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

Episode 54

Anatomy of a Coverage Litigation, Part 2

By Lynda Bennett, Eric Jesse

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Lynda Bennett: Welcome back to Don't Take No For an Answer. I'm your host, Lynda Bennett, Chair of the Insurance Recovery Practice at Lowenstein Sandler. And I'm very pleased to welcome back my partner, Eric Jesse, my partner, not only in the group but my partner in crime, as we pursue insurance coverage from insurers on a daily basis. So Eric, welcome back to the show.

Eric Jesse: Thank you. Good to be back here as always.

Lynda Bennett: All right. Well, we're going to pick up our discussion of the anatomy of an insurance coverage litigation. In our last episode, we discussed the ways in which policyholders can stay out of court even after an insurance company has denied a claim. And we also laid the groundwork for what that coverage litigation is going to start to shape up to look like. You've chosen your forum, you've thought about your choice of law, you've set up your perfect strategy to file your motion for partial summary judgment to establish the duty to defend, and you've got your complaint on file.

But let's start getting into some of the practical realities, Eric, that after we file that early motion and the judge declines to rule or the insurers start to throw serious stand in the gears, what are some of the ways that these cases tend to go sideways and become protracted litigations that policyholders dread?

Eric Jesse: Yeah, and unfortunately it begins with discovery. Once you get past the filing of the complaint, the answer and the early motion practice hasn't been the quick win you are hoping for, the next stage of the case is really to get into discovery. And when you're in discovery with the insurers, that means you're going to have discovery disputes because insurers are often very difficult in turning over the documents that they need to and the documents that we as policyholder lawyers think are critical to proving our case.

So we often see this in particular where an insurance company is handled, they've seen this claim before, and we want to know how the insurance company has handled that previous claim so that we can try and find cases that maybe where they've found coverage that are analogous to ours. Well, when we seek discovery for other claims or other policyholder information, the insurers like to put up their hands and say, "Oh no, that's confidential." So that's a discovery dispute we often have.

One of my favorite defenses that carriers raise is, well, even though the words on the page don't necessarily apply, but there's an underwriting intent is the key phrase they use, where they try and support their denial that way. So when they raise that underwriting intent, all right, now we want the drafting history for that policy provision that's at issue. And that's where carriers are also going to put up their hands and try and prevent discovery. When we ask about their underwriting practices and procedures, how the policy came to be, they claim it's proprietary.

Lynda Bennett: One of the things that stands out the most to me in discovery is just even getting the organizational chart. To understand who are making the decisions inside of the organization, you would think is a piece of low-hanging fruit that quickly and easily gets picked in the discovery process. And what we find out is it can actually be trying to get into Fort Knox, right?

Eric Jesse: No, absolutely. And the headline here is when you're issuing those document demands and those interrogatories, just be ready for the inevitable motion to compel on these types of claims and just be ready to show why they're relevant. Carriers are claiming, not privilege but amorously claiming confidentiality or this is proprietary information. These are things that can all be solved with the protective order in the case as well.

Lynda Bennett: Well, you focused a lot on the discovery that we're seeking from insurers. Obviously, in a protracted coverage litigation, discovery is a two-way street, right?

Eric Jesse: Of course.

Lynda Bennett: And so, what are some of the things that carriers are looking for from our clients? And like you to touch a little bit on some of the prickly privilege issues that can come up from the document request that they serve on our clients when an ongoing [inaudible 00:04:51].

Eric Jesse: Yeah, absolutely. So yeah, unfortunately, yes, discovery is a two-way street. So while the carriers don't have to provide anything, we have to turn over everything. And so just a common request is going to be, of course, the files from the underlying action. So they're going to want the discovery that was produced, the pleadings from that case, the deposition transcript, every scrap of paper that the insurer can get their hands on from the underlying action.

And where the privilege comes into play is you have to be careful what you're turning over to the insurer in terms of documents that have been prepared or analysis that has been prepared by your defense counsel because those documents may not necessarily be privileged. This is going to be a state-by-

state issue, but if a carrier has not acknowledged coverage, then there is no common interest there that can shield those documents from a waiver of a privilege. If the carrier is providing a defense, your ability to argue for a common interest and keep those documents privileged to the outside world can apply here.

Lynda Bennett: Well, and we're going to hear a little something I think about the duty to cooperate when we're not providing that information too, right? That's another coverage defense that is at the core of a lot of these coverage actions.

And also, just on discovery disputes with carriers, one of the other issues that I always find interesting is we're seeking reserve and reinsurance information. So you've got an underlying action. The insurance company certainly will have a reserve. And for our listeners what that means is what the insurance company thinks the risk exposure is here and what's potentially covered under the policy. And they also have their own insurance companies that they have to answer to, that they provide information about what the underlying case is and that sort of thing. And those are the reinsurers. And these are two areas of discovery that the carriers will fight to the death not to give that information, but it can be some of the most valuable information that a policyholder will need to ultimately establish and win that coverage battle.

So let's talk a little bit about the depositions. So obviously, as you said, the carrier's going to want every person that works at the policyholder's company to be deposed and testify about this case. But here, let's focus in on what are the deps that you want to take of the insurance company and are you taking mainly individuals or are you focused more on getting a corporate designee notice out there that's going to cover the main areas?

Eric Jesse: Yeah, that's going to depend on the case. We've certainly done coverage litigations where we're able to be very targeted and just put out a Rule 30(b)(6) deposition notice. And so for our listeners, what that means is if you're in federal court, the insurance company has to designate an individual who would testify and bind the corporation or the insurance company to that testimony and you identify the topics that they have to speak to.

So we've certainly done those depositions to really lock in the insurance company and make sure there's no wiggle room from other company employees that might come forward, or even from the person who testifies. But you might also want to consider, or we often will take the deposition certainly of the claims' handler, and that's the person who signed that coverage position letter or that denial letter. So we want to understand and probe the reasoning behind that.

And to your point, Lynda, when we can get that organization chart, we want to make sure we're going up the ladder to any other decision-makers that are involved. What did they know? What did they consider? What factors were there? So those are usually the key individuals we're seeking to depose.

Lynda Bennett: Yeah, the reason I mentioned the org chart is it becomes a really important document because what we learn when we serve that 30(b)(6) notice or we

serve just the claims handler, is there's a secret decoder ring that's needed to understand where certain documents are filed or housed. There's a separate file if there are carriers defending the case. There's a separate file if there's a declaratory judgment action. So really understanding the organizational structure of the insurance company before you even serve those dep notices can be incredibly valuable.

So Eric, let's just talk a couple minutes about expert discovery. What kind of experts do policyholders need to line up in these cases?

Eric Jesse: Yeah, again, it depends. But sometimes we're dealing with claims under historic policies that are decades old and we've only been able to find a few pieces of the policy or just evidence of the policy. And so we'll want to work with an insurance archeologist expert who can actually piece together the policy. They know or they have information or can testify that when a policy number had this prefix, it used this policy form. And so they can testify to reconstruct that policy.

There's a bad faith claim, for example. You might want to rely on a claims handling expert, someone who's worked in the insurance industry and knows the right way to handle claims and can speak to the wrong ways. And sometimes just the policy formation and construction is at issue. And so in that case, you're going to want to work with an underwriting expert who can speak to when insurers are using this language or when this policy provision was drafted. This is what their "underwriting intent" really was.

Lynda Bennett: So this all sounds incredibly complicated, complex, prolonged, read in between the lines, very expensive. Who is paying for this coverage litigation?

Eric Jesse: Well, it's going to be the policyholder at least to begin with. But one nice thing that we like about our policyholder side coverage practice is that attorneys on our side can be open to alternative fee arrangements. So that's one way to factor the cost. But the ultimate answer is that it depends. It's going to depend on the type of policy that's at issue and what jurisdiction you're in.

In some jurisdictions, those states will have fee shifting to insurers who fail to honor their coverage obligations. And I think the reasoning behind that fee shifting is those states want to make sure that their policyholders who have to litigate to secure coverage are ultimately kept whole. And it's also aimed at keeping the insurers honest and avoiding groundless disclaimers.

So in New Jersey, for example, if you have a third-party liability policy and you prevail even on the duty to defend or the duty to indemnify, you are a "successful claimant" under the fee shifting rule, and then you're presumptively entitled to fees.

Lynda, in the last episode, you mentioned the Mighty Midgets case in New York where if an insurance company sues you on a third-party claim, you are entitled to your defense cost if you ultimately prevail. So that fee shifting is available in New York, New Jersey, and many other states.

Lynda Bennett: Yeah, I'll just add two other logs to the fire as you think about the cost of coverage litigation. One is to use requests for admissions. If you've got a carrier who's really functioning in bad faith and you do find yourself in a jurisdiction where there isn't statutory or common law fee shifting in place already, that's a good arrow in your quiver to send out those RFAs. Again, particularly on duty to defend, which is usually a pretty low bar that the policyholder has to clear to establish the carrier has been recalcitrant on that front. So send out those RFAs and now you've created a fee shifting risk for the carrier there.

And then the other technique that we've used from time to time is the offer of judgment. And some states have pretty good law on that. If you know what the underlying action's going to cost and particularly in first-party property claims, like Eric mentioned on the last episode, if you know how much out of pocket you are, that can be a nice lever sometimes to make an offer of judgment because when you have to then take the case all the way to the mat and you establish coverage, you're able to hand the insurance company the bill at the end of that.

So a couple of different ways to come at it. And as Eric said, and certainly we at Lowenstein Sandler are happy to partner with our clients on improper claim disputes on alternative fee arrangements. And then you have these couple of other techniques available to you.

So Eric, is there a light at the end of the tunnel? How many of these cases, these coverage litigations are actually tried?

Eric Jesse: While coverage litigation is different from other types of litigation, this is an area where they're going to be similar, where ultimately these cases don't see the inside of a courtroom or a jury. These cases are going to be resolved either in settlement.

So we talked about pre-litigation mediation on our last episode, but oftentimes there are natural points in a case, whether it's filing of an answer or after-motion practice on the duty to defend or when documents are produced where there's just a natural moment to have settlement discussions or a mediation or settlement conferences with the court. So that's where a lot of these disputes are going to be ultimately resolved.

And some cases, it's quite common for cases to also make their way to summary judgment once discovery occurs. And that's where the wins can come as well.

Lynda Bennett: Yeah, I mean, I think in our experience many times, summary judgment is the way these cases go for a couple reasons. As we said, the early summary judgment motion on duty to defend, it's a low bar for you to establish the carrier's defense obligation. There aren't disputed issues of fact because all you need is the policy and the complaint, the underlying complaint. And then when you get to indemnity, oftentimes these are breach of contract cases where the core issue is interpretation of policy language. So these are really naturally tailored to be disposed of on summary judgment. And then also, of

course, a lot of clients and insurers don't like to incur the full-boat cost of trial, which can be incredibly expensive as well.

Eric Jesse: Oh, and just one last point on settlement is eventually the carriers need to be concerned that they're going to make bad law for themselves because if they don't settle this case and the policyholder ultimately prevails in court, that's a decision that's going to impact all the policies that they've issued in states across the country. So that's another incentive for insurers to settle at those natural moments.

Lynda Bennett: Well, and that segues really well into where we'll wrap up, which is, so you've gone all the way to the mat, you've taken them to trial, you've taken the insurers to trial, the jury has come back with a verdict against the insurer, so we can declare victory, right? We're done. The carrier's just going to write that check and pay the claim.

Eric Jesse: If it we're only that simple. But in keeping with the theme of the protracted litigation, the carriers are going to keep fighting that good fight. And it's common. You can expect an appeal, especially if that is a decision that has wide-ranging implications that they really need to reverse. So expect the appeal after you win at the trial court.

Lynda Bennett: All right. Well, Eric, thank you so much for coming on and in the course of two episodes breaking down the anatomy of a coverage litigation and all of the different ways that policyholders can try to maximize their recovery, be practical when they can be, and bring the heat and the hammer down on the insurance companies when necessary, when they're really dug in. So thanks for joining and sharing your knowledge. Really appreciate that.

Eric Jesse: Absolutely. A pleasure to be here as always.

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