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

Episode 48
Sending Up the Mediation Smoke Signal: Tools that Policyholders Have Available to Settle A Claim With A Recalcitrant Insurer

By Lynda Bennett, Eric Jesse

SEPTEMBER 2022

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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 at Lowenstein Sandler and I'm very pleased to be joined today by my partner, Eric Jesse. And we're going to be talking about one of our favorite topics, which is getting that late Friday afternoon phone call from a mediation when a carrier is not paying. So Eric, welcome back.

Eric Jesse: Great to be here. How are you doing?

Lynda Bennett: Good to have the band back together here.

Eric Jesse: Absolutely.

Lynda Bennett: Let me set the scene. It's late in the day, as I said, usually on a Friday or my other favorite, which is the day before a major holiday, and the phone call comes in from a mediation that we have no knowledge of, we haven't been invited to and really don't know the facts of the case. There's a settlement opportunity, but the insurer has dug in with either a no pay position or a low-ball settlement offer. What in the world is the policy holder to do?

Eric Jesse: Yeah, so in that moment, there are maybe four, or four and a half possibilities. None of them that are ideal, unfortunately, but that's the reality. One option is just to walk away from the settlement. Obviously, if you're at a mediation, you're there to try and get a deal done. So again, not ideal. Another possibility is, you want to settle while preserving the right to pursue coverage in a subsequent dispute.

Lynda Bennett: So Eric, how do you that when the policy has a consent provision that says the insurance company has to say yes before you can agree to pay anything, how do you navigate that?

Eric Jesse: Yeah, so what we'll typically do here, because that's obviously an important factor. So, what we'll do is we'll ask the carrier to waive the consent to settle provision, so that we can go out and make the settlement. And all parties will mutually reserve their rights to argue about whether the settlement was reasonable, but that's how we often handle that situation. And in most cases, but not all, the carrier will agree to that waiver.

Lynda Bennett: So, in that instance, you can either write the entire check, is there a middle ground?

Eric Jesse: So yeah, writing the entire check, you're doing the pay and chase option. The middle ground is to see if the carrier will fund again where they're putting up the money instead of the policyholder, where all parties are reserving their rights on the coverage dispute going forward.

Lynda Bennett: All right. So, you said we have four and a half possibilities. You can just walk away. Two is to settle with either your own money or the carrier's money, that's the half option. What's the third option?

Eric Jesse: Yeah, so another option that we're often faced with is really where the claimant can enter into a settlement and then make an assignment to the claimant to pursue the invites to the insurance policy proceeds. And here, it's going to be important that the policy holder makes sure that that settlement is negotiated, is reasonable and in good faith, it can't be collusive settlement where you're just trying to hand the insurer the bill.

Lynda Bennett: And then what's the fourth and final option?

Eric Jesse: Yeah, and this is the one that we're also familiar with. This is where coverage council is really needed to parachute in to twist the carrier's arm, where we come in and we're making the arguments for why the insurance company needs to provide settlement authority here and provide a contribution to the settlement. Here we're pointing out that the insurer has a fiduciary obligation, under many states' laws, to put their financial interest ahead of the insured's, and so they need to settle to protect the insured. And we're making the bad faith argument that if they don't settle, we're going to be coming after them for any judgment, even if it exceeds the settlement or policy limits.

Lynda Bennett: So, when the policy holder's at that mediation and finds themselves in that unhappy circumstance, what are the first couple of things that the policyholder needs to know to assess which of the four and a half options you just outlined are the best ones for them to pursue in that moment?

Eric Jesse: So, I mean, first and foremost is the policy language. And this is where we constantly advise our clients to be proactive when they're obtaining a policy. Don't just buy a policy and place it on the shelf, understand what the policy language is and try to negotiate for better language if you can, because it is possible to negotiate language, to address the consent to settle option, where you can ask the carrier during the renewal phase where they want their premium dollars to add language, that the insurer cannot unreasonably withhold their consent. And so, policy language is certainly king.

There's a couple other options, or things that policy holders need to keep in mind. One is choice of law. I know that this has been a constant topic on Don't Take No for an Answer. This is going to impact the ability to assign the right to receive proceeds to a claimant.

Lynda Bennett: Right, so meaning that some jurisdictions may allow you to assign the rights to receive those proceeds under the policy, but as you're sitting at that mediation, as a policy holder, you better not assume that to be true without checking first, right?

Eric Jesse: Exactly, exactly.

Lynda Bennett: And what about the status and history of the business relationship between the policyholder and the insured? Does that really have any impact when you're sitting at the mediation and who are the stakeholders that you need to have on speed dial for that?

Eric Jesse: Yeah, so that's obviously another important factor, an intangible factor, where if the policy holder is a longstanding insured of the insurer, you can make the arguments for business accommodations to get things done. Conversely, if the policy holder has switched insurers and that relationship isn't there, the insurance company is much more likely to take a sand in the gears approach. But I think in all events, you really need to make sure your broker's up to speed and make sure they're available to advocate for your behalf, certainly on the commercial front and to request what I'll call the business accommodation from the carrier.

Lynda Bennett: And here, I want to add that policyholders need to think broadly about that business relationship. So, if you're sitting at a mediation involving an employment dispute, you don't need to know just the relationship for that EPL policy. Sometimes our clients have policies with the same insurer across five or six different coverage lines, and that's a lot of premium dollars that is being paid out year over year. So, when you think about the business relationship, you've really got to think broadly beyond just the claim that has brought you to the mediation that day and what leverage there is to play there. I also want to note that these three things that you just talked about, Eric, the policy language, choice of law and the business relationship, frankly, that's something that policy holders should be thinking about before they ever get to the mediation. These are all things that as you prepare to go in to try to resolve that claim. You really should have all of that information locked down because that's going to be able to put you in the best position to respond on your feet at the mediation. So Eric, I want to ask you, is there ever a time when you're called from the mediation because the policy holder is the one that doesn't want to settle and the insurance company does?

Eric Jesse: Yeah, so that can certainly happen. The reason a policy holder might not want to settle but the carrier does because the policy holder is concerned about their reputation and the insurer doesn't care. They want to try and get out for as little as possible. But a policy holder, they may be accused of professional malpractice, for example, and so they want a need that vindication in court by going to the mats and getting a finding of no liability.

But another reason a policyholder might not want to settle is they want to avoid setting a precedent. They want to communicate to the plaintiff's bar that they're not going to be an easy target and subject themselves to multiple lawsuits, whereas the carrier is just thinking about that one case and again, trying to get out for as little as possible.

Lynda Bennett: So the insurer wants to settle. The policy holder doesn't. Is there policy language that addresses this circumstance? And if so, how does that work?

Eric Jesse: Yes, there is. And this goes back to our earlier point about how the policy language is key and how you can't just take the policy and put it on the shelf. Many policies have what's called the hammer clause, which means that if this insurance company wants to settle and the policy holder doesn't, all right, well, this settlement won't go forward, but the insurance company will only pay a percentage of the future defense costs and any settlement costs. So oftentimes, you'll see a policy that might be says 50%, meaning the carrier only has to pay 50% of defense costs. After that, settlement opportunity is rejected by the policy holder. When we're negotiating the policies, we want to make sure that it's getting ... that percentage is as high as possible.

Lynda Bennett: So, once again, the words matter in the insurance policy and the best practices tip here again is, these are all terms that should be evaluated and negotiated during the underwriting and placement of these policies, as opposed to reading it for the first time when you're sitting at a mediation and the carrier's trying to cram a settlement down your throat. All right, Eric, so let's go back to our late in the day phone call from our unhappy client. Were there things that the policy holder could have, or should have done, to avoid finding themselves in that position?

Eric Jesse: I think this is the question, is how do we make sure everyone gets to happy hour on time? And so, one of the things that can really help us as coverage lawyers leverage the insurance company to step up, is getting a settlement demand from the plaintiff or the claimant, that is ideally at or within policy limits. And the reason for that is there is a case in New Jersey called Rova Farms. And there's similar case law throughout the country, that says when an insurance company has a settlement opportunity that is within policy limits and they fail to consent to that settlement, then they have liability for any judgment in excess of that settlement and even in excess of their policy limits. So, it can be a very strong hammer to twist the insurer's arm to step up.

Lynda Bennett: So, sometimes the plaintiffs will send that demand on their own in advance of the mediation. But it's important, I think, for policyholders to understand that sometimes the plaintiffs need a little bit of a prod and a suggestion that that would be something helpful going into the mediation, just to have an idea of what the plaintiff is looking for. Obviously you're not going to disclose that you have insurance, but getting that demand in hand is super important.

Eric Jesse: And Lynda, one other point, I think that can help this along, is really educating the mediator on insurance. So, when we're coverage council and our client and their defense council is going to the mediation, we'll often

prepare a mediation statement that goes to the mediator who can help facilitate getting the insurance company to step up as well.

Lynda Bennett: So, the plaintiff plays a role. The mediator has a role. What about the lawyer that's defending the policy holder at the mediation? Do they have any role in helping to facilitate avoiding the unhappy outcome that we've described here today?

Eric Jesse: Yeah, unfortunately they will ... if the carrier still refuses to step up, they can become the star witness in the coverage litigation, in the bad faith litigation where you're trying to get the carrier to ultimately pay a settlement or judgment that has been reached. And so, it's important that as defense counsel's preparing for the mediation, that they've properly analyzed the claim, that they've presented verdict and settlement value ranges, that they've provided a fully loaded litigation budget through trial, and also provided a realistic assessment of risk that happens if this claim goes all the way to trial. Those are very strong pieces of evidence that can either help us twist the carrier's arm or to ultimately prevail at trial.

Lynda Bennett: Yeah, I want to add here, this is one of the biggest mistakes, frankly, that I see policy holders make. Oftentimes we're getting this call from mediation because the insurance company has actually stepped up, agreed to defend the case, they've appointed the defense counsel who's handling the defense of the case. And the policy holder hasn't looked at the reservation of rights letter in about three and a half years. While the case has been bumping through the court system, they've really taken a laissez faire approach and now they're sitting at the mediation and the insurer is saying, "Well, remember that letter, I sent you three and a half years ago where I told you that there's no indemnity coverage, or there are all these terms and conditions for the reasons why I'm not going to have to pay indemnity here? So, I'm only going to pay 10% of this and 90% of this is yours."

We have seen that scenario over and over and over again because people, policyholders, fall into that false sense of security. Like, "Oh, this is insured because the insurance company's defending me." That's the single biggest mistake that we see people make. And the way that you avoid that is one, don't ever assume when a carrier's defending under a reservation of rights, you're good and you're covered. And two, without question, once that mediation gets scheduled, you need to start thinking about all of these things. And the more information that you have in your hand to tell me when you're calling at five o'clock from that mediation, the more of that information you've already got collected, the better off you're going to be and the more we're going to be able to help you get that carrier to pay the claim. But don't fall into that trap of, "Oh, the carrier's defending me so I'm good. Because that's the most common way that our phone rings from the mediation with unhappy surprises." So Eric, thanks very much for coming and talking about how to get out of the bear trap of mediation with no pay carrier. As always, I appreciate your insights and the practical advice that you give. So, thanks for joining us today,

Eric Jesse: Great, thank you for having me. Always a pleasure.

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