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Litigator of the Week: From Zero to Hero in Seven Days

By **P.J. D'Annunzio**

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It all comes back to square one.

That's how Gibson, Dunn & Crutcher appellate litigator Theodore "Ted" Boutrous Jr. describes his strategy for handling appeals—and it helped Travelers Insurance dodge a \$36 million bullet.

In successfully arguing to the U.S. Court of Appeals for the Third Circuit that Travelers shouldn't have to pay for General Refractories Company's slew of asbestos claim-related settlements, Boutrous applied commonsense, first-day of law school contract class knowledge to carry the day.

"I went to those first principles" said Boutrous, who is the global co-chair of Gibson Dunn's litigation group. "It's important in many cases to go back to the basics because that will be the dispositive issue, some fundamental principle of law."

The win was well-timed. Boutrous was on the losing end last week, when The Lit Daily crowned solo practitioner Howard Bashman (creator of the "How Appealing" blog) Litigator of the Week for a \$55 million appellate win in Pennsylvania against Boutrous' client, Honda.

This week, the tables turned, with Bashman, who represented General Refractories along with a team from Offit Kurman, coming up short against Boutrous.

Boutrous argued that the language of Travelers' policy with General Refractories didn't cover asbestos claims, plain and simple. The other side attempted to sway the court by arguing that the denial of coverage section for claims "arising out of asbestos" didn't mean it excluded coverage for claims related to asbestos-containing products.

The three-judge Third Circuit panel didn't buy it, and sided with Boutrous.

In the Third Circuit's opinion, Judge Thomas I. Vanaskie wrote that the exclusion's meaning was clear.

"While the district court engaged in a thorough analysis of the breadth of the term 'asbestos,' its focus was misplaced," Vanaskie said. "The rest of the language at issue—'arising out of'—has an unambiguous legal meaning that renders any uncertainty concerning the meaning of the word 'asbestos' immaterial."

Pointing to the 1967 Pennsylvania Supreme Court case *McCabe v. Old Republic Insurance*, Vanaskie said, "Pennsylvania



Photo: Diego M. Radzinski/ALM

Theodore Boutrous Jr.

courts have long construed the phrase 'arising out of'—when used in the context of an insurance exclusion—to [m]ean[] causally connected with, not proximately caused by."

No matter the circumstances, Boutrous keeps his cool. That was especially important when arguing the Travelers case before the Third Circuit. He specifically refuses to read too much into the judges' gestures, tone, and comments.

"I have a cardinal rule: when I'm arguing, I don't get too happy and don't get too sad," Boutrous said of his strategy for staying focused.

With that being said, the Third Circuit was not an easy court to deal with.

"It's a welcoming environment but they come at you on all sides," Boutrous said. He added that the judges "don't really tip [their] hand."

But intense preparation and question-and-answer sessions helped Boutrous ready himself for his appearance before the federal appeals court.

"I have facts on separate, discrete one-pagers I study before argument. I am also a big believer in moot courts. Until you start getting grilled by other lawyers who are acting as judges, you are really not prepared for the argument," Boutrous said.

Contact **P.J. D'Annunzio** at PD'Annunzio@alm.com