



## Lowenstein Sandler's In the Know Series Video 7 – An Uncompromising Insurer: What Is A Policyholder to Do?

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### Eric Jesse:

Hi, I'm Eric Jesse, partner in Lowenstein Sandler's Insurance Recovery Group, and welcome to "[In the Know](#)."

Today, we are going to talk about an all-too-common experience that policyholders face when trying to resolve an underlying claim or lawsuit.

So the company has been sued, it has insurance coverage, and it goes to mediation with the plaintiff to try to resolve the lawsuit. At mediation, there's a live settlement opportunity where the insurer should be contributing, but the insurer is dug in with no or low settlement authority and is refusing to step up. What is a policyholder to do?

One option is to just walk away from the mediation. But if the parties are at mediation, the goal is usually to settle and to bring about that global peace, so this option is obviously not ideal or preferred.

Another option, which is also certainly less than ideal, is the "pay and chase" approach. Here, the policyholder pays the settlement out of their own pocket while reserving the right to chase the insurance company for reimbursement. The insurer wins at least in the short term because it has avoided paying, and if the insurer later agrees to contribute, the insurer will almost certainly try to pay less than what the policyholder paid. Unfortunately, the reality is that sometimes the situation calls for this approach. If so, the policyholder needs to be aware of policy language that gives the insurer consent rights over a settlement. The best practice here is to have the carrier agree in writing to waive that policy's consent requirement with all the parties otherwise reserving their rights so that the policyholder can put the underlying case to rest while having the option to continue to pursue insurance.

A third option that can be beneficial to the policyholder is paying the plaintiff some money, but also giving the plaintiff an assignment of the right to receive insurance proceeds. This has the benefit of bringing the policyholder resolution while the insurance recovery becomes the plaintiff's burden to bear. Here, the parties will need to make sure that, depending on the applicable state law, that the assignment to be given will be valid.

Last but not least, the policyholder has the option to stand their ground in the face of insurer bad faith. This often involves utilizing coverage counsel to parachute into the mediation, to bring the hammer, to compel an insurer's contribution. Here, the policyholder is going to be challenging baseless coverage defenses and also relying on defense counsel's exposure analysis to justify that settlement opportunity. But most importantly, if the policyholder can secure a settlement offer within policy limits, then the policyholder can press a bad faith claim. And in this situation, the policyholder's leverage with the insurer is maximized because there is case law in many states that says when a policyholder receives an offer within limits and the insurer refuses to pay it, the insurer will be on the hook for any resulting judgment against the policyholder, even if that judgment exceeds policy limits.

Thank you for joining us, and we look forward to seeing you next time on "[In the Know](#)."