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

Episode 6 - Duty to Cooperate: How Much Information Do I Really Need to Provide to the Insurer?

By Lynda A. Bennett and Michael D. Lichtenstein
FEBRUARY 2021

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Lynda Bennett: Welcome to our Insurance Recovery podcast, Don't Take No For an Answer. We're your hosts, Lynda Bennett and Michael Lichtenstein of Lowenstein Sandler. And in today's episode, we're going to be talking about the duty to cooperate.

So you've put your notice of claim in. The insurance company has responded and indicated a willingness to appoint your defense counsel, but their reservation of rights letter also has 37 requests for information. So, Michael, what do we have to do with this?

Michael Lichtenstein: So the duty to cooperate is sort of a balancing act. On the one hand, we do have, as policy holders, we do have obligations to respond to reasonable requests for information from the carrier, because remember the carrier has the right to associate with the defense. The carrier has the right to investigate the claim to see if it really is covered by the policy. So if requests are reasonable, then we have an obligation to respond to them reasonably. And that means to give reasonable answers in a reasonable period of time.

The carrier does not have the right to bombard you with 37 questions, 30 of which may largely be irrelevant. They don't have the right to tell you that you have to respond in 14 days or else. The carrier does not have the right, in many cases, to invade the private conversations that you may be having with your, either appointed or self retained counsel.

So that's what the duty to cooperate really is at bottom. It's a duty to be reasonable with your carrier and to allow them to both kind of stay informed in terms of what's happening with the defense and to get certain types of information from you to allow them to determine whether they ultimately have a coverage obligation or not.

Lynda Bennett: Yeah. I've experienced clients that get very overwhelmed by the 37 requests and tend to put insurance over to the side and want to walk away and forget about it. I agree with you that there's got to be a balancing act. And what I really try to do in guiding clients on that is give them the basic facts about the claim.

And one of the areas that I find our clients resist on, frankly, which I don't understand, is giving the documentation for the damages. That's something that is going to be asked early and often by the carrier. And it really doesn't behoove you to take a litigation entrenched position with the carrier on that type of stuff, because that's the critical information that they need to position the case to be paid, at the end of the day, which is what you want.

Michael Lichtenstein: Right, and I agree. The way I approach these requests is, and sometimes they're box checking exercises for claim handlers, they know they have to ask a series of questions, and as long as you provide some reasonable answers, that's going to satisfy them by and large.

And when it comes to providing substantive information, I completely agree. If you're in a kind of a negotiated mode with a carrier, not truly adversarial, where you are sort of working together, then I agree with you completely. Giving them the information they need to help you both defend and ultimately resolve a claim makes perfect sense. Just like when you're saying, talking about damage information, it makes perfect sense to give them information if you have it, that will help them understand the quantum of the claim, which oftentimes drives how they respond to a claim in the first place anyway.

Lynda Bennett: Great point. So let's delve into the sticky area of how to handle privileged information, because inevitably on that list of 37 requests, many of them are going to touch and concern information that your defense counsel has prepared, maybe confidential business information that you're not super anxious to turn over to anybody.

So, Michael, let me start out by asking this question and we'll take it in phases here, as a preliminary matter before you answer any of their questions, do you need to have a confidentiality agreement with the insurer?

Michael Lichtenstein: You don't need it necessarily, but I think it's really good practice. You may be providing very sensitive business information that you would not want to get out into the public domain. This doesn't necessarily protect privilege. And I know we'll talk about that in a second. But this just guarantees when you give sensitive information about property damage you may have suffered, or what the profit margin might be in a business interruption claim, you don't want that information getting out to the public, to potential competitors. You want to make sure the carrier will only use that information to evaluate your claim and will not further distribute it beyond that. So it's an excellent practice.

If you have a small claim and the information you're providing is not particularly sensitive, I don't think it's necessary, but most carriers will enter into them if you ask. And they're really not that complicated to draft. So I think it is a good idea.

Lynda Bennett: Let's go that rung deeper because we know that on that list of 37 questions, many of them are going to touch on privileged information, either internal investigations that your client has conducted, or if defense counsel has started working up this claim, they're certainly going to have privileged information that will be responsive to some or all of what the insurance company is asking for. So can we just give it to them?

Michael Lichtenstein: Well, you could do whatever you want, but if you do, you're almost certainly going to be waiving the privilege. So it's a bad idea.

Let me just start from the beginning. And this is something that insurance carriers somehow just can't get through their head. The defense counsel, the counsel who is defending the claim for their insured, has a duty of loyalty that runs only to the insured, only to the policy holder. They have no obligation of any kind to the carrier, even though the carrier is paying their bills. And the attorney client privilege only attaches between the lawyer and the client. And when you bring the carrier in, unless the carrier has absolutely agreed to be responsible for whatever liability flows from that claim up to the entire policy limit-

Lynda Bennett: Which happens never.

Michael Lichtenstein: Exactly. Then they do not share those privileges and they're really not entitled to invade those communications. And the reason that's important is that if that information is provided to the carrier, then there is a reasonably good chance that you've just waved the privilege over that information.

So for example, when the carrier wants a monthly status report from the defense counsel, it's one thing to provide basic facts like this is what happened in the case, we took some depositions, it's okay to provide factual summaries. This is what happened in the deposition. This is what happened in the hearing. This is what happened on the motion. But it is not okay to provide those very protected mental impressions that lawyers use to help strategize the defense of a case. It's not okay to say, "Oh, here is the advice I'm giving to the client about X, Y, and Z." That kind of information really should be off limits, because once it is shared with the carrier, like I said, there is a really good chance that you've lost the privilege.

And it's a tough issue, because the carriers hate that position. The carriers say, "Well, I'm paying for the defense. I'm associating with the defense." That's absolutely true, but you're also reserving the right to deny a claim. And that means there is real adversity now between the carrier and their insured. And

because of that, they don't share the privilege. And because of that, that type of information really cannot be freely shared with the insurance company.

Lynda Bennett: And this one takes us back to one of our founding principles, which is jurisdiction matters, because there are some courts that have very explicitly said that whenever the insurance company has reserved their right to deny indemnity coverage, there is no joint defense, because that's what the carriers are going to tell you. They're going to tell you, "Oh, this is a joint defense. We'll enter into a joint defense agreement." And in certain jurisdictions, that's not going to be worth the paper that it's written on, because the courts have held that when you're reserving your rights, there is not a common interest between the policy holder and the insured and you can't produce that information.

And so before we wrap up today, one other practice tip I'd give you is, because Michael's right, this issue and this tension has existed for a long time and year over year, we're seeing it become more acute. This is another area where you can look to modify your policy language, particularly for your niche policies, for DNO, for cyber, for reps and warranty that yes, the policy will have an explicit duty to cooperate, but you can actually have language added in there that says, but the duty to cooperate does not extend or require you to produce information that is subject to the attorney client privilege or the work product doctrine. So that's something to keep an eye out for. And I really appreciate everyone joining us today for our episode. Thank you so much for listening.

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