



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

**Episode 93:
Stitching the Patchwork Quilt: Navigating Policy
Coordination and Exclusions in D&O Insurance**

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Lynda Bennett: Welcome to the Lowenstein Sandler podcast series. I'm Lynda Bennett, Chair of the Insurance Recovery Group at Lowenstein Sandler. Before we begin, please take a moment to subscribe to our podcast series at [lowenstein.com/podcasts](https://www.lowenstein.com/podcasts). Or find us on Amazon Music, Apple Podcasts, Audible, iHeartRadio, Spotify, Soundcloud or YouTube. Now let's take a listen.

Lynda Bennett: Welcome to Don't Take No For An Answer. I'm your host, Lynda Bennett, chair of the Insurance Recovery Group at Lowenstein. And today I'm very pleased to be joined by Alex Corson, a fellow policyholder advocate and an excellent member of our team. So welcome back, Alex.

Alex Corson: Glad to be here. Thanks, Lynda.

Lynda Bennett: All right, so today we're going to be talking about a recent California Appellate Court decision that reinforces the importance of proactively negotiating policies that provide seamless and consistent coverage across all of your coverage lines. As we'll discuss, insuring agreements in D&O policies cover a wide range of conduct, and they also typically include exclusions that narrow the coverage to eliminate overlap with other coverage lines.

For example, D&O and cyber employment practices. This is what I like to refer to your insurance program as a patchwork quilt, and you got to make sure that all the patches stitch together beautifully so that there are no gaps or holes in that quilt. Because when policyholders don't coordinate the language that's used across these policies, this is where we start to find the problem spots. It's also important, as we'll discuss, for policyholders to negotiate narrow what we call lead-in language. So all of these policies have language before you get to the specific exclusions that lead in the scope of that.

Additionally, policyholders should negotiate narrow lead-in language for policy exclusions to avoid unexpected disclaimers. When you look at a typical D&O policy, there are the specific exclusions, but oftentimes there's a little phrase that leads you in. And whether that leads in with broad language such as, "arising out of," "related to," "in any way connected with," or whether the lead-in language is, "We don't cover for this particular type of conduct or risk exposure" really matters, we'll talk about a bit more.

Finally, policyholders really need to give broad notice. When they get that complaint in, don't just go and put one carrier on notice. You got to look across that entire patchwork quilt to see if the complaint allegations potentially trigger more than just one of those policies, because if you wait too long, as we'll learn later in discussing this case, you may be out of luck.

So Alex, with that table setting of what we're going to talk about, why don't you start out by talking about the case. What happened?

Alex Corson: Sure. So this case is called Practice Fusion, and it was a software company that made a free software for health providers, web-based software. It was basically patient records, health record management. And they provided it for free and they made their money through advertisements, like so many apps these days, and they also entered into contracts with pharmaceutical companies. The application was capable of pushing these clinical decision support notifications.

Basically, I had read the opinion, I understood it to mean like a pop-up for doctors saying, "Here's a medication" or "Here's something for you to consider." And they entered into these contracts with the pharmaceutical companies, outlining the text and how much they would get paid for pushing these ads. And the DOJ thought that that was violative of the law because these types of alerts apparently need to be based on accepted medical standards, not how much the pharmaceutical company is paying you.

Lynda Bennett: Who knew? Wow.

Alex Corson: Yeah. My understanding of the gist of the statutory vision. So anyway, the company ultimately settled with the DOJ for 118 million.

Lynda Bennett: Wow.

Alex Corson: And when they went to their D&O carrier, the D&O carrier said, "Sorry, professional services exclusion. This is all arising out of your professional services." And they had a broad lead-in language for all acts, errors or omissions relating to, or based upon or attributable to professional services. And the professional services were not a defiant term of the policy, so the court had to supply its own definition, went to the case law looking-

Lynda Bennett: Not often a good thing for policyholders, yes.

Alex Corson: No, right. Because you can look to any case that's ever dealt with this word, and that's certainly what they did. The court went through a lot of different opinions, and they glommed onto language from the agreement where they were essentially selling ad space on their platform, and there was boilerplate words like, "We'll perform our obligations in a professional manner" and stuff like that.

So anyway, the court ultimately decided that this wasn't just selling ad space. They were designing and coding this program in a way that was specific to these pharma companies that they were contracting with, and that was a professional service. And they were unpersuaded by the policyholder's view

that, "Well, even if this is a professional service, this service is for us. We're improving our products that we're selling to others." The court was unmoved, and particularly in light of the broad language and the absence of a definition, they said, "Sorry, no coverage for you." So that's what happened in the case.

And Lynda, a lot of times you are graciously hosting me when I come on here, but I figured maybe I could flip the script a little bit and ask you some questions. So based on what you just heard, what do you think this policyholder could have done differently perhaps to avoid missing out on the coverage under their D&O line here?

Lynda Bennett: I think the first place you saw some trouble arising, wink, wink, pun intended, was from the lack of a definition of professional services. So when we review D&O policies for our clients before a claim is ever presented, which, by the way, you can, these D&O policies are carefully negotiated and a phrase like "professional services" can and should be defined even when that's appearing in the exclusionary language, you are and should, as a best practice, define what that means.

Because as you were describing the case, Alex, we found out that the software company was more than a little surprised that they were deemed to have been providing a professional search. They thought that they were pushing out and selling ad space and generating revenue off of ads, not engaged in what many people would ordinarily think as a professional service, which is a doctor, a lawyer, an accountant, or something of that nature. So lesson number one is, probably should have taken a look at the policy at the time of placement and get a definition of professional services so that the court didn't have to go and fill in that blank.

Alex Corson: And is the policy placement and the renewal the only time that it's valuable to do one of these reviews or audits of the... Is there a value to doing that at different times or is it really you got to catch it right at the beginning or else you're out of luck?

Lynda Bennett: Well, in this case, catching it after the claim came in, they were kind of behind the eight-ball, and doing that review before the policy gets placed is the best time. However, anyone listening to this podcast can certainly go crack open their policy right now, take a look and reach out and have a discussion with their broker or insurance professional to see if they can fill up that potential gap in their patchwork quilted coverage when they get the claim in the door.

Alex Corson: Yeah, and I was thinking about the fact that sometimes you review with the policies that you have, and you can identify the gaps and maybe go to a different part of your patchwork quilt if the claim comes up. Or maybe you can frame this in a certain way or be thinking ahead with positioning your claim to be in the best place. So what other things might this policyholder have done to avoid the sad day that they had in court?

Lynda Bennett: Yeah, so the other big lesson learned here is the scope of those exclusions and that lead-in language that we talked about at the top of the episode here. So as I said, there's a couple of places to find the lead-in. One is at the very top of the section that talks about the exclusion. You can find very broad language that are, "rising out of," "related to," "in any way connected with." And what we typically are looking for in that preliminary lead-in language of the exclusions is you usually want it to say for that portion of loss or that portion of a claim that, and then go on and read the laundry list of exclusions that follow.

The other place is, sometimes it will just say, "This policy doesn't provide coverage for a claim that, colon," and then you have to go through each and every one of the exclusions. And what you'll find in D&O policies and E&O policies is, sometimes the carriers will agree to use that for language where, and what we mean by that is if this policy had said we're only excluding coverage for claims that are for a professional service, the policyholder would have had a better shot at keeping the scope of that exclusion narrowly tailored and maybe have been able to dodge a claim denial here. Because the claim clearly wasn't only for a professional service.

I think where they got into trouble was that the language was quite broad, saying if it was arising out of, based upon, or attributable to a professional service. And that's what really opened the door for the insurer and ultimately the court to go and say, "Okay, well this relates in some way to a professional service because we tied back to reference to we'll perform our services under this contract in a professional manner," and there you go. It really created that opening.

Alex Corson: Yeah, that for language is so important, not just in claims like this where it's a little bit, oh, was the conduct professional service or not? But in these cases where we have sort of partial, right? Oh, there was some professional services, but there was also some, clearly, things that weren't a professional service, or you pick the exclusion, but there's going to be cases like that. And so often we see cases where the client has a partially covered, partially non-cover, there's certain things they did that fall within the exclusion, and the carrier says, "Well, my lead-in language says any claim having anything to do with or arising out of," right? And this is all one claim, right? It was all in the same lawsuit or it was all in the same demand letter or what have you. And so they say there's no coverage at all instead of having that portion, that portion language allows us to say, "Okay, well there's got to be a breakdown here. You can't just throw out the whole thing."

Lynda Bennett: Yeah, I've dealt with this a couple of times on behalf of professionals, so environmental consultants, lawyers, where you see the claim come in for wrongful billing practices, you overcharged me on the bills.

Alex Corson: Yep.

Lynda Bennett: And so does that become a professional services, I'm putting my malpractice carrier on notice, or is this a D&O type of risk? Because, by the way, when I go to my malpractice carrier, they're going to say, "Oh, you're not engaged in a professional service when you're generating your bills. That's just purely an

administrative task." So as we start to put this patchwork quilt together, we're going to want to look at not only coverage under our E&O policy, our malpractice policy, but also our D&O policy, which I'm now going to flip the script back on you, Alex. What's another thing that the policyholder in this case did wrong that's a good lesson learned for our listeners?

Alex Corson: Yeah. So I think that these types of hyper-technical arguments where you're getting into coming up with a definition of professional services and trying to decide, draw these lines, can be avoided best if you're coordinating coverage across your patchwork quilt. If you had, for example, a broad definition of professional services in your D&O exclusion, about a narrow definition of professional services in your E&O coverage, then you're creating an artificial and pretty huge gap, because you're going to have a huge swath of things excluded from the D&O, but only those specific things covered under the E&O, and that's potentially similar. We don't know much about their E&O coverage. Presumably there were reasons why they were looking for coverage under the D&O in this case, but this is a good illustration of probably they were looking under the D&O because the E&O was too narrow.

Lynda Bennett: Yep.

Alex Corson: It didn't capture this contract that they didn't think was a professional service ad space kind of thing.

Lynda Bennett: Yes, they didn't even realize that they were engaged in a professional service. And what we call this is don't fall between the two chairs.

Alex Corson: Yes.

Lynda Bennett: So you got to work closely with your broker and your policyholder lawyer to review these policies on the front end to make sure that we've got seamless coverage across D&O and E&O, and those definitions are syncing up or the definition of professional services syncing up.

The last thing that we really need to comment on with respect to this case is providing broad notice. Because, as we said, and Alex, you alluded to it, we don't know a lot about the E&O policy because it seems as though they didn't put the carrier on notice. One, they may not have even had E&O coverage in place here because they didn't think they were engaged in professional services and therefore they thought they didn't need it. But certainly, when a claim like this comes in, if you do have D&O and E&O, you would want to put both carriers on notice right away.

I want to reinforce the importance of working with a knowledgeable broker or coverage counsel, who will be able to guide you, again, both at the front end of making sure there's seamless coverage, but also when this claim came in, it would be important to look at all potentially available coverage, put all those carriers on notice, and then you can sort it out later. Because these D&O and E&O policies are written on a claims made basis. And we know from many of our other episodes that if you don't provide timely notice under a claims made policy, you're really out of luck. And even under CGL policies, if you don't

provide that early and broad notice, you're going to be addled up in terms of getting credit against your retention.

So broad headline there, provide notice across the entire patchwork quilt if there's any potential coverage at all for a claim that comes in, and then you can sort it out later so that you don't find yourself in this unhappy circumstance of going all in on the D&O only to find out that you were going to get knocked out on this professional services exclusion.

Alex Corson: Yeah, absolutely.

Lynda Bennett: So that's the top line. So wrap it up for us, Alex. What are the top three things that people need to remember as a result of this case?

Alex Corson: Yeah, you got to read those policies before they go into effect. Make sure you've got defined terms. Make sure you've got, for critical exclusions like this, you got to have the narrow lead-in language. If you can negotiate that, get that in place. And make sure you're coordinating across your coverage lines. Don't just buy one policy and then the next policy and the next policy all off the shelf. You might find yourself with an unhappy situation, where you've got a big gap created by that. Work with knowledgeable brokers that can coordinate these policies and place them together or at the same time.

Then, yeah, as we just said, put everybody on notice even if the facts are a little not sure yet at the beginning, put everybody on notice. Make sure that you're staking your claim, stopping the timer, as it were. And yeah, I think that whether this policy holder would've won or just maybe fared a little better, we don't know. But those are the things, I think, the key takeaways that are lessons learned from this software company's uncertainty about their ad space versus professional service fight in California.

Lynda Bennett: Way to put a bow on it, Alex. Appreciate it. Appreciate you coming back on the show, and we'll see everybody next time.

Alex Corson: Happy to be here. Thank you so much.

Lynda Bennett: Thank you for listening to today's episode. Please subscribe to our podcast series at lowenstein.com/podcasts. Or find us on Amazon Music, Apple Podcasts, Audible, iHeart Radio, Spotify, SoundCloud, or YouTube.

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