CARLTON FIELDS

Q&A With Carlton Fields' Dave Leonard

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Law360, New York (May 20, 2013, 2:14 PM ET) -- Dave Leonard, a shareholder with Carlton Fields, has experience in civil litigation, arbitration and negotiation of disputes. He has handled cases involving general commercial litigation; complex insurance and bad faith litigation; reinsurance arbitration; engineering and other technically oriented disputes; fiduciary liability; and other professional liability litigation. Leonard also has experience in intellectual property disputes, the defense of companies in class action litigation and the prosecution and defense of commercial contract, fraud and fiduciary claims. **Q**: What is the most challenging case you have worked on and what made it challenging? **A**: Cases asking for immediate relief are extremely challenging because much is at stake, and time truly is of the essence. One that comes to mind involved a Midwestern insurer that had decided to enter the high-risk area of trucking insurance through a managing agency in Atlanta. Over the course of two years, losses to cash flow exceeded several million dollars, much of which related to premiums that should have been collected but were never remitted to the carrier. I received the case on a Friday morning. After a four-hour conversation with the representative of the company, and his promise to deliver two boxes of documents the next morning, we concluded that the best approach was to freeze those accounts with client funds over which the managing agent had fiduciary obligations. We filed a motion for a temporary restraining order late Friday afternoon. We worked Saturday until 3:00 a.m. Sunday and then reconvened at 9:00 a.m. until 10:00 Sunday night, preparing for the hearing Monday morning. After over an hour of argument, the judge agreed to grant our client relief but did not wish to hear the lawyers argue the details for six more hours. He placed us both in the temporary holding cell adjacent to the courtroom with a U.S. marshal at the door and told us to stay there until we had worked out a term sheet that would protect our client's interest while not interrupting the business of the managing agent any more than was necessary. After several hours in the cell, we were able to reach an agreement that guided the clients through a difficult several months and ultimately to resolution of the case. **Q**: What aspects of your practice area are in need of reform and why? **A**: Litigation has become very expensive and specialized. Errors

are not tolerated well, and expectations are high. Experience has become an entry requirement. Perhaps intern or apprenticeship programs are needed. But under our current system, significant talent is going to waste as students graduate from law school and, unable to find jobs, leave the profession. **Q**: What is an important issue or case relevant to your practice area and why? **A**: Most of my practice deals with complex commercial insurance contracts, typically negotiated by brokers representing sophisticated parties. In many states, however, most insurance law develops in cases involving lower-limit consumer policies. As a result, assumptions that courts may apply to consumer policies can affect the result in sophisticated cases. For example, many courts view automobile policies as adhesion contracts that are not subject to negotiation and apply rules of interpretation against insurers as the drafters. Yet today, almost any contract can be negotiated. More to the point, the majority of commercial contracts insuring public companies, their directors and officers and other sophisticated parties are subject to extensive negotiation. Assumptions routinely applied by courts to 10,000 out of 20,000 automobile policies should not be applied to a large commercial contract. Part of the job of a lawyer representing the insurance industry is to discern when this is happening and attempt to guide the court (without offending) towards the true intent of the parties. **Q**: Outside your own firm, name an attorney in your field who has impressed you and explain why. **A**: I am going to name two because one came to me when I read the question, and then the second became obvious after I answered your last question. The first is Steve Susman of Susman Godfrey in Texas. He did a presentation at an annual American Bar Association conference in Atlanta in the late '80s that really made an impression. I try to attend some Continuing Legal Education conferences that are not in my core practice area because it exposes me to different approaches and ideas. Susman was doing a presentation on the approach he used to convince a jury that the billionaire Hunt brothers had been enticed by the banks to borrow too much money, allowing the banks to profit when, after some cash flow problems, the banks called the loans and foreclosed on many of the assets. It was in the early days of lender liability litigation, and the creative approaches he used in questioning witnesses and arguing for their liability were instructive and prepared me for what ultimately was to come in suits against insurers under their contracts — although it was over a decade before we started to see that kind of creative argument in insurance cases. The other lawyer is the one mentioned below, Ed Conerly, a defense lawyer in Birmingham, Ala. Trying a case against Ed was like attending an advanced CLE seminar. No matter how strong your witness, or your evidence against his, Ed would find a sentence or a phrase that would minimize the impact. He also had a remarkable ability to take a witness down the road through questions that seemed harmless at the time (causing one to relax), but before you knew it, he had moved them across the spectrum and was knocking down all of their points. I still use phrases in arguments that I learned from Ed in the '80s. **Q**: What is a mistake you made early in your career and what did you learn from it? **A**: I was trying a case in Alabama seeking damages from a natural gas explosion. One of the issues was a process called graphitic corrosion. It occurs to cast iron pipe over time as the iron leaches out of the pipe over many decades, leaving a gas-tight but very brittle carbon shell, which, when it breaks, results in what the gas industry calls a “blowing leak.” As one would guess from the title — that is a bad one. I wanted to demonstrate to the jury how a pipe that appeared solid had lost the iron that

made it strong. My metallurgical expert had a small magnet on the end of a pointer that he used to show that as one pushed the magnet down the pipe to the affected area, it would fall off when there was no more iron available to the magnet. At trial, the expert did not want to use the magnet from his pen (for fear that it would be marked as an exhibit, and he would lose it) so he bought refrigerator magnets from the hardware store. They were much stronger and did not fall off the pipe during testimony as the magnet had done during preparation. The expert finally flicked the magnet off with his finger, causing great laughter among the jurors. At the next break, Ed Conerly, one of the best defense lawyers I've ever seen in trial, put his arm around me and said, "Dave, every lawyer attempts a live experiment at trial once." *The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

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