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

Episode 21 -
Settling a Claim: Get Comfortable With Being Uncomfortable

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

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 back to Don't Take No for an Answer, an insurance recovery podcast. I'm your host, Lynda Bennett and today we've got the band back together. I'm very happy to welcome back my partner and my dear friend, Michael Lichtenstein.

Michael Lichtenstein: Hey Lynn. How are ya?

Lynda Bennett: All right, Michael. So today we're going to get into some of the knotty issues that come around, settling your underlying case when the insurer has either agreed to defend you, or as we often see, the carrier has not agreed to defend you, but the time is ripe to settle that underlying action. So Michael, I'd like to dive in and we'll go through two high-level claim scenarios. Let's take the typical one, which is where the carrier has received your notice of claim. They've issued the reservation of rights letter, acknowledging a defense obligation, but also identifying 16 pages of single-spaced policy terms, conditions, and other limitations that may ultimately pull the rug out from underneath you getting coverage for the claim. But the carrier's been defending the case, and the policy holder has put this on automatic pilot mode and figured that the carriers handling it and now we're going to the mediation. What happens next?

Michael Lichtenstein: Well, what oftentimes happens unfortunately, is when we get to the mediation or we start talking about settlement, the carrier goes back to that 16 page single space letter, and starts to raise in a more serious way, all the reasons why they're either not going to fund a settlement or they're going to fund a very small percentage of it, notwithstanding the fact that they've been defending the claim all the way through. First lesson learned there, just because the carrier is defending doesn't mean you should one, presume that when you get to what we hope is the end of the claim, which is a reasonable settlement for the policy holder. The carrier is going to show up with the checkbook.

And two, don't presume that what they'd been doing while they're defending you is necessarily designed to benefit you at the end of the day. I mean, part

of what the carrier is doing is gathering their own information, which at the end of the day may very well support some of the reservations. And we say it's an ROR letter, reservation of rights. It's really just a reservation to deny your claim at a later time. And so while you are not paying attention and the carrier's appointed lawyer was busily defending the case. They were gathering information, which they may well add a settlement conference, be using to tell you why they're going to fund 10 cents on the dollar of your settlement. That's a pretty common scenario in my experience.

Lynda Bennett: Yeah. I think one of the challenges too is, and you and I have both seen this movie a few too many times, what happens is the mediation is scheduled on a Monday or a Tuesday. And about a week before the carrier will drop the supplemental reservation of rights letter on you that says we're paying 10% or 20% or 0% of the upcoming mediation. And we'll see you there. So when you get that call from your client and they're panicking because now their mediations less than a week away, and they've gotten what is a surprise to them letter from the carrier, how do you proceed from there? Do we cancel the mediation? What do we do?

Michael Lichtenstein: Well, what I do A, we respond back to the carrier explaining why they're 20 cents on the dollar position is incorrect. I always go to the mediation because I find that whatever they're saying in their letter, in my experience, they're oftentimes staking out a fairly extreme position. This is a carrier 101 where they say one thing and they're just trying to create a little bit of leverage that they can save themselves some money in the settlement. I've seen even in the more extreme case where a week before the arbitration or the mediation for settlement, they deny the claim. That is a little stickier, right? If you're now facing a denied claim, I don't know that I go forward with the mediation, but it sort of depends on the facts. Because at that point I may actually want to have mediator recommend a settlement at a certain amount that's now deemed to be reasonable that you can use to try and put some leverage back on the carrier who almost certainly improperly denied a claim.

In terms of what we tell the client. That's a freak out moment for the client. My counsel is always take a breath. I don't want to get too down on the bar that represents carriers or the carriers themselves, but there is a rhythm to this settlement experience. And unfortunately it oftentimes starts with, we don't owe you anything. Or if we do, it's very, very little. And sometimes they can be pretty heavy handed about how they articulate that view, which I find at the end of the day, doesn't change the outcome and only makes the relationship between policy holder and carrier and the council just rougher than it really needs to be.

Lynda Bennett: Yeah, I agree. I want to come back to the denied claim scenario in a second. Because I think that there are different things that policy holder needs to do. But in that scenario where you get the letter the week before, or even 30 days out as the defense counsel is starting to request settlement authority and is providing all of the documentation for what's going to be needed to attend the mediation in good faith. We start to see the carrier sort of circling and taking their positions and raising in my experience, the carriers are oftentimes raising the allocation issue somewhat vaguely. They may not say we're only paying 20%, but just raising allocation and taking the position that the bulk of this case is the non-covered portion of the claim. And I've got

clients that everybody loves certainty going into a mediation. And especially when the time is ripe to settle the case, our clients are looking to have certainty.

Lynda Bennett: And the sad fact is you're not going to have it. And that's one of the things I tell the client right away is that you're going to have to get comfortable with being uncomfortable going to this mediation. Because a lot of the negotiation is going to depend very much on what the underlying plaintiff, what their mindset is coming into the mediation. Because if there's a deal to be had, and the plaintiff's ready to settle the case and strike a deal at a reasonable number, oftentimes you can get the carrier to pay more.

If the plaintiff is looking for an extremely large amount of money, and let's just say, hypothetically, our client wants to settle the case to maintain their reputation or for other business reasons. The carrier may tend to dig in on that a little bit more so for as uncomfortable as it is, I think you're usually best off when you get that letter or you're getting the signal of allocation to go in and accept a little bit of that uncertainty and negotiate as you go during the course of the mediation. Because in many instances, I find that you'll end up getting more out of the carrier than if you demanded certainty before you ever got to the mediation itself.

Michael Lichtenstein: I agree. It's odd. An insurance carrier is in the business of insuring against risk, right? So that's actually their business, is to sort of take your risk away and embrace it in exchange for a premium. But when it comes to talking about settlement, they hate uncertainty, right? They hate risk. And they generally, when they have an opportunity to lock it in, they will take it. And this sort of feeds into what you were just saying.

So getting them in the room, even if they have taken something of an extreme early position, I think is always the best answer because when they have an opportunity to strike a deal with a known quantum, and this is also I think the problem when settling for carriers. Before there's an offer on the table or before the mediator kind of gets you to that number where you know you're in the ballpark of a settlement number, the carrier doesn't know what they're being asked to commit it. But when a number's on the table and now the carrier knows that 60% of X is a firm number, I always find that they're much more willing to strike a deal because at that point, that uncertainty of what they might be owing is suddenly gone.

So I always think that's an interesting dichotomy there, an interesting dynamic for them. But getting them in the room, I think more often than not, it's not the carrier that stops the settlement, at least in my experience. It's that the number's too big.

Lynda Bennett: It's equally important if you can get the carrier there, even if they're taking a ridiculous position, I like having them at the table. Because when they get to see how the sausage was made, how we got to that number, it's a much easier sell than when you're coming to them after the fact with what could seem out of context as an eye-popping large number. When they're at the table and they're seeing the back and forth of how we got to that reasonable

range, the insurers are typically much more willing to be reasonable and negotiate in better faith.

Michael Lichtenstein: I know we want to move on to other topics and not make it too long, but I just recently had an experience where the counsel for the carriers was basically saying, and this is sort of a live case. If they're listening in, they may know I'm talking about them, but that's okay. I won't give away too many details, but I want them very much involved in the settlement negotiation of the underlying claim. And their view is, well, no, that's kind of your issue. Like you figure that out and then you can bring that number to us and we'll figure it out.

And in my mind, I always thought, well, aren't you way better off having that information, because at the end of the day, you need to explain to your client as you're trying to figure out risk reward, litigation risks, what a reasonable number would be. Understanding with great certainty, how the sausage was made so to speak, how you got to the number, that's really valuable information in advising a client. Whereas just sending me off to try and cut a deal, which we are later then going to examine. I think that they have a much harder time, advising their client and counseling their client. So that surprises me sometimes. Anyway, just an aside.

Lynda Bennett: No, that's great. So let's pivot to the more difficult scenario that we've also experienced before, which is either the outright denial of the claim from the outset, or as you alluded to just a couple of minutes ago, everything's going along swimmingly. The carriers defending, and then oops, the rub comes out just as we're about to go to the mediation table that they're denying the claim because additional facts have come to light. So what do we do there? Do we skip the mediation? And we're just in the case for the rest of time and have to hope for the best? Or does the policy holder have the ability to still go settle that case without having to give up all of their insurance rights?

Michael Lichtenstein: Yeah. So when I said before that we might think about canceling, that was only just from a dynamic perspective, right? In other words, that the plaintiff expected your character to show up the mediator thought it was a three-way. And two days before the carrier says, we're not contributing a penny because we denied the claim. You might need some time to step back and rethink your strategy. But to answer your question directly, no, I mean, if a carrier improperly denies a claim and is essentially in breach of the insurance contract, you do have the ability to go defend yourself against the claim and negotiate a reasonable resolution, if you think that's in your best interest. So you absolutely have the power to do that. Now, I think you need to be careful because most policies have provisions that don't permit you to voluntarily take on liabilities. Don't permit you to destroy subrogation rights.

So there's a lot of you can't, but those things are really typically only enforceable if the carrier is holding up their end of the contractual bargain, which in this case they aren't. But nevertheless, the policy I follow, which I think I would call it a best practice is I just keep the carrier informed of what it is we're doing as we're doing it. I give them an opportunity to say, here's the demand we got. Here's how we're going back. You want to weigh in. You want to come, you want to hear and what I either get silence or I get, well, you do what you think is best. I don't think there's a court in the world at

some time down the road if I cut that deal, is going to say that I waived my coverage because my carrier wouldn't participate. So I did what I thought was in my best interest to defend. So there, I like to keep the carrier involved to have a paper trail, an email trail, that sort of thing, but we absolutely have the right to resolve those claims.

Lynda Bennett: Adding to that, I've had situations where we're having the mediation, we've invited the carrier. They said, no, we're not coming. We're standing by our denial. What I'll also ask them to do then is waive the condition that Michael was just talking about to say, all right, well, I want you to waive that I'm acting as a volunteer or that I'm going to undertake a voluntary payment here. And you'd be surprised how many times carriers will agree to waive that explicitly before you go to the mediation. What they'll say is we're not going to waive the reasonableness of the number that you may settle at, but yes, we agree. We're not going to raise that as a coverage defense that you went and settled the case. And as Michael said, actually, there's fairly good developed case law in many jurisdictions that when the carrier wrongfully denies, they do so at their own peril.

And if you go and strike a reasonable non collusive settlement with the plaintiff, in fact, the carrier can't dispute what you did that was commercially reasonable to protect your interests and to avoid the risk and uncertainty of going to trial. So you do have some arrows in your quiver if the carrier has their arms folded and their checkbook shut. There are things that you can still do to at least tie off that liability and preserve all of your coverage rights, which is an important thing to do if the time is right to settle the case.

Michael Lichtenstein: And I would say, just asking them to wait. I mean, I've probably gotten as many yes's as no's over the years, asking them to wave the...

Lynda Bennett: You don't know how to ask nicely Michael. I do.

Michael Lichtenstein: I try. I try, I try. I really do try hard, but just putting the ask in writing, in my view is enough. If they say, no, I advise every client on this and if I'm wrong, boy, I've made 29 years of mistakes. But I have said, I am not afraid. I asked. They're in breach. They wouldn't waive. We're going to now do what we need to do to protect ourselves. And again, I just do not believe that there's a judge anywhere who's going to say, and this, by the way, your honors is not a challenge. So please, if there's any judges listening, I'm not looking for a throw down here, but I really do think you've done all you need to do in the face of a breach to still try and comply with some of your own obligations. And, but there comes a point in time where you just have to do what's best for you. And I'm very comfortable with that advice to clients.

Lynda Bennett: So Michael, before we wrap, there was one last little issue I wanted to cover because you touched on it. And that is the whole issue of optics of insurance being at the mediation and in the room. So just, in a minute or less, give us your views on how do you manage, is it a good idea to surface the carriers? Is it a bad idea? If you don't want to surface the carriers at the mediation, how willing are the carriers to either stay behind or be available by phone only at mediations?

Michael Lichtenstein: What I'll say is that's just a strategic issue that is very fact specific. It's a matter of sort of reading your room writ large. I mean, there are times when I know that the plaintiff knows because we're normally defending, right? So I know the plaintiff's knows there's insurance. And if that's the case, I tend to want to have the carrier there because everybody knows that that's where most of the money is coming from. And I may be playing that card in defending the claim, saying, look, you got to convince the carrier as much as I have to convince the carrier to pick.

There may be other times when the claimant isn't thinking about coverage and they really thinking that I'm spending my money. And in the right set of circumstances, I may not want the carrier to surface. Now that's something that I would be socializing with the carrier first anyway, assuming that we have a cooperative, which you hope for relationship is, you know that they're going to be picking up, hopefully the lion's share, but you don't want to surface that fact for the plaintiffs because oftentimes, carrier see policy. Their expectations for settlement dollars goes up in a meaningful way and that's not good for anybody. It's not good for the carrier. Not good for us. So I really think that's a case by case decision, but it's certainly something you need to think about every single time.

Lynda Bennett: Yeah, no, I love it. And I love the ability to leverage the insurance coverage dispute. So some people don't think about that, but you can leverage the fact that the carrier isn't all in, on your claim and driving that number down with the plaintiff.

Michael Lichtenstein: I was going to say how funny it is sometimes because on the one hand, you have to tell a carrier how great your claim is, but on the other hand, you have to tell the plaintiff, oh my God. I got no shot, right? It's a little weird. Sorry. Go ahead.

Lynda Bennett: Well, that's why we have uncle Tito visit us at the end of most mediations. All right. Well, thanks for this discussion, Michael. I think some really great practical tips around how to get your case settled and maximize insurance recovery while you're getting that case settled. Thank you everybody for listening to our episode today, and please remember to subscribe to our podcast series at lowenstein.com/podcasts, or you can find us on iTunes, Spotify, Pandora, Google podcasts, and SoundCloud. So we'll see you next time and thanks for listening.

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. 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. It is not legal advice or a substitute for the advice of counsel. Prior results do not guarantee a similar outcome. The 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.