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

Episode 95:
Second Circuit 'Swipes Right' on Notice Requirement for Tinder

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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 Group here at Lowenstein Sandler, and today I'm very pleased to be joined by Alex Corson, a member of our group and someone with whom I have the pleasure of working very closely with every day. So welcome back, Alex.

Alex Corson: Glad to be here. Thanks, Lynda.

Lynda Bennett: All right, today we're going to discussing a recent Second Circuit decision that reinforces the importance of reading your claims made policies carefully. As we're going to discuss, claims made policies define the term claim to mean more than just a lawsuit, which is often a surprise to our clients. In most claims made policies, the definition will include a written demand for monetary damages. So we're going to talk about that, and we're also going to talk about the need to carefully review terms and conditions before the policy is put in place so that you can avoid the kind of surprise then this policy holder encountered in this case. And finally, we're going to talk about the need for policyholders to leverage experienced coverage council, like my good friend Alex over here, as well as knowledgeable brokers to avoid some of these non-market language issues that can arise, as we're going to talk about and see in this case.

So Alex, why don't you start us off and talk to us about this case that came out of the Second Circuit. What happened?

Alex Corson: Yeah, so this case involves everyone's favorite matchmaker, Tinder, that found themselves with a claim filed by a consultant, a marketing consultant, who basically alleges that he came in and gave them the idea or parts of the idea for the Super Like functionality in that app, which as I understand is basically a button you can hit to make sure that somebody that comes up on your profile really knows how much you're interested in them, as opposed to just saying yes. So, he sent a letter to Tinder back in February of 2016

outlining his claim and saying that he should have been compensated for this idea that he brought them and was not, And then he ended up bringing the lawsuit in August.

Now the timing here is important so I'm going to go through it slowly. Tinder got the letter back in February, and then received service of the lawsuit about the same thing on August 17th, 2016. That's a Wednesday. They asked their broker to put the insurance company on notice on that Friday, and then notice was ultimately provided Monday morning, August 22nd, 2016, first thing in the morning.

Lynda Bennett: And when did the insurance policy expire?

Alex Corson: The insurance policy expired on Saturday, August 20th, in the middle of the night, specifically at 12:01 AM. And so the policy holder found themselves, here Tinder found themselves in the classic late notice, "You should have told us in the three days before your policy expired, and in any event, you should have told us back in February when you got the letter." So in the trial court, Tinder prevailed on a motion to dismiss filed by the insurance company, and they convinced the trial court that the February letter in 2016 was not a capital-C claim as that policy service divided the policy. So they didn't have any notice, obligation or requirement. They said it wasn't a capital-C claim until August of that year when they got the lawsuit. The Second Circuit however disagreed, they said even though there wasn't a specific monetary amount in that demand back in February, it was still a capital-C claim under the definition in the policy, there was an obligation to provide notice.

Now Lynda, I'm sure you're thinking what I was thinking when I was reading the opinion, which is what about the automatic extended reporting period? What about that 60-day grace window for situations like this where something crystallizes into a claim? And arguably there was a debate as to whether the February is a claim, but something crystallizes into a claim right before the policy expires, don't we get 60 days under most of our claims-based policies to put in the claim with the insurance company? This policy was a little strange. It had the normal 60-day grace period, but it was limited only to claims, capital-C claims, made in the last 60 days of the policy period. So if the claim was made in February, it doesn't get that grace period. If the claim was made in August, it does get that grace period. So because of the perfect storm, Tinder not realizing that that February letter could be considered a claim, and then expecting to have those 60 days for the claim that came in August, they found themselves with only three days to provide timely notice.

Now, all is not lost for Tinder. The Second Circuit instructed the trial court to reconsider, overturn the decision about the claim in February, but there was another issue which I found kind of interesting, which is there is apparently a statute in New York that suspends contractual performance that has to be done on a weekend or a holiday. So the dispute then becomes, did they have an obligation to inform the insurance company on Monday morning at 12:01 AM, or was their 8:42 AM email good enough? So that's the essence of the dispute, a funny fact pattern where Tinder was under the impression that it had more time to provide notice of the claim because it didn't expect that the

February letter would rise to the definition and then ended up with the denial. So we'll see how the trial court comes down on the statutory weekend exception but yeah, there are a couple of lessons learned here.

So Lynda, knowing now what you know about Tinder's claim, what do you think are the lowest hanging fruit for a policyholder trying not to find themselves in this situation?

Lynda Bennett: Well, the first thing I learned from today's episode is that we need to create a Super Like function for lawyers where our clients can Super Like us after we've done a great job.

This case is really interesting because it drives home a number of the core principles that we talk about all the time on don't take no for an answer, and the first one is really reading and understanding the policy and how tricky these claims made policies can be. We see this issue arise all the time, which is that most policyholders, even some pretty sophisticated businesspeople think that a claim under an insurance policy will be limited only to when you get the lawsuits served on you and not something short of that. So we see these demand letters come in all the time, in the employment context, in this context.

And what's interesting here is it's a written demand, sometimes the definition can be just a written demand to do something. Other times the definition of claim will be a written demand for monetary or non-monetary relief. But point is, when you get a letter that uses what I talk about, the magic language, which usually appears in the final paragraph of, "You better do X or I'm going to pursue all appropriate legal relief to you," alarm bells should be going off in your head to say, "Oh, let me go and take a look at my insurance policies and maybe even just protectively give notice because this letter may one day morph into that lawsuit that we hope doesn't come."

Alex Corson: Yeah, absolutely. And we've seen this movie before a hundred times where the letter is a little bit unclear, maybe the policy says it only covers money damages, not non-money damages. Maybe the letter is a little unclear. And what do we normally say about those letters when they get them?

Lynda Bennett: Notice early, broadly and often, right?

Alex Corson: Yeah.

Lynda Bennett: Yeah, exactly.

Alex Corson: Yeah, better not to get stuck behind a deadline because you took it upon yourself to determine whether that was a claim, better to provide notice. So then what other language in this back pattern could the policy holder have stood to perhaps review a little bit more closely, given the situation?

Lynda Bennett: Yeah, what really stood out to me is that loophole that was in the automatic 60-day grace period. Because by the way, folks, the reason that 60-day grace period is in these types of claims made policies is because insurance policies aren't supposed to be structured in a way of saying, "Gotcha." And

so the whole idea behind the 60-day grace period is a recognition that claims can come in at the last minute, and as you're assessing what's happening in this underlying litigation, you should be given a reasonable period of time to breathe and remember and think about insurance. The timing of this one was particularly unusual because of the claim coming in literally as the policy was expiring. But in most claims made policies, that 60-day grace period will apply for any claim. So even though that letter got deemed to be a capital-C claim all the way back to February, under most claims made policies, that 60-day grace period would still be available.

Alex Corson: And I think that the notice, that grace period having that limitation, the automatic extra period, was potentially a catch on the front end when the policy was going into effect or when they got the letter looking at the definition of claim. But also, when you get that letter, open up, flip straight to the notice section, right? Because we've seen weird language in these claims made policies, everyone was trying to reinvent the wheel on this, it's not like CGL where we've got the same exact form that then is modified sometimes by endorsement, but same exact form. Every insurer's got their own take on it. And we've seen situations where it's not just the grace period, maybe you have a grace period to provide notice of a claim, but you don't get to provide notice of a circumstance for that extra 60 days. Maybe you have all sorts of strange and unusual limitations on this what's supposed to be a market standard.

Lynda Bennett: Now there's one other thing that people should be thinking about too with these notice provisions. And again, I'm going to kick out a little bit, it's hyper technical, but really important, which is many policyholders will see that there are 'standard amendatory endorsements' based on the state where the policy was issued. And interestingly enough, sometimes these state amendatory endorsements will modify exactly this kind of a provision like the grace period. Maybe your claims made policy for whatever reason doesn't have the 60-day grace period but based on the state in which the policy's been issued, there's a requirement to provide that 60-day grace period, so that may be found in the state amendatory endorsement to your policy.

And the other place to look is, and something that we advise clients when we're doing a policy audit, I know we'll get to that in a couple of minutes. But the other thing that you want to have in your policies is a requirement that any inconsistencies between the policy and what state law requires, statutory law requires, the policy will be modified to provide the broadest shot at coverage there is. So, the Tinder case doesn't really talk about that, but that would be another place that I would be looking to say, "Hey, can I improve my chances now by getting away from this unusually narrow grace period in my state amendatory?" Or maybe just having to liberalize the terms by looking to see what the requirements were for the state in which that policy was issued.

And one last little note before we get into best practices of how do you avoid this problem, I would also note, if I were the broker on this case, I'd be more than a little worried that if this case gets knocked out on late notice and my client provided the copy of the lawsuit on Wednesday, Thursday or Friday, and that then knowing that the policy was going to expire on Saturday or Sunday, if Tinder finds itself out of luck based on a late notice when they did

get the claim to the broker in a timely manner and somebody decided, "Ah, I'll deal with it Monday morning," we may be looking at a broker malpractice claim that'll spawn out of this case.

Alex Corson: Yeah, absolutely. All incredibly good points. And I think that you hit the nail on the head with respect to places that we can look for additional arguments and the potential for the next step after the claim is fully denied. We're always looking to see where it goes after that. So you mentioned, my ears perked up, I heard the word policy audit. So I think there are some really key distinctions here we can make on the steps that the policyholders can take to protect themselves on the front end, both on the broker side and on the coverage council side. So on the coverage council side, we've talked a lot about policy audits. What is a policy audit and how does it help our clients, Lynda?

Lynda Bennett: Yeah, so we work actually very closely with insurance brokers. So the insurance broker typically goes out into the market, solicits bids, talks to our clients about the price, the premium, the self-insured retention, which insurers are willing to offer a quote, which are not. But in our experience, not every broker does the deep dive into what the policy language actually says, and that's what we do through the policy audit. So we bring our knowledge, experience in handling claims, doing market checks for clients to say, and if we had done that here, we would have flag lists to say, "Whoa, hey, you need the broader grace period, not ones that are limited only to claims that are asserted in the 60 days preceding." So that's something that could have and should have been done here.

In addition, you want to find yourself working and partnering brokers that actually take that extra step. There are some out there that will do that and then look at the terms and conditions. So an experienced broker in placing this type of coverage would not have allowed this kind of language to slip on through.

Alex Corson: Yeah, absolutely. And I often, when I'm explaining to people the what's for the broker and what's for me as coverage council, I explain it as we're both aiming at the same thing. We're both looking at the language, we're both trying to give advice on what's standard and what's not. But the reality is that the broker is going to be much closer to what endorsements and changes are modified or available in the market? How much is that costing? What's an additional premium versus what's just something we could slip in there for goodwill? Whereas coverage council, we're looking really a little bit more closely and more attuned to the specific words and exactly how the language is fitting together in our experience and deferring a little bit to the broker on the market stuff, even though we've seen many a policy and can advise on that.

So finally, what's the overarching number one thing I think for policyholders in tender situations to remember when they get the demand letter, just to drive it home?

Lynda Bennett: Yeah, it's the core principles on don't take no for an answer, when you've got a claims made policy, when you receive this type of letter, get the notice

letter in immediately. You can notice it as a claim, a potential claim, but get that carrier on notice as soon as you know somebody is asserting a potential legal liability against you. Lot of our clients will say, "Well, I don't want to send that letter in because I don't want to drive my premiums up," and the reality is that carriers generally, if you're sending a hundred of them, you should have a legitimate concern. It's communicating who you are is a risk.

But in a one-off situation like this, if Tinder had sent that in back in February and nothing ever came of this, there really isn't an impact to the evaluation of you as a good or a bad risk. You're not going to see an increase in premium, you're not going to see an increase in self-insured retention, if you put notice in and the claim goes nowhere. But as we learned in this case, the consequence of delaying and hoping things can work out and trying to negotiate a deal or putting your very careful rebuttal back out there, time's a wasting, and under these claims made policies, it really can become a gotcha bite in the butt.

Alex Corson: Yeah, absolutely. Couldn't have said it better myself, and hopefully we've given folks some things to think about here. These claims made policies are everywhere. So many of the lines are written this way and these subtle little differences and changes to what we might expect to see, don't assume. When in doubt, do it. Put them on notice. Get it in there because I think the potential benefits significantly outweigh the risks of waiting.

Lynda Bennett: Absolutely. All right, so come on back next time and Super Like this episode, it's going to make us Big Ben, but thank you, Alex, for joining me in discussing this very interesting case.

Alex Corson: Thanks for having me. See you next time.

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