



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

Episode 62

What's New in the RWI Market? A Sneak Peek at Lowenstein's Upcoming Survey Results

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

APRIL 2023

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: Thank you for joining us again today on Don't Take No for an Answer. I'm your host, Lynda Bennett, chair of the Insurance Recovery Practice here at Lowenstein Sandler, and I'm joined today by my partner, Eric Jesse, who's also been promoted to co-host. So congratulations, Eric!

Eric Jesse: All right, always good to be here.

Lynda Bennett: Today we're going to be talking about reps and warranty insurance to answer the burning question for private equity firms and strategic buyers in the M&A community, do these insurers still pay claims? And we're very excited to talk about this question because we at Lowenstein Sandler first ventured to ask and then did answer that question back in 2020 when we conducted a survey of rep and warranty market participants and stakeholders, but because reps and warranty insurance has evolved significantly since 2020 when the world changed, we decided to conduct a follow-up survey in late 2022 of 154 rep and warranty stakeholders because we wanted to, again, consider and answer that question because it's so vitally important to the M&A community. So today we're going to be sharing the results of our newest survey, that will officially drop in mid-April, but we wanted to provide a sneak peek for some of the really interesting results on our podcast today. So Eric, thanks so much for joining me. Really appreciate that.

Eric Jesse: Of course. Happy to be here, especially with that promotion.

Lynda Bennett: So why don't we set the table and take a quick look back at 2020, and so remind our listeners, Eric, what exactly it is that we set out to do and what results we saw.

Eric Jesse: We work closely with our buyer clients in placing R&W insurance policies for their deals, and the question that was always coming up was do R&W

insurers pay claims? And we were often able to provide anecdotal stories, or we were able to share our experiences, or brokers were able to share their experiences, but we wanted to provide an answer based on data. And so we ventured to conduct the survey back in 2022 to answer that question, are R&W insurers paying claims?

Lynda Bennett: And so one of the most surprising things was that the answer to the question was yes, but, as we said, with caveats. So 2020, what was revealed was carriers would pay claims, but our data really suggested that it was awfully hard for policy holders to recover, quote unquote, real insurance recovery because our survey results showed that 71% of the claims that were submitted to an insurer remained within those very significant self-insured retentions. We made the rally call for the market to take a more careful look at are the retentions set at the right attachment point or do those need to come down a little bit so that our clients could actually reap the benefit of having bought this policy. But Eric, why don't you talk a little bit about once the client was able to overcome the hurdle of that significant self-insured retention, what did the 2020 survey show there with respect to actually getting a claim paid?

Eric Jesse: When there was a claim that exceeded the retention, what we found out was that you can actually negotiate a claim payment, and the results were very surprising from our jaded view of the insurance world, but we saw that 87% of respondents say a negotiated claim payment was possible, but you mentioned the caveats, so there are caveats, which means it took patience, the claim process was slog frankly, didn't last up to three years many respondents were reporting at that time, and it also took persistence, you continually had to move through that process, and the other key takeaway was it took expertise. A lot of respondents said that when they were on the buy side, they needed to engage deal counsel, coverage counsel, potentially experts, work with the broker all to make a claim presentation and ultimately get paid. And that was so important that buyers did that, because on the other side of the table with the insurance companies, they had their own specialist advisors experts there. So it really was a drawn out and fulsome process, but eventually buyers could get there.

Lynda Bennett: So in 2020 that was very interesting for us to see that claims were getting paid and what the process was. And in our prior survey results, we really flagged a lot of the typical coverage defenses or best practices that policy holders should engage in. But as you and I want to do, as we went out for lunch last year, we were saying, "Gee, we really should take another look," because our experience at Lowenstein for the clients that we handle rep and warranty claims for, we were starting to see some differences. At first, they were subtle little differences or changes or coverage issues that were coming up, and then it started feeling more like a sea change. So why not take a fresh look and send out another survey? Eric, why don't you touch on a couple of the things that we were particularly wanting to probe in our refresh survey, bringing our experience on claims to bear to that fresh look?

Eric Jesse: One of the things we certainly asked about was just given our own claim experience, we wanted to circle back and really check on the timing of claims, how long was it taking to get paid, were there any changes there, but obviously the world had changed, we were emerging from COVID, insurers

were reporting increased claim frequency and severity, and the world had also changed in terms of SPACs, which had become very popular, and so we wanted to understand the R&W insurance overlay with SPACs. And ESG is also a very important focus these days, and so we wanted to understand more about R&W claims and whether ESG companies were experiencing them. So we asked those questions, which we didn't in 2020.

Lynda Bennett: SPACs became flavor of the month and ESG certainly seemed to be gaining traction in our world. So we added a couple of more of those directed questions in the survey.

Eric Jesse: The other thing was we had talked about, or in our own experience, we had seen carriers really pushing back on the loss valuation or challenging how the loss or damages were being calculated. And so another question that we added to this survey was what are the defenses carriers are making when they're pushing back on the valuation? So we wanted to get a deeper understanding there as well.

Lynda Bennett: What was interesting was a couple of things stayed the same as, Eric, you mentioned, the length of time felt pretty steady, somewhere between one and three years after a claim was presented, it had cycled through the claim negotiation and adjustment process. And the responses remained fairly steady with respect to the claim process itself, you still have to be patient, you still have to be persistent, and you still need the expertise of those who are handling these types of claims day in and day out. But in just three short years, there were some pretty significant changes that happened, including, I was very proud to see, that one of the things I mentioned, our rally call of wanting self-insured retentions to come down, sure enough they did because we now had respondents reporting that 61% of the claims were above the self-insured retention. And Eric, why don't you comment on why you think that was?

Eric Jesse: I think there's probably two main reasons. One is the information that R&W insurers have been reporting, claims are more severe. And so if they're more severe, the damages are higher and are going to be more likely to exceed the retention, but to the point about our rallying cry, we had noted the imbalance back in 2020 when so many of the claims were within the retention, and it really called into question of, by buyers, "All right, do we really need R&W insurance?" And what we're starting to see is, yeah, you do, because more claims are above the retention. And part of the reason for that is 1% of enterprise value is the standard retention that we see today and saw three years ago, but R&W insurers to be competitive are more often offering lower retentions, 0.75% of enterprise value, or 0.8 or 0.9%. And so as the retention goes down, it's easier for claims to exceed the retention. So I think that is a big reason for claims exceeding the retention, good for policyholders, it brings value to them if they can actually access the policy.

Lynda Bennett: And in a surprise to no one, as the claims were exceeding retentions and more claimants were ringing the doorbells of insurers to pay those claims, the ability to negotiate a claim came down too. So we saw here that respondents reported that only 60% of the time were they able to recover something on the claim, whereas you said in 2020 it was a much higher, it was a 87%

success rate on recovery. But Eric, why don't you also just talk about there were a couple of interesting trends on the types of breaches. So financial statement claims remained in the first position.

Eric Jesse:

There were a couple here. One that really stood out was cyber privacy, data security, that was the second most... After financial statements, our respondents were reporting that was the second most common breach, so that was interesting to see. And in a way, not too much of a surprise just given in the world we live in with technology as it is today. And then another, I think, surprising representation that we saw being breached pretty frequently was the environmental representation. And that might have to do with we did have a decent amount of respondents reporting that the target was in the manufacturing industry, so that might be a reason why we're seeing the environmental rep more dominant here. And then of course there's just the regulatory action under the current administration. Again, I think that might have a lot to do with why that representation is becoming more prominent.

Lynda Bennett:

And one of the other key takeaways that emerged from this survey is that there are newer coverage defenses that really go to the heart of accessing coverage. So in the early days of rep and warranty claims activity, a lot of the time and effort, frankly, was put into valuing the loss, putting the package together to explain to the insurance company what went wrong and how much it was going to cost or how much loss was incurred as a result of what happened. And certainly, over the last year and a half or so, we've experienced this personally with claims that we're handling on behalf of clients, and talking to other of our networking partners in the industry, this is becoming a clear trend, which is many carriers aren't even letting you get out of the starting gate. There's a lot of time, effort, and energy focused on whether there was a breach at all.

Some of our clients can remain embroiled in that for at least a year before clearing that hurdle to getting to talk about how much will actually be recovered and paid on this claim. So Eric, just give me a word or two on why you think these changes have come about, again, in a relatively short period of time. We looked at this in 2020, here we are in 23, there seems to be still a lot of shifting in movement in this space.

Eric Jesse:

If you want just one word, I guess I would sum it up as commoditization. It's a combination of things. I think the R&W insurers recognize that there's high demand here, and the concern is that they start to treat R&W insurance like a more commoditized insurance policy like D&O or E&O or cyber, rather than recognizing the true value is its uniqueness, that it was actually born out of the M&A world, let's make a deal, commerciality. And I think that's why it was that spirit that I think led to, in 2020, 87% of respondents reporting they were able to negotiate a claim payment. That's dropped now because R&W insurers might be just holding onto that demand. And of course, there is, as I mentioned earlier, the increased claim frequency and severity that is leading to that monetized mindset as well.

Lynda Bennett:

Yep, I agree. So we can't give everything away in this podcast episode, we got to tease our listeners a little bit so that you'll actually take a look at our survey results, but I think this is a very nice overview of where we were, what

the survey results revealed, and in our survey itself we're going to give you a look ahead, and once again issue a new rallying call to the market so that we can keep this product working the way that it is intended, expected, and that it can remain a very important tool in the toolbox of those functioning in the M&A space.

So if you'd like to find out more about our survey, we will be dropping it in mid-April. But if you'd like to get on our list so that you get it hot off the presses, please send an email to rwisurvey@lowenstein.com and we will be happy to add you to our list so that you'll have it in your hot little hands as soon as we launch it on our webpage. Otherwise, you'll be able to find it on our webpage at lowenstein.com. So Eric, thanks again for all the hard work in putting this survey together. I think that our readers are going to be very impressed and surprised by the results and look forward to having you back to discuss the aftermath after we share it with the world.

Eric Jesse: Absolutely. As the co-host, I'll definitely be here. Thanks for having me.

Kevin Iredell: Thank you for listening to today's episode. Please subscribe to our podcast series at lowenstein.com/podcast or find us on iTunes, Spotify, Pandora, Google Podcasts and SoundCloud. Lowenstein Sandler Podcast series is presented by Lowenstein Sandler and cannot be copied or rebroadcast without consent. The information provided is intended for a general audience and is not legal advice or a substitute for the advice of counsel. Prior results do not guarantee a similar outcome. Content reflects the personal views and opinions of the participants. No attorney-client relationship is being created by this podcast and all rights are reserved.