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

Episode 23 -
Can't We All Just Get Along? Effective Ways to Navigate the Tri-Partite Relationship Among Policyholders, Insurers, and Insurer Chosen Defense Counsel

By Lynda A. Bennett, Loren Pierce, and Tom Quinn
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Lynda Bennett: Welcome to Don't Take No for an Answer. I'm your host, Lynda Bennett, Chair of the Insurance Recovery Group here at Lowenstein Sandler and today I'm very pleased to have two special guests, friends and sometimes adversaries, over the many years of practice. I'd like to welcome Loren Pierce, who is a partner with the law firm of Bressler, Amery and Ross. Welcome, Loren.

Loren Pierce: Thank you, Lynda. Happy to be here.

Lynda Bennett: And my very dear friend, Mr. Tom Quinn, also a partner at Wilson Elser. Welcome, Tom.

Tom Quinn: Welcome Lynda and Loren. Pleasure to be here.

Lynda Bennett: Great. Today we're going to be talking about a topic that is near and dear to all of our hearts, the tripartite relationship and I very cheekily titled this episode, Can't We All Just Get Along? Let me set the table for a minute or two and then I'll throw some questions at my good friend, Loren, who represents the insurance industry and Mr. Tom Quinn, who is typically in the role of defense counsel in these types of cases.

What is the tripartite relationship? Well, this is how policyholders, insurers and defense counsel approach a matter where the policyholder has been sued in a lawsuit. The insurance company has acknowledged an obligation to defend the case but there are questions. Loren will tell us all about the need for her reservation of rights letters that I like to respond to. And Tom is going to talk to us about some of the prickly difficult ethical dilemmas that can sometimes arise for defense counsel when he's handling the underlying case but those coverage issues may crop up along the way. And what we're striving to do to in today's episode is to give our listeners some techniques about the ways that we can make that road a little less bumpy and less of a

Gordian knot routine. Loren, why don't you start us off by telling us why the insurance company wants to have control over the selection of defense counsel and defense strategy while at the same time riding what I like to call the picket fence of reserving their rights?

Loren Pierce: Well Lynda, the insurance contract entered into by the insurance company and the policyholder is what controls. And so the insurance contract, generally speaking, they could be manuscript but generally speaking they say that the policyholder wants the insurance company to defend the policyholder when there's a lawsuit, get representation for the policyholder and if the matter can be settled, to settle it or try it. The policyholder will often receive from the insurance company, the reservation of rights letter that Lynda just mentioned.

That is when the insurance company says to the policyholder, "Hey, we have your claim. This is what we understand the claim is about, the complaint. This is what the other side is seeking and by the way, here's some things that you need to be aware of that are contained in the insurance contract between policyholder and insurance company. And we just want to be on the same page so read this letter, we'll give you a defense but we want you to understand that it's not for everything," depending on what the claim is about. But as long as the carrier sets forth a clear and complete reservation of rights from the get go, the parties should have a clear understanding of where they are going. And that is why the insurance company does that because the policyholder does want the defense to go as smoothly as the carrier does.

Lynda Bennett: I appreciate that Loren and as usual representing your clients, you want to tell me all about my insurance contract. I will note for our listeners that there are certain circumstances and we've talked about this on prior episodes, this is where state law matters. And if there is a significant coverage dispute, notwithstanding what may be in the insurance contract, there are some states that allow the insured to choose their own independent counsel because of that reservation of rights. I just want to note that.

Now Tom, in this circumstance where my client is sued in the lawsuit, we've sent it to Loren's client, she's issued the reservation of rights letter saying, "Okay, we're ready to defend this case while reserving our rights on indemnity. Give Tom Quinn a call and he's going to defend this case for you." Who's your client in that circumstance?

Tom Quinn: Since the time I've gotten out of law school, about a year before I got out of law school in New Jersey, New Jersey Supreme Court answered that question unequivocally and that is it admitted for defense firms effectively. Let's be realistic, you probably have two clients in a sense. This insurance company is sending you lots of cases. They call you on any number of issues. They're asking you a question that's unrelated to this case, it's hard to say that they're not a client in the firm. In fact, when you run your conflict check, they're a client of the firm.

But your absolute or your paramount client in this situation is definitely the person or entity that you've been appointed to represent and you always have to keep that in mind. You have to treat that person as if that person

came to your door, you signed a retainer letter with them, they're paying you and they are who you represent. But particularly when there are coverage issues, you really have to be careful to make sure that you follow that rule of the road because that's what New Jersey says and that's what essentially every state says.

Lynda Bennett: While Loren and I like to have our boxing gloves on and fight over things every now and again, what are some of the steps that you, Tom, take as a practical matter to try to keep harmony between Loren's client, my client and the policyholder who the insurance company as you just described as sort of a mutual client for you? What are some of the practical steps that you can take to keep harmony among all of us?

Tom Quinn: Couple things but I think it's really important out of the gate, especially if coverage counsel is involved, it almost makes my job a little bit easier. I usually like to know who they are and then go to that particular person and my client, the insured, and just introduce myself. Explain that I understand the rules of the road. I understand what I need to do ethically and legally and just to make sure that we're on the same page. But even if coverage counsel is not involved and I know that there's coverage issues out there that are serious, that I explain right away to my client yes, I'm appointed by the insurance company. I'm paid by the insurance company but I'm your lawyer. I owe you responsibilities. I don't owe the responsibility to the insurance company. I'm trying to do the best job for you under the circumstances.

I think you have to assure them of that and then I also like to be incredibly transparent, almost with any insured, but certainly with coverage issues. If I'm writing to the insurance company, I copy the insured. No one likes to think that I'm having a side conversation with the insurance company when there are coverage issues around. In today's world the word transparent gets thrown around all the time but it really is important to be transparent. And I do that by carbon copying and avoiding what appear to be secret communications. I think that's important.

Lynda Bennett: Loren, I want to throw it back to you for a minute because Tom was talking about written communications. We all know the pace of these cases so after defense counsel has been appointed and an answer has been filed and discovery is starting to take place, your clients like to receive written status reports. And I've had conversation with many people across the aisle on this, what's your view on defense counsel status reports? Who gets them? And when should they get them?

Loren Pierce: Defense counsel should be reporting to in my practice and I believe Tom is on board with this as well as most coverage and defense counsel, the defense counsel reports should go to the carrier and to the policyholder, to his client, particularly when there is potentially a coverage issue going to arise. As Tom pointed out, transparency is key. Communication is key. The carriers do like to have regular reporting. Oftentimes the guidelines say every 30 days or when a significant event is occurring, when there's a big deposition, they want to report right after. But it is best to report to both the carrier and the individual or person or entity to keep everyone on the same page because once the communication lines close off for some reason,

suspicion, whatever is then rife and that's not the way to go. You've got to have open lines and transparency.

Lynda Bennett: Yeah. That's one of the things I want our listeners to really understand is that some of my clients don't understand that they're entitled to get it because the insurance company is the one in the first instance asking for it or has the process in place, doesn't mean that the policyholder isn't entitled to get that and get it at the same time that the carrier's getting it. I don't want to veer off too far into the weeds but I think an interesting discussion is whether the policyholder should see it first, before it goes to the insurance company. And that's something that we've bumped heads with opposing counsel on in certain circumstances. Tom, you want to give an opinion on that?

Tom Quinn: Yeah, I will quote the Tom Quinn rule and I can, is that if I've got coverage counsel in a case where I know that the certain facts are sensitive both to coverage and yet there's sensitive to the piece of litigation you're in. I drafted those reports and I sent them to coverage counsel first, to send and review and edit because to me, it takes me off the hook of inadvertently disclosing something confidential that I shouldn't. I do it that way and others do as well.

Lynda Bennett: Yeah. Let me ask you this though, Tom, because this is another classic that we see a lot of the time and this is where your professional judgment may clash with the insurance dispute. Loren's sent her reservation of rights letter. We've got a 12 count complaint, one negligence count and the rest are breach of contract, intentional conduct, fill in the blank. We'll just call it non-covered causes of action. And the line claims representative instructs Tom Quinn, "All right. I want you to file a motion to dismiss on the negligence claim right now for A, B and C reasons." What do you do with that?

Tom Quinn: On that one, I tend to resist a little bit because I loop in. Normally it's not claims people who are deciding when to make motions. Almost every insurance company I deal with has a guideline and they're looking for counsel's recommendation on motions, what the costs will be and what to do about it. When I do these things and I realize that there's some coverage issues involved either I want to move on all counts or most counts if one of them is including the covered one and I'm trying to get buy in from my insured on that. I certainly don't do it on motion to dismiss basis. I'm in state court a lot, they don't work. Federal court could be different but I generally not there either. And then summary judgment is to me it's a different animal. But I try to, again, communication's the key on all of this. Got to talk to people. Don't blindside them because that's what everyone hates.

Lynda Bennett: Loren, let me ask you this question, and we can all be our typical lawyer selves and say, "It depends on the facts." But when you've got a claim where frankly, the majority of the claim is that non-covered situation and the carrier has acknowledged defense obligation but is messaging pretty clearly that there's not going to be indemnity coverage available here. Does your client approach the control of the defense issue differently in that circumstance where the driver is uncovered or the client or the policyholder is under insured? You've got just a primary limit and that's it. Is there a different approach from your clients in that kind of a circumstance?

Loren Pierce: I will tell you again, as you point out, you have to look at the facts but there should not be a difference. There should be that the carrier gives out guidelines to defense counsel. Defense counsel's got to communicate as Tom pointed out, very regularly and say, "Hey, I need to take these depositions on all these different issues and lay out the strategy." Most, if not every carrier I've ever worked with, they want to hear the strategy and they generally defer to counsel. If for some reason, it's going down a path that's highly irregular, there'll be a conversation about it but generally speaking, the carriers understand that it's got to be controlled by defense counsel and the guidelines are there to guide defense counsel. But if defense counsel needs depositions, defense counsel's got to communicate that to the carrier and the carrier will confer if there's any issue.

But communication again is the key. Keeping everyone on the same page and informed is the way to go. The only thing carriers really do not like is if a defense counsel does not communicate and then all of a sudden, an invoice shows up with 10 different depositions in a 45 day period that the carrier had no idea was going to happen. And then the carrier is ticked off and says, "Well, I'm not going to pay for all this." As long as defense counsel communicate and the strategy is generally agreed upon as the case progresses, that's what keeps the road less bumpy, shall we say.

Lynda Bennett: Tom, what are some of the things that you do to not sacrifice the quality of the defense while living within the confines of those lit guidelines Loren was just talking about?

Tom Quinn: I don't think the lit guidelines end up being too much of an issue in the coverage world. I think that it's more of a counsel problem than anything else but there will be times when, for example, you've got a serious coverage issue where all of a sudden you're getting resistance from the claims person to say, when you would say, "We need an expert on these subjects." And they're like, "I don't think that any of this is covered at the end of the day." And I kind of do the, "Well just tell me, we need a defense expert."

Lynda Bennett: And then they call me and I say, "The duty to defend is broader than the duty to indemnify," and we're off to the races.

Tom Quinn: But what you have to remember, it started with the same thing that I started with, which is, got to remember who your client is. The client is the person who is named in that pleading and you've got to be taking the steps necessary, I don't want to say damn the costs, because obviously you would be sensitive to the cost if the client was paying you yourself, but you have to think of it the same way. If you would go to that client, say, "We need an expert. I know it's going to cost $40,000 but here's why, because you have this type of an exposure." I do that without putting on my coverage hat on and knowing where the issues are. I just say, "If it was your money, this was what you should do," and then let the chips fall where they will is generally how I try to go with it.

Lynda Bennett: That's great. All right. We've got just a minute or two left here. I'd really love for each of you, Loren and Tom, to give me your one key to success of having the insurer, the policyholder and defense counsel working together

harmoniously to defend a claim, notwithstanding that there's a coverage dispute brewing on the side.

Loren Pierce: Mine would be communication and keep the lines open always.

Lynda Bennett: Great.

Tom Quinn: And from my perspective, when I'm defending someone, I'll go back to step, I think that the money that an insured pays for personal counsel to be involved, from a couple thousand foot level of writing letters and staying abreast of things, yes, that's costing money when you're quote unquote getting predefense from me already but the money you spend there can be worth, save you way more when the result goes south and no one was involved looking over their shoulder and all of a sudden you become surprised. I think it's helpful to have counsel in those settings, especially in bigger coverage disputes and bigger cases.

Lynda Bennett: That's great. All right. Well, thank you both so much. This can be a tension ridden process but I think you've given some really great tips on how to tone down the temperature on the tensions and find a way to work cooperatively and collaboratively to defend these cases. Really appreciated having you here today and will love to have you back in future episodes. Thank you both.

Tom Quinn: Thanks for having us.

Loren Pierce: Thank you.

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.