



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

Episode 24 - Coverage Litigation Leapfrog: Why Venue Matters and How to Avoid Pre-emptive Strike Actions

By [Lynda A. Bennett](#) and [Michael Lichtenstein](#)
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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 practice. And I'm happy to be back in the saddle with my good friend and partner Michael Lichtenstein. We're going to talk about a very exciting topic today, coverage litigation leapfrog, and it's really designed to talk about why venue matters, where your lawsuit is filed and how to avoid preemptive strike actions. And the reason that I wanted to spend an episode talking about this is because this is one of these trends in insurance recovery that is a bit cyclical. So we'll talk a little bit about how and why the idea of preemptive strike litigation started. There was a bit of a lull and in the last couple of years, it's back and we've seen carriers getting more involved and proactive in filing lawsuits to try to get into jurisdictions that they think may be particularly helpful to them. So, Michael, why don't you set the table for us and talk about what is coverage litigation leapfrog? How does it happen and why does it happen?

Michael Lichtenstein: All right. So forum selection, we'll may even step back, so insurance policies are governed by state law and you could have half the states interpreting the same policy provision one way and half the state's interpreting a policy provision another, and that provision could really be outcome determinative for your claim. This happened famously early on and in asbestos litigation and in environmental litigation, back in the 80s and 90s, where for example, in the asbestos space, whether 1,000 claims that came from one facility was treated as one claim or 1,000 could determine whether you had any insurance coverage, because each claim could fall within your deductible, your proclaim deductible. Whereas if all 1,000 were viewed as one, then you really had coverage for 99 of the 100 claims. So that was a famous issue in asbestos early on.

In the environmental context, there were two big provisions. One was your notice requirements under general liability policies. And the other was how eight year pollution exclusion, which went into policies in the early 70s were interpreted. And again, depending on what state law applied to those provisions, your claim could be good or bad, forgetting about any of the other merits of the claim just based on those two provisions.

So what happened back in the day is both policy holders and carrier lawyers started thinking about venue as a very, very strategic choice, recognizing that if you got in the wrong court and that court applied the wrong law for your claim, your client was out of luck. So both carriers and policy holders were very active in getting into court very early on. Wasn't too much negotiation going on pre suit and in fact, Lynn, as you know, I follow that strategy very much in my practice today when it comes to environmental claims, that I very often strategically file a claim in a forum that I think gives us the best chance to have the most favorable law applied to that claim. Not because I want to litigate, but because I want to show the carrier that I've actually locked in the law that I'm looking for. And that gives me the upper hand in a negotiation to try and resolve a claim.

Lynda Bennett: Yeah, as I mentioned at the top, this is something that you and I both certainly saw 20 years ago as a very prominent strategic issue that policy holders had to think about. And then once the sort of go-go days of asbestos and environmental calmed down, we reverted back to the more to additional, the policy holder would sue the insurance company if they weren't able to resolve the claim in the jurisdiction of their choosing. But again, more recently, and I agree with you, it started out around notice and pollution exclusion issues. I would say now, one of the hot button issues where people are thinking about choice of venue relates to the allocation philosophy that's going to apply to some of these longer tail claims, whether it will be pro rata or all sums. And as you mentioned, there are different jurisdictions that have very well settled and established law.

Lynda Bennett: And then there are the jump all jurisdictions where those issues haven't been resolved. And so those are things you got to think about. And then, because we can't all forget about the pandemic that seems to still be going on and never ending, we have also seen this trend emerging in the COVID battles, because again, there are certain jurisdictions where there was favorable case law that policy holders and or insurers thought they would be able to leverage to their advantage. And so I've seen another reemergence of this with the coverage battles. So Michael, why don't you start to tell us a little bit about what are some of the strategic considerations knowing now that getting there first and into the jurisdiction you want really matters? What are some of the things that our listeners should be thinking about when they're evaluating whether to pursue coverage litigation? And if so, where?

Michael Lichtenstein: So my view is that if you think that you have a claim that is not likely to be resolved amicably, then I think you have to start thinking whether choice of law is going to matter to you, because it doesn't always. Because there are certain issues where you can evaluate a policy and say, well, there's four different perhaps states law that could apply to this particular policy and all four are good for me.

Lynda Bennett: What are the four potentials in a typical coverage dispute?

Michael Lichtenstein: Well, sometimes it's easy, right? You can look at the policy and there's a place of law provision, right? So that's simple. And by the way, sometimes you look at a policy and there's a choice of forum provision. And so you can

be first file, but you'll be the first file in the same forum the carrier might jump you in.

So you might be looking at where you are as an insured, where you're located and in particular, where you were located when you negotiated and received the policy. And it can be very different when you're dealing with directors and officers and types of coverage, where we're looking at policies that exist today in 2021. That can be easy, but sometimes we look at that were written in the 60s, and 70s, and 80s and it's not quite as easy. But in any event, you look to see where the policy is. You might look to see where the carrier was located. You can look to see where the broker was, assuming there was a broker involved. You'll want to look to see where the liability is. If you're dealing with environmental contamination, that can be a very big factor in a court's determination about what law applies.

If it's in the product space, you might look for things were manufactured. You might look for things were sold. You might look where those injuries are taking place. Sometimes the injuries are geographically limited, because the product doesn't sell.

Lynda Bennett: Sounds like a lot more than four potentials there Mr. Lichtenstein.

Michael Lichtenstein: Sorry. No. Well what I meant to say was there might only be yeah, right. I hear what you're saying so. See, this is why Lynn's the boss and I'm the wing man. So now you see ladies and gentlemen.

Lynda Bennett: Tell them why this is so complicated and you have to really think broadly and very carefully about what [crosstalk 00:07:51].

Michael Lichtenstein: Yeah, it's a complicated analysis and because in so many different ways it can be outcome determinative, it's certainly worth taking the time at the beginning, right? This is not an analysis you want to be doing after you've been jumped. Right. You're already behind the eight ball. This is something you want to think about at the outset and run through this formula and make some decisions about whether you think from a strategic perspective, getting jumped could be very bad and therefore first filing could be very good for you.

Lynda Bennett: How important is it to be first? Is that an important factor that the courts consider?

Michael Lichtenstein: It is. So if you're looking at two different state courts, right, let's take a simple case. You file first, the carrier reacts two days later and file second. First file gives you a lot of power. In most states there's a presumption that the first filed will go forward and the second filed case will be stayed or dismissed, but it's only a presumption. It can be rebutted if you can prove that there's some interest of justice that factors in, convenience of parties or witnesses.

So, you might file in a far away, let's say you're on the east coast and you decide for whatever reason you want to file in Wyoming. Someone could come forward and say, well, the property is in New Jersey and all the witnesses are in New Jersey and all the parties are in New Jersey. So from an interest of justice perspective, it makes no sense to be dragging everyone

3000 miles across. So it's rebuttable, but that's what it is. When you have the presumption, right, you already are over the 50.1% and it's on the other party to convince a court that the presumption should not carry the day. So I would say it's extremely important. It's not 100% outcome determinative there, but it's pretty important.

Lynda Bennett: I agree with that. One comment I would make though, that is a little bit unique to the insurance recovery space. There are courts that will consider who is the true plaintiff in this case and look at the facts. So by way of example, if you're at the mediation with the carrier and they're leading you down the Primrose path that they're going to provide coverage or they're willing to contribute toward the settlement and the mediation craters and the next day, they file a lawsuit against you in their chosen jurisdiction. Those are facts that you can leverage if you do find yourself in that unfortunate circumstance of being second to the courthouse and really leveraging the fact that the policy holder is always the true plaintiff in an insurance claim dispute. That can sometimes move the needle. And there are actually cases in certain jurisdictions that will recognize that that's an important factor for a court to weigh as well.

Michael Lichtenstein: I want to note one other thing that in many states, New Jersey being one of them, a policy holder who successfully prosecutes a claim against a carrier can get their reasonable attorney fees. In some states, I think New York is one of them that, rule only apply if the carrier initiates the litigation. So if the carrier brings a declaratory judgment action against you and you prevail, then you can get your costs against them. And it's just another factor. I haven't done a survey across all the states, but it's also something to think about when you're trying to weigh the pros and the cons that I guess in certain circumstances, you might want to wait for the carrier to sue you if you think the cost of the litigation aren't going to be a meaningful component of the overall value of the claim. And then so talking about state versus state, then you have state versus federal. This is pretty common and today it's happening a lot I think in the COVID cases where the policyholder will file in state court and then the carriers are all filing in federal court.

Lynda Bennett: What tactical advantage do the carriers think they're going to get in federal court versus state court?

Michael Lichtenstein: I think there's two reasons. And one is that they feel like they'll get homered in a state court if the policy holder is suing in their backyard, essentially.

Lynda Bennett: Yeah.

Michael Lichtenstein: If you think of some of the folks who have been suing small businesses, restaurants, hospitals, folks who are typically sympathetic plaintiffs, especially in the COVID case where they've gotten whacked economically through no fault of their own. Right. And I think the carriers are concern that there'll be sympathetic judges. I'm not suggesting for a minute that judges are persuaded by that. But I think that's the thinking. And the other thing I think they're thinking about is that state court judges tend to be a bit more overwhelmed. I think the federal judges have more resources. I'm not, again, not talking about the quality of the jurisprudence. It's just, federal judges get

two clerks and they have all the trappings and state court judges tend to be under more pressure, more cases, less support.

So they might be thinking in the ability to move a case, especially if you file motion, trying to dismiss, which is famously what's been happening all across the country. I think the carriers view is that they've got a better shot at cutting these cases off early. I want to mention though, interestingly, there's been a study of that I think it was in conjunction with the project at the University of Pennsylvania law school where they're tracking these cases. That they've actually found that some policy holders for reasons have been filing in federal court, maybe thinking the same thing that they can get things moved more quickly. But the study has determined that the carriers are right. The policy holders are going to do better in state court. At least that's initially, that's where they are right now. The cases we filed for COVID, we've filed in state court whenever possible. And every time I've seen a carrier have the ability to remove those cases, they have removed them. So that's what I think it's going.

Lynda Bennett: Right. You got to dust off your Civ pro 101 learnings and port yourself back to Colorado River and Brillhart, Wilton Doctrine, et etc.

Michael Lichtenstein: And just quick for the listeners. That's very similar to first filed where if you've got an ongoing state court litigation, you get a presumption that the federal court should stand down. It's a bit of a complicated process, more granular than I think we have to be here, but the court's going to look at what law is going to apply. Is it a comprehensive lawsuit? Can full relief be delivered by the state court? Can all the parties who are necessary be held into that state court? Because the venue can be more limited sometimes in terms of service of process. So, but that's another version of first file I think, going on with Colorado River.

Lynda Bennett: So when our listeners are thinking about crafting their complaint allegations, are there any special considerations they should have if they're anticipating that there will be a forum battle? So you're getting ready to file your complaint, but you think there may be an immediate retaliatory filing somewhere else by the carriers or something that the policy holder should do in the first instance in their complaint allegations.

Michael Lichtenstein: Yeah. So here again, I tend to be a famous notice pleader where my complaints tend to be fairly bare bones and only contain as much detail as I think is absolutely necessary to plead out the complaint. But if you think a foreign battle is coming, then I go the other way. And now I want to hit all of the highlights that I know will become an issue in a first filed versus second filed or a Colorado River.

So I'm going to want to be making a very comprehensive pleading. I want detail the location of the parties. I want to detail the location of the risk, detail of the loss, the connection of the witnesses to the forum, the connection to the policy holder to the forum. I'm going to put all that gratuitous information that would end up in an affidavit anyway, in a forum battle, but I'm going to put it right up there in the complaint. Because in a forum battle, I know the judge is going to read it. I clerked many, many years ago for a trial judge and

my judge rarely got involved substantively until the case was much further down the road. So what was in the complaint was not nearly as important, but I think in a forum battle, the complaint is going to be front and center. And you want that to tell your very comprehensive story. So that would be my recommendation if you think a forum battle is coming.

Lynda Bennett: Right. Great. So let's wrap up coverage litigation leapfrog, the three most important things that policy holders need to keep in mind.

Michael Lichtenstein: Three most important. Okay. Well one, do you think you're going to have a real coverage dispute? Meaning do you think it's a real risk? Because it isn't always. So that's the first thing. Second thing is that if you think there's any legitimate risk, then you really have to do the analysis that we talked about to kind of figure out what different laws might apply, what different factors might apply. And to kind of give you a sense of which forum and I want to, I know you said the top three things, but one thing we didn't talk about is we talk about the forum, but you don't always get the law of the forum just because you file there, right? It adds a whole other element of complexity. You can file in New Jersey and New Jersey might apply the law of Pennsylvania and vice versa.

So it's a very complicated analysis, but in any event, you do your analysis and you try and figure out which forum gives you the best chance to get the law that you want. And then I think when you then plead out that complaint, you plead it out in a way that backs up and justifies why this is the one and only forum where this complaint really should be heard. So is there a risk? Game out the risk and draft a complaint that gives you the best chance of surviving a forum battle. How about that. Three and a half.

Lynda Bennett: I will add four, which is, if you do lose the race to the courthouse, get your complaint filed in the other jurisdiction you want to be in immediately because the one of the other factors honestly, that courts consider is if that other case is further down the road than yours, it's going to be a lot harder to get your chosen jurisdiction. So if you do happen to get jumped by the carrier, you got to make sure you get a complaint filed very quickly in the jurisdiction where you want this to be heard so that those dueling motions to dismiss can get teed up at the same time. And you have a hope of landing in the jurisdiction that you'd like to be in. Well, I appreciate your insights Licho. This has been great. And as usual practical as we like to do here on Don't Take No for an Answer. So thanks again and hope you all join us next time.

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