

Protecting Your Insurance Protection #4

**PAYING THE POLICYHOLDER'S LITIGATION COSTS:
*DO NOT FORGET YOUR EXCESS AND UMBRELLA POLICIES***

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One of the most important aspects of any liability insurance policy is the litigation coverage – the provisions requiring the insurance carrier to hire and pay for counsel to defend claims made against the policyholder. The duty to provide and pay for an attorney for the policyholder is triggered whenever any claim is made in a lawsuit that might possibly suggest a reasonable possibility of coverage, even if the allegations might appear false or groundless. Umbrella and excess policies may include the same duty to defend as their primary policies. Obtaining contribution from the umbrella and/or excess carriers to the defense costs for a particular lawsuit is an important right that policyholders should always pursue.

Excess insurance is implicated only after a specific amount of coverage under the primary policy is exhausted. This is known as vertical coverage. Umbrella policies provide additional coverage after the primary policy limit is exhausted (vertical coverage) and also “drop down” coverage for claims that fall outside of the scope of primary policy (horizontal coverage).

There is no defense obligation under a pure excess policy, one that is only triggered when the primary policy's limit of coverage has been exceeded, as long as the primary insurer is required to defend the claim. Recent changes to the form of primary insurance policies have included provisions terminating the defense obligations of the

primary policy when the policy limit is exhausted. Absent this provision, the defense obligation would continue for the primary carrier.

Assuming the primary policy contains a defense termination provision, courts typically impose a defense obligation upon the excess carrier to commence paying the litigation costs when the primary carrier ceasing doing so because its policy limit has been exhausted, and the policy coverage of the excess carrier has, therefore, been triggered.

Depending upon the facts, courts may also require the excess carrier to pay the defense costs when the primary carrier denies coverage on a claim that reasonably could exceed the primary policy's limits and trigger the coverage of the excess policy.

Where the umbrella policy is providing horizontal coverage dropping down to provide primary coverage not included in the scope of the primary policy, the umbrella carrier has the primary duty to provide and pay for a defense for those claims for which it is providing primary coverage. Where the umbrella policy provides coverage for occurrences not covered by the primary policy "as warranted", the umbrella carrier will also have to provide a defense where the primary policy covered the loss but the primary carrier refused to provide a defense for the claim "as warranted."

Where the umbrella policy is providing vertical coverage, for claims that exceed the specified limit of the primary policy, the umbrella carrier must provide and pay for an attorney when the claim comes within the coverage of the primary policy and the liability limit of the primary policy has been exhausted. The language of most of the umbrella insurance forms written today follow this result.

Some umbrella forms contain particular language that has led courts to conclude that the umbrella carriers under those policies did not have a duty to provide and pay for

an attorney for the policyholder even when the primary policy's limit has been exhausted. The Coverage A section of these policies provide coverage for a loss in excess of the primary policy limits and expressly exclude any defense obligation. This is the vertical, excess policy coverage.

The Coverage B section of these policies provide coverage for any occurrence "not covered" by the primary insurance policy and do not exclude the obligation to provide a defense. This is the horizontal, drop down, primary coverage of an umbrella policy.

Courts applying these types of umbrella policies interpret "not covered" to mean the fact of coverage, not the extent of coverage. Only if the claim does not fall within the scope of the primary policy, not that the primary policy's dollar limit has been exhausted, will a claim be included in the Coverage B section. If the primary policy contains a provision terminating the primary carrier's duty to defend when the policy limit is exhausted, the policyholder will have to pay its own legal costs. This is obviously the result we are seeking to avoid.

G & C COMMENTARY: The extent of the obligation of an excess and/or umbrella carrier to provide and pay for a policyholder's defense costs depends greatly on the exact terms and provisions of the specific policies involved. The litigation insurance provided by these policies is a significant benefit paid for by the policyholder's premiums. To maximum the benefit of this litigation coverage, it is important that the policyholder contact its insurance broker and knowledgeable insurance attorney to review the terms of all policies – primary, excess and umbrella – that may be involved with any occurrence or claim. By doing so, the policyholder can insure that it receives the best and most extensive defense coverage to which it is entitled.