



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

Episode 108:
**Using an Insurance-Based Strategy in Commercial
Litigation**

By [Heather Weaver](#), [Jennifer Fiorica Delgado](#)

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- Lynda Bennett:** Welcome to the Lowenstein Sandler podcast series. Before we begin, please take a moment to subscribe to our podcast series at lowenstein.com/podcasts. Or find us on Amazon Music, Apple Podcasts, Audible, iHeartRadio, Spotify, Soundcloud, or YouTube. Now let's take a listen.
- Heather Weaver:** Hi everyone, and welcome to *Don't Take No for an Answer*. I'm Heather Weaver, counsel in Lowenstein Sandler's Insurance Recovery Group. Today, I'm joined by my friend and colleague, Jen Delgado. Jen is a partner in our Business Litigation group and has spent years guiding clients through some pretty complex disputes. We're going to dig into something that doesn't always get the attention it deserves, how commercial litigators and the businesses they represent can make insurance a core part of their litigation strategy, not just an afterthought.
- We'll cover the whole spectrum from what to look for on day one to making sure notice requirements are met, to locking in defense coverage, and even structuring settlements to get the most indemnity possible. Basically, how to squeeze every last dollar of coverage out of a policy. Jen, thanks so much for joining me today. Are you ready to jump in?
- Jennifer Delgado:** Absolutely. So, let's start at the beginning. Say I get a new matter, whether it's a lawsuit, investigation, whatever it is, what insurance question should I be asking before I even touch the merits?
- Heather Weaver:** So, first thing, find out what policies the client has that might respond to the claim. A lot of clients will just say, oh, we have insurance, but they often don't know what type or if it even applies. So, walk them through some of the possibilities: commercial general liability, D&O, employment practices liability, cyber, pollution, whatever makes sense for the facts that you have. And if you're not sure, that's when policyholder-side coverage counsel can really be a big help in spotting potential sources of coverage.
- Then you want to check the policy period. So, for example, for bodily injury or property damage claims, you want to know if they had CGL coverage when the incident happened, not just whether they have it today. And for D&O or professional liability, you're really focused on what was in place when the claim was made. So, once you've narrowed down what might apply, get those policies

in hand as soon as possible. Having someone review them early can help you spot coverage gaps, tailor your litigation strategy, and make sure, importantly, that you hit the notice deadlines.

And don't forget about contracts. Sometimes your client is an additional insured under someone else's policy or they have indemnity rights built into a contract that they've entered into, and that can open up extra coverage or funds that you might otherwise miss.

Jennifer Delgado: Thank you so much for that. And by the way, I think that just proves how important it is to get your coverage counsel involved very, very early on in the process. So, let's say my client gets served with a complaint. We know the right policies are in place, and they include a duty to defend. How do you explain the duty to defend versus the duty to indemnify, and how do you know if the insurer actually has to defend the lawsuit?

Heather Weaver: Jen, you'd be amazed how much the wording of the complaint drives defense coverage. The key is the allegations in the complaint. If the allegations taken as true could fall within coverage, that should be enough to trigger the duty to defend. The insurer can't just wait to see if your client actually loses on the merits. It's about the four corners of the complaint. If any theory in there could be covered, they have to step up and defend.

So, the broader the allegations in the complaint, the harder it is for the insurer to duck its defense obligation. And defense coverage is huge because it gives your client the resources to mount a strong defense without draining their own budget. Now, indemnity, that's a different animal. That's the obligation to actually pay a settlement or a judgment after liability is established. So, defense is about funding the fight. Indemnity is about paying the bill at the end.

Jennifer Delgado: Okay. So, you've confirmed coverage, timing lines up, and the complaint potentially triggers defense. How do you actually lock in that coverage?

Heather Weaver: First, you get the notice in promptly and in compliance with the terms of the policy. You want to tender the claim directly to the primary carrier and copy all excess carriers so the whole tower is on notice. And that's super important. And with the tender, you want to include the complaint and anything else that supports your tender. Brokers can really help out with this process, but we don't recommend handing it off entirely. It's important to make sure that the policyholder keeps control of the notice process. And always get proof that the notice was received, whether it's an email confirmation, a certified mail, whatever it takes, because a clean paper trail can really save you if the insurer later challenges coverage, especially on notice-related grounds.

Jennifer Delgado: Got it. So, there's a variety of responses you can get from the insurer at this point, right? Let's say the insurer agrees to defend but then sends a reservation of rights letter. What should I be looking for and what should I do next?

- Heather Weaver:** Think of an ROR as a yellow light. The insurer is agreeing to defend for now, but it's signaling that it may deny coverage down the road. The ROR really needs to be read carefully, ideally by coverage counsel. And the things you really need to look for there: are the insurers excluding certain time periods, are they excluding certain allegations, are they pointing to any sublimits in the policy?
- And this is really important because having a clear checklist of the issues flagged in an ROR helps you to monitor how developments in the case might affect coverage. And it also puts you in a stronger position to push back on overly broad or improper reservations, especially before you get to the point of settlement or judgment when the insured is going to be looking for indemnity coverage.
- Jennifer Delgado:** What about defense counsel? If the insurer is providing a defense under a reservation of rights, is the policyholder entitled to select its own counsel? And do you generally recommend pushing for that?
- Heather Weaver:** That's a great question, and it's one that comes up often. When your client's being defended under an ROR, there's an inherent tension, right, because the insurer is paying for the defense, but it's also keeping the door open to deny coverage later. If your client's facing allegations that the insurer has carved out in an ROR, you should absolutely consider pushing for independent counsel because it helps to ensure that the defense is focused squarely on your client's best interests without the risk that coverage concerns could influence the defense strategy. And it also avoids issues that can arise when the same lawyer tries to serve both the insurer and the insured.
- Jennifer Delgado:** That makes sense. So, under this set of circumstances, in practice, you'd send them something like, "Given your reservation of rights on X, we're invoking our right under Section Z of the policy or perhaps under state law to retain independent counsel. Please confirm you'll cover fees at these rates."
- Heather Weaver:** Exactly. And name the firm, give the rates, and ask for quick approval. That way there's no question about who is steering the defense and how much it's going to cost.
- Jennifer Delgado:** This is super helpful. Let's talk about the other side though, getting the insurer to actually pay out when it's time to settle or after a judgment. What steps should the client take to protect their interest and maximize the chances of a full recovery for any potential payout?
- Heather Weaver:** Also a good question. So, the indemnity question often gets overlooked until closer to the end of the case because so much focus is on the duty to defend from the very beginning. But indemnity is really something that policyholders should be thinking about early on, and there are certain ways to try to maximize your chances of getting indemnity coverage. So first, stay cooperative. Respond to the insurers' reasonable requests. Keep them updated, keep them in the loop. Invite them to key events like mediations or, at the very least, share mediation

statements. Let them know the mediation is happening and make sure that they're available during the mediation to discuss any settlement authority that might be needed. If you shut them out, they may use that later to argue that they're off the hook.

Also, get their buy-in on settlement strategy early. If your policy requires their written consent to settle, don't skip that step. And third, sometimes you can structure settlements as consent judgments or non-admission agreements with the insurers sign off. So then if you do that, they can't turn around later and say they didn't agree to the deal.

Jennifer Delgado: This is great. Just so that we can leave today with some best practices, can you give us a quick hit list?

Heather Weaver: Sure. To sum it up at a very high level, some of the key things to remember, one, identify all possible policies and policy periods right away. Two, tender promptly in writing to every insurer in the tower. Three, track reservation of rights letter or whatever other response might come in from the insurer and watch for potential conflicts. Four, keep your own paper trail. Don't rely on the broker alone. My fifth tip would be to keep insurers looped in on major developments, including settlement discussions. And also get insurer consent for settlements when it's required.

Jennifer Delgado: Thank you so much, Heather. Let me just translate that for non-insurance lawyers out there. It's critically important to loop in your insurance coverage lawyers early on. I mentioned this a couple of minutes ago, and I can't overstate that. This is a lesson I learned early on in my career, and it really has paid dividends. They can help guide you through all of the preliminaries, make sure that your claim notices are airtight and that the insurers are kept informed throughout the process appropriately.

I've also found it very valuable to involve coverage counsel in strategic litigation decisions. Oftentimes, there's a coverage issue overlay that's not very obvious, and coverage counsel can help ensure that your litigation and coverage strategies are aligned. At the settlement stage, they should not be brought in after the fact. They should be on speed dial and taking an active role in various aspects of settlement, including helping to craft releases. This is especially true if you anticipate having to tap into that policy again.

Heather Weaver: Absolutely, Jen. I couldn't agree more. Looping in coverage council early helps the insurer to stay on top of everything that we talked about today so that they can be sure that they're getting the coverage that they paid for and really the coverage that they deserve. Well, thank you, Jen, for an insightful discussion. That's a wrap for this episode of *Don't Take No for an Answer*. Thanks to everybody for listening, and we'll see you next time.

Jennifer Delgado: Thank you for having me.

Lynda Bennett:

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