



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

**Episode 58**

**Warranty Letters—Extra Protection or Insurer Loophole?**

By [Lynda Bennett](#), [Eric Jesse](#)

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**Lynda Bennett:** Thank you for joining us on 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, Eric Jesse. Welcome, Eric.

**Eric Jesse:** Thank you, Lynda. Good to be back.

**Lynda Bennett:** So on today's episode, we're going to take a look at warranty letters, which are sometimes used by insurers to require policyholders to make affirmative representations about the awareness of actual or potential risks. We want to cover this today because policyholders really need to be careful in reviewing these documents before they sign them, and don't fall into the trap of believing that it's just another form that has to be completed during the binding or renewal process. This is really something that you should be reviewing with your broker and frankly with experienced coverage counsel before you sign anything because these are not standard form documents. So Eric, I want to start off for our listeners who may not be familiar with these letters or have only dealt with them in passing, let's talk about what they are and why do insurers use them. So just start with the explanation of what it is.

**Eric Jesse:** Yeah, of course. So warranty letters, right? They are going to be different from insurance policy applications. And they're not something that's used on every single placement or renewal. And what the warranty letter is, is essentially it's having the policyholder, having the insured make an affirmative representation to the insurance company as to whether an insured, and I want to talk about what that means, but whether an insured is aware of facts or circumstances that may reasonably give rise to a claim, any potential claims that might be subject to coverage under the policy. And of course, the insurance company wants to know if there are any actual claims that are out there. Because if there is an actual claim that exists, you know what's coming. You're getting that specific matter exclusion on the policy.

**Lynda Bennett:**

Yes. I want to really emphasize the point that you made that these warranty letters are different. They're separate and apart from the application. And they're not going to be required on every policy. There really are a couple of specific circumstances in which we've seen them being used. And the two that I've seen is either when you're placing a new niche type of policy. So for example, a few years back, it was very common on cyber policies. The first time you were placing a standalone cyber policy, some carriers were requiring warranty letters. Eric, you are our resident expert on rep and warranties. We're going to talk about that in a couple of minutes.

But you'll see something like a warranty letter that's being asked for there. But the most common that I've seen is when our clients are looking to add a layer of coverage, an excess layer of coverage. In the middle of a policy term, those policies tend to come together very quickly, not going to have the same intensive underwriting process. And so some carriers use these warranty letters as a bit of a proxy, and to get that, as you said before, affirmative representation. Now, I mentioned rep and warranty, and I want you to talk about the difference between the warranty letter that you just explained and what you know in rep and warranty common parlance of a no claim declaration. So what's the difference between those two?

**Eric Jesse:**

Yeah, that's right. So every R&W policy is going to have a no claims declaration that needs to be signed by a policyholder representative. And really, the biggest difference is, and part of this is because reps and warranty policies, you really can negotiate the specific wording and there are some favorable provisions in those policies. And one of them is this actual knowledge definition, right? That's a defined term in the policy and it's incorporated into the no claims declaration. But the reason it's so beneficial is it is a very policyholder-friendly definition where actual knowledge means that a person has to have actual conscious knowledge and awareness of a fact, and they have to have actual conscious awareness that that fact constitutes a breach under the policy.

And so the no claims declaration that's being signed is saying I don't have any actual knowledge, that defined term, that there is a breach. And so it will be a very, very, very high standard for the insurance company to prove that that no claims declaration was not accurate. I contrast that with a warranty letter where you're just not going to have that actual knowledge definition. You're going to have lower case knowledge or lower-case awareness in the warranty letter.

**Lynda Bennett:**

Yeah. So we're going to get into the nuts and bolts of what's being asked for and what can be negotiated in those warranty letters. But I think it's important for our listeners to understand, as you just said, what you outlined on a rep and warranty policy, that's a very high bar for insurers to meet on a rep and warranty policy. On the warranty letters, we've talked about this in prior episodes on Don't Take No for an Answer, what standard of knowledge is going to apply on a warranty letter is going to be state law specific. And the two approaches are an objective standard, what would a reasonable policyholder who's filling out this warranty letter know or reasonably should have known? Versus a subjective standard, when I filled out this warranty letter and signed my name to it, what was my knowledge base? And if I'm not an intelligent person or didn't do the proper diligence, but it's what I actually

knew. And so that's a huge difference and it's a lower bar, frankly, in many instances for the insurers to clear. So go ahead.

**Eric Jesse:** Yeah. And I was going to say, and sometimes in a warranty letter, and this is again things you want to be aware of and maybe try and negotiate out, but you could have subjective and objective where I don't have knowledge of a claim or a potential claim, but then there's the other language we often see, which is, and I'm not aware of any fact or circumstance that could reasonably give rise to a claim. And so that reasonableness will incorporate the objective standards. So much better to try and keep it subjective.

**Lynda Bennett:** So we touched on this a little bit, but why do the carriers ask for this before they'll issue the policy? What are the main drivers of this, Eric?

**Eric Jesse:** Yeah. So at the end of the day, I think the insurers want a number one, they want to figure out, is there something they need to exclude right now? Because they don't want to ensure the building that's already on fire, figuratively speaking. And then the other reason is if it's a new risk, if it's a new placement, insurers just don't have that relationship year after year of renewals. And so there's an added exposure concern. And so that's why they want this additional comfort. And same thing even for midterm or increases to excess limits partway through the policy period where an excess insurer again might not have been part of the deep due diligence or underwriting process at the outset of the policy period and is new to this particular policyholder. But I think with these midterm excess limit risks, really I think what the carrier wants to make sure is that the policyholder's motivation for requesting an additional X million dollar of limits is because the policyholder doesn't see a claim coming down the road where they're going to want those increased limits.

**Lynda Bennett:** All right. Eric, let's do what we do best, which is get into some best practices. If you are a policyholder and you're being asked to sign a warranty letter, what are some of the things that our clients need to do to protect themselves?

**Eric Jesse:** Yeah. So when you see a warranty letter, our client's antenna should go up. They should be asking questions, "What is this? Do I need to sign it? And what should it say?" And so if you're being asked to sign a warranty letter out of the two contexts we're talking about, a new placement or a midterm request for excess limits, you should really be going through your broker to push back on even having to sign that warranty letter to begin with. But one of the things you want to do is first make sure that you try and negotiate the wording because don't just accept the piece of paper that the insurance company puts in front of you. You can try and negotiate.

**Lynda Bennett:** Yeah. One of the first things that I tell a client when they say, "Oh, here's this letter, I've got to sign it," again, don't approach it from the viewpoint of this is a box checking exercise. I tell clients, first thing you got to do is poll the audience. What you're going to be asked to represent to your carrier is you're not aware of any facts or circumstances of an actual claim or a potential claim that's on the horizon that may or may not be asserted in the future. You

can't sign that letter if you haven't undertaken appropriate diligence within your organization.

And we're going to get into this in a minute, but who are you making the representation on behalf of when you sign that letter? Because I can assure you that the draft that you're going to get from the insurance company is you are going to be making a representation on behalf of every single person in your organization. So you are signing a piece of paper that is going to attest, if you sign the draft as is, you'll be attesting to the knowledge base of all 300,000 of your employees. And you certainly shouldn't make that representation if you don't have a process in place to poll that audience. But Eric, tell our listeners how you can start to narrow the scope of that representation. What are some of the things you need to do?

**Eric Jesse:** Yeah. So this is what I mentioned earlier when I talked about, described what a warranty letter is. It's a representation on behalf of the insured. And what does that mean? Because the audience you want to have to poll, you want to make sure that that is narrow as possible and you want to make sure that that is explicitly delineated in the warranty letter, so that there's no confusion. So you want to make sure that when you're signing that, you're saying, "I have spoken with these executives, the CEO, the CFO, and the risk manager, and none of us have actual awareness of a claim or potential claim." You want to really lay it out at that level of granularity.

**Lynda Bennett:** Right. We call that the control group.

**Eric Jesse:** Exactly.

**Lynda Bennett:** And Eric, you're right. You've identified ideally who we want in it. And we've negotiated warranty letters for clients that will be somewhere in the middle of that spectrum, not just the names, the C-suite names that you just said, but also not all 300,000 employees. There's a middle ground in there. Another thing that I recommend to clients to do is also make sure that that warranty letter is only being provided with you're making the representations as of a specific date. And most important of all, you're only making the representations for purposes of securing this policy. It's not for every policy issued from hereafter by that carrier.

**Eric Jesse:** To jump onto that point too, just when you have that midterm excess layer that's being brought on, you want to make sure that the warranty letter specifically says that this warranty letter only applies to those new and fresh limits, whether it's a new carrier or existing carrier that's bumping up their limits. You want to make sure that it only applies there, so that the warranty letter doesn't touch the limits that are already in place.

**Lynda Bennett:** Correct. And we also typically negotiate for what we call a severability provision in there, which is the representations being made. And if you have one bad apple that had knowledge, information, didn't come forward with it, that knowledge is not necessarily going to knock out coverage for every other individual insured. For example, on a D&O policy, not every individual director or officer will lose their coverage because someone didn't raise their hand and share information that they had. So that severability provision is,

again, not typically included in the first draft that you're going to get of that letter, but one that we've been able to negotiate for our clients in other contexts. Also, Eric, just a quick word on if you do have a claim and you are filling out that warranty letter and you say, "We don't have any knowledge except for John Doe v. Jane Smith lawsuit," what happens when you make that disclosure?

**Eric Jesse:** Exactly. So here, again, you need to really be thoughtful and make sure that the litigation, how you're describing this potential claim, and you want to keep it as narrow as possible. So you want the disclosure to be, "Except for this specific lawsuit involving this specific alleged wrong or injury or product." Right? You want to avoid what the insurance company might try and draft, which is saying any matters related to or arising out of or having to do with that lawsuit. You really want to just confine it to the specific lawsuit and the known allegations and issues there.

**Lynda Bennett:** Exactly right. All right. So last, my question to you is, does it matter who signs the warranty letter?

**Eric Jesse:** Yeah, it ultimately does. It has to be someone that has authority within the insured and frankly any other entities that are insured under the policies. Because they're acting on behalf of the insured, so they need to have that authority. And they need to have been conducted that inquiry that might be required of other, as we try and limit it to the control group. And it's also important because if there is a claim and if there is a denial and if there is litigation for a subpoena, or excuse me, the first deposition notice is going to be issued to that signatory.

**Lynda Bennett:** Absolutely, for sure. All right. So let's review. Warranty letters should not be signed for every policy that you're placing. They are separate and apart from the application. When you receive a warranty letter, call your friendly neighborhood policyholder lawyer to help you review, negotiate, and narrow the scope of that document. Make sure that you poll the audience. And last, but not least, and we didn't mention it, if you do have knowledge, don't fail to disclose it because the consequences of that are far outweighed. So if you've got something, you have to put it on the table. You're far better off to do that and get a specified matter exclusion in there than to hope that this doesn't have to come to light later because signing a warranty letter and not being truthful and honest in providing that warranty letter could result in your entire policy being rescinded. And so certainly, you should fully and fairly disclose on that letter and accept the consequence of a specified matter exclusion, but retain your ability to secure coverage under the rest of the policy.

**Eric Jesse:** Exactly right.

**Lynda Bennett:** All right. Well, that's a wrap for today. Thanks for joining me, Eric.

**Eric Jesse:** Anytime. Happy to be here.

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