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

Episode 26 -
The Slippery Slope of Additional Insured Coverage and Contractual Risk Transfer

By Lynda Bennett and Michael Lichtenstein
NOVEMBER 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.

Michael Lichtenstein: Good morning or afternoon folks. This is Michael Lichtenstein, welcoming you to Don't Take No for an Answer and Insurance Recovery podcast. Today, I have the great pleasure of having as my guest my boss, and one of my closest friends Lynda Bennett. Who's the chair of our Insurance Recovery group here at Lowenstein Sandler.

And we are going to talk about, again, a very interesting and topical topic. We call the slippery slope of additional insured coverage and contractual risk transfer. So we short form that is to AI, additional insured and AI issues come up in all sorts of claims. They involve contracts. They involve issues with how you actually get on a policy, how you access those rights.

And really no one is better to talk to you substantively about that then Lyn, so let me get started and ask the very basic question: what does it mean to be an additional insured on somebody else's insurance policy?

Lynda Bennett: Thanks, Michael. This is a topic that's near and dear to my heart. What it means to be an additional insured is a policy has been issued to a different entity and you are being added as a party who will have direct rights under that policy that was issued to and paid for by somebody else. And as we'll get into later, the scope of the coverage that you get will very much depend on the precise words of the endorsement that you've been added... So it's one of our Don't Take No for an Answer, bedrock principles; the words matter. So at the very highest level, being an additional insured essentially allows you to have access to an insurance policy that was issued to someone else and paid for by somebody else.

Michael Lichtenstein: Alright, so let's take this in sort of baby steps now that we know what it is. So how do you become an additional insured on somebody else's insurance policy?

Lynda Bennett: So there are a couple of different ways to accomplish this, the best, easiest, and most complete way is for you to require that other party to have an endorsement added to their policy that says my company widget Corp is hereby named as an additional insured on this policy. So will be an endorsement that specifically references my company widget Corp and says widget Corp is an additional insured under this policy.

Michael Lichtenstein: So let me guess that's not easy to get, right?

Lynda Bennett: That is not easy to get, it becomes very cumbersome, particularly for companies that enter into services, agreements with lots of different vendors, suppliers, et cetera, so the insurance industry has developed what's called a broad form, additional insured endorsement. And what that endorsement will say on the other entities policy is that anytime you are required by written contract to provide additional insured rights to an entity, they are now so deemed an additional insured under this policy.

Now what's important to know is that additional insured coverage, particularly under broad form, additional insured endorsements will limit the ability for that additional insured to access coverage. They essentially have to be involved in the lawsuit on a vicarious liability basis. In other words, the additional insured in the lawsuit is going to be held potentially responsible for the acts of the named insured on this policy.

So if widget Corp is sued in the lawsuit for widget Corp's own negligent acts, let's take a construction project, for example. If widget Corp independently acted negligently on that construction project, they're not going to be able to use the other company's policy.

Michael Lichtenstein: So that, so just to make sure the listeners get it. So if you're using a broad form endorsement, if you become, let's say you're a subcontractor and you're on the general contractors, policy. If you become liable because they're liable. For some reason you have AI coverage, but if you become liable for something you do on the project, you don't, is that right?

Lynda Bennett: Correct. You can't use your additional insured coverage to account for your own negligence.

Michael Lichtenstein: And so, so how do you get coverage for direct liability? Do you have to go back to that? You have to endorse me specifically onto the policy?

Lynda Bennett: Well, there's two ways. One for direct liability, the named insured is going to tell you, go buy your own policy.

I'm not covering you for your direct liability, but the case law on the scope of additional insured coverage is very interesting. Because most forms, whether it's that broad form that I talked about, or even when your named specifically, it will talk about liability arising out of, or arising from the named insured's conduct.

And so there's a lot of case law looking at whether, if I'm the additional insured and I'm 99% responsible for what's happened? And the named insured is 1% responsible. Do I get to drive a truck through that arising out of, in hand, the entire liability. And so just on that point, and it's important for our listeners to know this, that's why you really need to be paying careful attention to the additional insured language that you're getting now, because there are now several different types of broad form, additional insured endorsements out there. And again, the words matter, you actually have to read it and know the scope of the coverage that's being provided.

Michael Lichtenstein: So I'm going to ask you a few pointed questions about that, but I know there's one other way that you can become an additional insured, which my guess is it's probably not the best way to secure those rights. It's called a certificate of insurance. Can you tell our listeners whether that, whether a C O I has any real value at all?

Lynda Bennett: It does not. And it's the biggest mistake, uh, that our clients make. Um, so a certificate of insurance is typically an accord form. It's a pre printed form that the party that's required to give you additional insured coverage will give to you.

And what that form says, it'll tell you the name of the insurance company that's issuing the policy. It'll give you the policy number. It'll give you the limits. It may even have an, a box on that form. That widget Corp is hereby named as an additional insured on the policy. But the fine print in the upper right-hand corner of that accord form is going to say that this certificate of insurance confers exactly no rights, it is for informational purposes only.

And so if you rely on that certificate of insurance, you have just bought a pig and a poke. It's not worth anything. And when you try to sort that out after a claim has been made good luck to you on that. So gotta really pay attention on the front end when you're entering into that contract. And you're given the proof of compliance with the insurance provision in that contract, you got to get that endorsement certificate of insurance isn't going to get you anywhere.

Michael Lichtenstein: Alright, so can we talk a little bit about the different issues? One has to be thinking about when you're giving additional insured rights to someone, as opposed to when you're getting.

Lynda Bennett: Right. This topic, I'll call my corporate partners and I love them all dearly, but it's when corporate lawyers try to play insurance lawyer on TV.

And so you've really got to look very carefully at the insurance provision in the contract. And if you are the party that is getting additional insured coverage, you are going to want that provision to be as broad as possible. You're going to want that arising out of language on the endorsement that's adding you as an additional insured.

You're going to want to be very specific about the limits, about the types of policies that are required to be in place. You know, one example I'd tell you is you better make sure that you're now requiring folks to have cyber insurance coverage in place. And to the greatest extent possible naming you as an additional insured, at least on the liability coverages associated with cyber issues and risks.

Conversely, if you're the party giving the additional insured coverage, then you are going to want it to be as narrow as possible. You're going to try to drive down the number of the amount of limits that you have to prepare. When you give that additional insured endorsement, you're going to want it to say it is only coverage for vicarious liability.

So these are things that you would work with your broker on to make that coverage as difficult as possible for the other party to exercise. I mean, one of the things that I say to my clients all the time when they're dealing with a 10,000 pound gorilla, Uh, contracting party, who's making all of these demands.

I say, okay. I just want to make sure you understand that when you comply with all of these insurance requirements, you are paying for a policy and giving somebody else the ability to access it directly without your involvement, without your consent. And all of these policies do not have language in them that treats a named insured on a prioritized basis over an additional insured. Once you've given somebody additional insured coverage rights, they have exactly the same rights that you do to those limits. And it can be a race to who's going to get those limits first.

Michael Lichtenstein: And that I don't know that our listeners really get that and I think it's worth emphasizing, you know, if you have a $1 million policy and you give rights to a couple of few folks, and a claim comes in. You're all racing to the million dollars, right? Unfortunately for you, the one right you have that they don't have or obligation is you pay the premiums and they're free riding, but if they get to your policy first, or if the claim is so big that a totally swamps the policy, I mean, you're giving away.

A valuable asset of your business. And so like all contracts, as Lynda was saying, you want to give away as little as possible. And conversely, when you're getting an asset for nothing you want to grab with both hands and take as much as you can. So I don't want to get too granular Lynda, but do you want to talk just a little bit?

I think you've already touched on this a bit in terms of the difference in language that you might see in different broad form endorsements, even if, just to say like, this is a good language, if you're giving or this is a good version, if you're getting.

Lynda Bennett: Right. So we've talked a little bit about that. That the difference between a rising out of versus caused by.

So if it's a rising out of my negligence, that's a very broad, all encompassing, easy to access type of triggering language. Whereas if the additional insured endorsement only provides additional insured coverage for losses or damage that is caused by my negligent acts, that's going to be a lot harder for someone to access.

The other thing here, I want to emphasize. And again, a lot of folks don't realize this until they have a claim and get this unhappy surprise. But some of these additional insured endorsements will say, okay, we're going to add widget corporation as an additional insured on your policy. But when we pay defense costs on behalf of widget Corp, those defense costs are going to erode your policy limit whereas one of the big values of a CGL comprehensive general liability policy, for example is you get defense paid outside of the limits and it's limitless. So when you start to give additional insured coverage to widget Corp, and they're getting their defense costs paid, they could theoretically be eating away at your limit before you're anywhere near having that liability fully resolved. So it really is super important to read those endorsements very carefully before a claim comes in.

Michael Lichtenstein: So I know we've been going for a while, so let's sort of wrap up with this topic, the flip side of that. So we've been talking about the risk to giving it because you're basically giving an asset away, could erode limits things of that sort.

But what's the value to me as one of say, a thousand additional insureds. If I know I'm contracting with a party who has this broad form endorsement, and if they're giving away AI rights like candy, then if possible, how do I even know? What value I'm getting? How do I know if the carrier will be around to pay the claim?

If a claim ever comes? I mean, is there any advice we can give to our listeners addressing those points?

Lynda Bennett: Yeah. So there's a couple of things to do there, and these are very real considerations. And when I'm advising the client, who's in the position of being the beneficiary of getting the additional insured coverage.

I go over these very things to say, look, if you're going to push too hard, if you're going to ask for too much, you're really not getting much of anything at all. If, if you can get disclosure on how many folks are getting the same, additional insured endorsement from you. Great. If you have concern. Oh, and the, and this is also very important when you're the 10,000 pound gorilla you have to look to see who their carrier is because a lot of times these vendors that enter into supply contracts, they're not looking for the best coverage. They're looking for the cheapest coverage. And that's another thing that you have to evaluate. Is this going to be worth the paper it's written on?

Is there actually going to be real coverage here. If you have the concern that you're not getting real coverage, one of the strategies that I've advised on again, I'll use the construction project as a good example, you can get what's called an OCIP policy where basically you're the owner of the project.

You go out and get an insurance policy. That's going to cover that entire construction project. And then you divvy up the premium for that among all of the subcontractors and others who are going to touch the project. So if you're dealing with an important vendor or business partner, but you're concerned about the quality of their insurance, you can essentially tell them we're buying the policies and we're going to charge you for it. That's the best way to know that you're going to have good quality coverage that's dedicated to you and to address this risk.

Michael Lichtenstein: Right. So as Lynda loves to do to me, I shall do to her. So Lynda, as we wrap this up, what are the top three factors that our listeners should be thinking about when it comes to additional insured coverage?

Lynda Bennett: Okay. Number one, it will matter whether you are giving or receiving the additional insured coverage. That's first and foremost. Number two, make sure that your contract provisions that speak to the insurance requirements are tight and clear. I want to give a specific example there. So I mentioned before the broad form, additional insured endorsement says you get coverage when required by written contract.

Let me tell you a provision I see all the time in contracts that says: everything's done perfectly. They've got all the limits, all the different policies that are required. And then it says at the request of the company, you will name me as an additional insured. Guess what? At the request of is not the same as being required and guess further what.

People don't tend to remember to make that request until after the claims come in. So the words in your contract that established what the additional insured requirements are going to be matter. And then third and most important of all. And I want to get a big poster board and hang it in my office. The certificate of insurance means nothing.

Get your endorsement that confirms that you're actually an additional insured. Otherwise you're holding a piece of paper that ain't worth the paper it's written on.

Michael Lichtenstein: I love it. Lynda as always it's a pleasure and I thank our listeners for joining us, and we look forward to being with you on a future podcast.

Lynda Bennett: Thanks so much. Be well.

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.