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

Episode 52

Insurer Litigation Guidelines: The Unholy Grail of Defense Cost Coverage

By Lynda Bennett, Eric Jesse

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Lynda Bennett: Welcome back to Don't Take No For An Answer. I'm your host, Lynda Bennett, chair of the Insurance Recovery Practice at Lowenstein Sandler. And it's old home week. I've invited my partner, Eric Jesse, back today. Welcome back, Eric.

Eric Jesse: Thank you for having me, Lynda. Always good to be here.

Lynda Bennett: All right. Well, so hey Eric. Today we're going to talk about one of our favorite topics, and that is insure litigation guidelines, the unholy grail of defense cost coverage. So, why don't we set the table by informing our listeners what are litigation guidelines? And more importantly, where can they be found in the insurance policy?

Eric Jesse: Yeah. So, to be blunt, these are the handcuffs that insurance companies try and put on defense counsel's defense of the claim, right? Defense counsel, they have their professional responsibility obligations to their clients, and they need to do what they think they need to do. And the insurance companies want to second guess and really use these guidelines to try and go line by line through the defense counsel's bill and strike out this task or that amount. And to answer your question of where they can be found in the policy, it's probably a game of "Where's Waldo", except you're not going to be able to find Waldo because they're not in there.

Lynda Bennett: All right. Well, so in that case, typically, when do policy holders get to see what those guidelines say?

Eric Jesse: Yeah. So, typically it's when the litigation begins, and defense counsel is appointed. At that point, that's when those guidelines are going to come across and usually not before.

Lynda Bennett: So, what do the guidelines say though? Give me some examples of what are the details that are in there and what's in bounds and out of bounds?

Eric Jesse: Yeah. So yeah, these are the guidelines. I mean, even though they're called guidelines, the carriers will treat them as hard and fast rules when you're reviewing the defense counsel's invoice, and they're going to go and say, "Well, you had three lawyers at this meeting, so we're going to strike that because we don't allow in firm meetings." And so, part of the problem there is carriers don't recognize that sometimes putting on defense requires collaboration with attorneys in the firm, and so you need to have those discussions. Other restrictions are going to be that only an attorney of a certain experience level can perform certain tasks. They might restrict the number of attorneys that can even work on a case to begin with.

They can impose requirements for task-based billing as opposed to block billing. So, if an attorney dared put two-time entries together, the carrier is going to strike that. It might involve caps on the hourly rates that the carrier's going to pay. It can be an exclusion for what the insurers deem administrative work. One of my favorites is that even though we're in the year 2020 where everything is done electronically, legal research costs are going to be stricken, so no coverage for Lexus or Westlaw, the carriers will argue.

Lynda Bennett: Well, there's always Google. So, it sounds like the rubber really meets the road in these lit guidelines for what constitutes a reasonable, "reasonable" defense cost or activity. So, who gets to decide what's reasonable or not?

Eric Jesse: Yeah. I mean, I think there's the practical reality that I think a lot of these issues are going to be negotiated. So, if an insurer is taking a scalpel approach to a defense cost invoice as opposed to a hatchet, I think you're going to try and work it out with the carrier and try and get some more of those costs covered. And you're going to try and explain why that task was important, why it was important to have a third attorney in a meeting to talk about the defense of the case. Where carriers take the hatchet, you can still try and negotiate and go through the give and take, but it may ultimately be a judge who decides if the amount and controversy is significant enough.

Lynda Bennett: Yeah. I mean, I think we're joking around a little bit. The stated purpose of these litigation guidelines and the carriers will tell our clients is to manage the cost of the litigation. And they're doing that with an eye toward preserving the limit. In many instances now, defense costs erode the policy limit where these lit guidelines come into play. And so, the pitch by the insurers is, "Hey, listen, we're trying to help you preserve the limit of the policy, so that when there's an indemnity obligation, either through a settlement or a judgment that gets entered against you, there'll be sufficient funds available for that." But I think the in practice, what we've seen is that really insurers tend to try to use these guidelines to provide a cheap defense, not necessarily the best defense.

Eric Jesse: Yeah. Insurers, I think with these guidelines, they'll often take a one-size-fits-all approach, so the guidelines they're using for the car crash case are the ones they might use for the company litigation that is also subject to coverage.

Lynda Bennett: No, exactly right. And so, you said that in many instances, again, they always have to review the policy language, but in many instances, these guidelines are not a term or condition in the policy. So, the question I have for you is, are policyholders actually required to comply with the guidelines? What have the courts said about these when the dispute makes its way of court?

Eric Jesse: Yeah. So, here the opinions are very policy holder friendly. I mean, first of all, the carriers call them guidelines. So, to my point earlier, they need to understand that these are not hard and fast rules. And courts recognize that they are not part of the policy. They're not typically referenced in the policy. The policy is going to speak in terms of reasonableness. They have to cover reasonable attorney's fees, and so that's what must govern. And so, courts do find that these guidelines are extra contractual and not binding. And as we also mentioned, defense attorneys have professional obligations to zealously represent their clients, and so their ethical obligations will sometimes preclude them from being handcuffed by these guidelines. And so, courts will recognize that as well, and for that reason also find them unenforceable.

Lynda Bennett: Yeah, it's interesting. There's not a wide variety of opinions out there. There are some that have been rendered in state or federal court. But what I found interesting is the number of state's professional responsibility arms that have issued opinions that say these are unethical, that they are impinging on a defense counsel's judgment and ability to zealously represent their client. Those opinions are always nice to put in front of the carrier when you're having the fight over this to say, "You know what? Just like health insurance companies can't tell the heart surgeon when a transplant is or is not necessary here, the insurance company is not allowed to tell a defense lawyer, 'You don't need to take that deposition, or you don't need to hire that expert."

So, that's important for policy holders to know that there are not a lot, but there are some opinions out there that you can wave around if you're really having a hard time with the carrier on this. So Eric, do you see a difference in compliance with these guidelines when the law firm is appointed by the insurance company? In other words, panel counsel versus when the policy holder chooses their own lawyer?

Eric Jesse: Yeah. I mean, have the starting point of when you're able to comply with these litigation guidelines, it's the path to least resistance to ultimately get coverage, but ultimately that might not be possible. And I think really the key difference here may be who's ultimately paying. If it's panel counsel that's been appointed and they deviate from the litigation guidelines, I think typically it's that firm that will bear the risk of not getting paid. If it's the policy holder's chosen counsel that has deviated and the carriers aren't paying for a particular task, it's the policy holder that might have to fill that gap.

Lynda Bennett: So, let's talk about privilege for a second too. How do privilege issues intersect with carrier lit guidelines?

Eric Jesse: Yeah. So, this is an important issue, and it certainly may turn on the applicable state law that is an issue. In many jurisdictions where a carrier has acknowledged a defense obligation and they are paying defense costs, there

is a common interest privilege that can apply in that tripartite relationship of counsel, insurer and insured. And so in that circumstance, you can have some confidence that there won't be a waiver if information is shared with the insurer. But again, this is one where choice of law as we like to say really, really matters, so we have to pay attention to that and make sure we're not falling into a trap.

Lynda Bennett: Absolutely. So, we've talked about the fact that they're not a term of the policy. We've talked about that courts have found these to be unenforceable and that there are many bumps that can be created along the road with compliance with these guidelines. So, as a practical matter, is there a middle ground for policyholders to achieve with respect to litigation guidelines? Obviously, most policyholders would prefer not to get into a battle royale with their carrier, so are there some things that policy holders can do to smooth it out at the beginning to avoid those bumps in the road?

Eric Jesse: Yeah. Ultimately, communication is key. As I mentioned earlier, where defense counsel believes they can comply with the litigation guidelines, they should try to do so as much as they can because that is the path of least resistance to getting the defense costs paid. But ultimately, communication is key, and so having that conversation with the carrier up front to say, "Listen, you have given us guidelines for your car crash case, and this is about a company case, so this is how we're going to need to staff this case. These are the tasks that will need to be performed, and here are the attorneys that will be performing them. These are the number of depositions we're going to need to take in the case."

When you have that conversation up front and understand and help the carrier understand why there's going to need to be deviations from the guidelines, that will help for a much smoother process going forward. And it'll avoid the surprise or the shock that the carrier sees when they look at the invoice and see something that departs. And it will also save time on the back end in terms of having to try and argue and get those costs covered by the carrier.

Lynda Bennett: All right. Eric, I think you just gave us the key to unlock the handcuffs of the litigation guidelines, which is to establish strong communication between the defense counsel, the policy holder, and the insurance representative early on. And we can avoid a lot of the push and pull and fights that come out of these lit guidelines. So as always, I appreciate your wisdom, knowledge, and of course, sense of humor as we discuss all these things. So, thanks for coming on today to discuss this topic.

Eric Jesse: Absolutely. I'm glad we're able to get the gang back together.

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