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

Episode 81:
A New Year's Insurance Resolution: Better Risk Management Hygiene

By Lynda Bennett, Eric Jesse

JANUARY 2024

Kevin Iredell: Welcome to the Lowenstein Sandler podcast series. I'm Kevin Iredell, Chief Marketing Officer at Lowenstein Sandler. Before we begin, please take a moment to subscribe to our podcast series at 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 practice here at Lowenstein. I am joined by my cohost and partner in crime, Mr. Eric Jesse. Welcome to 2024, Eric.

Eric Jesse: All right, let's kick it off in a good way.

Lynda Bennett: All right. Well, as we're coming back from the holidays and we've already broken our New Year's resolutions to work out more and eat less, and the concept of dry January is already just a pipe dream, Eric. It'd be a good time for us to start establishing some achievable New Year's resolutions with a particular eye toward helping our listeners improve their risk management hygiene.

So today, I wanted to spend our time talking about some best practices that policy holders can and should follow in 2024 to pave the way for securing the best terms and conditions in their insurance policies. And of course, avoiding gaps and surprises when claims are presented or the company's risk profile changes or matures.

Why don't we jump right in and start talking about the most important part of any risk management program, and that's the insurance policy. One New Year's resolution, Eric, that our listeners should set for themselves on the insurance policy front.

Eric Jesse: Yeah. One thing is, like to get back to basic so start with the basics. This is a seemingly obvious one, but it's do you actually have copies of your policies?

Lynda Bennett: Wait, what?

Eric Jesse: Right? Exactly. Well, this is because when your policy was bound back in December or November, your broker probably just sent you a three, or four, or five page document that's called a binder. That binder confirms that the coverage is in place as of the beginning of the policy period in November, for example, but it's not the complete policy. That usually takes a few weeks or months to be issued.

Lynda Bennett: Yeah, it's pretty amazing. I've actually had clients that they're only getting copies of their current policy just as the renewal cycle is starting for next year's policy. It's pretty incredible. You're right, what you're going to get is that two- or three-page binder that's going to identify the forms and those scripted endorsements.

One important tip is that, once you actually get a copy of the policy, make sure that it's accurate. You check that, but you should also make sure that your broker's gone through, particularly if you've done some heavy negotiation on those endorsements. You got to make sure that all of them made it into the policy, and that the wording that was actually agreed upon was put in there as well.

I guess, one other thing that's becoming more of a bugaboo for me on your policies is… have you taken a look at each of them, to see if there are sub-limits on coverage? We're seeing this particularly in the cyberspace. It's been a known issue in the property, the first party property insurance space for a while. But you don't want to have a surprise thinking that, "Oh, I've got a $10 million policy," only to find out when you have the flood claim that your flood coverage is capped out at $100,000. Same thing with your excess policies. It's a really good time, when you get a copy of your policy, to see if you do have sub-limits on it, how does that roll up into your excess coverage?

Give the example of derivative demand coverage under DNO, and something that maybe some of our listeners haven't thought about that you can do is you roll up into excess land.

Eric Jesse: Yeah. Under a DNO policy, they'll have usually, I'm just going to have a number, but we typically see there's a $250,000 sub-limit for derivative demand, so that's the cost of the company to investigate whether a claim needs to be asserted against the Ds and Os on behalf of the shareholders. When you have an excess policy, usually the excess policy, or sometimes the excess policy will have language that says, "While we follow form to the policy's terms and conditions, there is an exception. If there is a sub-limited coverage, we're not following that." So you get $250,000 total.

Sometimes, what we like to see is an endorsement added to the excess policies that says, "No, we will drop down and we'll provide our own sub-limited coverage over a sub-limited coverage in the primary."

Lynda Bennett: Now, we've got our policies and we're coming up on the renewal cycle. We've done a great job manuscripting terms in the first go round. What are some of the things that our listeners should be thinking about as they start to enter the renewal cycle?

Eric Jesse: Yeah. One thing that I think is really important ... First of all, you want to understand what changes are going to be made to your policy in coming year. But, even when your broker is telling you, "Well, the policies, they're going to renew on generally the same terms and conditions." Maybe we're going with the same carrier this year, because there's an existing relationship and the market's favorable, you still want to probe what that means. Because there are light changes or a new endorsement that might be added that can meaningfully change the policy. So really push your broker, even when they say, "You're being renewed on the same terms and conditions," really probe and make sure that's the case or understand what those changes are, to again, avoid the surprise if and when the claim comes.

Lynda Bennett: Yeah. Great point. One of the things that I've noticed over the last couple of years is a lot of our clients go through the renewal process, especially if they've had a couple of years in a row with the same carriers and the renewal comes up, they're not necessarily looking at that renewal application with fresh eyes. You and I both know another emerging trend is that, if you haven't properly polled the audience, the question that gets asked on these renewal applications of are you aware of an actual claim, or any facts or circumstances that could lead to the assertion of a future claim.

One of the things that I really want our listeners to be thinking about in 2024 is do you have the right mechanisms in place to make sure you're properly polling the audience? and looking at your policy to see on whose behalf representations are being made. Sometimes, it will narrow that group that you're making the representation of behalf of in the application, if you're thinking about that in advance.

Like I said, really look at those renewal applications with fresh eyes. Do you have more employees, do you have greater revenue? Risk profile changed in some way that you're going to want to take a sharper pencil to that renewal application.

Eric Jesse: Absolutely because there, you're cutting the insurers off at the pass on the rescission claim. Because that's what we're seeing more and more, so absolutely. This is something that can be done on the front end to, again, just take another coverage defense away from the carriers.

Lynda Bennett: Now, some of our listeners are thinking, "I don't have to worry about this. I just went through my renewal cycle. All of my policies became effective Jan 1, so I'm good." Do you agree with that, Eric, or are there things that, even though you maybe just concluded are renewal process there are things, come January, that you need to be thinking about today, even if renewal may happen in June or in December of '24?

Eric Jesse: Yeah. The insurance market is, for many types of policies, is hardening. I think there's just a lot of proactive things that can be done to just be a good risk.

One of the things is just making sure that your contingency plans, for example, are being updated. That you have the right protocols in place to notify insurers. And just, really understanding what that underwriting process is going to look like so that you can prepare the materials, because if you are prepared, you have the submission ready, it's thorough, you have your executives that are going to speak to the underwriters ready, well-prepared, you're going to come across just as a risk and ensured that where you have your act together.

Lynda Bennett: Yeah. I want to double down on one thing that is insurance is very much about relationships and making sure that your management team is actively involved in your renewal process, and the underwriters know them and are comfortable with them. With your cyber coverage, your chief information officer should be prominently involved in discussions to create that comfort factor. And have the insurance company understand that you are a good risk, because you're not relying only on insurance, you understand your business and you're taking other measures as well, to protect against future claims.

On the heels of that relationship theme, let's talk a little bit more about some of these relationships. You've mentioned a couple of times the role that the broker has to play in the placement of the policies. Do you recommend, as another good hygiene practice, that our listeners think about evaluating their current relationship with their insurance broker, with their insurers? What are some of the things that we should be thinking about on that front?

Eric Jesse: Yeah, you're absolutely right. This is a relationship business, and it's also just a specialty business. One broker is not necessarily going to be one-size-fits-all for your entire program. Because DNO is specialized, cyber is specialized, your property and general liability risks can be potentially very specialized. You can go with a brokerage firm where there might be one-stop shopping, but you're working with different individual brokers who have that expertise. Always important to make sure that your brokers that you're working with have the expertise and specialized in the types of insurance policies that you need.

And also, just that they have credibility with the carrier when the claim comes. Because there are times when we certainly will rely on the broker relationship to, when there's a claim dispute, to try to close the gap between where our clients are and where the insurance company is.

Lynda Bennett: Yeah. Another broader relationship concept is the relationships of your corporate structures. Again, particularly we've got some clients that have corporate org charts that are 150 pages long. It's really important to make sure that all of those corporate structures roll back up into the named insured or are capped in the definition of insured in your policy. So again, January is a good time to dust off that org chart and make sure that every entity that you expect to be covered under your insurance program is so covered.

Another, again into the relationship bucket, is it's time for you to review your standard contracts and master services agreements, and particularly the insurance provisions in there. So give your thoughts on that.

Eric Jesse: Yeah. This is another thing, again, that you should be doing now even if your renewal is just months and months away. This is a way to, again, come across as a good risk. To be able to tell your insurers that, "Listen, we do have these vendor relationships and we are including these types of insurance requirements in those contracts where we're asking to be named as an additional insured," for example. You're able to tell your insurer that we tried to spread your risk out, number one.

And then, number two, I think this is important, just to make sure you really have your ducks in a row. Do you have these insurance requirements, number one, that you're imposing? And then, a lot of times, people might just include these requirements and not think about them. Are you getting the certificate of insurance that's required? A lot of times, we'll include a provision that says, "The service provider has to provide a certificate of insurance within X days." So every year, you should be reaching out to your vendors, your business relationships and asking for that proof of insurance.

I'll just plug here and say if you can, try and get more than the certificate of insurance. Try and get a copy of the declaration page, the endorsement that makes you an additional insured. The policy, if you can get it. That might be a tough ask. But get that information because, if and when the claim comes and you want the insurer is who you should provide notice to, you want that information at your fingertips, as opposed to having to go to a third party. Just avoid flying blind, if and when a claim comes.

Lynda Bennett: Right on. On the certificates of insurance, please also read them. Make sure that the limits you are requiring ... By the way, this goes both ways. When you are required to provide additional insured coverage to another entity, you got to make sure that you have the policies that are required, you have the limits that are required. Because if you don't, you're just adding to the claims that are going to be asserted against you in the future. If you're the recipient of that certificate of insurance, the proof's in the pudding and you got to make sure the policy period matches up, the limits match up, identify the retentions, that sort of thing. Action them, don't just stick them in the file and hope for the best.

Let's move on to claims assessment, and you touched on this a bit before, but the contingency risk planning. As the policies are now nearing their expiration period, what should you be thinking about in terms of fact patterns that may not actually be the lawsuit, the EEOC notice of charges, a particular demand letter?

Eric Jesse: Yeah. When the renewal's coming up, this is the right time to be thinking about providing a notice of circumstances. What that is, for our listeners, that's essentially telling the insurance company or providing them with notice of a potential claim or wrongful acts that could turn into a formal claim a year, or two years, or three years later. When that formal claim comes, it will relate back to the notice that you gave under your current policy. So just be thinking about whether a notice of circumstances should be provided to lock in that policy. And frankly, to have access to those limits in policy year one, rather than having to use up policy limits when the claim comes a few years later.

Just also, this is certainly a theme here on Don't Take No For an Answer, is notice, notice, notice with respect to claims. Take a moment and just think, "Were there any claims that were made?" Formal claims, lawsuits, lawyer letters, threats of litigation that are written or oral. Were any claims made against your company that need to be provided to the insurer? Because once that policy period expires, the opportunity to provide that notice will expire with it and that'll subject the claim to a late notice defense.

Lynda Bennett: So speaking of late notice and claim denials, as we turn the calendar, another important thing that I think our listeners should be thinking about is always the statute of limitations and limitation of action provisions, or any other deadlines that may be ... If you've got an active, open claim, has the carrier actually formally denied notice? Because that could trigger the statute of limitations for when you have to bring suit for that breach of contract. When we're dealing with first party property claims, in particular, many of them have limitation of action provisions in there that actually truncate the statute of limitations period all the way down to two years, or sometimes even one year. And then, will enforce that.

If you've got an open claim, definitely take a look at what the position the carrier's taken of the outright denied. If there is a limitation of actions provision that you're looking at, does that get triggered off of when the loss occurred or some other event? Those are two really important things to keep eyes on, as these back-and-forth with the carriers tend to drag on for months and into a year, sometimes people take their eye off of that ball. January's a good time to just go through your claim inventory and see if you've got any limitation of action or statute of limitation deadlines approaching.

Eric Jesse: Yeah. I would just add onto that piece, because this is usually specific to a first party policy, like a property or cyber is, is there a strict deadline to provide the proof of loss? Because a lot of times, we see you have to provide that within 180 days, or whatever the case is. That can be a strict deadline too, that our listeners should keep their eye on.

Lynda Bennett: All right. We're just about running out of time here, Eric. Let's do a couple of parting thoughts, just from the broader perspective.

Eric Jesse: Yeah. Big picture, just to wrap up is just make sure your insurance program is right-sized for your company. If your company has grown, hopefully it's been growing by leaps and bounds over the past year or years, just make sure that you have the right insurance policies in place. A lot of times, a startup will just have a handful of policies and will add on as they grow. So make sure you're being thoughtful about what policies you need, and think about whether you need additional limits as your company has hopefully grown by leaps and bounds.

Lynda Bennett: Yeah, great point. Well, I think that we've given people lots of food for thought today on how to have a very successful 2024, from a risk management perspective.

But if you'd like to hear more, Eric actually has done even a deeper dive into this. He will be issuing his In The Know video next week. So if you like what you heard today, come on back next week and watch Eric live and in-person, walk you through some more of these issues.

Eric Jesse: All right. Thank you very much, have a good one. Happy New Year.

Kevin Iredell: Thank you for listening to today's episode. Please subscribe to our podcast series at lowenstein.com/podcast or find us on Amazon Music, Apple Podcasts, Audible, iHeartRadio, Spotify, Soundcloud or YouTube. Lowenstein Sandler Podcast series is presented by Lowenstein Sandler and cannot be copied or rebroadcast without consent. The information provided is intended for a general audience and is not legal advice or a substitute for the advice of counsel. Prior results do not guarantee a similar outcome. Content reflects the personal views and opinions of the participants. No attorney-client relationship is being created by this podcast and all rights are reserved.