

THE POLICYHOLDER ADVOCATE

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Internet Resources

- M. Mayerson, Defense Coverage Under Excess Insurance Policy Forms www.insurancescrawl.com/archives/2006/01/defense_coverag.html
- J. Young, Meaningful Limits on the Duty to Defend and the Duty to Indemnify through Reimbursement, Allocation, and Characterization www.wileyrein.com/publication.cfm?publication_id=7967
- F. Lattal, Issues Involving The Relationship Between Primary and Excess Insurers in Environmental Coverage Litigation www.connellfoley.com/articles/lattal3.html

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On the Defensive: Excess Insurers and the Duty to Defend

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When one thinks of excess insurance (and who doesn't) the duty to defend is probably not the first thing that comes to mind. The duty to defend is typically associated with primary insurance, not excess insurance that provides coverage above underlying layers of primary or other excess insurance. Not all excess insurance is created the same, however. Certain excess insurance policies, especially excess umbrella insurance policies, expressly impose a duty to defend on excess insurers.

Umbrella insurance policies have been described as "hybrid" policies because they combine the characteristics of both primary and following form excess policies.¹ Umbrella insurance policies typically promise to defend policyholders against occurrences, which are not covered by underlying primary policies, but are covered by the terms of the particular umbrella policy. That duty to defend is set forth in the Defense Settlement provision of certain umbrella policies.

Beyond defense coverage for occurrences not covered by underlying insurance, some umbrella insurance policies also promise to defend the policyholder upon the exhaustion of underlying insurance. Courts have focused on three policy provisions in determining that umbrella excess insurers have such a duty to defend: (1) Underlying Insurance; (2) Retained Limit-Limit of Liability; and (3) Assistance and Cooperation.

Starting with the last provision first, an Assistance and Cooperation provision in an excess insurance policy with no duty to defend will typically provide that the insurer "shall not be called upon to assume charge of the settlement or defense of any claim, suit or proceeding..." Assistance and Cooperation clauses in umbrella policies that include a duty to defend provide differently, as follows:

Except as provided in Insuring Agreement II (Defense, Settlement) or in Insurance Agreement VI (Retained Limit-Limit of Liability) with respect to the exhaustion of the aggregate limits of underlying policies listed in Schedule A, or in Condition J [Underlying Insurance] the company shall not be called upon to assume charge of the settlement or defense of any claim made or proceeding instituted against the insured; but the company shall have the right and opportunity to associate with the insured in the defense and control of any claim or proceeding reasonably likely to involve the company. In such event the insured and the company shall cooperate fully.

Thus, pursuant to this form of the Assistance and Cooperation clause, insurers are obliged to defend pursuant to the three provisions identified in the clause. As discussed above, the Defense Settlement provision requires umbrella insurers to defend claims covered by the umbrella policies, but not the underlying insurance policies. Pursuant to the remaining two provisions, umbrella insurers are obliged to defend upon the exhaustion of underlying insurance.

As for the effect of the Underlying Insurance provision, one court concluded that the plain terms of the provision imposed defense obligations:

All three policies contain a clause imposing an obligation to assume charge of and pay for [the policyholder's] defense under certain circumstances. Specifically, [the Underlying Insurance provision of] the

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policies provide:

If underlying insurance is exhausted by any occurrence, [the Excess Insurer] shall be obligated to assume charge of the settlement or defense of any claim or proceedings against the insured resulting from the same occurrence, but only where this policy applies immediately in excess of such underlying insurance without the intervention of excess insurance of another carrier.

Accordingly, by its plain terms, the policies impose defense obligations upon the insurers where the immediately underlying insurance has been exhausted by a single occurrence.²

The Eighth Circuit Court of Appeals also relied on the Underlying Insurance provision in concluding that an excess insurance policy expressly imposed defense obligations on the insurer.³

The Retained Limit-Limit of Liability provision provides, in pertinent part, that excess policies “shall continue in force as underlying insurance,” in the event of “exhaustion” of the aggregate limits of liability of the underlying policies. In accordance with this language, excess insurers must function as primary insurers upon exhaustion of the underlying primary policies.⁴ Of course, functioning as a primary insurer includes the assumption of the duty to defend that was previously shouldered by the primary insurance before the exhaustion of the primary policies.⁵

Accordingly, it would be a mistake to blindly assume that excess insurance policies contain only a duty to indemnify, and no duty to defend. As always, the policy language controls, and policyholders should not hesitate to take advantage of all of the benefits the duty to defend offers.


¹ Roberts v. Northland Ins. Co., 705 N.E.2d 762, 769 (Ill. 1998) (citation omitted); see also Bryan Constr. Co. v. Employers’ Surplus Lines Ins. Co., 290 A.2d 138, 139-40 (N.J. 1972) (the nomenclature of “umbrella” insurance “suggested a purpose to protect against gaps in the underlying policies and indicated more than mere excess coverage.”) (citation omitted).

² Stonewall Ins. Co. v. National Gypsum Co., No. 86 Civ. 9671 (JSM), 1992 WL 296435, **1-2 (S.D. N.Y. Oct. 6, 1992) (emphasis added) (alteration in part in original).

³ American Family Life Assur. Co. of Columbus, Ga. v. United States Fire Co., 885 F.2d 826, 832 (11th Cir. 1989).

⁴ Zurich Ins. Co. v. Heil Co., 815 F.2d 1122, 1126 (7th Cir. 1987).

⁵ Elas v. State Farm Mut. Auto. Ins. Co., 352 N.E.2d 60, 62-63 (Ill. App. Ct. 1976); see also Fireman’s Fund Ins. Co. v. TIG Ins. Co., 14 S.W.3d 230, 234 (Mo. Ct. App. 2000) (citation omitted) (“we read [similar continue in force language] as providing in pertinent part that if, in the defense of various claims...the aggregate limits of liability of the underlying insurance are exhausted...then [the excess carrier] shall accept responsibility for the defense of [such] claims....”).




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