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

Episode 17 -
Wait, are we related? Well, that depends on the facts and circumstances of each Claim

By Lynda A. Bennett and Michael D. Lichtenstein
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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.

Michael Lichtenstein: Hi everyone and welcome to our next episode of, "Don't Take No for an Answer", an Insurance Recovery Podcast. Today, Lynda and I are going to talk about issues surrounding claims that may be related one to the other. So you might have a series of claims or you might have two claims that could be separate in time, but involve the same basic set of facts. And that can raise very specific issues for policy holders. Fortunately, Lynda is an expert on relatedness issues, and I'm going to talk to her about that today.

Lynda Bennett: Great to have the band back together today, Michael. It's been a while since we've done one of these together and we've got to get the comedy routine up.

Michael Lichtenstein: Thank you. All right, so let's get started. So Lynda, what is relatedness and why is that an issue that our listeners should be concerned about?

Lynda Bennett: So this is an issue that we typically see in directors and officers policies, employment practices policies, and sometimes professional liability or ENO policies. And one of the reasons that I wanted to talk about it in today's episode is, I'll call it a trend that is starting to develop around this issue, again, particularly in the DNO space. So just to give an example, if we've got a publicly traded company and they've had a particularly rough go of it over the last four or five years, and they've had a couple of stock drops, the first securities class action lawsuit that gets filed in year one, we know which carrier and what tower of coverage we're going after. If when the second stock drop happens in year three, what we're starting to see is carriers and policy holders mapping out positions as to whether that second claim that was filed in year three, goes in as a claim in year three, or whether it should relate back to the claim that was filed in year one.

Michael Lichtenstein: So I take it that it's not a foregone conclusion that one result will necessarily be better or worse for a policy holder.

Lynda Bennett: Yeah. So as usual as we talk about often here at Don't Take No for an Answer, the policy language matters because all of these policies do have something called an interrelated claim that is a defined term that will have in concept it will say if there are facts that are common or overlapping, we will treat that as one interrelated claim. And what I've found in my experience is sometimes the policy holder is advocating for a claim to be related to an earlier asserted claim and sometimes they're looking to create separateness so that there can be access to more than one tower of coverage.

Michael Lichtenstein: So let me see if I've got it right. So you might have a policy holder who has a very high self-insured retention, say, $5 million with a tower over $100 million. First claim comes in, they dispose of that claim for a million bucks. So they really don't do very much erosion. Second claim comes in, might be worth it for them to try and bring that back the same tower of coverage so that now they only have a $4 million SIR as opposed to starting a new claim in a subsequent year where they might have to satisfy the full SIR again. Is that about right?

Lynda Bennett: Yeah, exactly right. So you've got to look at the self-insured retention. You've got to look at the nature of the claim too. One of the interesting things that I've seen recently is if you've got a whistleblower situation, so you've got an employee, you let them go, they file their claim with the EEOC, or they hire a lawyer and they send you a letter to say that was a wrongful termination for X, Y, and Z reasons. And then two or three years later, a regulator comes knocking with a subpoena or perhaps something worse and it actually arises out of, or relates to the whistle blowing activities that the employee alleged that they were engaged in. Once you have that situation, you're going to want to take a look to see is your employment practices embedded within your directors and officers. In other words, do you have a management liability policy? Will the self-insured retention on an employment claim, count and credit against what's now going to be a DNO claim?

Lynda Bennett: And do you have other claims that might have been made in that same policy year where you're looking to maximize coverage by hitting a brand new tower when that subpoena comes in or something of that nature? So it really is a very fact specific analysis that has to be undertaken. And there's a fair amount of strategy that goes into the decision making processes, as you said Michael, the self-insured retention, the total available limits, whether you think there are going to be additional claims coming down the pipe. If the company is hitting a particularly rough patch, you may want to have the ability to slot these claims in to maximize the total available coverage to manage all of those risks.

Michael Lichtenstein: What I'm hearing is there shouldn't be a knee jerk reaction one way or the other, because there will be pros and cons to weigh in the different situations. So even if a carrier is trying to advocate for one position or another, from the policy holder's perspective you have to be thoughtful and planful and deliberate in your response and really gaming out a lot of variables to determine whether or not you either agreeing or disagreeing with the carrier's approach will make any sense in the long run.

Lynda Bennett: Yeah. And I have to emphasize that the policy language is different because when we've had to evaluate these claims that have been litigated, there aren't a lot of cases all over the country, but for the handful of cases that there are, we do find that there are differences and material differences in how interrelated claim is defined in the policy that can impact the analysis significantly. But one other thing that I wanted to drive home here is many clients and lawyers that aren't insurance coverage specialists will say, "Well, I've got different legal causes of action. So I've got a derivative claim, I've got the securities class action claim and they're filed in different years. So of course they should be separate claims and of course I should have separate towers of coverage available to me." And the reality is that given the breadth of the interrelated claim definition, that's not always the case.

Lynda Bennett: So just a different legal cause of action is not going to be enough typically for you to establish separate claims. If that's what your objective is, you really are going to have to dig into what are the alleged wrongful acts. And is there enough difference between the wrongful act in claim one versus the wrongful act that's alleged in claim two? So this is like I said, it's a trend that's developing in the claims world right now, your policy language matters and really understanding your facts and what your strategic objectives are before taking a position really super important on this type of an issue.

Michael Lichtenstein: In closing for me, this is hitting on the themes that we talk about all the time in these podcasts, that the facts of your case matter, the words in your policy matter. One shouldn't leap to any conclusions about either without doing a deep dive analysis and not to toot our own horns here, but that's the work that an insurance specialist should be doing. Not necessarily the lawyer who's defending your class action, or defending your employment claim, or defending the whistleblower, or what have you. You need somebody who really understands how this policy language is interpreted by the courts and can do that for you and then help you make an informed decision about what the best claim side approach to coverages.

Lynda Bennett: Yeah. And Michael, I'll add just one other important theme that we talk about all the time, which is the importance of notice and giving notice, because one thing that I've also experienced is this interrelatedness concept, sometimes it will be readily apparent like the example that I gave with the employee and the subpoena, of course, you're immediately going to naturally connect those two things, but sometimes you really have to look carefully at that initial coverage position letter that you get. You may give notice in the year that the claim came in and if a carrier is identifying interrelatedness right out of the gate, you better make sure that you go back and give notice under that earlier policy right away, because when we're spending money we want credit against that retention. Or if the retention, as you referenced earlier is fully satisfied that may lead you to say, "Hey, wait, that may be a great thing for me to relate this back and I'm going to go back and ring the doorbell of the carrier that handled that earlier claim for me."

Lynda Bennett: But really being on top of and if you're not sure, as we always say on, Don’t Take No for an Answer here, give notice to both carriers and sort it out later. The one thing that you don't want to do is pick one and pick the wrong one when it's too late to then give notice to that subsequent carrier. So cover all of your bases, give notice early, broadly and often.

Michael Lichtenstein: I love it. I think we can leave it here. I want to thank our listeners again. This was a short one, but it was a good one and full of really excellent information. Thank you, Lynda, for joining me. I know it's been a while, but it's really great to be together**.**

Lynda Bennett: Absolutely.

Michael Lichtenstein: We look forward to, I don't know I always say, "Seeing our listeners on the next one," but of course we don't see you, but we don't really hear you either. So I look forward to doing the next podcast, which I very much hope you're going to listen to. Take care.

Kevin Iredell: Thank you for listening to today's episode. Please subscribe to our podcast series at lowenstein.com/podcasts, or find us on iTunes, Spotify, Pandora, Google podcasts, and SoundCloud.