When Following Form Doesn't Mean Following Form – Analyzing Excess Policy Language

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Follow-Form Language in a Modern Insurance Coverage World

When an excess policy is a "follow-form" contract, the policy language is often shorter and more streamlined than the underlying policy because it embraces many of the underlying policy's terms. The youthful, fledgling attorney may be lured into believing that the follow-form contract language in the excess policy follows the language of the underlying primary policy. However, the young attorney would be keen to carefully analyze the language in that excess policy.

Introduction / Interpretation of Excess Policies

Recently, in December of 2024, the Texas Supreme Court issued an important ruling addressing the interpretation of excess liability insurance policies.[1] In *Ohio Cas. Ins. Co.*, both of the lower Texas courts had issued rulings indicating that the excess liability policy owed defense costs by analyzing the coverage provided by the primary policy. The Texas Supreme court reversed, noting that the lower courts were incorrect by "start[ing] from the ground up, first examining the terms of the [underlying] policy and then looking to the excess policy to determine coverage."[2] Rather, the Texas Supreme Court held that courts should instead begin by analyzing the excess policy's text and then look to the underlying policy only to the extent that it incorporated the primary policy's terms. Taking this approach, the court ruled that the excess policy did not cover defense costs.

Factual Overview

This insurance coverage lawsuit stemmed from a drilling rig incident, and various personal injury lawsuits that subsequently followed. The primary question presented was whether the Ohio Casualty excess insurance policy covered defense costs incurred by its Insured, the drilling company, Patterson-UTI Energy, Inc ("Patterson"). Patterson provided oil-and-gas equipment, and services including drilling.

Each year, Patterson had purchased insurance to protect itself from costs arising from any incident that might occur during its drilling operations involving its rigs. Patterson attempted to cover its risk by developing a "tower" of insurance coverage, which consisted of a primary insurance policy that underlies multiple layers of excess coverage.

For the 2017–2018 policy year, Patterson purchased several lines of insurance through its broker, Marsh USA, Inc. One of those lines—the "underlying policy" – was an umbrella policy from Liberty Mutual Insurance Europe, Ltd. Patterson also obtained various additional excess policies through Marsh, including one from Ohio Casualty.

As noted, a drilling-rig incident occurred during the subject policy year which led to multiple lawsuits, which Patterson settled after protracted litigation. Patterson argued that the settlements as well as Patterson's litigation's defense expenses triggered the Ohio Casualty excess policy after exhausting the coverage limits of all lower-level policies. Ohio Casualty agreed to fund portions of the settlements but refused to indemnify Patterson for any defense expenses.

Patterson then sued Ohio Casualty and Marsh. Patterson alleged that Ohio Casualty's refusal breached the contract and violated the Insurance Code.

The parties filed competing motions for summary judgment regarding whether the Ohio Casualty policy covered defense expenses. The trial court granted Patterson's motion and denied Ohio Casualty's. The court determined that "the defense costs sought by [Patterson] are covered under the Ohio Casualty policy at issue in this case because the Ohio Casualty policy did not clearly and unambiguously exclude the coverage for defense costs provided by the underlying primary policy."

Ohio Casualty appealed. The (District) Court of Appeals affirmed. It noted the parties' agreement that the underlying policy covers defense expenses. The excess policy, the Court of Appeals noted, is a "follow form" policy that does not unambiguously exclude defense expenses. Therefore, the court reasoned, the excess policy necessarily also covers those expenses.

Analysis

The Texas Supreme Court granted review. The Court noted that this case turns on the construction of the excess policy (not the primary policy).

The excess policy is defined by the contractual undertaking between the parties. The excess policy language determined what Ohio Casualty promised Patterson that it would cover. The critical question in this case is thus what is meant by the word 'damages' when the Excess Policy uses it in its definition of 'loss.'

The Court noted that the Ohio Casualty excess policy supplied the following statement of coverage:

> "We will pay on behalf of [Patterson] the amount of "loss" covered by this insurance in excess of the "Underlying Limits of Insurance[.]" ... Except

> for the terms, conditions, definitions and exclusions of this policy, the coverage provided by this policy will follow the [underlying policy].”[3]

According to the Court, Patterson’s legal expenses related to the drilling-rig accident would be covered by this provision only if those expenses constituted “loss” because “loss” is the only defined item the excess policy agreed to cover.

> The excess policy defined “loss” as follows:
>
> “Those sums actually paid in the settlement or satisfaction of a claim which [Patterson is] legally obligated to pay as damages after making proper deductions for all recoveries and salvage.”

To constitute “loss” the Ohio excess policy required that Patterson was legally bound to pay the amount “in the settlement or satisfaction of a claim ... as damages.”

Ohio Casualty agreed that the settlement amounts were “damages” under this definition and were thus covered as “loss.” It indemnified Patterson for the amounts that Patterson owed the plaintiffs through the various settlements. However, Ohio Casualty contended that Patterson’s own legal expenses did not qualify as “loss” because they did not constitute “damages.”

The Texas Supreme Court agreed with Ohio Casualty that the excess policy did not cover attorney’s fees as “loss.” The Court noted that a party’s own attorney’s fees are generally not considered as damages.

The Texas Supreme Court distinguished that even for follow-form excess policies, the contract that governs a dispute about excess coverage is ***the excess policy***, not the underlying policy. As in any contractual case, the Texas Supreme Court indicated that the parties should begin by analyzing the excess policy’s text and then look to the underlying policy only to the extent that the parties consented to incorporate its terms. Here, while the underlying policy covered the insured’s defense expenses, the excess policy did not. Thus, the Texas Supreme Court ultimately reversed the lower courts’ rulings.

The Court noted that the parties to the Ohio excess policy could have defined “loss” or “damages” to expressly include defense expense, i.e., attorney’s fees, but they chose not to. The Court commented that the underlying primarily policy did precisely that by expressly providing that defense expenses were covered by the policy.

The excess policy, however, did not provide any such special definition—it did not even define “damages” at all. Furthermore, the context surrounding the excess policy’s use of “damages” suggested the usual definition—not an expanded one that included defense expense—primarily because a party paying its own defense expenses would not do so “in the settlement or satisfaction of a claim.”

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Conclusion

An excess insurance policy itself remains the contract that governs a dispute about its coverage, rather than the underlying policy. Characterizing an excess insurance policy as a "follow-form" policy confirms only that the excess policy will to some degree incorporate the provisions of the underlying policy—the degree of incorporation is determined by the excess policy's text.

The Texas Supreme Court ultimately reversed the lower courts' decisions, finding that the excess policy did not unambiguously cover defense costs and that the excess policy was not a "follow-form" policy that necessarily covered defense expenses.

The *Ohio Cas. Ins. Co.* case shows us that an excess "follow-form" policy must be analyzed on its own, independent of the underling policy. A "follow-form" policy does not necessarily cover defense expenses. This is contrary to what many attorneys in the coverage world have once thought. As Yogi Berra once said, "The future ain't what it used to be."

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Endnotes

1 *Ohio Cas. Ins. Co. v. Patterson-UTI Energy, Inc.*, 703 S.W.3d 790 (Tex. 2024)
2 *Id.*, at 792.
3 *Id.* at 793–94 (Tex. 2024).