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

Episode 36 -
Mediating Complex Insurance Coverage Disputes Series Part 4 - How to Seal the Deal

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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 here at Lowenstein. And I'm very pleased to have my co-host Michael Lichtenstein back in the saddle with me. Good to see you again, Michael.

Michael Lichtenstein: Good to see you, Lyn.

Lynda Bennett: All right. In today's episode, this is part four of our mediation series. In prior episodes, we've addressed how policy holders should go about preparing for the mediation. Then we had a really great discussion in episodes two and three, where we had a mediator and an insurance company representative giving their perspectives on how to conduct a successful mediation.

In today's episode, Michael, you and I are going to address how to actually seal the deal after the mediation. You and I have both experienced where we thought we had a deal leaving the mediation that day and then we end up in a months-long battle of trying to get a settlement agreement signed and the amounts agreed to paid.

Michael, let's start with when do we start bringing up some of the terms beyond the dollars that are going to be paid on a disputed claim? We're going to get into some of the details of what those key terms are, but let me just start at the high level. When do we start raising things beyond just how much the insurance company's going to pay for the claim?

Michael Lichtenstein: Lyn, I raise some very basic terms at the very outset of a mediation or any settlement agreement, because I think they affect the dollar value that our clients are willing to settle for. For example, I raise issues of scope of release so that we understand what it is we're releasing. In a litigation, it sometimes can be easy because you're releasing that one claim and all of the claims that were brought in that case, but in some other situations like environmental claims, for example, a carrier may want to settle more than one particular site, and they may want you to give up any known claims at other sites, they may want you to give up unknown claims at other sites, and

they may want to buy the policy back entirely where they're essentially saying, we'll pay you some money today and then it's as if the policy never existed and you can never make claims against that policy in the future.

I think that's a very important term and you need to have an understanding with a carrier so that when you're talking about dollars, you know what you're actually getting and what you're actually giving. Indemnification is another term. The carrier is going to want to know that we're going to indemnify them against additional claims in the future. That could be claims by other insurance companies or other parties that have some liability that's related to this, and that can be a big fight, because carriers oftentimes want unlimited indemnities. We generally don't want to give them at all, but if we give them, we don't want to give an indemnity that is worth more than the money we're getting to settle the claim. We don't want to become their insurance company essentially. That's another one.

Subrogation is one I normally raise upfront. If you have multiple carriers on a particular claim and I'm settling with one, I want to make sure that that carrier isn't thinking they're going to pay me a million dollars and then lay off $500,000 on the other carriers because, of course, I'm having the same conversation with those carriers to settle and they're also going to want indemnities. I can't be in a situation where I get money from them and then they're all just trying to reallocate those dollars on my dime. I don't need to go through the entire agreement with them, but there are some basic terms I want them to understand before I put a dollar on the table.

Lynda Bennett: I think it's a tough call and I love debating issues with you, Michael. I think it's a tough call because you can get over your skis. Why get into the devil with the detail of all of those issues that you've just raised if we're not going to arrive at an agreeable price at the mediation or as a result of the mediation process. I take a little bit of a different tact and we both know, it depends on the particular dynamic of a claim. Sometimes it may make all the sense in the world if you're pretty sure that you're going to get to a deal as you just laid out, address all of those issues on the front end.

In other instances, and frankly in many instances of the matters that I handle, I don't include that as part of the demand. I don't want the carrier to have multiple cards to play with right at the outset of negotiating the price. And so, I will just keep the discussion with the carrier limited to the price, but you raise very important issues that the client needs to be prepared for long before they get to the mediation of just what are the different issues that are going to be raised, what are the dollar values and risk tolerances for the company to address all of these other non-monetary, seemingly non-monetary elements that are going to go into that settlement agreement. I agree it's important to get your client understanding on all of those things, but I think it's a difference in style. I like to hold that back until I know I'm actually going to have a deal with the carrier on the money.

Let's start diving into the settlement agreement itself. I came up with a list that really is just a list of war stories for me. Some things you would think would be so basic and simple become a war of the ages after you've left the mediation session. Payment term, what is typical in a settlement agreement

with a carrier and again, that's another one, should we make clear right up front what we want before we get to the number or is that something we can deal within the settlement agreement?

Michael Lichtenstein: That's one of the terms that I'm happy to deal with later, although, and I don't know if we want to talk about it now or even on the podcast, but there's another issue about, well, what do you want to have in writing and agreed to before you leave the mediation and start the process of drafting? I like to have term sheets that have some pretty detailed information on more than just those two or three issues I raised before, things I want them to know about when I first make a demand or an offer. I think you want some of the issues I think we're going to talk about here on a term sheet that I like to have signed by the parties.

It obviously is not binding until you have a fully negotiated agreement, but I think it puts some bite into the agreement that you have, but a lot of people resist that, a lot of people are so exhausted by 11:00 at night when the mediation's over, nobody wants to start drafting.

Lynda Bennett: You make a great point and that's something, we all know that mediations include a lot of downtime. If you're starting to get the vibe that a settlement's going to happen, we've started drafting those term sheets to have them ready so that we don't deal with the fatigue excuse at 11:00. I'll just observe that many more mediators that I deal with now are requiring that and the reason for it is they've seen the same movie that you and I have that you think you have a deal and then it's a six-month negotiation of the settlement agreement. Mediators are getting wise to that too and are really pressing the issue of having that term sheet.

Michael Lichtenstein: The carriers want to delay as long as possible and our clients, the policy holders typically want their money as soon as possible. I've seen most carriers will start with 90 to 120 days, which I find just preposterous, especially when there's been a process going on for some time. The carrier's fully aware of the types of dollars we're talking about. We normally come back with anything from 10 to 30 days and I would say we generally land depending on the claim at 30 to 45 days of payment, if you're just talking about lump sum reimbursement. This would get more complicated if you're putting coverage in place and you're going to negotiate a procedure for submitting defense costs and having objections, but in a basic case, that's where I think we typically land is somewhere between 30 and 45 days for payment.

Lynda Bennett: Yep and watch for them to slip in the word business in front of days. All right, let's get into the definition of the entities that are going to be covered because in many instances, we've filed the lawsuit and it's in the name of the policy holder, the entity that actually got issued the policy, but when we get into the settlement agreement, we tend to see tremendous expansion of the defined terms in the settlement agreements. Just touch on, Michael, why that matters.

Michael Lichtenstein: I just think you have to be very careful about whose rights you're giving away and whose rights you're trying to preserve. Again, it depends on the type of

policy, the type of claim, but you see a lot of language when they're defining who the parties are to the agreement, successors, assigns, parents, subsidiaries, predecessor. The language is so broad to almost be nonsensical because there are going to be parties in that definition that you don't actually have the power to commit or waive or anything really.

I try to boil it down to, okay, who is this claim against, who really has the coverage and what am I prepared to give up to settle the claim. I think downstream is normally easier to give up as long as you understand what that needs, because all of your subsidiaries, depending on the policy and how broadly the named insured is defined, they may have independent rights in a big coverage program. I don't know that you want to be, or even can necessarily waive a large wholly unsubsidiary's rights to coverage under your policy. I just think it's something you have to think through carefully, because the carrier's default will be everyone in the world who has any conceivable connection to you in waiving future rights and I think you have to just be very careful about that.

Lynda Bennett: Now, we're going to get into... The next two topics are really the main events and I'll just note here the definition of entities becomes absolutely crucially important because it directly intersects with the scope of release that's going to be given and the parties that you are going to be providing indemnification to, like for the carrier too. When you've got an AIG and they've got lots and lots of different insurance companies under their umbrella, when you've broadly defined AIG in your settlement agreement, you may have unwittingly greatly expanded the indemnification that you're providing, but let's talk scope of release, Michael. That's obviously, other than the dollar amount being paid, I would say it's the singularly most important term in your settlement agreement. What are the issues around scope of release?

Michael Lichtenstein: When you talk about claims, the carrier, again, depends on the type of issue you're bringing. What is your claim against the carrier? If you're in a lawsuit, there's an issue of the claims that were brought and identified versus the claims that could have been brought. The carriers again will say, well, we don't want to just limit it because the plaintiff pled this in a certain way. We're going to want to define the claim that we're resolving in a much broader way. I think you just have to be careful to make sure there aren't independent claims that in theory could have been brought in the case that weren't, that would still survive your resolution of whatever that lawsuit was. I think you have to be careful of that.

If you're talking about a claim, let's say like an environmental claim, the carriers may not want to settle your one cleanup claim at one site in one particular location, they're going to say, "Hey look, you haven't had a claim like this in 25 years, we want to make sure that all of your either known or possibly unknown environmental claims are going to be subsumed by the settlement."

The broader that release, the closer you're getting to a policy buyback, where they're saying, "Look, the only claims you conceivably have under your GL policies from 1969 to 1975 are these old long-term claims and you haven't had one other than this. This is a one-off. The only value to us as a carrier is

to pay one price and make those policies go away." That's pretty common, at least, in my practice. And so, you have to think that through carefully with the client to sort of understand whether they're comfortable, whether they think there's a risk that there's another ticking time bomb nobody knows about. That's sort of a bit of a Murphy's Law question.

On the issue of what releases were given, got to be super careful about unknown policies, for example, because carriers have been connected, torn apart, consolidated. You have to have a really good understanding especially of a historic coverage profile before you say all of the AIG-related companies get releases because I don't know who was associated with a particular carrier in 1974 versus today. And so, you really have to know before you agree to release on that language. I prefer to actually spell them out and actually say, "These are the five carriers who are getting releases for known or unknown or policy buybacks for known policies or your unknown policies," so that you can have a discussion with your client and make an informed decision.

Lynda Bennett: Michael, your practice is mainly focused on these long-tail claims, CGL policies, but this scope of release issue comes up with equal importance in the D&O context, employment context, when you're negotiating with a carrier and you've settled a particular claim, you need to make sure that, I'll take an employment example, you need to make sure that the person who has been accused of misconduct, for example, doesn't have other potential plaintiffs lurking in the background at that company, because when you settle that one-off claim, the scope of release is going to be awfully broad and if two or three more plaintiffs come out of the woodwork a couple of years later, that carrier may try to take that very broader release and say, "You're out, we're not paying these subsequent claims because they arise out of the same pattern and practice of conduct for the claim that you just released."

Similarly, in the D&O context, we see these publicly traded companies that have multiple securities litigations asserted against them and we've talked in past podcast episodes about the concept of related claims, but think about that when you are settling this claim today and making sure that it's really confined to the facts and the policies that are before you today, super important.

Michael Lichtenstein: The default has always got to be we want to go as small as possible, as narrow as possible. The carrier will want to go as broad and the right answer may be somewhere in between, but it's something any practitioner or client has to be focused on, like laser-focused.

Lynda Bennett: All right. Moving on to indemnification. You mentioned this at the top. I would say this is the second most important seemingly non-monetary term. This is where we are agreeing to become the insurance company's insurance company is how I always describe it to clients. What it means is after the carrier has paid you, if another carrier comes after them, if one of your subsidiaries comes after them, if there are any states where a direct action can be brought by the plaintiff against the insurance company, you are contractually agreeing to indemnify them.

I want to pause there just so our listeners understand that, because when you enter into a settlement and you're giving that contractual indemnification, you are giving the insurance company something more than they could ever get in court and I always tell clients that because that is what I use as the basis to start to narrow down the unbelievably broad request that you're going to get from the carrier. With that, Michael, let's talk about some of the ways that you can narrow and put a fence around that contractual risk you're taking on.

Michael Lichtenstein: Right. I'll say it because I agree with you that my opening position is typically I'm not indemnified, so you can forget about it. I make them push hard to get an indemnification in the first instance. Then I feel like, okay, well I already made one concession, so it sets me up, I think, for an easier time in limiting or narrowing the scope of the indemnity.

How do you do that? You can cap it in terms of monetary value. A very common one is what you're being paid, but I don't start there. You start with a percentage perhaps of what you're being paid.

Lynda Bennett: Agree.

Michael Lichtenstein: And say, "Look, I'm not agreeing to give it all back. That just doesn't make any sense." You can agree three to time limits and say, "Look, I'm not going to get a claim from you 20 years from now. There's got to be a limitation here." I would say, "One year is my starting point, three years is probably my outside," to say that anybody is coming out of the woodwork on this type of a claim is going to come out in the near term. I'm just, how do I tell my management that someone is going to have to watch this potential liability and carry it as a contingent liability that we might have to a carrier.

Carriers should understand that. They may not care, but it's absolutely a legitimate negotiating point. You've got this other issue of, well, what happens if they make the claim? Well, who defends it? Who controls the resolution? Everything is being flipped here where we're in the position of the insurance company and we may have an opportunity to resolve that claim at a dollar figure that makes sense to us, but the carrier now may not want to agree to that. They may want to have you fight that because they don't want to set a precedent where they actually have that exposure.

Lynda Bennett: You're exactly right and I love flipping the script on the carriers. I take some of their arguments and their provisions and their approaches and put it right back on them and say, "We learn from the best. We learn from you how to do this narrow and not provide much coverage at all."

Michael Lichtenstein: There's a lot built into it, but I would say typically, I end up with an indemnity provision where I'm paying no more than full, but oftentimes a percentage of it. I typically have to... This ties for me a little bit with subrogation. I typically extract a promise that they won't try and subrogate, but I promise to extract the same concession from other carriers with whom I'm settling. If I don't get it from that carrier and that carrier makes a claim against this carrier that I'm talking to, then no subrogation goes away for that.

I try to give them some comfort because that is one area where they're always worried that they're going to get a claim is that if they know there are multiple carriers and they don't have an agreement between, at the carrier level, on how to allocate the claim. They always seem to be concerned about that.

Term limits, I think three years is pretty much where I land, but that can be a hard one. A lot of carriers fight like hell because they don't want to be the lawyer, the outside counsel who agreed to a three-year and that a major claim comes in in three and a half years and they have to defend how they negotiated to three. Defense is normally okay with control. They typically have the right to participate. If they want to hire their own lawyers for that, it's on their dime. It's really the flip of the language that we normally put in going the other way. We get to choose the lawyers, that sort of thing.

Lynda Bennett: I mean, and I would say that the real risk exposure for our clients in providing that indemnification, I've been doing this 28 years and I can count on one hand the number of indemnification claims I've ever seen come through a settlement agreement with a carrier. The real risk are for those larger companies that have complicated corporate histories and a subsidiary that got spun off years ago comes out of the woodwork because now they too have an asbestos liability or something like that. Then the other real risk factor is if you've got claims that are in a direct action state, the plaintiff does have the ability to go right to the carrier.

Michael Lichtenstein: It happens at product liability too, where you spin off a product and the product now is being sold by someone else. Then a claim comes in at a time period that either can overlap where some of it was before, some of it was after, and now that party is making the claim that they have rights against your policies. You may settle your liability with your carriers and now, they suddenly come in and bring a claim and the carrier says, "You defend it. You figure it out."

Lynda Bennett: Well, we're just about out of time, Michael, you've given some really excellent food for thought on how to seal this deal, maybe get ahead of it a little bit on the front end by raising some of these terms before we shake hands and leave the mediation and certainly pay attention to the words and be careful in actually papering that settlement up.

Michael Lichtenstein: One other thing I want to point out, we should be in control of the drafting. Some folks might sound easier or better to your client to let the carrier do a first draft, I'd rather draft and see their edits than the other way around. That's just my practice. Reasonable minds could differ on that, but I would much rather say, "Hey, give me a week. I'll give you what I think of the rational settlement terms and let them try to edit it rather than trying to figure out where all the ticking bombs are in their draft."

Lynda Bennett: You're right. I mean, that's a great tip and also, that way, the first draft of the settlement agreement gets turned in a week. If you give it to the carriers, you may not see a first draft for 30 days.

Michael Lichtenstein: 90 to 100 days.

Lynda Bennett: All right. Well, this series is now concluded. We've taken you through the life cycle of preparing for your mediation, participating in the mediation and getting your settlement document all signed up and the money paid. As we've made clear throughout this discussion, no two claims are the same and certainly, it's important to have experienced coverage counsel handling these cases for you at mediation and Michael and I are armed and ready with a team behind us to do that.

Michael Lichtenstein: Right. Great. Thanks, Lyn.

Lynda Bennett: See you next time.

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