



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

Episode 18 -  
Reps & Warranties Insurance Claims: Getting to "Yes"

By [Lynda A. Bennett](#), [Eric Jesse](#), and Emily Maier  
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**Lynda Bennett:** Welcome to Don't Take No for an Answer, an insurance recovery podcast. I'm your host, Lynda Bennett, Chair of Lowenstein Sandler's Insurance Recovery Group. Today, we're going to continue our discussion about reps and warranties insurance, which has become a mainstay in mergers and acquisitions transactions. In our last episode, we gave an overview of what R&W insurance is.

It's an insurance product that is designed to largely, and sometimes entirely, replace the seller's indemnification obligations if it or the target breached a representation and warranty in the purchase agreement. We also talked about current market conditions, the best practices for placing those policies at the time of the deal, and how best to work with the insured during the underwriting process. Today, we're going to discuss perhaps the most important aspect of R&W policies, claims.

Do insurers pay them and what are the best practices to get the insurer to yes? Last August, Lowenstein Sandler answered that question with a survey of nearly 150 market participants. Our survey and, in fact, 87% of the respondents said that rep and warranty insurers are paying claims, but there are caveats. Policy holders have to work the claim process, and that's what we're going to dive into today. I'm thrilled to be joined by Emily Maier from Woodruff Sawyer.

Emily is the senior vice president and national group leader of Woodruff Sawyer's M&A insurance practice. As an insurance broker, Emily provides consultation and support to diverse clients across locations and industries who seek to minimize their risks associated with M&A acquisitions. Her experience includes rep and warranty insurance, tax opinion liability, and litigation buyout coverages. I'm also joined by my partner, Eric Jesse, from Lowenstein's insurance recovery group.

Eric works on behalf of buyers in M&A deals to negotiate policy forms, narrow exclusions, and advise buyers during the rep and warranty underwriting process. When claims are made, Eric has guided numerous clients through the claim process to presenting complicated claims in a

digestible format, working with experts to substantiate the breaches and losses, if necessary, and, of course, articulating the legal basis for recovery. Why don't we go ahead and dive right in.

When a buyer discovers a breach, where the loss looks like it'll exceed the policy retention, what are some of the best that buyers should employ to recover and then maximize their insurance recovery? Let me throw that away over to Emily first.

**Emily Maier:**

I mean, I think the thing to remember is unlike some other claims, there is three prongs to making a successful rep and warranty claim. You've got to provide an underwriter with which reps we think are breached, why we think they're breached, and a rough idea of the amount to which we think they're breached. And the more information we can give, the better. They on their side have to tick certain boxes to move it forward.

I think if we think about hitting those three prongs in our claims submission, I think we're going to have the best sort of first response. If we go in and we say, "Oh, we think there's a breach," they're just going to come back with a lot of question. The more questions we can answer, the more we can answer those three prongs straight away, the quicker we're going to get a usual response. Eric?

**Eric Jesse:**

And I'd also say that this process or this prong actually starts when you're negotiating the policy form by making sure you're negotiating, for example, as narrow exclusions as possible, or working to eliminate deal specific exclusions. Something I always try to include in the policy is for the right of the policy holder to go to court in the event of a claim dispute, because the R&W insurance community is tight knit and reputation matters.

And if there's a publicly filed lawsuit, that could have a reputational impact on the carriers and encourage them to behave and act commercially and reasonably during the claim process. The other piece of advice I would give is to make sure you assemble the right team depending on the claim, because the insurer will have a team of their own on the other side. You want to have the right representatives from the buyer.

You want to coverage counsel, deal counsel, potentially experts, as well as the broker working to advance the claim hopefully to the point where you can get in a room with the insurer and try and negotiate the claim.

**Emily Maier:**

I think that's great. The only other thing I would add is... Lynda, you prefaced by saying we think it's going to breach the retention. Even if we don't think it's going to breach the retention, I think it's worth noticing. Let's remember these retentions are aggregate and every little bit chips away and erodes the retention. Maybe this one won't end up in dollars and cents, but the next one will. Even if we don't think this one's going to breach retention, it's always worth noticing.

It's always worth submitting a claim, even if we're not sure whether it's covered or not. Let the carrier make that determination. It's always worth submitting and taking the chance to chip away at that aggregate retention.

**Lynda Bennett:**

That's a great point, Emily, but I think too, and I want to touch on this, I find it fascinating that some of our clients are very reluctant to make a claim after they've paid this very substantial premium. Eric, I want to pick up on a thread that you mentioned before. You talked about the carrier having to have some concern about reputational risk.

As we know, many of the purchasers of these policies are private equity companies and they oftentimes express a reluctance like, "Oh, it's going to look bad if we put a claim in, and we're worried about how we'll be perceived in the market." I want you to touch on that. And then, Emily, I'll put this into your thought process to follow up on with Eric, which is the other observation I have is M&A, private equity guys, these are deal guys. They want to move fast, close, and move on to the next deal.

One of the other questions they have right at the beginning of the process is, well, is this going to be a really lengthy, onerous, annoying process? And if so, what's the payoff pitch at the end? Is it going to be worth me distracting and putting resources towards this? Eric, why don't you just touch on the reputational risk first, and then Emily, you can follow up with why the orange is worth the squeeze?

**Eric Jesse:**

Yeah. On the reputational side, number one, the reason you're buying this policy is so that you can make a claim if it's needed. The reputational risk is really taken care of by having this policy, because the reputational risk that might come from going after the seller, for example, is completely negated because many times these policies don't require you to do that. You can deal exclusively with the carrier and try and erode that retention as much as possible.

It's a good idea to provide early notice just because sometimes the claim can be of a magnitude that's much greater than anticipated. It's certainly beneficial to have the carrier looped into that earlier in the process.

**Emily Maier:**

I would say, these are all distinct separate... I'll come to your second question, but these are distinct separate projects. There's not the sort of, "Oh, am I going to get dinged if I make a claim on this?" You don't get renewal premium because you made a claim last year, because it's a totally separate individual issue. I'm loving the phrase why the orange is worth the squeeze, and I'll be using that on an ongoing basis, but I would say one of the things that makes rep and warranty claims different is that the...

Very often in a claim, the broker and the underwriter are nowhere to be seen in the event of a claim, because these are sort of somewhat commoditized, then that happened, and then the claims people deal with it. That is absolutely not the case of rep and warranty insurance. The broker is very much involved. The underwriter is very much involved. The insurance expert that helped put the policy together is very much involved, because they were all very intimately involved with the deal and the transaction.

I think when one thinks about the kind of effort that is involved for someone like a private equity when they think about, "Oh, I have to do a D&O claim and it's going to take this much effort," et cetera, et cetera, they're thinking

that they're going to have to sort of dig around and do a lot more work on their own than they are in a rep and warranty claim versus, as Eric talked about before, you get a good team around you.

Certainly you're going to get a lot more support because the people that helped you put this together are the people that are going to help you put the claim together, and they are as intimately involved with the transaction as you were when you did it. You automatically have a lot more support in a rep and warranty claim than you do in any other type of claim. Usually for private equity firm, you are using the law firms like Lowenstein Sandler that have experts that understand sort of that unique point where M&A hits in the law so when your claims experience comes, it is a very specific skillset to understanding that claims process. There's a handful of firms that really have that unique skill sets. I think that can make it really a much less onerous process than your standard D&O claim. Plus, I think also on the buy side, we're really talking about a matter of fact. There is debate around, is it multiples? Is it consequential? We can leave that to the accountants, et cetera, et cetera.

But did a breach occur, did it not occur, is in many ways more simpler than, was a D&O breaching their fiduciary duty, and what was known and who was... Right? It's in many ways a simpler process. I actually think the orange is definitely worth the squeeze. We are talking about very substantial sums of money. Let's also bear in mind, we're not just talking about private equity. We're talking about strategics who are fast rising, and they are very set up to handle claims and go through that process.

I think we're reps and warranties, you've got a unique set of experts to help you who have been with you the whole way through the transaction in a way that you don't with any other line of insurance and the money at stake is well worth the effort.

**Lynda Bennett:**

Eric, you touched on this a couple of minutes ago. Let's talk about those claims that may look like they're going to be within the retention. What are the benefits of giving notice of it in any event? Emily touched on that a couple of minutes ago, but what would you have to add there?

**Eric Jesse:**

Yeah. I think there's two main benefits. One is the fact that the retention, which typically 1% of enterprise value dropping to .5% of enterprise value after 12 months is an aggregate retention. Multiple losses will erode this retention and that's a prime benefit of providing notice of the claim. The other reason is sometimes the loss can be much greater than than projected. And in that case, it's important to have the claim in early.

Because even though these policies will have protections against late notice and the carrier will have to show that they were prejudiced by a late notice, the reality is that carriers will not hesitate to look for any way to deny coverage, and this just takes one coverage defense away from them. The other reason is sometimes it might be necessary that the carrier consents to a settlement if it's a third-party claim, for example.

You want to make sure that the necessary consent, if it's required under the policy, is obtained, again, so you can take advantage of eroding the retention.

**Lynda Bennett:** Emily, give us an overview of the types of claims activity that you're seeing today. I'd be interested to know if you've seen any difference in the types of claims that have been asserted over time. Has it been pretty consistent, or are there new emerging claims?

**Emily Maier:** I think the classics are still the classics. Financial statements I think will always be first and foremost. I think we're seeing material contracts, employment tax. I think with the uptick of some of the healthcare, there's been a lot of healthcare deals, and so we've seen a bit more in the regulatory and compliance space. The majority tends to be first party, not third party. And what I've not seen and I don't know if it's too soon... I don't think it is too soon. I think it's because I don't think we're going to see it.

I've not seen anything that's really COVID-tastic. I think anything that is, is the sort of material contracts issue, and I've seen what underwriters have focused their underwriting in those areas. That's not where I'm seeing claims coming up. It's still your financial statements, tax, employment, and those things that you would expect in specific industries. As I said, where you see a burgeoning industry like healthcare and some FinTech stuff, you see those sort of specific focused reps coming up more a year or so later.

But I still think what we're seeing last year and the year before deals coming through in claims now, and we won't see the 2020 and 2019 claims until next year.

**Lynda Bennett:** All right. Eric, give me an overview of the claims process. Is this a typical knock-down, drag-out fight with the carriers, or what has your experience been on these rep and warranty claims and how does it differ from traditional litigation if at all?

**Eric Jesse:** I think overall the process can often be commercial and collaborative. Reps and warranty insurance is born out of mergers and acquisitions, where you have a buyer and a seller that are working towards a common goal of getting to a deal. I think that mindset translates over to the claim process in many ways. We have had positive experiences. Obviously the carriers are going to evaluate the claim, and they're going to want information, and they're going to want to test whether there's a breach or a loss.

But at the end of the day, you're able to get them into a room or for the past year in a virtual room to try and resolve the claim. The concern is that... Well, we have seen carriers that have taken very much a sand in the gears approach, especially when outside counsel is heavily involved. There is a concern that as demand for R&W insurance increases, that insurers might be much more difficult on the claim side where they might perceive less reputational risk.

**Lynda Bennett:** All right, great. We've got just a couple of minutes left here. What I'd like to close with is for each of you to identify your favorite pitfall that a policy holder

in the claims process should avoid, so something that you see often times that is entirely avoidable. Let's leave our listeners with a practical tip of how not to step into that trap.

**Emily Maier:** I think I would say that there is a tendency sometimes for clients to think that withholding information somehow gives them a tactical advantage. I think to what Eric said, that's just not the case here. He hit the nail on the head. This is a group of deal doers and withholding information or being obtuse is not going to help you in this situation.

**Eric Jesse:** In these policies, the R&W insurer will agree to waive say subrogation rights against the seller, except in the case of fraud. And a lot of times when there's a claim, the buyer might go after the small seller escrow and the buyer has to be very careful not to give the seller a full release.

Because the buyer gives a release to the seller of all claims, including fraud, the insurance company will use that to try and deny coverage or potentially minimize the amount of loss that they will pay because the R&W insurer will say that they no longer have the recourse against the seller that they potentially had before.

**Emily Maier:** Excellent point.

**Lynda Bennett:** All right. Great. Well, thank you, Emily and Eric, for sharing your knowledge in the claims world. I know that there's one thing we all will readily agree upon, which is that there will continue to be claims made under these rep and warranty policies. Both Emily and Eric emphasized the importance of having quality members on your team, and they are certainly both well steeped in experience and ready to advocate on behalf of policy holders. As Eric mentioned, I'll give the shameless plug. We did do a survey, a claims survey, just about a year ago.

That's available on our website at [www.lowenstein.com](http://www.lowenstein.com), and it's got lots of interesting information. Just about a year from now, we're going to wind the clock back and do it again and see how the claims activity is trending. Definitely check it out. If you're in the process of a claim right now, there are some really useful tips in there. Thank you, Emily and Eric, for joining us today, and we'll see you next time on Don't Take No for an Answer.

**Eric Jesse:** Our pleasure. Thank you.

**Emily Maier:** Thank you so much.

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