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

Episode 104: The Years-Long Wait: Policyholders in the Claims Handling and Negotiation Maze

By Lynda A. Bennett, Eric Jesse
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Welcome to Don't Take No For An Answer. I'm your host, Lynda Bennett, chair of Lowenstein Sandler's Insurance Recovery group. And today I'm joined by my partner and co-host, Eric Jesse. Good to see you again, Eric.

Eric Jesse: Hey, Lynda. How's it going?

Lynda Bennett: So Eric, you and I have had a number of conversations recently that there must be something in the water because although we've both been policyholder advocates for quite a while, it seems like something's really gone amiss here. We've got claim disputes that are off the rails taking years and years, and although you and I typically like to approach claim disputes from a pragmatic perspective and see if we can get something resolved quickly and easily, our colleagues on the other side of the aisle have not been compliant. So today we're going to take a deep dive into what's going on in today's claims environment, but even more important, you and I need to strategize and throw out some big ideas on how we can get this changed because the current dynamic just isn't workable for policyholders.

Eric Jesse: Absolutely.

Lynda Bennett: So, let's take a dive in. What do you see that's going on right now? Why in the last couple of years has it been so difficult to get claims paid?

Eric Jesse: Yeah, look, I think it just comes. One of the things we look at seemingly every day in the news is just natural disasters all over the place. Hurricanes in the southeast, wildfires out west, most recently LA. And even if you have a D&O insurance policy, that homeowner's claim is going

to trickle through to the bottom line of these insurers and so I think as those claim payouts are hopefully happening, insurers are constricting on other claim payouts. So, I think that's certainly one cause here.

Lynda Bennett: Some of my friends are a little more cynical, and in recent years, they've asked, "Well, gee whiz, with interest rates being what they were, were carriers making the affirmative decision that it was better for them to hold onto their money and not pay out claims because they were making more money by keeping it in the bank instead of paying valid claims to their policyholders?" What do you think about that?

Eric Jesse: Yeah. No, that's something we've talked about as well, and I don't want to steal the thunder from a little later, but that's one of the areas of reform that we want to talk about, which is just a prejudgment interest component. But yeah, absolutely, there's certainly investment component here as well.

Lynda Bennett: Let's dive in a little bit to what kinds of things we're seeing carriers do to deny or limit the claims. And again, there's a couple of things, and the reason that I wanted to record this episode with you, we're seeing some very common themes emerging across every coverage line that we deal with, one being the all-important, "Where is this fight going to happen?"

Eric Jesse: Yes.

Lynda Bennett: And in the last couple of years, we've had a few of our clients that have been sued and they're shocked that their carriers are running to court to sue them instead of, "We thought we were in a claim dispute conversation and now suddenly the complaint is sitting in my inbox." And you and I both know why that's happening and any of our loyal listeners on Don't Take No For An Answer know why that's happening because choice of law matters, choice of forum matters, right?

Eric Jesse: Absolutely.

Lynda Bennett: That's something that policyholders today need to be paying far more attention to than even five years ago because we've definitely seen, and if you have a claim dispute with your carrier, the first thing you do, you better figure out if the law is different on that core issue in one jurisdiction versus the other because that may inform what you need to do. Eric, how about you? I mean, forum battles would be one of my number ones.

Eric Jesse: Yeah.

Lynda Bennett: What else are you seeing?

Eric Jesse: So definitely that forum battles choice of law, but I would add just sometimes very silly coverage positions. It seems like the things that

should be easy, the things that really shouldn't be in dispute, the things that aren't the weighing arguments for the insurers, we're seeing it all. So, there's a laundry list of things we have to try and push back on. So, we actually have to kind of sweat the small stuff because the insurers are just running to very aggressive or sometimes ridiculous coverage defenses or claim positions. So that's another thing that we're seeing.

Lynda Bennett: Everyone knows you put in your notice of claim and the next thing that's going to happen is you're going to get that 19-page single space letter reciting every provision in the policy and then asking for 34 pieces of information. We write the letter responding back, give information about the claim, and then we get the next letter saying, "Thank you for that. Now we have 15 follow-up items." That never-ending claims investigation that, from my point of view, has started to extend far beyond what was reasonable and customary, again, just a couple of years ago.

Eric Jesse: Yeah, there are the never-ending requests for perfect information. We can provide multiple defense counsel assessments to an insurer, and it's still never enough to provide them lots of information and it's still not enough. And it's unfortunate because sometimes it seems like investigation, claim resolution mode, you have to behave as if you're in full-blown litigation discovery and that's not how that process should be. So, we're absolutely seeing that insurers, you say no to that information or say the information you're seeking is not reasonable or, "We've provided it and look here," right? It's just further delay in the process, which is, I think, what the insurers are looking to do.

Lynda Bennett: Right. We say no after giving a large amount of information, and the next thing that we hear is the lack of cooperation defense, right?

Eric Jesse: Yes.

Lynda Bennett: After you've given and responded to a mountain of information requests and provided a mountain of paper, the minute you finally say, "I've had enough, I'm not providing any more. Just give me your coverage position. I've provided you with sufficient information to give me a coverage position," then you get hit with the lack of cooperation defense, which, as you and I both know, and as our listeners need to know, it's a nice thing for carriers to stay. The standard is pretty high for a carrier to succeed on a lack of cooperation defense, especially when you have provided a pretty fulsome claim package for the carrier to review, evaluate, and take a coverage position on.

We also sometimes see that hardball tactic, which will send a chill down our client's spine of now carriers raising misrepresentation defenses, whether it's misrepresentation in the application, threatening rescission of the policy, things of that nature. We've also seen that kind of hardball that

is really intended to just have you back off. And a lot of times we find that there's no merit to that and, actually, we still have a covered claim at the end. So definitely worth pushing on that. And then, of course, you and I get the phone calls from the mediation or leading up to the mediation where we need settlement authority.

And it has been more and more difficult with each passing year just to get the carrier to take a position, "Are you coming to the mediation? If you're coming, what level of authority are you coming with?" And we're guiding our clients on what a policyholder is to do when a settlement opportunity arises and you have a non-compliant insurer, what are your rights? But obviously, our clients would strongly prefer to be sitting next to their carrier shoulder-to-shoulder working to strike the best deal to resolve an underlying litigation instead of having this sideshow with the carrier where we can't even figure out if we're going to have any settlement authority going into mediation.

Eric Jesse: Yeah. This is not the scenario where our clients want to be fighting a two-front war as they're trying to prevail or resolve an underlying case in the most favorable way possible and also while fighting with the insurer. So completely there. And this is where, unfortunately, we just see insurers trying to pull that hostage process or trying to leverage a contribution from the insured. I believe they even had podcasts on that, so we can refer our listeners back to those podcasts for the deep dive on that issue.

Lynda Bennett: Absolutely. So, against this very difficult claims environment, what are our clients and policyholders to do? What are some of the techniques that our listeners should be thinking about to move forward and to still get coverage for covered claims in this type of environment?

Eric Jesse: Yeah, I know we want to talk about some big picture items, but things that our clients can do specific to them to really improve their situation is part of this is during the renewal process, really speaking to your broker about who you're insured with and making sure you're insured with an insurer that has the best possible reputation for claims. So all insurers are not going to be created equal. So really talk to your broker about which insurer is best to be with from a claim standpoint.

And the other thing is just on the front end here, things you can do in advance is try and make sure that your policy form has the best possible language. These policies, you're not always getting the gold standard policy form, so we review policies on behalf of our clients, we put together a wishlist, and there's the old saying, "You don't get what you don't ask for." A lot of times we're able to secure improvements to the policy language, which can pay dividends down the road to give our clients a stronger leg to stand on.

Lynda Bennett: I agree with that. And that's even before you've got a claim, those are steps that you can take. When you have a claim, historically, what we've told our clients is, "Okay, receive the reservation of rights letter. Now let's go through and see what is reasonable to be asked for." When we're asking an insurance company to pay money, we need to give them information as to what our damages are, right? So, you were talking about natural disasters before. We've got to prove up what our damage to property is, what our business interruption is.

When we're in the context of the third-party underlying lawsuit claim, we've got to have that defense counsel assessment report that you were talking about earlier, Eric, that explains, "What is the potential risk if we take this to trial? What is the settlement value in this jurisdiction for these types of claimed bodily injury or property damage?" So, we do have to strike the right balance of giving sufficient information for the insurance company to be in a position to take a position on the claim and ultimately and ideally provide settlement authority for those third-party claims. But I have to tell you, Eric, and again, I've seen a real change, I've been doing this for 30 years, and the claims environment for the last five years has been crazy.

In the course of my practice, I've always wanted to guide clients toward, "Let's work it out with the carrier. You don't want to open up that new front of litigation. Let's see what we can do in a reasonable commercial way with our carrier to get this resolved." And in the last four or five years, that option simply hasn't been on the table. And in the last couple of years, we've had to deal with the carrier, sue them, and then they pay. That's something that I think listeners need to be aware of now. There is something very different over the last couple of years, and that effort of trying to just work it out and negotiate it is not going to work as effectively as it did just a couple of years ago.

Eric Jesse: The early coverage lawsuit can be important too. Especially, one of the things we try and do when we file those lawsuits is, "All right, what's an early motion that we can file to get an early win?" And especially on the duty to defend, that may be a way just to cost-effectively get the insurer to do what they need to be doing.

And look, one of the benefits of doing that is sometimes we have clients that are dealing with these issues like a duty to defend on the backend, then insurers use information that was developed during the course of the underlying discovery and use it against you later on. So you might actually be in a much stronger position to maximize coverage by being proactive early on with that.

Lynda Bennett: Exactly right. Eric, give me just a couple of words on bad faith. This is something that you and I love to debate back and forth of whether asserting bad faith against the carrier really scares them or not. This is something that our clients ask us regularly, so give us your views on that.

Eric Jesse: Yeah. One of the things here is bad faith, you really need to understand the choice of law that's going to apply. Some jurisdictions, bad faith can be a meaningful claim and other jurisdictions it might not really be as strong. And then there's just strategic considerations that you have to make here. One is, you include a bad faith cause of action, that might be opportunity for the carrier to delay a little bit more. They're going to file a motion to dismiss that you're going to have to impose, they're going to try and bifurcate discovery so it might actually delay getting to the merits of the claim, but it can potentially add value. I think when we're in jurisdictions where there isn't necessarily fee shifting for coverage counsel fees, the bad faith claim can be potentially useful, bring the attorney fees into play.

Lynda Bennett: Well, we've got just a couple of minutes left and that's a perfect segue to the pulpit that I want to climb up on to talk about some reform that I think is really needed to shake things up and get us back into a more reasonable and commercial claims adjustment process with carriers. And you touched on a couple of things, a couple of arrows that we have in our quivers already in certain jurisdictions. Number one being that fee shifting concept that you just talked about. When we have to sue the insurer, having the ability to recover our coverage litigation costs, one, makes it more attractive to our clients to open up that new front of litigation because they may actually be able to get those coverage litigation fees back.

And those jurisdictions that have fee shifting in place recognize that that's actually needed so that the policyholder doesn't lose the benefit of the insurance that they purchased by having to file the lawsuit. And that's diminishing what should have been a covered claim. Now it's not going to be fully covered. So, fee shifting is definitely one. Pre-judgment interest in certain jurisdictions, for example, in New York, there is a nine percent non-discretionary, you establish a covered claim, you get nine percent on what the carrier should have been paying, and that is a very healthy and heavy hammer to put down. As is, you talked about bad faith statutes, and again, some jurisdictions have that.

The place I really would love to see reform, because you and I both know getting a bad faith statute passed in a jurisdiction that doesn't already have one, the insurance industry has a pretty tight lobby, a pretty effective lobby, so getting a full-blown bad faith statute passed, very difficult. You may remember years ago when Superstorm Sandy came through, there

was an effort to get a bad faith statute passed because the carriers did not step up in the way that they should have, and the insurance lobby effectively shot that down several times. But, Eric, what are some other things, short of the full-blown bad faith statute, that we can do that will really reform and level out this claims adjustment process?

Eric Jesse: Yeah, a lot of jurisdictions do have claim handling standards, but are requirements for insurers, but there isn't necessarily a private right of action assigned to those. So, I think if we're able to actually have policyholders have the ability to press some of these levers, so if an insurer hasn't provided a coverage position letter within X days, there needs to be consequences for that. So, I think by trying to turn some of those pre-existing claim handling standards that are already in there and give policyholders the private right of action to pursue recovery or damages when those are violated, I think that could be an additional pressure point as well.

Lynda Bennett: Absolutely. Let's bring an end to that never-ending claims investigation by requiring a coverage position letter within a specific period of time. And if not a coverage position letter, then with specificity what is needed in order to give that coverage position. Well certainly, we've given some good advice on what you can do in the here and now, and hopefully you and I will be getting back together a year or two years from now on Don't Take No For An Answer and some of our suggested reform measures will have been considered and maybe even ideally, adopted. But thanks for joining me today, Eric, on this discussion, and we'll see everybody next time.

Eric Jesse: Absolutely. Have a good one.

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