



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

**Episode 14 -
The Intersection of Insurance and Bankruptcy – Part 2**

By [Michael Lichtenstein](#) and [Joseph M. Saka](#)
Guest: [Jeffrey Cohen](#)

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Michael Lichtenstein: Welcome to "Don't Take No for an Answer," an Insurance Recovery podcast. Today, we're doing part two of the fascinating discussion between my guest host, Joe Saka, and the Chair of Lowenstein's Bankruptcy Group, Jeff Cohen. Take it away, Joe.

Joseph Saka: Given that this is an insurance coverage podcast, I did want to turn to the intersection between insurance and bankruptcy. I was going to start with a fairly big question, which is broadly speaking, how do insurance policies come into play after a bankruptcy filing?

Jeffrey Cohen: Outside of COVID, let's exclude the cases from last year for a moment. As soon as we get brought into a case, either representing the company or representing the creditor's committee one of the first things we do is assess available D&O insurance, just to see what's available for potential sources of recovery in the event certain causes of action are available to be brought on behalf of the company. It is essentially, more often than not, the primary source of recovery if we're representing a creditor's committee. Usually, we are investigating whether any pre-filing conduct or transactions triggered or what the ultimate cause of the bankruptcy filing, or whether we can create legal theories that could result in causes of action against the Ds and Os. We look to see if that's a worthwhile endeavor based on whether there is sufficient coverage that could result in a distribution to one secured creditors.

Last year, layered on top of potential D&O insurance recoveries was, what is the business interruption insurance look like? Starting with Modell's in addition to trying to avoid paying the landlords for days we were not occupying the premises, we also looked to see if insurance carriers would give us coverage under our existing business interruption insurance policies for the days where

we were unable to actually operate the business. That became a new nuance for us last year.

Joseph Saka: That's very helpful. Starting with the D&O piece, how often are you finding that that comes up in the context of bankruptcy filings and how is that impacting the strategy that you pursue in representing creditors' committees?

Jeffrey Cohen: The analysis comes up in 100% of the cases. We always look to identify what the available coverage is. Whether or not we can identify valid causes an action varies from case to case on the facts as we find them. There are a variety of causes of action, both in common law and state law and specific to bankruptcy law that allow us to in hindsight, analyze transactions to decide whether they triggered the insolvency, whether they were transactions that created unreasonably small capital at the company, or basically were unfair from the perspective of the company and ultimately siphoned value away from unsecured creditors. That's really a case by case basis.

The reality is companies engage in transactions all the time that when you're not insolvent, are perfectly acceptable, but ultimately when you are found to be insolvent, those very same acceptable transactions could give rise to causes of action in a bankruptcy case. More often than not, we do have causes of action to either pursue, or at a minimum, assert a claim for that could trigger D&O coverage. It is, more often than not, a source of recovery or a perceived source of recovery in chapter 11 cases.

Michael Lichtenstein: Joe, what kind of coverage issues do you see? We just heard Jeff talk about the types of claims that might be brought against a D&O carrier on behalf of the company. What type of coverage issues do you see when those sorts of claims are in fact asserted in bankruptcy?

Joseph Saka: I would say when we're looking at D&O disputes in the context of bankruptcy, we're seeing three issues that come up most often. The first is whether the insured versus insured exclusion applies. That's an exclusion virtually all D&O policies that bars coverage from one insured against another insured, but there are common exceptions and one of them often is either a bankruptcy debtor or a creditors' committee. A second one that we're seeing in almost all of our D&O claimants right now are related to X provisions. It's a question of whether a claim that's asserted after a bankruptcy is related to a claim that was made prior to the bankruptcy, or that was made at some point earlier in time.

The third is, and it kind of goes back to Jeff's point about conduct being looked at from the perspective at the time of a bankruptcy filing. That's whether there's a misrepresentation in the insurance policy application. We often see insurers taking the position that there's no coverage because there was a misstatement or false information provided in the insurance policy application.

Beyond that, with COVID-19, we're starting to see a hardened insurance market where we're seeing insurance companies trying to add more restrictive terms to policies. One of the things that I've seen firsthand working with the bankruptcy group is that there is value that we can work in coordinating because there's ways that we can help creditors' committees plead claims to avoid some of these coverage issues. I would say that's the main thing for the D&O piece. In addition to that, one of the really interesting trends that Jeff noted was all of the claims pertaining to COVID-19 and the business interruption claims arising out of that.

Michael Lichtenstein: Well, once again, I'm really enjoying this, having an actual guest host since I just have to tee it up. I have to set them up, you have to knock them down. You just talked about some of the issues in the D&O claims. What type of coverage issues are we seeing in COVID-related business interruption claims in the bankruptcies?

Joseph Saka: Yeah, and Jeff kind of teed this up in the context of some of the retail bankruptcies that he's dealt with, but typically under property insurance policies, it's covering not just damage to property, but also income losses resulting from business interruption after property damage. To-date, there have been close to 2,000 lawsuits involving these business interruption claims. Some of those involve policies with virus exclusions. One of the issues in those cases is whether those exclusions bar coverage, but for the claims where there is no virus exclusion, the main issue has been whether the presence of COVID-19 constitutes physical loss or damage within the meeting of those policies. As Jeff emphasized, in a lot of instances, they weren't even able to access the store space. We really emphasize that while COVID-19 and the virus is invisible, it's not different than a fire in that it makes property unsafe. I don't know a lot of people that wanted to go sit in a crowded theater last year, let alone go shop in a crowded retail store.

We're now at a point where we're seeing decisions out almost every single week. Some trends so far is that state courts have been better than federal courts and policies where there's no virus exclusions are doing far better than policies with virus exclusions. I think it's too early to say how these things are going to play out. We're going to start seeing some appellate court decisions in the second half of this year. I think that's going to be very informative, but I think ultimately it may depend on which state's law applies as to how these claims come out.

Michael Lichtenstein: Hey, Joe, is it fair to say that carriers on almost a blanket basis, are just denying these claims and basically telling insureds to go to court and see if you can convince a judge that your claim has legs?

Joseph Saka: 100%. The only time that we're seeing any carriers pay claims is when there's express communicable disease coverage and even then, we're seeing carriers make policy holders really jumped through a lot of hoops in order to get paid on

those claims. I'd be interested in hearing from Jeff's perspective, how are these claims impacting the strategy behind bankruptcy filings now?

Jeffrey Cohen:

Well, I think that brings us to a good example of where our two groups worked very closely together last year, and that was our representation in Century 21. Century 21 was really unlike other retailers last year, primarily because, and you can explain this better than I can, Joe, primarily because their insurance policy was much more specific and in the eyes and minds of management of Century 21, specifically crafted to deal with situations like this. The flagship location of Century 21 was located across the street from the World Trade Center on 9/11. As a result, they were unable to access that location for a very long period of time. When they were able to commence operating their business back then, the owners of Century 21 began paying very substantial premiums on an annual basis for very specialized coverage that would protect them in the occurrence of the absolutely unexpected.

It was believed in the eyes of management and in the eyes of counsel representing Century 21 in an insurance action brought against the insurance carriers, it was their belief that the insurance policies of Century 21 were so substantially different than those filed in almost all of the 2,000 cases across the country that this action had substantial value.

We were hired as committee counsel. We immediately brought in our insurance practice, primarily Joe, yourself and Lynda Bennett to analyze from the creditor's perspective, whether we agreed with the position of Century 21 that these causes of action and this policy was so much more advantageous from the perspective of the retailer, that we could actually recover a substantial amount of money from the insurance carriers. That was a learning experience for me and particularly eye-opening, and I think a great example of the cross section of our two practice groups.

Ultimately, it's another cross section, of not only our practice groups, but the D&O insurance and the business interruption insurance that brought us to our ultimate conclusion because while our insurance group was investigating the nature of the policies and whether we thought they gave us a better chance of recovery, the bankruptcy side was investigating potential estate causes of action against directors and officers. Ultimately, we negotiated a global settlement, which resolved both. I believe, if I remember correctly, the total settlement amount was \$59 million with the potential for some upside, depending on a level of success in the business interruption insurance action. That's a good example of our practice groups overlapping, and then ultimately the D&O insurance issues and the business interruption insurance issues colliding to drive a rather substantial settlement for creditors.

Joseph Saka:

Yeah, that's a great summary and a great result for the creditors' committee in that case. I think it was one of the few cases where we've seen where there's been a really meaningful recovery for these COVID 19 business interruption claims. I'm going to turn back the spotlight on Michael for a second. Lowenstein

is obviously fortunate to have this strong bankruptcy and insurance coverage expertise under one roof. What's been your experience as an example of the time you've worked together to drive client success?

Michael Lichtenstein: I've been doing insurance work now for probably 15 years full-time. I started in the environmental space dealing with those sorts of claims and morphed over to insurance over the course of nearly 30 years. Lynda and I have done a very good job over that period of time of marketing the value of insurance expertise to our bankruptcy group. I'm pleased to say that in almost every case now, we work together to at least evaluate the possibility on behalf of creditors' committees and sometimes when we do debtor work, to see where we can create value to the estate, which can then be passed along to the various stakeholders.

I've been involved in many D&O claims. I've been involved in claims chasing old general liability policies when the estate is facing very large environmental claims, very large product liability claims, in particular asbestos. I had a case where we chased a \$50 million fiduciary liability policy, which was pretty much the only asset available because the owner of the business had walked away with 100 million dollars over 12 years, basically leaving nothing behind. We were able to successfully negotiate a settlement. I forget the exact details, north of 10 million, south of 50. I forget where that landed, but that was really the only source of finance, dollars to go out to the various stakeholders.

We've worked very closely with bankruptcy to try and fashion settlements. One thing we didn't get into, we can do a podcast on this alone, how to structure settlements with directors and officers, for example, but still preserving the rights to chase insurance. I think Jeff, I assume you would agree, no one is trying to hurt the Ds and Os personally. We're just trying to gather as much dollars together in a pot so that we can fairly treat the creditors, who we always know are taking some kind of a haircut. The question is how bad.

It's been getting trickier over time because the insurance carriers are getting more and more clever about language they're putting in policies that make it harder and harder to do settlements with Ds and Os while still preserving your rights to chase the coverage, but we work very closely with our colleagues in bankruptcy. As the policy language evolves, our strategies evolve, and that is a big way that we help drive value to another practice group and then ultimately to our clients. I'm pleased to say this is a great, I think, success story for how well Lowenstein both cross markets, but also just works together collaboratively to drive value to its clients.

I hope Jeff agrees since he's the big boss over there now, and so we want to make sure that we keep him happy. Jeff, let me just say that I really appreciate you taking the time. Fascinating stuff. I have to tell you, I knew a little bit about Century 21, about Modell, especially Modell because your personal relationship with that store, and with the products and the brands that are sold is really very

interesting. I think our listeners will really enjoy it. Any last words, Jeff, you want to share or is it okay just to say goodbye as well?

Jeffrey Cohen: No, it's okay just to say goodbye. I look forward to working with you gentlemen quickly sometime soon again, hopefully. Otherwise, I wish you guys the best of luck with your podcast. It's an exciting endeavor you guys are starting and I wish you the best of luck.

Michael Lichtenstein: Thanks.

Joseph Saka: Likewise. Thanks very much for being here.

Michael Lichtenstein: Joe, I want to say you held up your end as our first true guest host. I want to say, I really appreciate you taking the labor here and making my job easier.

Joseph Saka: With guests like Jeff, it makes it easy.

Michael Lichtenstein: Right, right. The car that sells itself. Okay. All right. Thanks, everyone. This is Michael signing out, saying thanks for listening and we'll see you down the road for our next podcast. Take care.

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