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Special Arbitration Option Offers Relief Amid Nuclear Verdicts

By **Jennifer Mandato**


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Law360 (October 2, 2025, 6:37 PM EDT) -- Rising jury verdict values continue to put pressure on excess liability programs, an element of what Covington & Burling LLP partner Allan Moore refers to as "the extra digit problem," but with many of these policies involving what is known as Bermuda Form, carriers have found an alternative to the American jury system.

The Bermuda Form dictates that coverage disputes must play out in mandatory, confidential arbitration that typically takes place in the form's namesake country or in other international venues like London. According to Covington, this can present a unique challenge for coverage attorneys as they and their clients typically then have to rely on barristers to present their cases.

As an international arbitration and insurance coverage attorney, however, Moore has spent 25 years handling Bermuda Form claims and arbitration. Here, Moore breaks down the strain excess liability programs are facing and what role the Bermuda Form plays in the current insurance landscape.

How have excess liability policies evolved to keep pace with nuclear verdicts and social inflation in general?

I think they're not evolving, actually. I think that's part of the challenge for the Fortune 500 and other corporate policyholders that I represent. In the last five to eight years or so, I would say that we've seen what I refer to as "the extra digit problem," where what used to be a seven-figure exposure is now an eight-figure exposure; an eight-figure exposure is now a nine-figure exposure; nine is 10. There's really been an explosion.

I think the corporate world needs, and is looking for, more limits. What we're seeing to address that, and it's inadequate in my view, are more general liability limits being written offshore. You're seeing more Bermuda Form programs. Virtually every major company that I represent has so-called Bermuda Form coverage, either at the top of their excess liability program or throughout their program.

What challenges, then, could that create for carriers based within the United States that would otherwise be issuing these policies?

There's a need for capacity. I think that much of the American market still prefers domestic coverage and insurers that offer that, in some ways, have an advantage. But I think that it's increasingly difficult

for corporate policyholders to fill out their programs without substantial offshore insurers and limits, whether that be in London or Bermuda or elsewhere.

With concerns surrounding nuclear verdicts and their impact on excess liability programs, do you think we could see carriers become more selective in the coverage limits they offer?

I think we are seeing that the carriers are becoming more selective in two ways. One is that, I think, many excess insurers are offering fewer or smaller limits at renewal. They're only willing to take a smaller portion of a given layer or for a given policyholder than they may have in the past. Second, we're seeing, in some circumstances, brokers being unable to fill out full layers or as much coverage as policyholders want. In some cases, policyholders are having to take a portion of risk within the layers of their tower, and not just in the self-insured retention at the bottom of the tower.

For example, in the earlier days when I did this work, you might have, hypothetically, 10 insurers offering maybe $50 million or more of limits in whatever layer they participate in. Now, you're seeing the policyholder may need to have 30 or more insurers in its program, and they're taking limits of $20 million or less per layer.

Many commercial liability policies for these corporate policyholders include a so-called Bermuda Form, which requires mandatory, confidential arbitration outside the United States. Why is that?

I think the main reason is that insurers have wanted to avoid American juries. They also have tax-related reasons and administrative reasons for not wanting to subject themselves to U.S. jurisdictions, but I think a big part of it was the desire to be in situations where their fate is going to be decided by arbitral tribunals and not subjected to the American jury system.

That has created, I think, two challenges. One is that because they're confidential arbitrations, outside of the handful of lawyers like myself who do a significant amount of this work, nobody knows the results of these cases because they're unreported. The second is, because these arbitrations typically are not administered by arbitration institutions like the ICC, the AAA (the American Arbitration Association) or the LCIA (London Court of International Arbitration), these tend to be what are called "non-administered" arbitrations. There are relatively few lawyers who know the rules or the "soft law," the customs and practices, that guide the procedures in these cases. So, some people are starting these cases without knowing the rules.

You have a unique position as both an international arbitration lawyer and a coverage lawyer. What advantages do you think the combination of these roles has afforded you in your work with policyholders?

I think it's both of those things: knowledge of what arguments tend to work in these cases and knowledge of the procedure and processes. Although the cases are unreported, because I do a fair amount of this work, I have seen a lot of the arguments that have been presented over the years and see how they play in this setting.

Relatedly, the second point is having familiarity with the customs and practices of how the international arbitration community, particularly in London but also elsewhere, operates.

For me, it's become a fortuity. When I started my practice about 35 years ago, I was always interested in the coverage work. But I also wanted to do international disputes work because I wanted to do things

that were cross-cultural. The one thing that's really interesting about arbitration, which I figured out as about a sixth-year associate, is that arbitrations tend to go to trial a lot more frequently than domestic commercial litigation in the U.S.

What happened for my practice, which was a happy fortuity, is that I thought I'd have to live these two professional lives to do both of these things. But I grew up in my practice with this trend where more and more insurance coverage matters were going into arbitration. The two skill sets ended up aligning very happily and fortuitously for me.

You mentioned a lot of the work you do is with Fortune 500 companies. Is that the typical audience for policies with Bermuda Forms?

Now, the prevalence of these kinds of policies and programs means that it's a wider target audience, but the core of the market is still very much the Fortune 500.

I would say that the profile is twofold. One, it's companies that have high environmental exposures or whose operations are at high risk of accidents or explosions, so companies like those in the energy sector, railroads and certain types of manufacturers. The other category are companies with high-risk product liability exposures, so pharmaceutical companies, chemical manufacturers and the like.

Although Bermuda Form arbitrations are confidential, are there any trends you're keeping tabs on that you think policyholders should be aware of?

One thing that's very interesting is that we're starting to see the arbitration provisions in these policies migrate over into the property insurance, D&O and E&O space.

The other thing that we are seeing, and this is always true, is gaps and inconsistencies in a tower that are sometimes quite material. People will say that the market's tight and insurers are unreceptive to coverage enhancements, but people have always said that. That's often true, but that doesn't mean that insurers are not receptive, or brokers can't be helpful in working with coverage counsel to eliminate gaps, inconsistencies or irrational language, or to include endorsements that help ensure that the intended coverage is provided.

I think that the most sophisticated companies in the insurance space these days are realizing that it doesn't cost very much to engage their coverage counsel at renewal, to work with their brokers and ensure that their programs are as buttoned up as they intend them to be.

Then, I'd say, that within the actual dispute, the actual arbitration, there are certain kinds of defenses that insurers who may force a policyholder to arbitrate a coverage issue have tended to run over the years that we now know and have been able to show are not very good defenses.

For example, in the environmental space, it used to be quite common for insurers to argue under these programs that there's no coverage for environmental response costs, which are a huge part of a policyholder's loss, given the strict liability that the environmental laws in the United States impose for environmental damage and pollution. Most of these programs, for companies that have that exposure, do provide pollution coverage through blended pollution provisions that are not outright pollution exclusions.

In the product liability space, sometimes the insurer's trying to invoke provisions that don't relate to the

product liability coverage to try to bar the coverage. But these policies tend to provide quite extensive product liability coverage. One of the founding reasons for the Bermuda Form was to provide broad excess product liability coverage.

Looking ahead, based on the challenges the insurance industry is facing, do you anticipate any changes to the Bermuda Form?

I think the Bermuda Form has to evolve, like everything, to be able to stay current. I think the dispute resolution provisions themselves will be tweaked, and I think that there are insurers that are receptive to that.

One of the best compliments I ever received, which was entirely inadvertent, is that I had a client ask me to review an endorsement that an insurer sent to them indicating that it was a standard new enhancement. When I looked at it, I realized that it was language I had written several years earlier for another client. I think that's a healthy and happy thing when you see the market respond favorably to suggestions that, again, are hopefully in the interests of both policyholders and insurers.

How prevalent will Bermuda Forms remain as the insurance industry looks to get a handle on social inflation?

I think that they are increasingly prevalent because I think that's the way that the market and brokers are finding the limits that they need, that the policyholders need.

As I said earlier, I think in some cases for many policyholders that is translating into more insurers each offering smaller denomination limits.

I don't see this market as going away. I see it as becoming more important. It's very important for policyholders and their brokers to consult with their coverage counsel at renewal, not only at the point of claim, to make sure that they're getting the best that they can for themselves.

The second thing is there's a persistent challenge in the corporate world of a combination of a slow response and a lack of coordination on the insurance side when a major loss occurs. For example, if there's a major tort exposure, product liability, or industrial accident, you can bet that the company at the heart of that will lawyer up quickly on its defense effort and often will do so quite effectively. But many companies are still quite slow and uncoordinated on the insurance side, and they get to that piece of their response very late.

At that point, we, as their counsel, are often playing catch-up and trying to deal with things that could have been done maybe a little more effectively earlier on.

The most sophisticated and effective companies realize that reducing exposure in the face of a major tort is a combination of (a) an effective defense and (b) an effective coverage effort. Those two things need to be coordinated from the get-go. It really is night and day comparing policyholders who do that well in the face of a major exposure and those who do not.

--Editing by Amy Rowe.
