black College and University (HBCU) recruiting;
- A heightened focus on deepening relationships with diverse organizations and HBCUs;
- A robust onboarding process and heightened talent development opportunities using an opt-in approach for leadership development;
- Participating in the Leadership Counsel on Legal Diversity Fellows and Pathfinders programs, providing high potential employees with leadership

training, networking, mentoring opportunities, and exposure to other corporate General Counsel and Law Firm Managing Partners;

- Various pipeline initiatives, ranging from K-12 presentations to post-graduate connections, such as BarBri and law school writing program support, and high school law class engagement;
- Financial support to organizations such as NAMWOLF for law student scholarships, the National Asian Pacific American Bar Association (NAPABA) Law Foundation to support a mock trial program, and to the Congressional Black Caucus Foundation which helps minority students obtain college degrees;
- Focusing heavily on pro bono work, supporting a number of legal clinics; and
- Sponsoring Equal Justice Works fellows. For example, State Farm sponsored a 2020-2022 fellow in support of the Florence Immigrant & Refugee Project in Arizona. In September 2022, State Farm also sponsored a fellow in support of a project to create a community-informed response to the legal and social service needs of displaced Afghans in Georgia.

Q: Regarding your third pillar, how does State Farm advance D&I in the legal industry?

A: Recognizing the limited progress made throughout the legal profession, one of the State Farm Law Department's top priorities remains advancing diversity in the legal profession through active support of external organizations and increasing our use of diverse firms and lawyers in our retention of counsel. This is reflected through:

- Signing on to American Bar Association (ABA) Resolution 113, "creating a legal profession that reflects the public it serves,"
- Serving as a member of the Leadership Counsel on Legal Diversity through our General Counsel,
- Supporting the work of the ABA's Commission on Racial and Ethnic Diversity since 1993, including serving as a key sponsor of the ABA's Spirit of Excellence Awards for over a decade,
- Participating in the Inclusion Initiative, a Fortune 500 collaborative committed to a measurable increase in the retention of minority and women owned law firms,

- Maintaining a strong relationship with NAMWOLF where member firms present CLEs to the mutual benefit of their attorneys and State Farm,
- Participating on NAMWOLF's Advisory Council, with department attorneys serving as in-house resources for various committees, and assisting with the NAMWOLF Guide to Promoting Diversity and the Legal Department D&I Maturity Model,
- Presenting department team members as speakers at NAMWOLF events, including State Farm's General Counsel participating in a panel discussion at a NAMWOLF annual meeting,
- Hosting the Rising Star Academy, featured in the Minority Corporate Counsel Association (MCCA) 2020 Winter Edition of the Diversity and Bar Magazine. The Academy introduces diverse counsel to State Farm's business, shares leadership lessons, and enhances business acumen. Participants interact with in-house counsel, fostering a pipeline for diversity in the supply of legal services,
- Receiving the NAMWOLF Diversity Initiative Achievement Award in 2018 and again in 2021,
- Actively supporting a wide range of diverse legal organizations and bar associations, such as HNBA, IILP, LGBT Bar, MCCA, NAPABA, NAWL and NBA. Law Department attorneys serve as relationship managers for each of these organizations, and
- Contributing pro bono services to underserved constituencies.

Q: Why do insurers need diverse counsel? And What are the benefits of diverse counsel?

A: D&I is necessary to achieve the best outcomes in our business and industry. The insurance industry serves all constituencies. Fairness, opportunity, and collaboration are essential to serve all communities. State Farm is conscious of the benefits realized when individuals of different backgrounds and experiences participate, which serves these communities well.

Customer input and preferences also clearly demonstrates their desire to do business with those with similar backgrounds and experiences, providing insurance professionals with a deeper understanding of their needs, and sharing a common perspective. Since the insurance industry serves all communities, it needs to reflect those communities to best serve them.

Q: How does State Farm know outside counsel is taking D&I seriously?

A: The State Farm Law Department does this in several ways:

- Reflecting our ongoing commitment to diversity through our written retention agreements with outside counsel, which State Farm has been doing for over 25 years;
- Considering D&I survey data as part of our law firm procurement process;
- Surveying outside counsel annually to gather demographics, their approach to origination credit, and D&I actions internally and externally;
- Conducting conversations with our top retained outside law firms to encourage further diverse growth; and
- Acknowledging outside counsel's pro bono contributions to underserved constituencies.

Our commitment in engaging diverse law firms is further demonstrated in our regular interaction with diverse firms, and reflected in our legal spend.

Q: What is something a reader can do today to further D&I in their organization?

A: Advocate for D&I goals, promote D&I initiatives, demand D&I be embraced by legal service providers to your organization, measure the impact of D&I efforts, and engage in D&I activities. We, our customers, and our employees benefit from these efforts. It's a changing environment, labor pool, and customer base. Organizations that adapt to these changes, and who evolve and adopt D&I are more likely to rise to the top of the industry and remain successful.

From the tone at the top of our organization and throughout the leadership ranks, State Farm is proud of the high-level of engagement of our team members, and strong company support of various diversity organizations, as we continue on this D&I journey.

Calendar

April 10-12, 2024	**Motor Vehicle Product Liability Conference** Contact: Janet Hummons – 312/988-5656 Yasmin Koen – 312/988 5653	**Omni Scottsdale Montelucia** Scottsdale, AZ
April 11-13, 2024	**Toxic Torts & Environmental Law Conference** Contact: Theresa Beckom – 312/988-5672 Sara Lossett – 312/988-6372	**Omni Scottsdale Montelucia** Scottsdale, AZ
May 1-4, 2024	**TIPS Section Conference** Contact: Janet Hummons – 312/988-5656 Theresa Beckom – 312/988-5672	**Loews Hollywood Hotel** Hollywood, CA
May 22-24, 2024	**Fidelity & Surety Law Spring Conference** Contact: Janet Hummons – 312/988-5656 Yasmin Koen – 312/988 5653	**Estancia La Jolla Hotel** La Jolla, CA
August 2-4, 2024	**ABA Annual Meeting** Contact: Janet Hummons – 312/988-5656	Chicago, IL
September 19-20, 2024	**Aviation Litigation Conference** Contact: Theresa Beckom – 312/988-5672 Sara Lossett – 312/988-6372	**Ritz Carlton Pentagon City** Arlington, VA
September 25-27, 2024	**FSLC Fidelity Fall Conference** Contact: Janet Hummons – 312/988-5656 Yasmin Koen – 312/988 5653	**Philadelphia Marriott** Philadelphia, PA
October 16-19, 2024	**TIPS Fall Meeting** Contact: Janet Hummons – 312/988-5656 Theresa Beckom – 312/988-5672	**Royal Sonesta Kauai** Kauai, HI

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