



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

**Episode 41
I Still Haven't Found What I am Looking For: The Search
For Missing Policies to Cover Long Tail Liabilities**

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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'm very pleased to be joined by Bill Denver, who's special counsel and a member of our Insurance Recovery group. Bill has been representing policy holders in coverage battles for about two decades now. So Bill, thanks for joining us today.

Bill Denver: Thanks Lynda. I'm really happy to be here.

Lynda Bennett: Great. So today we're going to be talking about an important issue, which is how to find missing policies to address certain long tail liabilities. So, this issue first came up back in the 1970s and '80s when companies were sued for environmental liabilities and exposure to asbestos products. When those companies were facing those liabilities they turned to their insurance policies and many of the policies that were going to respond to those types of claims were occurrence based policies. Meaning that coverage would be available if you could demonstrate that the damage or injury took place during the time period when the policy was in effect.

Lynda Bennett: So, many companies were surprised to learn that a policy that was issued in 1952 may actually provide coverage for a claim that was being asserted in 1970. So we'll take the classic example of a company who was accused of polluting by dumping chemicals in their backyard and that chemical sort of made its way through to the groundwater and contaminated the groundwater. So as those companies were facing those liabilities, what they came to realize was it was really important to have strong records of the insurance policies that had been issued to them historically. And what we found is that for many of our clients sometimes we were lucky and found the box of policies that went back all the way to 1940, right Bill? And other times we weren't able to find the box of policies, but we were able to find a couple of pieces of paper that proved that a policy was issued.

Lynda Bennett: So today we're going to talk about how do you go about the process of trying to find them? Because even though we're in 2022, believe it or not,

companies are still facing these types of long tail liabilities where they've got damage or injury alleged back into the 1960s. So today by way of example, we're dealing with tort claims, sexual abuse claims, and other product liability claims.

Lynda Bennett: So, Bill, let's start at the beginning. When facing one of these types of long tail liabilities, where does the company start to try to find that historic policy information?

Bill Denver: Well, what I always tell people to do is start with the people who know, and if you're a company of a sufficient size and you actually have a risk manager who helped place your coverage, go talk to your risk managers. Whether they still work for you, whether they're retired, it's amazing how often these guys know exactly who they placed coverage with, what their limits were, things like that, even going back 20, 30, 40 years sometimes. So if you have access to that person, that's great and that's a good starting point. Some companies aren't big enough to have risk managers, so they rely on brokers really to place coverage. I would have the same conversation with the broker trying to access what their records are and the people who have knowledge of the insurance program. And that's always my starting point because those are the people who should know the most about your historical coverage.

Lynda Bennett: Well, I love talking to those risk managers because you always get to hear about the great flood or the fire that basically burned up or water damage and they threw out all the records. But you're right, that is a great place to start. But, let's talk about some of the particular files that you may want to get into. Because, as I mentioned, one thing that's surprising to a lot of our clients is that you don't have to have a complete copy of the policy. So, where are some of the good places in the company's historic records to start looking for a couple of pieces of paper to start to string this together?

Bill Denver: Well, you want to go back and start looking through the historical archives and the business records. And, a lot of times, you just need to undertake a physical search because a lot of this stuff was pre-automation obviously and so they're not going to be electronic files and you need to go back and see if there are files where you kept your insurance policies? Are there files where if you were a company that did a lot of government work, did you have to keep records of what your coverage was that was in place? If you did a lot of financial transactions, sometimes you have to show coverage or if buying and selling subsidiaries sometimes there will be lists of coverage there. So basically you go back and you start trying to do kind of a physical search to locate some of those historical policies or even just evidence of them, even a list of coverage with a name of a carrier, hopefully you have an insurance policy number, but sometimes even if you just have the name of the carrier and the policy year, that's enough to get you going and to show that it's a business record so in some states you've already shown that you have prima facie evidence that you had some coverage in place at that point.

Lynda Bennett: Yeah. I agree. A couple of other places to look, some of your historic lawsuits. One of the standard questions to ask in a car accident case, for example, is what insurance do you have? And our listeners need to understand that these policies typically provided CGL, auto sometimes in a

package. So that policy number may be found in an answer to interrogatories from an old case. And also I encourage clients to think broadly about where they may have been required to provide proof of insurance to others. So, if you did government contracts, if you have master services agreements with longstanding business partners you may have been required to provide a certificate of insurance or at least provide the name and amount of the limits of the carrier that you have in place. So you're right, start with the finance, look for evidence of premium payments for a great place to look. But there are some of these others that are little bit outside the box, places that you can also search as well.

Lynda Bennett: So, let's pivot to the insurers. Do they play any role in this process? So let's take the example, Bill, that you gave, that I've got the name of my carrier and I know what the limits were and I've got a crusty old risk manager who said, oh, we definitely were with INA throughout the 1970s. What happens next? Do you reach out to the carriers? Will they have those policies available when you make that outreach?

Bill Denver: In general, I always favor reaching out. We have a good experiences with reaching out to insurance companies, typically. I will say a lot of times your first or second or third request will be ignored.

Lynda Bennett: Seen that movie before.

Bill Denver: Yes and so it does take some persistence. But if you push hard enough, usually you start to get somebody who will say, okay, I'll undertake a search. And then you ask them not to look in their own desk, which is probably not going to have the insurance policies you're looking for, but to actually do a real search. And every once in a while you will get real meaningful results. We have one carrier who just sent the letter to New Jersey Manufacturers and New Jersey Manufacturers sent 15 policies that were in place from the '30s, '40s, and '50s, which was amazing. And they had claims that went back that far. So it was pure gold and they got it in a week and it was just that easy, just making the request.

Lynda Bennett: Picking up the money off the floor, that's terrific.

Bill Denver: Exactly.

Lynda Bennett: How far back are carriers—This is a question that I get asked routinely by clients, which is how far back do the insurers are they required to keep those records?

Bill Denver: Well, unfortunately, I think it depends on the state, and the business practices are very different on top of that. There's been a lot of consolidation in the insurance industry over years, so there's a lot of lost files that might be buried somewhere or maybe weren't being kept. So it really depends on the state of the jurisdiction that you're in.

Lynda Bennett: Yeah. I think you're exactly right, Bill, that the carriers in the first instance, I mean you gave a great example, that's more the exception to the rule, sending that letter and getting back a box of policies. And I do want to

encourage our listeners to be persistent in chasing the carriers because some of them do have microfiche of policy information going back into the '60s, '70s, '80s. And really putting the carriers through their paces is an important thing because we're going to get into how the court deals with this in a little while, but it is important for our listeners to understand that carriers will be found in bad faith if they don't undertake a reasonable and diligent effort to look for those policies.

Bill Denver: And one of the things it's important is it's kind of like peeling an onion. Like there's going to be multiple layers, there's literally multiple layers of insurance coverage a lot of times, and it's kind of like once you get through that surface layer and you start getting some information sometimes you can snowball. So, literally, if you get one policy and it's an excess policy, well maybe that policy's going to list the insurance carriers and the insurance policy numbers that sit below it, that same policy might say that it's a renewal of a policy the year before. So now you go back to the carrier and you ask for the year before, and then you get the same kind of information. And all of a sudden you start to build slowly just by reading from one insurance policy and you can build up an entire insurance program.

Lynda Bennett: That's a great point, Bill, and I'll just build on that. Also, understanding what the policy numbers mean, because there's a method to the madness of what the policy number is and sometimes, for example, if it has an 04 in the policy number that means it was the fourth policy, it was a renewal and it's been in place for four years prior to the policy that you have in your hands. So, absolutely great points there.

Lynda Bennett: So we've talked about looking at policy holder records, we've talked about begging the insurers to find the information in their records. What about outside experts? Are there any outfits out there that can help also fill some of the gaps if we've got a couple of pieces of paper to work with?

Bill Denver: Yes, there are. I mean, there's a college industry of people who call themselves insurance archeologists, including Insurance Archeology Group. And basically their job is to go out and try to find insurance policies and they will have experience and they'll be sometimes more efficient at the process than you could be if you hired attorneys or even other people who don't have this kind of experience. These kind of people will have more familiarity with, for example, like the Naval archives, which frequently have long insurance records for anybody who did contract work for the Navy. They also have more familiarity going to London Market. London Market has its own database of information that they keep through Price Forbes and some of the insurance archeology groups are more accustomed to interacting with them to conduct meaningful searches and making sure that they're accurate. So they'll be more efficient, but it is also a costly process and you want to make sure that what you're facing in terms of potential losses justify the expense.

Lynda Bennett: Yep. No, that's a great point. Those insurance archeologists, which by the way I'd love for there to be a major in college for that, maybe one day we'll get there, but they also have form files. So if you only have that one piece of paper and you know it was issued by INA in 1962 and you've got a policy number, there were standard forms that were used and those insurance

archeologists have done an amazing job going to insurance regulators to create an entire library. So they are a tremendous resource if you've got a couple of pieces of paper to start working with.

Lynda Bennett: Bill, so I want to just pivot over to now that we've done our search and we don't have complete information and now we're in our coverage litigation, how much secondary evidence is enough? How do courts look at this? What is the standard of proof that will be applied to whether my four pieces of paper are enough to prove that policy?

Bill Denver: Well, again, unfortunately it's the typical lawyer answer of "it depends." It depends on where you are and, under the federal rules, you don't need to show a full insurance policy in order to show coverage. But typically federal courts do want you to show that you undertook a meaningful and efficient search before you try to come to them and say, well, I've got the secondary evidence. But once you've taken that search and you bring the secondary evidence, it might be a certificate of insurance, sometimes they'll even accept testimony from risk managers saying I know that we bought coverage from AIG for 10 years, it was our primary carrier. Sometimes courts will accept that and we'll move forward, but it really depends on where you are, and some courts are a little bit more strict on that. Other states, like New Jersey, if you have some secondary evidence and basically there's some strong indications that there was coverage in place, basically the courts will shift the burden over to the insurance carriers to show why there was no coverage at that time.

Lynda Bennett: Yep. Great. Yeah. It's the preponderance of the evidence, is it more likely than not than the policy was issued or clear and convincing. You better have nine tenths of the information of that policy available to prove it, right?

Bill Denver: Exactly.

Lynda Bennett: All right. Well, so we're just about out of time. I want to wrap up. The search for missing policies is crucially important because those are incredibly valuable assets that can be monetized, but what are the parting shots for you? What are the best practices that clients should put in place to find and keep and preserve those very valuable assets for a future liability?

Bill Denver: Well, the number one best practice is make sure that you keep good insurance records and you keep them acceptable, both physical copies and electronic copies. So, that's number one.

Bill Denver: Number two is use the people who you've hired to maintain these records and to do your insurance work, rely on them when you need to in order to get faster and more efficient access to your records. And then don't be shy about digging in and doing physical searches, looking through your records, having a law firm do searches for prior cases and similar work like that so that you can really make sure that you've dug in and that you've unearthed whatever is out there that could show what your insurance coverage was.

Lynda Bennett: Great advice Bill, really appreciate your time today and we'll look forward to having you back on Don't Take No For An Answer. See you next time.

Bill Denver:

Thanks.

Kevin Iredell:

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