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

Episode 53

Anatomy of a Coverage Litigation, Part 1

By Lynda Bennett, Eric Jesse

DECEMBER 2022

Kevin Iredell: Welcome to the Lowenstein Sandler podcast series. I'm Kevin Iredell, Chief Marketing Officer at Lowenstein Sandler. Before we begin, please take a moment to subscribe to our podcast series at lowenstein.com/podcasts. Or find us on iTunes, Spotify, Pandora, Google podcast, and SoundCloud. Now let's take a listen.

Lynda Bennett: Welcome back to Don't Take No For an Answer. I'm your host Lynda Bennett, Chair of the Insurance Recovery Practice here at Lowenstein Sandler. And today, I'm joined by my partner Eric Jesse. And together, we are champions for policyholders who fight the good fight against insurance companies to get them to live up to their obligations when their insureds face a claim. But as we like to say with our jaded coverage worldview, insurers are in the business of taking premium dollars and denying claims. So today, we're going to discuss the mechanics of what happens when a policyholder is forced to litigate to secure the insurance coverage that they purchase. So Eric, welcome back and thanks for joining me today.

Eric Jesse: Good to be here as always.

Lynda Bennett: All right. Let's set the stage here. So you're a policyholder, you've made your claim, and, in a surprise to no one, the insurance company denies it. What do you do? Are you racing right to the courthouse to vindicate your rights?

Eric Jesse: So typically, you're not going to race to go right to the courthouse when an insurer denies coverage, unless there's a special circumstance or special reason to do so. So one can be always pay attention to statute of limitations. So if this is a claim that's laid dormant, make sure you're racing to the courthouse if the statute of limitations is approaching. And policyholders need to be aware that sometimes policies will actually shorten the statute of limitations that applies.

Another reason why you might race to the courthouse is just based on forum selection and choice of law. Policies are typically silent on where a coverage lawsuit can be filed or the applicable law that will govern. So particularly where the outcome of the case could turn on which state law applies, a policyholder might want to file suit first and get to the courthouse sooner

rather than later to get a strategic advantage. And that's certainly something that the insurers will be thinking about. So policyholders need to have that same mindset as well.

Lynda Bennett: Yeah. Eric, two things I want to comment on there. I think you're dead on right. On the statute of limitations, one of the things that our clients want to know is when does that statute begin to run? So you're right. It is an important consideration. But why don't you tell our listeners when the statute of limitations typically begins to run?

Eric Jesse: Yeah. Typically, it's going to run when that denial letter arrives. So it's not necessarily when you put the claim in. It's when the carrier has denied coverage, because at that point, they have breached the policy. So that's when the cause of action truly accrues.

Lynda Bennett: Absolutely right. And as you said, the forum selection, that is the first place that you need to go look, though, when you get that denial letter in your hand. You're right. Most policies are silent. But not all of them are. And so that is really an important first step when you get that denial letter, to see is there a particular jurisdiction that you have to file in? And as you said, if choice of law really matters, it is important to be first sometimes to the jurisdiction where you want to have the fight.

And one other special reason I would add to the mix is, in some jurisdictions, it actually works to the policy holders benefit if the insurance company is the first one to race to the courthouse. So for example, in New York, when an insurance company sues the policyholder there and the policyholder prevails in establishing coverage, that actually creates a fee shifting provision where you can hand the insurance company the bill for that declaratory judgment action. Whereas if you as the policyholder file first, you're not going to have that fee shifting in play.

Eric Jesse: Yep. Absolutely.

Lynda Bennett: So as you and I like to joke from time to time, when a policyholder purchases the policy, what they're really paying for is the ability to negotiate coverage, right?

Eric Jesse: Yeah.

Lynda Bennett: After a denial, a policyholder shouldn't take no for an answer, hence the reason for the name of our podcast. So what is the usual next step after you've got that denial letter?

Eric Jesse: Yes. So if you don't need to race to the courthouse for a particular reason, what we typically want to do is really test the waters and see if the carrier is open to negotiating coverage or if they're truly at a no pay or a low pay position. And so there's three categories we can end up in.

A lot of times, insurance companies are just denying claims in the hope that the policyholder will read it and give up and will just go away. And so they've just saved on defense costs or settlement or indemnity. So what we typically

will do when we get a denial letter is we will prepare a letter on behalf of our client to the insurance company, explaining why they're wrong and why we think there's coverage and why they need to be stepping up. And so sometimes, when these carriers are sending a denial letter, they'll actually reverse their position and agree to provide coverage. So those are certainly the minority of the circumstances, but it certainly happens.

The other category is I'll call the agree to disagree category, where, again, we're writing letters back and forth to the carriers, where we're explaining why they need to step up, and the carrier is in writing continuing to adhere to their coverage denial. But there's messaging, maybe it's a lawyer-to-lawyer conversation, that we're going to agree to disagree, but we're ultimately open to trying to negotiate a claim resolution. And so oftentimes, that can happen through a lawyer-to-lawyer discussion or a settlement discussion, or it can happen in a pre-litigation mediation, which I think we've seen a little bit more of over the past few years.

And then the third category here is just the no or low pay position where the carrier is just... They are entrenched in their denial and there's only one way you can get them to step up and pay, and that's by going off to the courthouse.

Lynda Bennett: Yeah. So here, I think it is important to bring back around that concept of the statute of limitations, because as you said, Eric, there's these different pathways in front of you.

Eric Jesse: Yeah.

Lynda Bennett: And many of our clients, when they're knee deep in the thick of the underlying action, may be reluctant to open a new front of litigation by having to go and sue their insurer. And so as you said, it's important to keep your eye on that statute of limitations, because if the clock's ticking and you're close and you need to run into court, so be it. But what many listeners should understand is that the statute of limitations in many jurisdictions is anywhere from three to six years, because these are breach of contract actions. But again, that's where choice of law and applicable law comes into it. But sometimes, that agree to disagree while things continue to develop in the underlying action's not the worst course of action.

But let's do the deeper dive into, so the carriers dug in, sent that very clear message, "Maybe you didn't hear me the first time. Claim denied after we send that letter," and now you have to file the lawsuit. Either you or the insurer files the lawsuit. So at the very outset of that coverage litigation, why don't we frame out what are the typical issues that we're thinking about in the first couple of months of that litigation?

Eric Jesse: So after the policyholder, after they file the complaint or the insurer files the complaint, one of the things I like about coverage litigation, I think what makes coverage litigation different is that you have an opportunity to try and get a quick win for the policyholder. And this is because if a coverage dispute involves a liability policy and involves the duty to defend, a policyholder can file an early motion for summary judgment on the duty to defend. Many

jurisdictions have favorable law, holding that it is broader than the duty to indemnify.

And so what courts really need to determine if there's a duty to defend are two things: the complaint and the policy. Right? And so long as the complaint potentially triggers coverage, the insurer should have a duty to defend. And so you can file that early motion with those two documents and try and get that quick win.

Another issue that we see coming up very early in lawsuits is the forum battle. And this is something we've been seeing more and more of, where a policyholder might file a lawsuit in one jurisdiction and the insurance company, because of more favorable law that they perceive in another jurisdiction, will run into that court. And so now you have to have, in addition to maybe defending the underlying action, now you're fighting a coverage action on two fronts as you're trying to decide what court will ultimately hear the coverage action.

Lynda Bennett: So great points, Eric, and I agree. One of the biggest benefits when a client is ready to run right into court while that underlying action is proceeding is it's a pretty big hammer that you can bring down to get, as you said, that quick win on the duty to defend. And then there is a good technique that we can put in place to stay the issues of indemnity and potential insurer, bad faith, but walk away very quickly with a lot of leverage on that carrier by getting that duty to defend put in place.

So against that backdrop, once we filed that DJ action, how long does it typically take to get resolved? Are you in for a year's long battle protected coverage litigation, or is there a quicker, easier, more seamless path to follow?

Eric Jesse: So the wheels of justice can turn slowly even in a coverage litigation. We talked about the quick win you can try and get on the duty to defend. But once you get that quick win, you might be in a holding pattern as the underlying action is being resolved. But even with these quick wins and staying the action while the underlying case is going on, right, the case can absolutely drag out. There can be factual disputes that need to be resolved in order to get the carrier to step up and honor a judgment or a settlement that's reached in the underlying action. And first party claims, that's not one where you traditionally can bring an early motion for summary judgment like you can on the duty to defend. So if you have a property or business interruption claim, you can expect probably a decent amount of discovery and discovery disputes and years of litigation.

Lynda Bennett: Well said. And one other factor in there, too, is how much the judge is going to allow by way of discovery. As you said, one of the beauties of a duty to defend motion is what should happen is the court will only look at four corners of the complaint and the four corners of the policy. But when you get into these types of entangled coverage battles with carriers, they will go through lots of cases to convince the court that a lot more information's needed before even that preliminary duty to defend motion can be decided.

So Eric, frame out for us, what are the kinds of claims that you're going to bring in that declaratory judgment action against the insurer? What's on the table in terms of the type of relief that you're going to be looking for?

Eric Jesse: Yeah. So to start, one of the things that makes coverage litigation different is you can bring a declaratory judgment action. So even if the carrier hasn't denied coverage yet or even if there are still open issues, you can bring that lawsuit and lock in your forum and your choice of law through a declaratory judgment action. And that will go hand in hand with breach of contract. When the carrier's not honoring the policy, you have a breach of contract claim based on the duty to defend, a duty to indemnify if it's a liability policy, or just a general breach of contract claim on a first party claim.

Another cause of action that policyholders need to be on the lookout for is insurer bad faith, right? These policies have a covenant of good faith and fair dealing. And so if the insurance company is misbehaving, if there's no legitimate basis, reasonable basis, fairly debatable basis, these are the different standards different courts employ for denying coverage, then a policy holder can include a bad faith claim. And that will allow for different types of recovery. So depending on state law, it could be punitive damages, attorneys fees, maybe it's statutory awards.

And then another cause of action to keep in mind is an estoppel or a waiver. Has the insurance company undertaken conduct that prevents them from ultimately denying coverage? Did they take too long to issue a coverage position letter, for example? Are they trying to rescind a policy and did they accept premiums, for example? So you might be able to assert those types of claims as well.

Lynda Bennett: Or did they pull the rug out from underneath you? We've seen this movie before, too, where the carriers were in there-

Eric Jesse: Exactly.

Lynda Bennett: ... defending. There's been no change in the facts and suddenly they've said, "Ah, you know what? I've changed my mind." So yeah, that's certainly a cause of action to include.

I just want to come back to bad faith for a second and get your views on are carriers scared or moved by bad faith claims being included in there, or is it just, "Oh, that again?"

Eric Jesse: I think it's the latter. Unfortunately, that's been our experience when we've brought bad faith causes of action. We continue to see bad faith that continues in our view through the course of the litigation even. And a lot of times, what the carriers are going to try to do, and maybe this is one reason the carriers are less afraid of this cause of action, is they'll try and bifurcate the breach of contract and declaratory judgment piece of the case from the bad faith piece of the case. And so sometimes, courts are amenable to that. And when they are, it really takes the sting out of that cause of action.

Lynda Bennett: All right. Well, this has been a good first session of the anatomy of a coverage litigation. We've talked about the ways that you can keep yourself out of court and actually still get the carrier to belly up to the bar and pay. And we've done some nice table setting of where the lawsuit gets filed and what are some of the causes of action. So I think we need to come on back next time to discuss, all right, now that we're in the thick of the coverage litigation, how's the rest of this going to play out? I really appreciate your insights today, Eric, and look forward to having you back to continue our discussion here.

Eric Jesse: Absolutely. Looking forward to it.

Lynda Bennett: All right. See you next time.

Kevin Iredell: Thank you for listening to today's episode. Please subscribe to our podcast series at lowenstein.com/podcast or find us on iTunes, Spotify, Pandora, Google Podcasts and SoundCloud. Lowenstein Sandler Podcast series is presented by Lowenstein Sandler and cannot be copied or rebroadcast without consent. The information provided is intended for a general audience and is not legal advice or a substitute for the advice of counsel. Prior results do not guarantee a similar outcome. Content reflects the personal views and opinions of the participants. No attorney-client relationship is being created by this podcast and all rights are reserved.