



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

**Episode 72:**  
**Know Who is Saying No: The Critical Players in the Insurance Process**

By [Lynda Bennett](#), [Eric Jesse](#)

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- Lynda Bennett:** Welcome to Don't Take No For an Answer. I'm your host, Lynda Bennett, chair of Lowenstein Sandler's Insurance Recovery Practice Group. I'm joined today by my partner and co-host, Eric Jesse. Hey Eric. How are you doing today?
- Eric Jesse:** I'm good. Glad to be here. And Lynda, before we jump in, I just need to give a shout-out to two of our avid listeners, Olivia, my nine-year-old, and Jack, my six year old. I want to assure them that insurance is interesting, not boring as they claim. And Lynda, you know the kids and so you know that they really subscribed to the name of our podcast. They do not take no for an answer.
- Lynda Bennett:** Well, Eric, you can get the kids involved and interested in insurance. I tried to do it for years and now my older son works for an insurance company in the claims department and my younger son is getting ready to join the insurance world potentially on the broker side. So well done. And we are raising the next generation, so all good.
- Eric Jesse:** Absolutely. Absolutely.
- Lynda Bennett:** And actually, it's timely for us to be talking about bringing up that next generation because we have to educate them about who the players are in this industry that you and I have worked in for quite a while. So especially because we're in the dog days of summer, we thought this would be a good time to go back and get back to basics and talk about who's involved in the insurance market and how does an insurance policy come into existence and what happens after claims are presented. So let's just dive right in and start talking about all of the different participants in the insurance market. So Eric, let's talk about who are the top three players in the industry.
- Eric Jesse:** Yeah, this may be obvious, but the key players as I see it, it's going to be the insurance companies, it's going to be insurance brokers, and it's going to be the policyholders, those that get the benefit of the coverage.

**Lynda Bennett:** Of course policyholders are near and dear to our hearts, Eric, but let's unpack each one of those roles a little bit because it's never as simple as it sounds. So let's start with the insurers. What do our listeners need to know about insurance companies? Because insurance companies are not all created equal, as you and I know quite well.

**Eric Jesse:** No, they are not. One of the things we tell our clients when they're looking to place a policy or renew policies is consider the reputation of insurance companies. Ideally, you want to go with a carrier who's going to work with you when there's claims and not dig their heels in the sand and be difficult every step of the way. So we'll talk about brokers too, but brokers and coverage council can help advising policyholders on who are the better insurance companies in the market. And then there's also just the financial strength of those insurance companies. So if you're with a reputable broker, they should be placing you with A or A+ carriers or A- carriers that have good financial strength. And there's rating agencies out there like AM Best that can guide policyholders in that respect.

**Lynda Bennett:** Yeah. On the reputational considerations, I mean, one of the things that I always tell clients is if you're looking at just what the price of the policy is, you're really only looking at half of the math equation here because certainly price matters, budget matters, but the policy's not going to be worth the paper it's written on if the carrier's not going to pay the claim. And so understanding which carriers are good partners when claims get presented versus those that are willing to offer a cheap policy but won't pay a claim, certainly has to go into the mix. But let's talk also about the financial strength you mentioned, but let's also talk about the different types of insurers. So there's what we call domestic insurers. So many people are familiar with AIG, Liberty Mutual, Travelers. We also have what is referred to as the London Market. And then we've got something that's a little bit different, which are MGUs and MGAs. So break that down a little bit.

**Eric Jesse:** Yeah, so MGUs and MGAs, we did a podcast on this, but at a high level, MGUs, MGA that stands for managing general underwriter or agent. These are not insurance companies, but these are entities where the insurance company has essentially authorized these MGUs, these MGAs to write the policy, to underwrite the policy, to issue these policies on behalf of the insurer and in many cases, to also adjust the claim. But one important distinction and the key distinction that people need to keep in mind is the MGUs and MGAs, they are not writing the check when a claim needs to be paid. So there's that extra layer in the process where authorization might need to be obtained from the insurance company to ultimately get the claim paid.

And then, yes, you mentioned the more traditional insurers. So you have admitted and non-admitted insurers. So an admitted insurer, they're an insurance company that's authorized to issue policies in a state in many cases, or I think in most cases, those insurers need to get their policy forms approved by state insurance departments. And the benefit of going with one of those insurers is if that insurer does go insolvent, then the policyholder can tap into a state insurance guarantee fund to satisfy some or all of its claims. So there is that backstop financial protection.

**Lynda Bennett:** Yeah. The benefit of... And a lot of people don't even pay attention to whether the policy's admitted or not. And the way that you know that it's not admitted is actually it's stamped all over the policy itself. It will say, and there will be disclosures in the policy that will say, "This is issued by a non-admitted insurer." Now, before people get too concerned about going with a carrier that's not admitted, there can be benefits. And particularly for sophisticated corporate policyholders, a non-admitted form may be better because that can be what we call manuscripted. So there's a lot more flexibility in customizing the terms and conditions of the policy to your liking and to your specific risk profile. So non-admitted carriers are not necessarily a less than option, it's just more looking at what your particular needs are. So let's talk a little bit Eric, about within the insurance company, we've made reference to it a couple of times already. They have their own set of players, so there's two different houses within the insurance company generally. Let's talk about what are those and what are the different functions.

**Eric Jesse:** The two different houses are divisions. So you're going to have the underwriting function and the claims function. And on the underwriting side, these are the people that are concerned about getting the business. The underwriter is going to evaluate the risk and decide the terms and conditions of the policy and ultimately determine the premium. So the other side of the house is claims. So when a claim comes in, you're going to be working with a claims adjuster or the claims department is going to decide if there's ultimately coverage or not. And the two houses don't always speak to each other. And so sometimes when we're on the claim side and we're trying to push for coverage or a commercial or business resolution, sometimes we're working through the broker to insist that the underwriter gets involved to exert a little pressure on the claim side because the underwriter wants to keep the business, the client or the policyholders, otherwise a good risk for the flip. And so it's a way where we can try and get some business accommodations.

**Lynda Bennett:** Yep. Let's move on to number two of the big three that you talked about, and that's brokers. So what is an insurance broker and what's their role in the process?

**Eric Jesse:** So the broker's going to work with the insurers and policyholders, and it's going to be in the middle to ultimately place that policy. They're going to make recommendations on types of policies that an insured should have, the terms and conditions. We often look to brokers to advise on the appropriate limits of liability in a policy. And the broker is typically going to be paid on a commission. So the policyholder's not coming directly out of pocket to pay the broker, they're going to be paid by the insurance company. And one of the cautionary tales here is to choose wisely. A lot of insurance policy, cyber, D&O, reps and warranties, E&O, these are specialized policies. These are nuanced policies. And so you want to work with a broker that has expertise there. And the other thing I'll say is relationships matter. A lot of times they're working with a broker that has strong relationships with the carriers. That's a way to get enhanced terms and conditions.

**Lynda Bennett:** Just two other things on the broker because I think a lot of clients don't understand the role of the broker, particularly once a claim comes in. So I have to be the broken record and make the point that the broker is not in your privileged circle. So when you have a claim and you've got information from

the lawyer that's representing you defending the underlying case, you cannot freely share information with that broker because otherwise you're risking waiving the privilege over that.

And the other thing is, and Eric, you and I have direct experience in this, just like not all insurance companies are created equal, not all brokers are created equal either. And their role is really to be intermediary between policyholder and insurance company. And I'll just say that some brokers understand that role better than others. And you want to have a broker that understands you want them being your advocate in the process and not really just being a further extension of the insurance company, particularly when it comes to negotiating the policy terms and conditions upfront. We've both seen that movie before, right? Let's talk about there are actually two different types of brokers. So Eric, just comment for a minute on what the differences are there.

**Eric Jesse:** And your last comment's a good segue to this point, because there are insurance brokers and then there are insurance agents. And the insurance agents are going to be an arm of the insurance company where a broker should not be so an agent, they're going to be affiliated with the insurer, they're going to represent the insurance company, and they're going to be able to act on behalf of the insurer to issue terms and conditions on behalf of the insurer and combined coverage. But in contrast, the broker can and should work and represent the interests of the policyholder of the insured. And frankly, in some jurisdictions there are actually a fiduciary, which means that they need to put the policyholder's interests ahead of their own. And so that means they need to be proactive in actually analyzing the policyholder's insurance program, making recommendations, potentially trying to fill gaps as part of that fiduciary standard.

**Lynda Bennett:** And let's just touch briefly on how the broker interacts in the claims process. What is their role there? I touched on my bugaboo already on privilege, but just talk about how does the broker fit in once a claim gets presented.

**Eric Jesse:** Yeah. A lot of brokers will have an in-house claim advocate that will advocate to try and get coverage in the first instance. And so they will be involved in that process. Where I see the broker adding real value is sometimes later in the claim process and sometimes after we've been involved, where both parties are a little entrenched and you need the broker to come in and leverage their commercial. And this is the point I made earlier about relationships matter where they leverage their relationship on the commercial and business side to say to the insurance company, "You need to step up here," because the broker is writing many policies with a particular insurance company on behalf of many clients. And it's helpful when a broker says, "I'd hate to have to tell my clients my concern about how you behaved in this claim process," and that can hopefully bridge the gap and get the claim resolved.

**Lynda Bennett:** All right, we've spent a lot of time talking about insurance companies, brokers. Let's get to the main attraction here. Let's talk about the policyholder. What role does the policyholder have and what are some of the

things that we need to be thinking about when we're placing the policy? Who is the policyholder?

**Eric Jesse:** Exactly. Yeah, no, this is obviously the issue near and dear to our heart. So the policyholder, they are going to be the named insured under the policy. That declaration page, the first page of the policy, it's going to identify who the named insured is, and that's the entity that ultimately is going to have the rights and the obligations under the policy. So we start there.

**Lynda Bennett:** All right. But you and I have also seen this movie before. Getting the named insured isn't always the end of the story. What are some of the other considerations that we need to have, particularly for large corporate policyholders?

**Eric Jesse:** So it's not just enough to list an entity as the named insured, it's critically important to know who else has access to that policy. So other affiliates, I'll say loosely of the named insured can also be insureds under this policy. So that can include directors of the company, officers, employees, subsidiaries, and even potentially sister or cousin entities. And what is key here is just to avoid any surprises, is to make sure that the entities and the individuals that are intended to be covered are properly captured and any entities are people that are not intended to be covered are excluded.

So you can do this by making sure you have the right defined terms. So in a D&O policy for example, you're going to have an insured person definition that will capture directors and officers and many other policies, you're going to have a subsidiary term that's going to be defined to capture direct or indirect subsidiaries of a named insured. So you just need to make sure that you have those right catchall terms. And in some instances, it might even be appropriate to specifically list other entities on an endorsement that are also intended to be insureds.

**Lynda Bennett:** Yeah, and here's a pro tip for our corporate policyholders that love to have incredibly complicated org charts. Another pro tip is attach that org chart to your application because most times your application's incorporated by reference into the policy, so you'll make sure that you capture everybody in that net. What about additional insureds Eric? Let's talk a little bit about that with a couple of minutes that we have left here.

**Eric Jesse:** Yeah, absolutely. So additional insureds, this is something policyholders need to keep an eye on because these are other third parties that are out there that you are giving access to your policy and so they are going to have rights to tap into the limits that you intend to be dedicated to yourself. And so this usually comes up in the contractual environment. Perhaps you're a service provider and so your client or customer is insisting that they be named as an additional insured. So that's just a third party that has access to your policy and you need to be careful in giving that out because a lot of times companies might be giving that out to dozens and dozens of entities.

**Lynda Bennett:** And if I'm getting additional insured coverage, I'm good if I get a certificate of insurance, right?

**Eric Jesse:** No, those are often not often worth the paper they're printed on. They're not issued by insurance companies. A certificate of insurance is issued by the broker and they have disclaimer language and all caps at the very top that says, "This is for informational purposes only. This confers no rights on the certificate of holder." So what we like to do at a minimum when we're representing an additional insured is to actually ask for a copy of the declaration page of the policy and the endorsement that confirms that our client would be an additional insured and that could be an endorsement that lists our client as an additional insured or sometimes usually there's catchall language that says, "This entity is an additional insured when required by written contract." And so you want to make sure that you have the contract that requires the additional insured status.

**Lynda Bennett:** All right, Eric, we've got just about a minute left. Let's get to what's our role. I mean, other than our listeners being able to listen to all of our podcast episodes, they can understand all the tremendous value that we bring. Just comment for a minute on what role does coverage council play in all of this?

**Eric Jesse:** Yep. So one thing is that's important that our listeners understand is when there's a claim, insurance companies are absolutely going to use counsel that's specialized in insurance coverage. And so to make sure the playing field is even because this is a nuanced and specialized area of the law, policyholders want to work with insurance coverage counsel as opposed to a general practitioner to go head-to-head and do battle with the carriers. But there's also help we can provide on the front end to hopefully avoid a claim. And that is by reviewing policies, identifying the gold standard terms and conditions to try to negotiate for. And we work hand in glove with insurance brokers to try and get some of those changes.

**Lynda Bennett:** All right, well Eric, you've done an amazing job talking about all of the players on the field of insurance and thankfully we've already got our farm league working with Olivia and Jack and Tom and Dan. So thanks to everybody for joining us today and we'll look forward to seeing you next time.

**Eric Jesse:** All right, thanks for having us.

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