



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

**Episode 30 -
Maximizing RWI Recovery Claims: Don't Be Penny Wise
and Pound Foolish**

By [Lynda A. Bennett](#), [Eric Jesse](#), Douglas Worth
JANUARY 2022

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Lynda Bennett: Welcome to Don't Take No for an Answer, an Insurance Recovery Podcast. I'm your host, Lynda Bennett, Chair of Lowenstein Sandler's Insurance Recovery Group. Today we're going to have a discussion about reps and warranties insurance. We've discussed this topic a few times in prior episodes but because this is an emerging and now, frankly, a staple product in the M&A space, we wanted to do a deeper dive into presenting the claim. What are the nuts and bolts that go into presenting your claim to the rep and warranty insurer, and what are some of the practical tips that you can employ to make that process go smoother and maximize your insurance recovery?

So today, I'm thrilled to have two guests with me. First is Douglas Worth from Willis Towers Watson. Doug is a Senior Vice President, Regional Leader of Willis's Claims and Legal Group. And in that role, Doug is responsible for Willis's Reps and Warranty Insurance Claim Group and has seen the reps and warranty insurance claim process firsthand and has helped to secure reps and warranties recoveries on behalf of numerous clients. So Doug, welcome and thanks for joining us today.

Douglas Worth: Thank you for having me.

Lynda Bennett: Pleasure. And I'm also very happy to have with me my Partner, Eric Jesse from Lowenstein's Insurance Recovery Group. Eric works tirelessly on behalf of buyers in M&A deals to negotiate policy forms, narrow exclusions, and advise buyers during the rep and warranty underwriting process. And then when claims are inevitably made, Eric has guided numerous clients through the claims process. He works with them to present complicated claims in a digestible format, works with experts to substantiate the breaches and the losses and if appropriate, articulating the legal basis for recovery.

Lynda Bennett: So we certainly have the right people to dive into this topic area today. So let's begin. And I'll throw out the question first to Eric. Before a claim is ever made, what are some of the things that buyers should do to protect themselves and maximize the amount of their recovery?

Eric Jesse:

Yeah. So this really begins with the underwriting process when you're beginning to go out to market and try and find the right reps and warranty insurer. One thing you want to do is ask your broker, ask your counsel about the R&W insurer's reputation for paying claims. Are they commercial? Do they pay claims? Have they been difficult? Just ask anecdotally about their experiences with that particular carrier or the carriers that quoted.

The other thing that's important is also to perhaps be a little weary of the new kids on the block. We've worked with a lot of newer insurers and have had success with them, but some of those insurers unfortunately have quickly disappeared from the market. So you don't want to be faced with the claim from a carrier that's disappeared.

The other things I try to focus on is, one is obviously work hard to narrow deal-specific exclusions that an ounce of prevention can be a pound of cure if a claim is eventually made. And then another thing I try to do is remove the arbitration provision from these policies so that the buyers have the ability to take the insurers to court, because a lot of these claim disputes are probably resolved privately in an arbitration setting, but these carriers, I think they're still concerned about their reputation. It's a small-knit community and being able to publicly file a coverage dispute can give you some leverage in a claim dispute, I think.

Lynda Bennett:

Yeah. Absolutely. In addition, just the fact that they'll face a precedent. As we always say to our clients, a loss for a policyholder is one loss, a loss for a carrier can be hundreds of losses for claims that they have in dispute. So Doug, let me throw it to you. Who should present the claim in the first instance? Give us insight into whether the carriers view a claim differently when you and your team are making that presentation in the first instance and if they get intimidated when Eric shows up and the claim's coming in on Lowenstein letterhead.

Douglas Worth:

Yep. So Lynda, I think it's actually a product of both parties being involved. Typically, and maybe short answer would be it be I think it's very important for someone like myself, the carrier adversary, maybe not initially but potentially somebody that the carriers see in that way. They know we carry a lot of weight, not only sort of individually but specifically. Obviously, I speak on behalf of Willis, but whether it's one of the other large brokers in the space as well, there's a certain amount of clout that we bring to the table because to your point, these aren't just one-off matters. They are to some degree for that policyholder. But for the insurers, it's multiple matters. Dealing with Willis Towers Watson clients consistently and then sort of working hand in hand with firms like Lowenstein, I think that brings a lot of just power to the claim process. So my recommendation is always, involve us. That's what we're here for and we happen to be good at it. So use that expertise.

Lynda Bennett:

Absolutely. And Eric, there were a couple of other key team members, and let's talk about when and to what degree they get involved. And that is deal counsel and the expert. How quickly should you get the expert lined up and involved in the process?

Eric Jesse: I think a lot of it is really going to depend on the nature of the claim and, frankly, the size of the claim. If you have a financial statement breach claim and it's going to be a substantial claim, you want to get an expert involved. You want them involved early on in the process. It can be shortly after you put in a formal claim notice and then you're gearing up to submit a more substantive proof of claim where you want the experts input into what's being submitted and just the claim overall.

For smaller claims that still involve a financial statement breach, for example, perhaps you can work with a company CEO and have that one-on-one principle-to-principle dialogue between your buyer client and the insurer to try and resolve a claim. And then I think deal counsel should always be involved. They were involved in drafting the reps and just can provide insight again at the outset of the claim.

Lynda Bennett: Great. Doug, at the beginning of the process, when the claim's presented, what's your finger on the pulse sense of the market right now? Is there a natural inclination by the carriers to get into, as Eric said before, commercial negotiation mode? Or is this going to be more of a standard reservation of rights letter, fight you tooth and nail to the bitter end? What's your sense of the market right now?

Douglas Worth: So my sense is these claims are certainly, as they come in quantity, the historical landscape is changing where carriers, and they've always been open to receiving and reviewing claims, but some of the commercial aspect that I think we've seen where they've been very open and very willing to negotiate. Now whether that's day one and it probably isn't, and maybe it's six months later, whatever it is, that could be changing a little bit. Hard to say exactly, but there's quantity here. And the quantity is also bringing severity. So when we talk about multiple claims at high-dollar value, a lot of the carriers could be, again, maybe not initially, but could be looking to dig in.

So I think as a prudent broker, as a prudent advice I would give to a policyholder, everything you do should be with an eye on what happens if and what happens if we have a larger problem with the carrier, and what happens if we have to dig into this a little bit and it's taking some time and it's not sort of quickly evolving? I think we need to be at the ready and just it's smart business that we can expect if not a tough haul but a long haul with the carriers.

Lynda Bennett: Yeah. I mean, I think we're seeing a little bit of that with D&O and cyber, that claims swamping the system are going to result in a lot more digging in. And that's really, I mean I think you're giving us a read into, we may be a few years behind that with reps and warranties, but if we continue at the same pace we'll find ourselves in the same spot with D&O.

Douglas Worth: And I'll just add to that comment because it kind of, Eric had said something earlier. Lynda, I think that's exactly right. And I think, in my mind it goes back to, we always look at terms and conditions of critical importance for a policyholder but more and more as I see new players, and we can talk about new players in a minute. And I'm happy to have policyholders with new players. But I think the tried and sort of trusted long-term players in this

space, and there are a number of them, and I'm talking about insurance carriers. I think significant consideration has to be given to the product that they put out in the market because at the very end it's been tested and they are paying claims. So to be optimistic, we expect that to continue very much so. And we want to deal with those players that understand this market and how to navigate through it.

Lynda Bennett: Absolutely. And just echoing what Eric said earlier, not all carriers are created equal on claims. And that should be a consideration at the placement end.

Douglas Worth: Absolutely.

Lynda Bennett: So Eric, just at a high level, take us through the life cycle of the claim. I mean, the number one question we get from clients is how long will it be before my claim is paid? Take us through the life cycle at a high level.

Eric Jesse: Yeah. And unfortunately, the reality is that even sometimes the simpler claims can take a while to get paid because you're going to... First of all, sometimes a lot of buyers may even delay in providing notice of a claim to carriers. And that's something that we try and caution against because you want to start this process as soon as possible because there is going to be a lot of time and effort that's going to be involved. So once you discover a breach, you want to submit a claim notice to the carrier. And then what we often try to do is put together a statement of claim that really tries to walk the carrier through the basis and the justification for why there's a breach and to give information on the valuation and the amount of the loss. And on top of that, when appropriate, we want to include backup information or an expert report with that statement of claim because we know the carriers are going to ask for it.

What often follows next is that the carrier wants to have an introductory call with the buyer. It's one thing to read the substance of a claim on paper. It's another thing to hear it from the buyers who are very close to the issue. And so oftentimes, we have a call and we want to make sure that our buyer clients are well prepared for that call before they're going to speak to the carrier or their counsel. And then inevitably, there's going to be information requests that are going to come in.

And this is where there can be a lot of tension because the insurance companies want everything and a lot of times buyers are going to say, "Well, we gave you that statement of claim. And so you have to find the right balance in responding to reasonable information requests." And that's where there can be a time-consuming process. And the quicker that the buyer is able to turn around and respond to reasonable information requests, allows the claim to move forward. And I think the ultimate goal when we're handling a claim is obviously to do so cooperatively and collaboratively so that we can end up in a conference room and hopefully a real conference room sooner-

Lynda Bennett: Not a virtual.

Eric Jesse: Exactly. Sooner rather than later where the buyer team and the insurer's team are in there and negotiating the claim and trying to reach a settlement.

Lynda Bennett: So Doug, let me ask you through the broker's lens, as a practical matter where do you see the greatest divides? Eric mentioned the tensions about getting them enough information, but on the broker side of things where are the two or three biggest stumbling blocks coming from in keeping the claims process moving smoothly?

Douglas Worth: So the information request and to Eric's point the balancing act in terms of what you provide, what's sort of wishful thinking, but over the top, oftentimes the advice to clients is it's a process and even though... No, let's take a step back. Even though the buyer might have been very involved with the underwriting team at the insurance carrier and they might have a lot of information, although how much of that institutional knowledge is passed along is unclear, but there's a new group that comes in when we have a claim and that's the claims team. And that claims team as I was just talking about, may be tested or they may be very new. So that's always a big, not only sort of effort in terms of time but just real energy retrieving documents, making sure that they're put into the carrier, making sure the carrier understands what it is they're looking at, understands what it meant during the diligence process or what it might not have meant, which is important and that we work through that.

As we sort of work through that process, one of the big stumbling blocks I think that rise from that and this is a little bit more claim specific, but on those claims where the actual damage figure is then going to be, we're going to use a multiplier to come up with the damages presented against the policy itself, that's another large item. And I sort of say it this way, while the deal might have been done at a certain multiplier, clients have to understand we're pushing for that same multiplier to be used in claims. And it should be. I mean, that's sort of the firm answer. But oftentimes, if we're being honest, the carriers don't see it that way.

So that to me is stumbling block. They won't want to use a multiplier as high as the deal. They'll look to some number that's less. And when we say less, it's probably considerably less. And there's a lot of time and effort, again, spent on which is the right rationale to follow. So those are kind of two big areas for me.

Lynda Bennett: Yeah. I agree. And the melding of benefit of the bargain versus I thought I bought a profitable business becomes a major tension point in all of these negotiations. You'd agree, Eric?

Eric Jesse: Yeah. We've definitely seen that.

Lynda Bennett: All right. So we've got just a couple of minutes left here. And so I would like each of you to give the two pieces of advice that you would give to a client to make the claims process smooth, and result in the highest recovery that you could possibly get for the claim. And so, Doug, I'll have you go first and Eric will close us out.

Douglas Worth: Yeah. So I think it comes back to some of the things that we've been talking about already. I think it's on the front end, have the right team available. Don't sort of be penny wise, pound foolish, meaning, hey, I don't want to continue to use the deal team or I don't want to bring in potential litigators from the deal team because now they've got to come up to speed and there's a cost there. Be very aware that every claim might be met with some serious pushback from a carrier. So I think go in there, let's be diplomatic and let's be cooperative. In all my claims experience, in all my history, and I'm in this business almost 28 years, that rule carries the day. But be aware and be ready and have the right team available. And oftentimes, that also means bringing in a forensic expert, accounting, what have you, so that we can walk through damage figures.

The other sort of, and it goes hand in hand is really understanding that there's a lot of information gathering and information disclosures that this takes time. This is not something that I give you, even a comprehensive proof on the front end will still come into questions. And a client shouldn't have the expectation that this is instant. We're going to do everything we can on both sides of this.

Lynda Bennett: Well, Doug, we are dealing with wheeler-dealers. We have to remember, we're dealing with wheeler-dealer M&A guys. They close a deal, they move on.

Douglas Worth: Right. I don't want to be the one to stand in the way. It's lead, follow or get out of the way. But there's a real consideration here that you just have to be mindful of, and that is, it's a timing process and what can you do to make the timing better, to Eric's point? Be really well prepared and be open to sharing information because the claims team that's coming to this unlike the underwriters, they don't have quite the same eye on it. And there's a lot of information that they'll need to learn. So I'll pass it over to Eric from there.

Lynda Bennett: All right, Eric, bring us home.

Eric Jesse: All right. Well, one thing, as I mentioned earlier that I would recommend, and we found that when we're dealing with different brokers they're impressed by this process, carriers are impressed by this process, which is really having a good handle on the claim from the outset. So you might put in your one or two-page notice letter. And then you really want to put together that comprehensive statement of claim that really walks the carrier through in detail, why you think the rep was breached, identify by the facts and circumstances, walk through your theory on loss valuation, and give that backup information. Because that really, to Doug's point about timing and delay and responsiveness concerns, when you present the claim initially in that manner, you're already ahead of the game and you've moved the claim process forward. The other thing that buyers can consider doing is really just retaining and then partnering with their coverage counsel and consider alternative fee arrangements to bring this claim home and work together and in that manner.

Lynda Bennett: All right. Great. Well, Doug and Eric, thank you so much for your insights. What I took away from this is, I will get my claim paid, but I've got to be super

patient. I've got to have Doug on my team. I've got to have Eric on my team. And we've got to have a crackerjack expert and a client who's got exceedingly excellent patience. And so with that, we'll wrap it up for today. Thanks for joining us, Doug. Really appreciate your time.

Douglas Worth: My pleasure.

Lynda Bennett: Eric, appreciate your insights as always.

Eric Jesse: Of course.

Lynda Bennett: And we'll see everybody next time.

Eric Jesse: All right. Thank you very much. Appreciate it.

Douglas Worth: Great. Thank you.

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