

Coverage May Not Follow Form with New Umbrella Policies

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Assume that your client instructed you to procure \$10 million in general liability limits and, in response, you placed a \$1-million CGL policy and a \$9-million umbrella policy for that client.

Assume further that sometime thereafter a claim is made against your client that results in a judgment for \$7 million in damages.

Assume finally that the claim is covered by the terms and conditions of the CGL policy, but not by the terms and conditions of the umbrella policy. So your client gets stuck paying \$6 million of that \$7-million judgment.

Can this happen? Yes. Can you avoid being put, and putting your client, in this situation? Yes.

Umbrella-liability policy forms come in a few basic types. Perhaps the oldest, and best, is what I call the "traditional" policy form because it provides "traditional" Coverage A and Coverage B, or Coverage I and Coverage II, protection. Under such policies, Coverage A, or Coverage I, serves as excess insurance for any occurrence covered by a policy that is scheduled on the umbrella as underlying coverage. This is what is known as full "follow-form" excess coverage.

Using an umbrella that has full "follow-form" excess coverage avoids the hypothetical problem outlined at the beginning of this article. This is because a traditional umbrella policy does not subject the occurrence to the policy terms, conditions, definitions and exclusions contained in the umbrella policy, except perhaps for the umbrella's own asbestos, pollution and lead-paint exclusions. (The umbrella policy will expressly explain which of its own exclusions, if any, apply to Coverage A.)

Under such traditional umbrella forms, the terms, conditions, definitions and exclusions contained in the umbrella policy apply to the occurrence only if the occurrence is not covered by underlying insurance. In that case, Coverage B, or Coverage II, provides "drop-down" insurance, where the umbrella insurer typically is obligated to defend the claim and pay any covered settlement or judgment subject to some type of deductible or self-insured retention.

New Form May Not Follow

A more recent umbrella policy form is now being used in the market that is quite different from the traditional

form. This newer umbrella does not necessarily provide "follow-form" excess coverage. Instead, the policy subjects the occurrence to its own terms and conditions even if the occurrence is covered by a scheduled underlying policy.

This type of umbrella is unfavorable in my opinion, but I can understand the concerns of umbrella-liability underwriters — they don't want to write "follow-form" coverage over policy forms with which they are not familiar. (This concern, of course, should be removed if the insurer offering the umbrella is also offering the scheduled underlying insurance.)

The differences between the traditional and newer forms can have serious implications for insureds, as well as their agents or brokers. As noted previously, if your client has a traditional umbrella policy, whatever coverage enhancements the client gets in its underlying policies typically are carried through to its umbrella- and excess-liability programs.

If, however, the client has a newer, nontraditional form of umbrella, how can you be certain the policy enhancements in the underlying policy have been carried through to the umbrella and excess policies in the program? In addition, even if the client does not have policy enhancements in its primary coverages, how do you know whether some of the coverage afforded in one or more of the client's primary policies is *not* also afforded in its umbrella policy?

Is someone going to review the policies, line by line, to assure the client that the umbrella's terms and conditions would apply to every conceivable claim covered by all of the scheduled underlying policies? That, in my opinion, would be an errors-&-omissions risk no broker or agent should undertake.

What can brokers and agents do to minimize their E&O exposure when they get umbrella quotes from some insurers that are using traditional forms and from others that are using the newer coverage? At the outset, the brokers and agents should explain to their clients the differences between the two types of forms. That conversation should be recorded in the producer's notes and/or confirmed in writing to the client.

But what if, for whatever reason, the client needs to use the quote containing the nontraditional umbrella form? The broker or agent should attempt to get

the nontraditional umbrella quote as close as possible to the terms and conditions of the traditional form. One way to do that is to add a "broad-as-primary" endorsement to the nontraditional policy form.

'Broad-As-Primary' Endorsement

A "broad-as-primary" endorsement generally provides that, notwithstanding the terms and conditions of the umbrella policy, if any occurrence is covered by a scheduled underlying policy, the terms and conditions of the umbrella policy are amended for that particular occurrence so that coverage as broad as the primary is provided by the umbrella. This is probably the best way to address the issue, provided an underwriter is willing to add such an endorsement.

Another way to amend nontraditional umbrella forms is to issue "follow-form" endorsements on the policy for every coverage part of a scheduled underlying policy that is a concern to the client. For example, assume the client wants to ensure the umbrella provides "follow-form" coverage for "property damage." The "follow-form" endorsements I have seen provide generally that "property damage" covered by the umbrella policy is deleted in its entirety, except that if a scheduled underlying policy covers "property damage," then the umbrella will provide such coverage, but only as broad as that covered by the scheduled underlying policy.

The same can be done with coverages for "bodily injury," "personal injury" and "advertising injury."

In my opinion, this way of addressing the problem is somewhat deficient in that, while it does guarantee a limited form of "follow-form" coverage, it eliminates the possibility of "drop-down" cover over self-insured retention (Coverage B). In other words, if the umbrella has this type of "follow-form" endorsement for, say, "personal injury," then the umbrella will never provide "drop-down" coverage for "personal injury."

Pursuant to such an endorsement, the only way the umbrella policy provides any coverage for "personal injury" is if a scheduled underlying policy also provides it and covers the occurrence at issue.

Letter of Coverage Intent

Another way to address the potentially limited coverage provided by the nontraditional umbrella form is to have the umbrella-liability underwriter issue a

letter of intent. I have been able to procure such a letter from some insurers that refused to provide my client with a "broad-as-primary" endorsement. In such a letter, the underwriter will state it is the underwriter's intent that the coverage provided by the umbrella policy is not intended to be narrower than any of the specifically scheduled underlying policies (or at least ones the underwriter has issued along with the umbrella).

This, I believe, is a less-satisfactory solution, but it is better than nothing if the underwriter is not willing to include a "broad-as-primary" endorsement.

The issue of umbrella-liability forms is another reminder that brokers and agents should discuss insurance terms and conditions with their clients and negotiate same with underwriters — and record those discussions in writing where appropriate.

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