



**Lowenstein Sandler's Insurance Recovery Podcast:
Don't Take No For An Answer**

**Episode 45:
Insurance Renewals: Know When to Hold ' Em, Know
When to Walk Away**

By [Lynda A. Bennett](#) and [Joseph M. Saka](#)
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Lynda Bennett: Welcome to Don't Take No For An Answer. I'm your host, Lynda Bennett, chair of the Insurance Recovery Practice Group. And today, I'm very pleased to be joined by two guests, to talk about something that every company goes through on a regular basis, and that's the renewal of their insurance program. So I've got two folks who are knee-deep in handling these issues for companies, Jennifer Sylvester, who is a regional leader for financial institutions for Alliant Insurance Services. So welcome Jennifer. Thanks for joining us.

Jennifer Sylvester: Thank you. Thanks Lynda for having me.

Lynda Bennett: And then I'm very pleased to welcome my friend and colleague, Joe Saka, who is senior council in the Insurance Recovery Group here at Lowenstein. So Joe, thanks for joining us as well.

Joe Saka: Thank you for having me. It's great to be back.

Lynda Bennett: So today, we're going to talk about what are the things that companies can and should do, when they're preparing for a renewal of any of their insurance policies. This is going to be one of our How To Be The Best And Brightest In The Class. So let's start with the basics, Jennifer, what's the right time for a company to start the renewal process with their insurers?

Jennifer Sylvester: Sure. Well, first and foremost, clients and their brokers should be in constant contact throughout the year. But typically, as a guide, we start the renewal process about 120 days in advance of the renewal. And that is-

Lynda Bennett: Wow, you're barely finished and you got to start again?

Jennifer Sylvester: Yes. The clients love it. They love it. That includes sending the clients the required applications, information from last year so it's not as burdensome for them to fill out the new apps, a list of additional documents that the insurers typically require. But I'll say, within the current market environment, and

specific challenges on certain classes of business, and our coverage line, we've even pushed that date out farther, and have started the renewal process for some of our insureds 140 to 160 days in advance.

Lynda Bennett: Holy smokes.

Jennifer Sylvester: Yeah.

Lynda Bennett: You literally are not finished?

Jennifer Sylvester: Yeah.

Lynda Bennett: You're never finished, right?

Jennifer Sylvester: Yeah. And that's only one part of the process, because we also want to strategize with our clients. So we're also asking them to put some time on their calendar to speak to us, so we can make them aware of what's going on in the market, any appetite changes at the insurers, who we think may be prospective alternatives. And we use this session, the strategy session, for them to think about how they tolerate risk, whether it's pricing, retention, structure. And then using our knowledge of what's going on in the marketplace. And then trying to align those goals to achieve a good renewal, a good result.

Lynda Bennett: So one of the questions that Joe and I regularly get from our clients is, "Well, I've been with my company, my insurance company for a long time. Why do I need to bother with the renewal process in talking to other carriers?" So Jennifer, what's your take on when and how often companies should competitively bid their renewal programs?

Jennifer Sylvester: Typically, in this environment, I believe every renewal should be marketed. There's a lot that goes into it, right? The tenure of the relationship, claims history, what the insurance market looks like, what type of market cycle we're in. I think historically, there was some sort of bad connotation with marketing a renewal every year. That an underwriter is seeing submission year after year, and it's coming across their desk, and then they're not really taking a good look at it.

Jennifer Sylvester: But nowadays, from a broker perspective, you're doing your client a disservice if you aren't fully marketing, or at least strategically marketing a renewal. And putting in those phone calls to carriers about an opportunity at risk, and really ... Because underwriters are moving more than I've seen in my 20 years in the industry, and appetite at insurers are constantly changing. So I think marketing renewal is okay. There are a couple circumstances you shouldn't, that we can get into now, or I can wait.

Lynda Bennett: Let me kick that one over-

Jennifer Sylvester: Yeah.

Lynda Bennett: ... to Joe. So through the coverage lawyer's lens, Joe, are there circumstances where it's better off for a company not to move carriers on a renewal? What are some of those circumstances?

Joe Saka: Yeah, the main ones come up when you're talking about claims-made coverage, where the policy's intended to provide coverage for a claim made against the insured during the policy period, regardless of when the conduct took place. But oftentimes, when we find policy holders moving carriers, we see insurers try to add retro-active dates, or prior acts exclusions to bar coverage for claims involving X taking place prior to a certain date. And that can be very dangerous, because then you could be left with no coverage under your prior policy, or under your current year policy. So that's one circumstance where you really need to be careful. And I think another circumstance, if you have multiple lines with one carrier, you need to be careful before shifting certain coverage away from that, because you could be left with a gap in coverage.

Lynda Bennett: Yeah, I think that's true, and I oftentimes will guide a client away from moving their coverage if they've got a large open claim. Just generally, when you're sitting at the mediation, the carrier understanding that they're going to be able to start to recoup some of what they pay in collecting future premiums may be an important card to have in your deck. So certainly, if you've got open claims, significant claims, that may not be the best time to move the program away from the carrier. So Jennifer let's get into the nuts and bolts a little bit of the underwriting process. So first question, who from the company should participate directly in the underwriting and renewal discussions with the insurers?

Jennifer Sylvester: Could depend on the line of coverage. I think, certainly a GC should be involved, possibly HR, the CFO, for cyber, you're going to want to engage an IT, or a CSO. It really depends. If cost of corrections is involved, you want to have a head trader, who's aware of what's going on day to day and any errors involved. I think it's really a team approach, because you want the right individuals answering the right questions.

Lynda Bennett: Right, and one of my favorite taglines is, "Mom always said, 'You don't get a second chance to make a first impression.'" And I've seen that particularly come to fruition in the cyber space. If you can't put somebody in front of the underwriter that shows you have a good command of where your documents are, what your security measures are, that you're really on top of that, you may not find yourself getting a quote from that carrier. Or it might be a much higher price point to secure that coverage. So what are some of the dos and don'ts when you're actually on that call. Joe, for example, what do we have to do to preserve privilege, when carriers want to get into the weeds on some of the open litigations, for example, they may have?

Joe Saka: That's a really dicey question, because you want to provide the information that the carriers need, while avoid having to disclose information outside the context of a non-privileged relationship. So that could require a Common Interest Agreement with the insured before you share the information. I think you also want to be cautious about what you're sharing. You should probably

only share the absolute essential, and the insured should really have a reason for the information that they're trying to obtain.

Lynda Bennett: Jennifer, do you have other tips of the dos and don'ts?

Jennifer Sylvester: Yeah. I mean, just to add on to that, if you are engaging non-incumbent insurers who may not be aware of litigation history, it's every underwriting meeting, it's a question on the agenda, you want to keep it high level, similar to what Joe was saying. And the underwriters are going to ask for, to consider a risk, a loss run anyway. So they're going to see the matter, what the payout was, but yeah, you want to keep it high level, and not get too granular, and say things you shouldn't be saying.

Lynda Bennett: Well, and I do want to note, Jennifer is a good friend of ours, as are many insurance brokers, but clients need to understand that the broker isn't in the privileged circle either. So when you're doing those strategy sessions Jennifer was alluding to earlier, certainly giving information's important, and fully and fairly disclosing to the extent that you can, but you've really got to keep your eye on privilege issues, particularly for open claims. And even giving that information to the broker may lead you to a waiver of privilege assertion there. So keep careful eyes on that. Let's pivot over to what most of our clients dread, which is filling out the application, and let's get into how do you balance providing the insurer with enough information, against this becoming a full-time job that you're spending 145 days gathering and responding to the information that's asked for. So Jennifer, what are some of the rules of the road that you share with your clients on that point?

Jennifer Sylvester: Well, certainly, you don't want this process to be overly burdensome. So you want to do what you can to help them in the process. Certainly for a public company, purchasing D&O, for example, the application should be waived, all the information is publicly available. You should really just be having an underwriting meeting, or a call with the incumbents and non-incumbents. Cyber market is challenging, as we've noted. So insurance carriers are not only requiring application, but they want a supplemental ransomware application.

Jennifer Sylvester: I think getting the information to the client ahead of time and not making it piecemeal, and speaking to the underwriter beforehand, "This renewals coming up," and this is before you even send the application, or schedule your renewal strategy with the client, broker should be having the conversation with the incumbent carrier, of what's really required? Is the supplemental application going to be required? And getting that all to the client in one full swoop, and not having it piecemeal, back and forth with questions. If the information's not public, they're always going to want to see financial statements. So they know how the company's doing from a financial perspective, but any information that I can obtain on my own without burdening the client, I always make sure I do that. And every broker should.

Lynda Bennett: That's great. So Joe, let's walk through some of the downside risks of incomplete or non-disclosure. When we talk to clients, sometimes they have concern. Like, "I don't know if this is enough information. I don't know if I

actually have to share this information in response to this question." What happens when you don't provide full and complete disclosure?

Joe Saka: Yeah, it's a really dangerous situation, because we've seen an increasing trend in the insurance industry to either deny coverage, or seek to rescind the policy, if they contend that there was a misrepresentation in the policy application. So if there's a black and white answer, it needs to be answered correctly. And the other tip that we always recommend, particularly in the D&O context, is you want to try to get a non-rescindability, or severability provision, to protect innocent directors and officers who had no information regarding the misrepresentation or undisclosed conduct.

Lynda Bennett: Great point. And for our listeners rescinding the policy, let's just translate that, break it down into plain terms. You completely forfeited coverage for the policy that you paid for. You'll get your premium check back, but you're not going to get any coverage if the carrier has the ability to show that there were material misrepresentations in that application. So the downside risks are very severe. So give careful consideration to that. All right, Jennifer, so let me ask you the flip side of that coin though. If the client does make disclosure on that gray area, really as a practical matter, what's the worst case scenario that comes out of making that disclosure?

Jennifer Sylvester: Yeah, I mean, from a claims perspective, the carrier could deny part, or all of a claim, that the client may file. It's stating there was a material misrepresentation in the application

Lynda Bennett: And when our clients make that disclosure though at the front end, what I've seen carriers do is say, "Okay, that potential claim, I'm putting a claim-specific exclusion on that policy. So we're still going to issue you the coverage, but that potential claim that you think is lurking out there, we're just not going to agree to cover that one particular thing." Right.

Jennifer Sylvester: Yeah, but that should only be with if you're moving insurer, and you want to make sure you've noticed that to your current insurer.

Lynda Bennett: Okay. Other than what's asked for in the application, Jennifer, is there any additional information or documentation that companies should volunteer to provide to the carriers?

Jennifer Sylvester: Some information is they, carriers will ask about perspective acquisitions and things like that. And clients, in some cases, can't disclose that information. Certainly, if we're talking about a hedge fund, and they're thinking about launching a new strategy, that's going to be maybe outside of that underwriting appetite with their incumbent insurer, they should mention that. If they're a long-short, and now we're doing PE or something, that should be mentioned. And that really isn't confidential information. But I think it's important to be as transparent as possible, because it is a relationship that you're building with your insurer and the client, and the carriers really appreciate transparency. They don't like surprises, especially if it's something they, a client could share.

- Lynda Bennett:** All right. Great. So let's just touch on who should be involved in completing the application, and putting that documentation package together.
- Jennifer Sylvester:** I mean, similar to the individuals I named before, right. GC, because there may be a claims question, which really you shouldn't have any warranties if it's a renewal. HR, if it's employment practices type of application. CFO, if there's financial type questions. IT, CSO. Yeah, I think it really depends on the question. Again, similar to the meeting, it should be those individuals who could best represent on behalf of the insured, the appropriate answer.
- Lynda Bennett:** Joe, are there things that companies should be thinking about in terms of what representations are actually being made in the application and by whom? You mentioned a few minutes ago, the importance of getting a severability provision in your policies. But are there things that you can do in that application, to narrow the scope of the representation, and on whose behalf the representations are being made?
- Joe Saka:** Yeah. So I think you want to look for a definition of, "Applicant," that's very narrow, as opposed to one that's very broad. Oftentimes we do see, particularly in the management liability space, that the insurer is attempting to make the disclosure of one insured on behalf of all directors. So under those circumstance, you want to try to make sure that the director is inquiring, or whoever fills out the application, is inquiring of the other directors before making that representation. And I know for our malpractice insurance, for example, every year we get a request from our general counsel, "Does anyone know of any claims or circumstances that might lead to liability?" So I think oftentimes, that's going to be required as part of the application process.
- Lynda Bennett:** Yeah, I think the practical tip there, that our listeners should be very carefully attuned to, is whether that, and Joe, you touched on, I think, the most important question in the application always, which is, "Do you have awareness of claims, or facts, or circumstances that could lead to the assertion of a claim?" In the future, look to see who's making that representation. Is it being made on behalf of, "The insured," which is very broadly defined in the policy, or is that representation being made after reasonable inquiry by the executive control group, that undertook a reasonable and diligent search to answer that question. So we're just about out of time, but Jennifer and Joe, I'd like to give each of you a parting shot. What's the most important thing that a policy holder needs to do in the renewal process, to have them be perceived as a desirable risk. So Jennifer, why don't you give us your parting thought first?
- Jennifer Sylvester:** Sure. I think the most important thing they could do, is stand out. And when ... Conduct an underwriting meeting, whether it's a call, a Zoom, with your insurer, or alternative insurers, and really stand out and highlight the factors about your company and risk profile that differentiate you from other businesses in your peer group. Again, work with your broker to understand your company's tolerance for risk. And put together a timeline of goals and achievable goals. And then expertise, work with a broker that understands the risk, and can also be having those conversations with underwriters to

differentiate you from others. And that broker should also be guiding you, and communicating with you throughout the process.

Lynda Bennett: That's terrific. Thank you, Jennifer. Joe, you get the final word.

Joe Saka: Yeah. So I think when you're looking at applications, some of them are about controls, and what controls you have in place. And for cyber, we know that this is critical, and you might not even get an offer for a quote if you answer the wrong way. So look at those things, and if you don't have those controls in place, put them in place. And not only will that increase your likelihood of getting a quote, it'll also increase your likelihood of getting a premium reduction. So I think that's a very important step in the application process.

Lynda Bennett: All right, terrific. So I think we've learned, be prepared, be well represented, be open and honest, and start early, so says Jennifer. Well, thank you both so much for joining us today on Don't Take No For An Answer, and we'll look forward to seeing you next time.

Jennifer Sylvester: Thanks Lynda. Thanks Joe.

Joe Saka: Thank you.

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