



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

**Episode 87:  
Priority of Coverage: Debunking "Other Insurance"  
Myths**

By [Lynda Bennett](#), [Alexander Corson](#)

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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 at Lowenstein Sandler, and today I'm very pleased to be joined by my associate and partner-in-crime, Alex Corson. So, welcome to the show, Alex.

**Alex Corson:** Glad to be here. Thank you.

**Lynda Bennett:** So every now and again on Don't Take No For An Answer, we like to pause to take a moment and talk about some higher-level themes, as opposed to specific cases or specific coverage grants, and Alex and I were chatting the other day about an issue that seems to come up an awful lot, and has a lot of myths associated with it, and that relates to priority of coverage. And so, I want to just set the table for this topic by talking about a prototypical example of what might happen.

So, our client is involved in a construction project, and let's just say they're the general contractor for the construction project and the building, and a couple of years later, the claim comes. And the property damage claim is that the building leaks like a sieve, and our general contractor has brought a number of different subcontractors to actually build the building. We're more of the clipboard holder. Right, Alex? So, we've seen this movie once or twice before.

**Alex Corson:** Yeah. Yes, a few times.

**Lynda Bennett:** So, the complaint gets filed, and there are allegations and finger pointing all over the place, and our client has come to us and said, well, I have my own general liability policy, and then I was really excellent when I was hiring all of these subs. I required all of them to get their own insurance policies, and oh, by the way, I might even actually have opted into a broader OCIP policy, which is an owner-controlled insurance program policy, and so, here are all these policy documents. Do what you do, and geek out. So, what's one of the

first things, Alex, when you get that mass of documents, what's one of the first things that you're going to be looking at to try to sort through who has to pay what?

**Alex Corson:** Yeah. So, first, we need to identify the additional insured language or, specifically, named additional insured language that shows that our client is actually insured by that policy. And then of course, we would do the normal walkthrough of the coverage grant and make sure there's no exclusions. But assuming that our client is an insured under the policy and that the policy responds to the loss or some portion of the loss, we would then go to what we call other insurance language. We'd look for other insurance clauses.

**Lynda Bennett:** Well, we certainly wouldn't do that. We just know that's the playbook that the carriers do, right?

**Alex Corson:** Yes.

**Lynda Bennett:** So, if you're preemptively looking because, in my hypothetical here, you know the very first thing that's going to happen is our client's carrier's going to say, hey, if there's other insurance available, go talk to them. We're going to go and assert our additional insured rights under the sub-policies, and that carrier's going to say, hey, if there's additional insurance available, go talk to them. We're going to go to the OCIP carrier and say, hey, by the way, we think we're in this program, and the first thing they're going to say to us is: is there other insurance? Go talk to them. Right?

**Alex Corson:** Right.

**Lynda Bennett:** So, if a high-level overview, and I should note, that virtually every insurance policy, if not everyone I've looked at in the last 20 years, every policy has that other insurance clause. So, give us an overview, Alex, of what does that other insurance clause that's "standard" in every policy, what does it say?

**Alex Corson:** Sure. Yeah, so the other insurance language is usually found in the terms and conditions section of most policies, and what it essentially says is it's purporting to say who goes first and whether this policy's going to respond together with other insurance or whether it's going to go after that other insurance. There are a couple of different types.

**Lynda Bennett:** But fortunately, they're all exactly the same, right? So it's really easy to sort through who goes first, right?

**Alex Corson:** Yeah, the standard language comes in basically two varieties, where it's either saying we're primary, we'll go first alongside anybody else that's primary, or we're excess, we're not paying unless all the other available insurance that exists has gone and has paid out in full, where we are excess to that. And some policies include these types of escape clauses where they purport to say we're not going to pay anything, if there even is other insurance. Although, those types of clauses are disfavored by courts generally. So, yeah. The policy either is saying we're going to be primary; we're going to pay alongside the others, or it's saying we're going to go

second. And that language varies slightly but looks very much the same in just about every policy that exists over the last 20 years, like you said.

**Lynda Bennett:** Yeah, if you've got the off the shelf policy, right?

**Alexander Corson:** Right.

**Lynda Bennett:** We sometimes have clients that have manuscripted policies, where we've seen some pretty funky stuff from time to time on these other insurance clauses. And so, one of the things that we harp on all the time on our podcast here is that the precise words always matter, and when we look at those precise words, then we pivot to, what's a court going to do with this? So, generally Alex, what is the approach that the court will take when you essentially have, and again, returning back to my example, you have three insurance carriers all pointing the finger saying, go ask somebody else to pay first?

**Alex Corson:** Yeah.

**Lynda Bennett:** What does a court do when they're presented with the talk to the other guy defense from the carrier?

**Alex Corson:** Yeah. So, when the three carriers all have a policy that purports to be excess to all other insurance, courts are generally going to take the approach that when all policies purport to be the same thing, i.e., excess, they have to share at the same level. And if there is no other policies that say they're primary, then all those "excess" other insurance policies are going to be the primary. They're going to go first, and they're going to share. And there's two general approaches to how they will share.

They will either share sort of in equal parts, if that's what the language says and/or if that what's the court, that jurisdiction's preferred approach is, or sometimes they'll share on a pro-rata basis, which basically means they'll pay in proportion to their relative limits. So, if one has a one million policy limit, the next one has a five, and the other one has a three, they're going to pay one, well, I should have picked better numbers. One, five, and four, one's going to pay 10%, the next one's going to pay 50%, and the next one's going to pay 40% of the costs.

**Lynda Bennett:** Right, so one twist that I've seen carriers press, and sometimes with success, returning back to my example, and I was intentional in bringing up my example. So, the general liability policy that's issued to our client as the general contractor and the subcontractors' general liability policy, they're going to be pretty much the same. The OCIP policy may be the same, may not be.

And now, I'm going to add another type of policy that could be in play in a construction case. Maybe there's a pollution legal liability policy and some element of the claim involves pollution claim. What you'll see with these "specialty policies" is they'll take the position that well, gee, the general policy should go first, even if we have uniformly canceling out other insurance clauses. Generally, the approach should be that a general policy should pay

before a specific policy, and in a surprise to no one, the general liability carriers will say, nah, we should all pay around the same time. So, that's one other twist that I've seen carriers argue, and sometimes with success in front of particular courts.

And so, again, I'll bring up another bedrock principle here on Don't Take No For An Answer, which is whenever you get presented with a claim like this, choice of law, and what law is going to apply to interpret these other insurance clauses is super-duper important.

**Alex Corson:** Yeah.

**Lynda Bennett:** Alex, I want to deliver on our promise in today's episode that we're going to also debunk the myths associated with priority of coverage disputes and/or other insurance clauses. And so, what is one of the biggest myths that we experience all the time with respect to other insurance?

**Alex Corson:** Well, I have two for you, and I'll start with the idea that other insurance clauses are a total defense to coverage, and that because I have the right to seek contribution from another insurance company, I don't have to pay you anything or do anything until I've run that down to ground. Sometimes the carriers will try to say, let's issue a laundry list of information requests aimed at understanding what other insurance you might have, and say we're not taking a coverage position until you give us that information. And generally speaking, that is not correct. Another insurance clause, almost every case that I've looked at least, has taken the position that other insurance is a problem for the insurance companies to sort out between themselves. You have to make your insurance benefits available to the policyholder upfront, and then you have an equitable right as an insurance company to go after the other carriers that should have been contributing upfront, if they choose to hold back that benefit. So, that's one of the bigger myths I think, is that we can hold back our insurance coverage based on the available other insurance.

And then the other one you alluded to, we talked a little bit about with the OCIP policy. What do the policies actually cover? Like, are they the same risk or are they overlapping, where one policy is broader than the other? Or are they entirely separate risks? Because as you said, it's a myth to suggest that because there is other insurance that responds to some of the loss, that you don't have to go first. Even if that other policy was a primary, if the primary only covers, you know, says that it's going to be primary. If it only covers a portion of the claims or some of the claims, then that other policy that purports to be excess has to come down and be primary as to the balance of that claim, right? Because they are not actually covering the same risks. So, that's the other big myth that we see, is when carriers purport to say well, I'm excess, and that policy over there is primary, it's got to go first, when that policy is much narrower in scope. So those are the two big ones that came to mind.

**Lynda Bennett:** Yeah, and I think the overuse of citing the other insurance clause has become more and more prominent as we deal with complex claims, but what I would say to our listeners is just because there may be two or more policies

triggered by the claim, you cannot accept the position that an insurer is going to take 11 out of 10 times in their coverage position letter, which is well, I'm excess, see my other insurance clause. So, the first question you really need to ask yourself when that claim comes in is do these policies actually overlap? Are they providing the same type of coverage for the same time period of coverage? Because I would say at least 50% of the time, that's not true. The policyholder really needs to know to push back on that.

**Alex Corson:** Absolutely.

**Lynda Bennett:** Alex, what are some of the things that clients can do, policyholders can do, on the front end to avoid this messy other insurance finger pointing game that we've been talking about?

**Alex Corson:** Yeah. The number one thing that policyholders can do on the front end is they can negotiate specific language. There are off-the-shelf versions or language that states that it will be primary and/or contributory, right, using the primary language. That, oftentimes, can be negotiated in our clients' own policies. But then also, you can impose requirements on vendors, contractors, subcontractors, like in the example, that the additional insurance that they provide to you also contain such primary contributory type of language, making clear that, so that you don't get a mess of different policies, some saying they're going to go first, some that they're saying they're going to go excess, and covering different losses. So, getting the other insurance language consistent across the policies that are going to be available to you for a particular line or risk is one of the things that you can do to avoid this sort of messy analysis that results in a lot of delay, and sometimes expense.

**Lynda Bennett:** Yeah. I want to drive that point home a bit further, because probably about six, eight months ago, I was reviewing a policy for a client, and it had a very bizarre other insurance clause in it that said: "And as long as there's other insurance available, whether or not that other insurance pays, we don't pay." I mean, it was pretty shocking.

**Alex Corson:** Super escape clause, right?

**Lynda Bennett:** Pretty shocking. Yeah, exactly. It was an escape clause on steroids. But that got me thinking, particularly for corporate policyholders who have the ability to negotiate terms and conditions, one of the ways to push back and put greater clarity around this on the front end is actually to inject language that says the other insurance clause can only be invoked if in fact other insurance pays.

**Alex Corson:** Yeah.

**Lynda Bennett:** So, that might be something that is worthy for corporate policyholders to discuss with their brokers, at least to start the conversation, and perhaps at least level the playing field to avoid these finger pointing games later. So, to recap, I think the big takeaway is read the policy language, understand whether you've got a primary v. excess or always excess or an excess with the attempted escape hatch. Read that policy language. If you, ideally, do it before your policy's placed, get rid of anything that allows an escape hatch.

Once a claim comes in, don't necessarily immediately assume that the insurer's invocation of the other insurance clause is even proper for the claim, because if there is not an overlap in the coverage provided by the two or more policies in play here, the easy pushback is the other insurance clause is irrelevant, and it doesn't let you off the hook at all. And of course, if a carrier tries to deny or avoid their immediate coverage obligation on this basis, don't take no for an answer. Right, Alex?

**Alex Corson:** That's right.

**Lynda Bennett:** Words to live by. All right. Well, thank you for joining me today, Alex, and we look forward to getting together again to further educate our listeners in the future, so thanks for coming.

**Alex Corson:** Glad to be here.

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