Lowenstein Sandler's "In the Know" Series Video 39

The Hidden Asset in Litigation: Early Insurance Strategy

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Heather Weaver: Hi everyone, I'm Heather Weaver. Welcome to "In the Know." Today, I want to talk about something that doesn't always get the spotlight it deserves: how commercial litigators and the businesses they represent can really leverage insurance as part of their litigation game plan—not as an afterthought, but as an essential tool from day one.

When you get a new case, you should immediately ask: what insurance policies might apply? Many clients just say, "Oh, yeah, we have insurance," but they don't really know what's on the table. You need to dig into all potentially relevant policies—think Commercial General Liability, Directors & Officers, Cyber, Employment Practices, Pollution—the list goes on. And if you're not sure, that's when coverage counsel can be a big help in spotting potential sources of coverage.

Then make sure that you are looking at the right policy periods. For personal injury or property damage claims, for example, you want to know if they had CGL coverage when the incident happened, not just whether they have it today. For D&O or professional liability, you're generally focused on what was in place when the claim was made. Once you know what might cover the claim, grab those policies and have someone—ideally coverage counsel—review them right away. This helps spot any coverage gaps, make sure you meet notice deadlines, and tailor your litigation strategy accordingly.

Also, don't forget contracts. Sometimes, your client might be an additional insured on someone else's policy or have indemnity rights built in. Those can open extra coverage you don't want to miss.

Next up is the duty to defend. The key is the complaint's allegations—if any claim in that complaint could fall under coverage, the insurer generally has to step up and defend. Defense coverage is huge because it lets your client fight the case without draining their own budget.

Now to lock in that defense coverage, you have to give notice in compliance with the policy to all insurers—primary and excess—and keep a paper trail to avoid issues down the road.

Sometimes, insurers agree to defend but send a Reservation of Rights letter, saying, “We’ll defend you for now, but might deny coverage later.” If that happens, you want to read that letter carefully. It might carve out certain claims, time periods, or seek to impose a sublimit. If the insurer agrees to defend but subject to an ROR, you should think about pushing for independent counsel to protect your client’s interests.

Finally, think about indemnity early—not just at settlement time. Keep insurers in the loop on key developments, involve them in settlement talks, and get their consent if the policy requires it. Sometimes, you can even structure settlements to make it more difficult for the insurer to back out later.

Involving coverage counsel early is always a good idea. They help you navigate the fine print, keep insurers honest, and align your litigation and coverage strategies—that way, you’re not just hoping for coverage, you’re making sure you get it.

Thanks for listening, and we look forward to seeing you next time on “In the Know.”