



## Expert Commentary

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# Additional Insured Coverage under Excess Policies

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As part of their insurance and indemnity requirements, project owners and general contractors often require additional insured coverage in excess of \$1 million from the project's subcontractors. Subcontractors ordinarily satisfy this limits obligation through a combination of primary and excess general liability insurance, with parties expecting the coverage to be consistent throughout.

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 Additional Insured Issues

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This coverage is usually verified at the onset only by copies of the certificates of insurance and additional insured endorsements, not the production of complete policy forms. So, it often comes as a surprise that the additional insured coverage under excess policies can be more restrictive than the primary. The resulting gap in coverage can present unique exposure considerations for upstream and downstream parties alike.

## Unique Considerations for Additional Insured Coverage on Excess Insurance

Excess policies are often issued on a "follow-form" basis, meaning that they adopt and incorporate the terms and conditions of the primary layer policies. However, it can often be mistakenly assumed that a so-called follow-form policy provides the same coverage to the additional insured that the underlying policy provides.<sup>1</sup> In fact, follow-form policies almost always state that the excess policy follows the terms of the underlying policy *except to the extent that the excess policy's terms differ*, in which case, the language of the excess policy will control. See *Insituform Techs., Inc. v. American Home Assur. Co.*, 566 F.3d 274 (1st Cir. Mass. May 22, 2009) (no excess coverage where excess policy does not include amendments to exclusions that had been included in primary policy); *In re HealthSouth Corp. Ins. Litigation*, 308 F. Supp. 2d 1253 (N.D. Ala. 2004) (excess policies "follow form" except where they specifically provide otherwise).

As other IRMI articles have pointed out, an excess follow-form policy follows form except where it does not follow form. See "Commercial Umbrella Policy—A Few Things To Consider" by Craig Stanovich. This difference in coverage can undermine the contracting parties' expectations and, in the case of narrower coverage, quickly generate tension among them.

## Coverage Gaps To Look for

The "follow-form" gap usually becomes an issue when the additional insured seeks excess coverage on a primary and noncontributory basis or a waiver of subrogation in favor of the additional insured.

**Primary and Noncontributory**—Excess follow-form policies almost always have an "Other Insurance" section stating that, when other valid and collectible insurance applies to damages that are also covered by the policy, the policy will be excess over the other insurance. Thus, if the primary policy provides coverage to the additional insured on a primary and noncontributory basis, the follow-form excess will not provide this coverage because the "Other Insurance" clause is different from the primary-and-noncontributory coverage of the underlying policy.

Without an endorsement making the excess apply to the additional insured on a primary and noncontributory basis, many courts conclude that the excess policy sits excess over *any* valid and collectible primary layer insurance, including the additional insured's own policy.

**Waiver of Subrogation**—Additional insured agreements customarily require the named insured's policy to waive the insurer's right of subrogation in favor of the additional insured.<sup>2</sup> Many follow-form policies have a "transfer of rights of recovery" clause that transfers any rights to recover all or part of any payment that the excess carrier has made under the policy to the insurer.

Again, because the "transfer of rights of recovery" clause is different from any waiver of subrogation endorsement on the underlying policy, the "transfer" clause bars the waiver of subrogation in favor of the additional insured at the excess level. This too must be corrected by an endorsement.

## Possible Modifications to Excess Policies

Market forces play a significant role in a policyholder's ability to change additional insured coverage. Generally speaking, a policyholder's access to the excess market tends to be commensurate with the amount of risk the policyholder is willing to transfer by means of

insurance. Policyholders that are more willing to retain risk are frequently reluctant to spend money on insurance premiums. But, faced with the challenge of obtaining broader coverage endorsements, these policyholders may be forced to purchase coverage in a market that serves clients who are used to transferring steeper and more complex risk by paying higher premiums.

These market forces particularly become a problem when small subcontractors bid on large projects. Smaller subs tend to work in limited geographic areas and generally have more modest risk exposure than larger subs. When these subs buy excess insurance, they are usually not used to paying premiums to cover exposure to the complex risks involved with bigger projects. In fact, sometimes the reason small subs buy excess insurance in the first place is to comply with the higher limits requirements they encounter when they bid on bigger jobs.

## When Modifications of Additional Insured Coverage Cannot Be Made

For upstream parties, you can avoid some of these problems by planning in advance. You will generally have an easier time getting the additional insured coverage you want from subcontractors who have experience on big projects. But be realistic and recognize that subs may try to "bid up" into big projects to gain experience and commercial growth. You can plan for this by making sure your contracts and bid documents specify all the terms of additional-insured coverage that you expect from your subcontractors. This candor puts bidding subs on notice that they may have to figure increased premiums into their costs.

For upstream and downstream parties alike, persevere and think creatively about ways to advance the dialogue and improve the process. For example, sometimes brokers have challenges changing policy endorsements if they have not had relevant experience. Open communication and education can help. Have a discussion with your own broker about commercially available forms, and share what you learn with your business partner. If your work involves bigger projects, chances are you have a seasoned broker willing to educate you on the availability of cover in certain markets. Approach this as a learning opportunity, and be generous about passing this knowledge along. Educated policyholders improve the insurance market for everybody.

If all else fails, you may have no other choice but to accept the additional insured coverage as it is for a particular project. This is especially so if you have a longstanding relationship with the other party and the contracts have not clearly spelled out the insurance requirements. Good

relationships between contractors have a value of their own, and you may consider alienating a good business partner is riskier than living with some coverage gaps. Still, when the project is over, discuss your coverage concerns with your broker and your subcontractor for future projects.

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<sup>1</sup> Many policies contain no "follow-form" language whatsoever. In such cases, an additional insured's coverage depends on how the excess defines insureds under the "Who Is an Insured" section.

<sup>2</sup> Generally, additional insureds want subrogation waived in their favor in the event of a loss outside the scope of the additional insured endorsement. For example, if a subcontractor's employee is injured on the job and sues one or more subcontractors but does not name the general contractor as a defendant, the carriers of any of the defendant subcontractors may seek subrogation against the general contractor on the ground that the general contractor's additional insured status on their policies has not been triggered because it has not been named in the suit.

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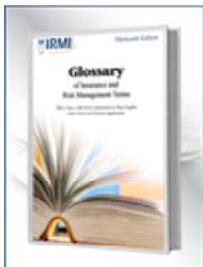


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