



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

Episode 4 - Notice of Claims: To Be or Not to Be?

By [Lynda A. Bennett](#) and [Michael D. Lichtenstein](#)

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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 our Insurance Recovery Podcast. Don't take no for an answer. We're your hosts. I'm Lynda Bennett and I'm fortunate enough to have my partner Michael Lichtenstein today. And we are going to be talking about the hot topic of notice of claims to be, or not to be, that really is the question. So Michael, why don't you tell us when's the right time to make a notice of claim?

Michael Lichtenstein: You should give notice of a claim to a carrier as soon as you can. Now, depending on the type of policy, you may have a shorter period of time or a longer period of time to provide notice, but the rule of thumb is that you should give direct notice to the carrier of a claim as soon as you can.

Lynda Bennett: When you say I have to do it as soon as possible, if I give it to the brokers, is that good enough?

Michael Lichtenstein: A lot of large sophisticated brokers actually will. If you provide them with notice, they'll turn that around and provide notice to the primary carrier. And if you have excess coverage, they'll often provide notice to them. But if you do that in that circumstance, you're relying on them to actually get the notice to the carrier. The broker's not an agent for notice. In fact, if you actually look at your policy, I know we've talked in prior episodes about how important it is to beat the policies, the policy will tell you how to send notice. It will oftentimes give you an address, an email where you can send notice, and the policy will actually tell you what information you need to provide the insurance carrier to actually satisfy your notice obligations.

It'll never say, "Send notice to the broker." So if you have a sophisticated broker and you know they're going to forward notice, you can do that, but that doesn't constitute notice under the policy. You got to get notice directly to the carrier and you need to follow the rules that are set forth in your policy.

Lynda Bennett: Yeah. I mean, one thing I'll add there is by having the broker give the notice, it adds an extra step and that invites Murphy's law to come in and when somebody doesn't get it or sends it to the wrong place, you're really opening yourself up to a problem that you may not otherwise have if you just gave notice directly yourself. And as you said, Michael, and it's an important point, a lot of times the policy will tell you the exact address of where it needs to be sent. And in today's day and age, they also oftentimes have email address that you can send it to, which is great.

Michael Lichtenstein: And I'll just add Lynda, sometimes it depends. I recently had kind of a small client with a very small claim and we didn't want to get coverage counsel involved. They didn't want to pay, and they actually did have a fairly sophisticated broker. And in that context, I thought it was okay for the broker to send the notice. We looked at it and made sure it actually was noticed and satisfied the policy obligations. But there may be times when using a broker is okay, but I completely agree with you. More often than not, the notice should come from the policy holder and it can be drafted by a policy holder council on their behalf.

Lynda Bennett: What happens if I don't give notice? What's the downside if I take a wait and see approach?

Michael Lichtenstein: The downside is that you've given the carrier a legitimate reason to deny your claim. Even if the claims should have been covered under the policy, under certain types of policies and under certain state law, if your notice isn't provided in time, or it's not provided in accordance with the requirements of the policy, that is an absolute defense for the carrier to coverage. Now you're pushing a huge boulder up a huge hill and there was no reason for it because you actually had coverage had you provided notice in a timely manner.

Lynda Bennett: Yeah. Well, let me give you a couple of the reasons why maybe I don't want to give notice right away. I mean, one of the things that I'm always concerned about is if I put that notice letter in, are my premiums going to go through the roof?

Michael Lichtenstein: And the answer to that as I know you know, Lynda, is absolutely not. Your premiums go up when the carrier pays, right? There's something called a loss run and the carrier keeps a very careful account of the premiums they take in, and the claims they actually pay out. That's money, whether they're paying for lawyers or they're actually paying claims under the policy. They may keep track of notice, but it doesn't affect your premium. So if you're thinking about not giving notice because you're afraid that they're going to not renew your policy, or they're going to raise your rates, that is absolutely positively not a good reason not to provide notice to the carrier.

Lynda Bennett: All right. Well, let me try another one, which is, I don't want the insurance company mucking things up. I think I'm probably going to be able to get this taken care of and certainly well within myself insured retention or my

deductible. So why do I have to get the insurance company to start trampling through my claim when I think I'm probably going to get this buttoned up pretty quickly?

Michael Lichtenstein: Well, I mean, the short answer is you're taking a huge risk. You may think you're going to get something buttoned up and we've seen this before with our clients who think it's going to get buttoned up, they think it will be well within the self-insured retention and then it turns out they're wrong. And they didn't get it buttoned up and now they provide notice to the carrier and the notice should have been provided to the carrier a lot sooner in time.

And it simply creates a defense to coverage that never should have existed in the first place. I mean, most policies will give the insured pretty much total control to defend and resolve a claim if it's inside the SIR. Another reason you want to get them involved, you may have an SIR that is an aggregate. So it's an SIR across multiple claims. Well, you want to get credit. If you spend money defending or you have to settle a claim under the policy, even if it's inside the SIR, you want credit against that SIR because the next claim that comes may actually explode right through it. But if you don't give timely notice and they're not at least tangentially involved in that process, there's a good argument that you won't actually get credit for the SIR and that's not a good result for you.

Lynda Bennett: Yeah. And I guess I'll just also add the flip side to that is let's assume that everything does work beautifully and perfectly, and you do get the claim resolved within the self-insured retention or the deductible. And then what happens is that in the next policy period, somebody brings a substantially similar claim with facts that overlap with the claim that you had knowledge of and that you buttoned up within the self-insured retention that you didn't tell the insurance company about. Then what we start to hear is well, this is actually a related claim, you knew about it, the last policy period you didn't tell me about it and so because this arises out of the same set of facts and circumstances, we're denying this claim too.

Michael Lichtenstein: Absolutely Lynda. And that just goes back to rule number one, which is notice, notice, notice, give it and give it as quickly as you can. There's really no downside, but there's a minefield of potential problems if you don't give notice.

Lynda Bennett: So let's just touch on one more topic here, Michael, which is what should the notice letter say?

Michael Lichtenstein: Well, again, this is why we read our policies. I mean, most policies will actually tell the insured what type of information they need to provide in the initial notice. But even if you don't have very detailed requirements, you at least want to make a demand. If you have opportunities for defense coverage under your policy, you want to demand a defense. You want to demand that they cover the claim, which is indemnities, so you want to make a demand for indemnity. If you were served with a complaint, for example, you want to send the carrier a copy of the complaint. If you received a letter demand, at least for my practice, I

would send a copy of the letter along to the carrier. So the answer is read the policy, try to make sure that you include any of the specific information that is required and send copy of the actual written demands if you have one, whether it's a formal complaint or some type of a letter.

Lynda Bennett:

One thing that I like to advise clients on though in the notice letter is not to dive too far into the detail and not to anticipate what you think the carrier's coverage position is going to be. So Michael, as you said, if you have a copy of a complaint, if you've got a demand letter, I'm a fan of short and sweet. Enclose whatever that communication is and as you said, make that demand for a defense for indemnity, and then wait to see what the carrier comes back with because you may... Going down the road of trying to be specific, one of the things that brokers love to do is assign a date of loss, for example. And they're just randomly grabbing something out of the complaint and that can sometimes come back to bite you. So I'm a much bigger fan of enclose that document that you've received that's prompting you to give notice under the policy and then wait until you get the carrier's coverage position to start diving into the terms and conditions and exclusions that they may raise in connection with that communication.

Michael Lichtenstein: As usual Lyn, you are absolutely right.

Kevin Iredell:

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