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

Episode 55

Looking Back to Plan Ahead – The Year 2022 in Insurance

By [Lynda Bennett]

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Kevin Iredell: Welcome to the Lowenstein Sandler podcast series. I'm Kevin Iredell, Chief Marketing Officer at Lowenstein Sandler. Before we begin, please take a moment to subscribe to our podcast series at lowenstein.com/podcasts. Or find us on iTunes, Spotify, Pandora, Google podcast, and SoundCloud. Now let's take a listen.

Lynda Bennett: Welcome to a special episode of Don't Take No For an Answer. I'm your host, Lynda Bennett, chair of the Insurance Recovery Practice here at Lowenstein Sandler. Today, we're going to take a look back on some of the key trends that emerged over the past year that we've discussed in some of our most popular episodes. Since launching this podcast in 2021, Lowenstein Sandler's Insurance Recovery Group has used this space to not only discuss the nuts and bolts of how to secure and maximize insurance recovery, but we've also focused on timely and important issues impacting policyholders.

To date, and it's hard to believe, we've released 54 episodes addressing a wide variety of substantive topics in the D&O, rep and warranty, cyber and environmental space. We've also addressed key considerations that every policyholder should consider through the life cycle of an insurance claim, from securing or renewing policies that contain the broadest terms to how to properly notice a claim and how to exert leverage through coverage litigation, all the way through mediation and settlement with insurers.

We've been privileged to welcome more than 50 guests, including our terrific colleagues at Lowenstein Sandler, and many stakeholders from across the industry including brokers, insurance companies, and many terrific attorneys in a wide variety of practice areas. Throughout 2022, we've seen many of the issues addressed on this podcast become hot topics in the insurance industry. There's been a lot of volatility in D&O and the cyber markets for sure, stemming from economic and regulatory uncertainty in the United States as well as around the world. And of course, we've seen surging claims activity, particularly in the cyberspace.

New law regulations and market developments have changed insurer practices and policyholder needs. And we've been right there with you, keeping you fully informed and up to date as those changes have taken place. So now as we close out the year, it's a great time to look back at some of the most important areas we've discussed on Don't Take No For an Answer and consider the trends that may continue or change in 2023. So, one area that requires continued attention and focus is D&O. And 2022 has been an up and down year for the D&O industry.

Coming into this year, policyholders faced a difficult market with rising premiums and some difficulty securing coverage. But as we predicted back in February, 2022 has brought at least some stability. We've got new insurers that have entered the market, rising capacity, and premium increases are leveling off, and for some of our clients, they've even decreased. But the best D&O policy is much more important than just the cheapest premium. As we discussed in our episodes on renewals, it's important to find the right partner, whether working with a new insurer or renewing with an incumbent insurer who has been on the risk for years.

Even once you've found the right partner, you have to read those policies very carefully. As we've discussed many times on Don't Take No For an Answer, small word changes can be the difference between a covered claim or being out of luck. In order to make sure your company has the best and broadest coverage, it is vitally important to work with a knowledgeable broker and experienced coverage counsel. As we move towards 2023, several important issues sit on the horizon. Government agencies continue to increase enforcement efforts, including a focus on individual accountability.

And policyholders have to evaluate risk in this context and they will face a push pull dynamic. As regulation increases, insurers are modifying and restricting coverage terms. So again, careful review and negotiation of your policies is required. As we'll discuss, larger financial industry trends like SPACs and ESG disclosure rules have begun to, and in 2023 will continue to develop, altering and clarifying policyholder risk profiles to D&O insurers. In more traditional litigation areas, securities litigation filings have dropped this year, but the length of litigation and the value of settlements has increased. As talk of a looming recession continues, this will certainly be a trend for us to watch in 2023.

And speaking of SPACs, that was another hot topic for us in 2022. As market participants knew all too well, the SPAC market exploded in 2020 and 2021. And in April of this year, we released a two-episode series on coverage for SPACs and where the market might go moving forward. But 2022 turned out to be a very difficult year for SPACs. As we predicted back in April, new SPAC formations have slowed considerably in the face of difficulties closing acquisitions. And earlier this year, the SEC proposed new rules that would require additional disclosure and impose stricter rules for forward-looking statements, potentially increasing liability for SPACs and making them even riskier for insurers.

On the other side of the equation, SPACs that formed during the boom of the last two years have had difficulties making it through the de-SPAC or acquisition process. Most SPACs are required to either close a deal within an 18 to 24 months or they are required to refund a substantial portion of the capital to their investors. A number of deals have had high profile failures and many struggling SPACs have found it difficult to get additional investors if needed. SPAC directors and officers may face derivative suits from their own investors or securities suits from investors in the entity to be acquired.

This may also lead to a rise in the number of and cost of SPAC related D&O claims, further limiting the availability of coverage going forward. So we're certainly going to keep our eyes on that in 2023. Even if SPACs are disappearing from the market, coverage issues are certainly not going away. Newly formed SPACs and existing companies are going through the de-SPAC process. They not only face liabilities, but have to provide coverage to three different groups. First, the pre-closing SPAC, directors and officers, second, the pre-closing directors and officers of the target company, and third, the post-closing directors and officers of the combined entities.

We expect claims activity associated with SPACs to be a very hot topic in 2023, so you should be sure to tune back in on that. And speaking of hot topics, let's spend a minute reviewing the episode that we did addressing ESG and how it intersects with insurance markets. It's the acronym on everyone's lips. ESG, which stands for Environmental, Social, and Governance, is one of the hot topics of the insurance world for a number of reasons. ESG encompasses a wide variety of goals and values and includes everything from climate change, to diversity, to workplace treatment, to cybersecurity, board representation, and company oversight.

More than ever, investors are demanding accountability in new areas while companies are using their ESG efforts to attract new business and investors. As we discussed in our episode, the insurance market's ESG perspective has continued to evolve since our podcast in July as the SEC continues to push, to formalize new climate and cybersecurity disclosure rules. The SEC's climate disclosure rules will require certain funds to integrate ESG factors into their investment decisions and describe how they're incorporated. The SEC also requires ESG focused funds to provide additional information about their strategies and to disclose emissions data.

The SEC's new cyber rules, the G part of the ESG, required disclosure of material cyber incidents as well as reporting on cybersecurity practices and board oversight. For international companies, the EU has adopted the Corporate Sustainability Reporting Directive which requires reporting on a broad range of ESG topics that will be subject to audit and be publicly available. So whatever happens, there's no question, ESG's impact will be felt everywhere in 2023, and the insurance market's no different.

So, for D&O policyholders, the rise in focus on ESG and the new rules create another potential source of liability. This can be event-driven litigation, which is more prevalent than ever. We all are watching carefully what's happening with the opioid litigation, the “Me Too” movement continues to be vibrant, and climate suits of course. But it can also be allegations of breach of fiduciary duties by boards or officers who lack sufficient cybersecurity knowledge or have historically turned a blind eye to ESG issues. If they haven't already, policyholders are likely to start seeing ESG focused questions on their renewal applications. So, that's something to keep an eye on.

The impact on claims is less predictable right now because this area is relatively new, but ESG based litigation is only likely to grow from here, so we'll be keeping a careful eye on that in 2023 as well. One SEC commissioner who's admittedly anti-ESG recently speculated that ESG requirements may increase public company reporting costs more than fourfold from about 2 billion to nearly 8.4 billion a year. You could be sure that D&O carriers are going to be paying careful attention to that prediction. As we discussed on our podcast, ESG is also becoming a negotiation point in M&A deals, impacting rep and warranty insurance, underwriting and claims.

For companies touting their ESG creds as a sales point, buyers will need to continue to conduct increased diligence and carefully negotiate their representations. A breach of those representations may be difficult to measure, leading to more litigation of course and R&W claims. If faced with a potential breach, policyholders should take care to clearly document the basis of the breach and work closely with experienced coverage counsel and experts from the very beginning to maximize the likelihood and amount of recovery.

Now, finally, before we close out 2022, we obviously can't end the year without talking about the cyber insurance market. The biggest story of the year in cyber insurance has been the upheaval of the market in general. In this hard market, our clients and policyholders are facing lower limits, higher retentions, more limited coverage, and increased premiums of up to 300%. So pretty much a tsunami of horribleness in the cyber insurance space right now. While there's been some easing in the last month or two, the market remains incredibly difficult for policyholders facing renewal.

One symptom of this is the greater scrutiny during the underwriting process. With cyberattacks increasing in frequency and severity, insurers are requiring much more detailed information about a company's cyber program and the protections that are in place before they will issue coverage. To maximize your coverage, there are a number of steps that policyholders should take, including working with a trusted broker and experienced coverage counsel to maximize every opportunity to secure better coverage. Also, you want to ensure management and board buy-in about the importance of cybersecurity. And that includes not only your policy, but also the risk management measures that you're taking to protect your data and your systems.

Also examining the cyber programs of counterparties and others in your supply chain, because a breach at a partner entity can be just as dangerous, if not more so for your network. Taking extra steps to communicate with insurers and make them partners in the process at both the underwriting and claim stage will surely smooth your ability to access and maximize recovery under your cyber policy. Another key development that we discussed in a two-part series in October is beyond the lookout for new exclusions for any state-sponsored cyberattack. And we particularly talked about an important development at Lloyd's of London.

These exclusions are at least an indirect response to a decision earlier this year in a New Jersey case where the court refused to apply a broadly written war exclusion to cyberattack. It remains to be seen, however, how this decision and Lloyd's recent announcement of its exclusion will impact the broader cyber insurance market. So that's something again we'll be taking a careful look at in 2023 so be sure to tune back in. You can find links to all of the episodes that touch upon the topics and themes that I've just discussed during this episode. To find those links, check out www.lowenstein.com/podcasts.

So, before I conclude here, I'd like to thank you all very much for supporting Don't Take No For an Answer throughout these very interesting times in the insurance space. We're grateful to have the opportunity to share our knowledge, experience, and practical tips to help policyholders navigate this ever increasingly complex world of insurance. And from all of us here at Lowenstein Sandler's Insurance Recovery Group, we'd like to wish you a very happy holiday season and a healthy and prosperous New Year. We look forward to having you come on back in 2023 as we continue to watch, wait, and see what's going to be hot in insurance next year. Take care.

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