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

Episode 92:
When You're Close to Settlement but Your Insurer is Entrenched: How Policyholders Can Make it Over the Finish Line

By Lynda Bennett, Eric Jesse

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Lynda Bennett: Welcome to, Don't Take No for an Answer. I'm your host, Lynda Bennett, Chair of the Insurance Recovery practice here at Lowenstein Sandler. And today I am very pleased to be joined by my partner, Eric Jesse. Welcome back, Eric.

Eric Jesse: How's it going, Lynda? Good to be here.

Lynda Bennett: Well, it's going okay, but there seems to be something in the water these days. It's busier than ever with insurers trying to avoid their coverage obligations. As you know, we're seeing so many more roadblocks, more requests for perfect information, more coverages that come out of left field and more entrenched positions than we've ever seen before. Right?

Eric Jesse: Yep.

Lynda Bennett: We've talked to a couple of brokers. We're all bemoaning the same issues here. And so not surprisingly, more and more we're seeing insurers trying to abandon their insureds on the five-yard line when there's a meaningful settlement opportunity to resolve an underlying case. And that's what I want to talk about today. So Eric, why don't you set the scene?

Eric Jesse: Yes, exactly. What you're describing there, that is a quintessential insurance company bad faith, right? These insurance policies have a covenant of good faith and fair dealing that the insurers need to abide by. This is a situation when you, the insured, you're a defendant in a lawsuit, you're at a mediation with the plaintiff. This is when you're on the figurative courthouse steps trying to settle the case, and the insurer's just refusing to step up, not putting enough money on the table. We've seen this movie before. They're refusing to contribute the extra $50,000 to get the deal done on a multimillion-dollar settlement with massive exposure to the defendant.

Lynda Bennett: All right, well, before we get into the meat and potatoes, let's look at what the legal standard is going to be. You mentioned it, we have to start with that covenant of good faith and fair dealing, right? So we've got the insurance policy with the terms and conditions, but why don't you talk about that additional covenant that overlays every single insurance policy and how carriers need to treat their policyholders fairly.

Eric Jesse: Exactly. Here, the insurers need to put their insureds' financial interests ahead of themselves, so the insurer has a coverage obligation to settle within policy limits if there's an opportunity to do so. And unless there's no common theme here on Don't Take No, is choice of law. So, the specifics of those obligations are going to vary from state to state. But that's the general rule here.

Lynda Bennett: Right, and that's something that actually you need to be thinking about even before you find yourself at that mediation. That's something we really try to encourage our listeners and our clients to think about is, at the very front end of the case, know whether the law matters in terms of what your rights are under that policy and with respect to that bad faith standard, because there may be things that you need to start doing at the beginning of the case so that you're not in a scramble when you're sitting at the mediation and the carrier won't cough up that last 50,000 as you said, Eric.

Eric Jesse: Absolutely.

Lynda Bennett: So what are some of the things that policyholders can do to protect themselves?

Eric Jesse: Well, you could have just mentioned it and look, right or wrong, and I guess I would argue wrong, policyholders just need to be proactive here to protect themselves. They need to be attuned to insurers', what I would say is, their increasingly common entrenchment, and so this claim can't be on autopilot. And so that's a very long way of saying that insurance must be a consideration along the way, not just when, all right, it's time to go to mediation. Another theme I think we have here on Don't Take No, is just that communication is key, but start that process at the beginning. Keep the insurers in the loop in terms of information-sharing. Now, insurers like to request information. It seems to me a lot of times they don't know what to do with it, but they want it. So check that box, provide that information. That's certainly one thing to do from the outset.

Lynda Bennett: Right. Well, and you said that, and I agree, putting this claim on autopilot, I think a lot of our clients, when they first get that complaint, years before the mediation's ever scheduled, the first thing that they're concerned with is, "Is the insurance company going to defend me, and are they going to hire the lawyer so I don't have to worry about this? This is why I bought insurance." And that's sort of a big mistake frankly, that a lot of our clients make, putting this on autopilot, accepting the panel defense counsel and not understanding that that lawyer, although they are appointed by the insurance company, they are your lawyer in that case, and you should be getting updates constantly as this case is moving forward. The carriers have very strict reporting

requirements for the defense lawyers that they appoint on these cases to prepare case assessments, status updates.

And Eric, how many times have we gotten the phone call leading into, or sometimes even when our client finds themselves sitting at the mediation, what's the first question that we ask them? "Do you have copies of those defense counsel assessment reports? What has your defense lawyer reported into the carrier about what this case is about, what the strength or weaknesses are of the witnesses who would have to go and appear at trial? Who has the better expert? What is the strength of the defenses that are being put forward? Is there a motion that can be filed? Has a motion already been decided against you as you're heading into that mediation? And what impact did that have on the value of the claim?"

One of the things that I'm astonished at, frankly, when I ask for that, the defense counsel assessment or, "What has the defense lawyer told you the verdict value of this case is?" You know how many times clients can't answer that question? "What have they told you the range of settlement is? What is a reasonable range of settlement? What has that lawyer told you about that?" And what do we find out most times, Eric?

Eric Jesse: Yeah. No, that that information is lacking, and that's the goal that you need when the insurer's being entrenched. And those are the things, again, going to a theme of this episode, is these are the things that should be done throughout the case. Have defense counsel provide those status reports, evaluate the fact witnesses from the deposition, evaluate the legal theories and how the claim is developing over time because that's the gold that you'll need to put in to really twist the insurer's arm when they're not doing the right thing at the mediation, and to try to get them to step up and to not act in bad faith.

Lynda Bennett: I like to tell clients, "You don't realize it, but your defense lawyer can become the star witness of your case against the carrier if the carrier's going to be dug in on a low valuation." What we find in many cases, and frankly I've seen it much more in the recent past, is the insurance company, their claims rep or their outside coverage counsel has assumed the role of Monday morning quarterback for what the defense lawyer has done. This lawyer has been in the weeds for years defending the case, did the depositions, knows the read of the judge, knows the jurisdiction where the case is pending, and when defense counsel actually does everything right and gives you all of the information that screams out that this case should be settled, that's not always the end of the conversation. In fact, sometimes it's the beginning of the conversation for your coverage action because the carrier doesn't want to pay that much. They think, "Well, our chances will be better if we take this case to trial, or we'll see what happens on appeal." And as you know, that gives our clients a lot of consternation.

Eric Jesse: Absolutely. The other thing that defense counsel can provide is, because sometimes if the insurance company doesn't care about your financial interest, they'll care about their own. And so that's the defense counsel budget to take the case through trial, because a lot of times if that number is

significant enough, that can be another pressure point to tell the insurance company, "Look, now it's in everyone's interest, including yours to settle this."

Lynda Bennett: And Eric, you've been bringing up a lot of our themes here on Don't Take No for an Answer. There's yet another one, which is that the policy language always matters in every coverage dispute, and this issue of rights around who controls the settlement? Do you as the policyholder have the right to say no to a settlement? That's very typical. We've handled that on other episodes, it's the hammer clause, but here the words can matter very much if the insurance company has the right to say, "We're not settling this case." And so, why don't you just comment on that spectrum of policy language we see in there. And also, as we give our actionable advice here on Don't Take No for an Answer, make sure that you read that language and speak with experienced coverage counsel before you get to the mediation. That's a really important thing to know before you ever get to the mediation.

Eric Jesse: Yeah, exactly. Yes, the policy language certainly matters. Look, if you're dealing with the general liability policy, for example, there's going to be what's called a voluntary payments provision that says that you can't make any voluntary payments, or words to that effect. And that language can be difficult to negotiate if it's in that ISO form. What we often see in A DNO policy, for example, this language that says, "You cannot settle without the insurer's consent." And what we like to see there is, and this is something you should do on renewal, this is again, don't buy your policy and just put it on a shelf or don't renew your policy rotely.

But we like to see language that makes crystal clear that also the insurance company cannot unreasonably withhold their consent, because if our clients or policyholders are doing what we're outlining today, communication is key starting at the outset, not being on autopilot, all of a sudden you've really boxed your insurer into, they're withholding consent, they're being difficult, then they're behaving unreasonably and breaching the policy. So that's one of the things we're always looking at the outset, or even before the claim comes in.

Lynda Bennett: Right. So let's talk about timing when we've got that live claim, and lay out the hypothetical that you've gotten an off-the-charts, crazy nine-figure demand from the plaintiff saying, "Okay, we're going to come to mediation, but we're looking to ring the bell for a nine-figure verdict." What are the things that the policyholder needs to do? Should they just throw up their hands and say, "Forget it, we're not going to come, our carrier's never going to give us money for that." Or are there steps that should be taken to get that settlement conversation going even when it's a million miles away from a reasonable valuation and what the available policy limit is?

Eric Jesse: This is, again where choice of law will matter in certain jurisdictions. It's not just that the insurance company has to sit on their hands and wait for a demand that's within limits. They have an affirmative obligation to go out and try to settle the case. So to actually engage with that plaintiff with the crazy demand and try and bring them down. And so, it requires going to the mediation or doing the prep work, exchanging numbers. And look, if the plaintiff is still going to have pie in the sky numbers, that's one thing. But if the

plaintiff's engaging and there is a settlement opportunity that eventually kicks in, then that good faith obligation kicks in on the insurer.

Lynda Bennett: Oh, good. So I can call up my rep and say, "Well, I got this nine-figure demand. They want to go to mediation." So the carrier will just say, "Okay, we'll bring the policy limit and see what we can do to settle the case."

Eric Jesse: I wish. But no, I mean, the carriers always play their cards close to their chest. And so it's really, I think just going through the process. But it's also just reminding the carrier of these obligations, and sometimes you have to figure out when the time is right. But sometimes it's sending a strongly-worded letter that lays out their obligations, that pulls from these defense counsel status reports along the way, that hopefully add these verdict values and these case assessments to really lay the groundwork to establish that if you don't settle this, and first of all you have an obligation to settle this, and you must settle this, here's why. And if you don't, there are consequences to that if the insurer tries to leave the popular high and dry.

Lynda Bennett: Is there anything that we need to be careful about though, and as I mentioned before, defense counsel becomes the star witness, when we've got a carrier that has acknowledged a defense obligation but has not fully accepted coverage for the claim, are there certain precautions that we need to take with respect to privilege, for example, that we don't want to step on a trip wire?

Eric Jesse: Yeah, no, that's always a critical piece here. In many jurisdictions, if an insurer has acknowledged a defense obligation, then what's called a common interest privilege could exist. It's a triangle between the insurer and counsel. So these case assessments that we're talking about, that can be shared amongst those three parties without there being waiver to the outside world. But that's always an important consideration. And one other pro tip is, a lot of times defense counsel and the insurer just talking to each other, right? That needs to be a three-way conversation. You as the policyholder, you need to be copied on those reports or maybe even see them in advance.

Lynda Bennett: Exactly right. Exactly right. All right, so what happens when the carrier says, "We're not giving you settlement authority, or we're not giving you sufficient settlement authority to get that settlement conversation going or the case resolved." What are some of the tips and tools that the policyholder has available?

Eric Jesse: So you've laid out your reasons why and the strength of why they have to step up. I mean, this is unfortunately where you're in between a rock and a hard place. One option is what we call the pay and chase option. If the policyholder is well-heeled enough, they confront the settlement and then later try and chase the insurer to get recovery. And what's important there, our best practice there is, if you have to go down that route, make sure, or at least try and see if you can get the carrier to waive the consent to settle provision that's in the policy.

That's just the best practice to make sure that the carrier can't then say, "Hold on, you've settled without our consent," even though the insurer was

being difficult to not stepping up. That's one option. It's not a great one. Another one we often recommend is just trying to settle with the plaintiff and give the plaintiff, if they'll take it hopefully, an assignment of the right to go after the insurance proceeds that makes this the plaintiff's issue and potentially give the defendant or the insured and peace of mind there.

Lynda Bennett: Well, and that's when we got to be really careful again on choice of law, because while many jurisdictions will allow an assignment of a claim after it's been asserted and will allow that to happen freely, that's not true in every jurisdiction. So that's when you really should be working with coverage counsel to make sure that you do it and that you do it right. There are certain requirements that need to be met even when you give that post claim assignment. All right, so let's wrap it up with a quick discussion of, what are the damages that flow from an insurer not stepping up and settling that case for you? When you file your declaratory judgment action, what's on the table in terms of what you can get from that recalcitrant insurer?

Eric Jesse: Yeah. Look, if the case ultimately went to trial, for example, the underlying case, there was a verdict in excess of policy limits, guess what? The insured is responsible for that judgment, even though it's higher than their policy limits. That's a key consequence of the insurer breaching their obligations here. And then look, other types of damages that policyholders need to keep in mind are consequential damages. These are the foreseeable damages that can be caused or be sustained by the policyholder when the insurer refuses to settle. So for example, if the case is big enough, if it’s a bet the company case and the company's going to be forced into bankruptcy. There are potential damages associated with that that can be recovered. And that's why you also wanted to send that strong letter to the insurer, because you can lay these damages out or these consequences out in a letter, and then the foreseeability component here has been met because you've told the insurer exactly what you predict will happen if they don't step up.

Lynda Bennett: Well, exactly right. So my hope is that today's episode will be very helpful to policyholders in understanding the importance of staying on top of the case as it proceeds through years of litigation, to get yourself prepared, to get that record created that you're going to need to establish why the case needs to be settled at a certain price point, and if and when that carrier does not step up, you should certainly engage coverage counsel to assess whether the duty of good faith and fair dealing has been breached, and whether you have suffered damages or are exposed to damages as a result of that breach, so that you will be ready in the event that the case does not settle to turn and put that all on the carrier. But Eric, as always, you've been very practical and succinct in providing your advice and look forward to having you come back again to talk about other things that our policyholders need to do to perfect their claims. But thanks for joining today.

Eric Jesse: Absolutely. It's always good to be here.

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