



**Lowenstein Sandler's Insurance Recovery Podcast:
Don't Take No For An Answer**

Episode 63

**Avoiding the Bait and Switch:
When Excess Insurers Don't Follow Primary
Insurers' Acceptance of Coverage**

By [Lynda Bennett](#), [Eric Jesse](#)

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Lynda Bennett: Thank you for joining us on Don't Take No for an Answer. I'm your host Lynda Bennett, Chair of Lowenstein's Insurance Recovery Practice-and I'm pleased to be joined again by my partner, Eric Jesse. Thanks for joining us today, Eric.

Eric Jesse: Happy to be here as always.

Lynda Bennett: So Eric, you know our job is to fight the good fight on behalf of corporate policy holders to secure coverage for their claims and sometimes our clients face substantial claims where we have to look beyond the primary policies to the excess policies for additional coverage. And in those circumstances, policy holders expect the excess insurers to honor the primary insurer's acknowledgement of coverage if and when that happens.

But policy holders are starting to get a rude awakening as you and I have seen recently, because we're seeing situations where excess carriers are saying, "Nah, I'm not bound by what the primary insurer determined on this claim. I get to have a fresh look and make my own coverage determination before I have to pay the claim."

So today you and I are going to discuss this issue in more depth and what policy holders can do to protect themselves. So I want to start off with the basics. What exactly is an excess policy?

Eric Jesse: Right. So when a policy holder is working with their broker to place an insurance policy, oftentimes the policy holder may have needs for a substantial amount of limits. And in that circumstance, a single insurer may not be able to supply all of the limits of liability that are needed. In that case, an insurance broker is going to construct what we call a tower of coverage

that will be made up of a primary policy and one or more excess policies that sit on top.

Lynda Bennett: So how is this supposed to work when you have the primary policy and now we've got that large loss that looks like it's going to, let's just say the primary policy is a million dollars and the demand from the plaintiff in the case is 5 million. How does it work?

Eric Jesse: Yeah, so how it's supposed to work is each policy in the tower is going to have its own set of limits of liability. So in the scenario you just mentioned, a primary policy with a million dollars of coverage. When that million dollars is eroded by either payment of defense costs or settlement or judgments, the policy holder should theoretically be able to go up that tower to the next excess layer as the loss reaches those layers. So after the million dollars, you look to your first layer excess carrier up to whatever their limits are going to be.

Lynda Bennett: Now, when I look at excess policies, sometimes the primary policy will be 98 pages long, and then I get the excess policy and it's five pages long. And I see reference in there where it says that the excess policy's going to follow form to the underlying policy. What does that mean?

Eric Jesse: Exactly? So the way it's designed is what follow form means is that at a general matter, the excess policy is going to incorporate the key terms and conditions from the primary policy. And the reason for that is it's designed to make sure that the coverage is seamless, so that if the primary insurer acknowledges their coverage obligation, the excess carrier should as well and be able to step in as soon as the primary layer is exhausted,

Lynda Bennett: Right? So our clients think they're in the clear once they finally get the primary insurer to say, "Yes, I'll defend this claim. Yes, I'll cover this claim." We think that now it's just a matter of as each dollar is spent and we go up to the next layer, that excess insurance company is writing their check. But is that how it really works, Eric?

Eric Jesse: Well, unfortunately, I guess it's a tale as old as time because it doesn't always work that way because insurance companies like to take premium dollars and deny claims. And so what we were seeing, for example, both before and then during the pandemic, excess insurers and in certain lines, DNO insurance comes to mind immediately. They were hit particularly hard because those excess insurers by nature of being at a higher layer, were able to charge or were charging lower premiums than the primary insurer. But those excess layers were being hit more and more. And so I think that might be part of the excess insurer's motivation to take a much closer look at the claim and say, stop right there. Just because the primary carrier said there's coverage, that doesn't mean we're going to agree.

Lynda Bennett: And Eric, you're making a really important point. One of the things we like to do on Don't Take No for an Answer is give practical advice and taking a look at some of these differences in a retroactive date, a continuity date. Looking for specific exclusions that get stuck on to excess policies. Clients are really

well served to avoid those surprises by actually carefully going through each page of the excess policy right after it's bound. Correct?

Eric Jesse: No, absolutely. There's a lot of things that we look for in an excess policy. Just because it's five pages long or two pages long doesn't mean it can also be put on the shelf. There are key things we're looking for, like you mentioned. And another key thing that we're always looking for in an excess policy is an acknowledgment by the excess carrier of what will erode those underlying limits. So who has to pay the loss? Does the underlying insurer have to pay all of their loss, or can it be paid by any other source? Or can the insured make up the difference if there's a gap in order to trigger that excess policy?

Lynda Bennett: So one of the reasons that we wanted to do today's episode is because we're starting to see insurers, excess insurers increasingly taking coverage positions that are different from primary insurers. So why don't you comment a little bit on that trend and then we'll get into what policy holders can do to fight back.

Eric Jesse: Yeah, so what's happening there is again, really is a situation where I think excess carriers are becoming hard-pressed because they might not have charged the premiums that they wish they had. And so they're taking a much closer look at those coverage positions and they're saying, "Hold on, we don't think that there should be coverage here." And they want to deviate from what the primary carrier did.

Lynda Bennett: So what are some of the things that our clients can do to fight back when an excess carrier's trying to walk away from the primary insurer's coverage determination?

Eric Jesse: The outset of the claim, communication is going to be key. And actually, before I even get there, the first thing that needs to be done is when a claim comes in, you just don't notify your primary carrier. You need to go up the tower and notify each excess carrier at the same time. And one thing talked about what are some different terms and conditions in an excess policy versus the primary policy? Where you send that notice letter. So providing notice to the primary oftentimes or almost always, will not be sufficient. So take a look at that notice provision, provide notice up the tower.

But after you do that, you don't want to just keep the excess carriers on the back burner as the claim progresses, especially if it's expected to go up the tower. So communication's going to be key. Make sure that the excess insurers are remaining apprised of key developments in the case, settlement opportunities, just what's going on in the case, because a surprised insurer is going to be much more likely to balk at coverage. When if you're involving them in the claim process from the outset, well then they're up to speed once their layer is reached or once you're going to be asking them for a settlement contribution. So that communication helps avoid the initial shock or surprise. And the other thing it does is if the excess carrier is going to be difficult, you've created a strong factual record that you've done what you need to do as the policy holder to make it more difficult for them to walk away if they want to try and deny coverage.

Lynda Bennett: Now I want to pause here and just reinforce some of the things that you said and really bring our experience to bear. The point that you made on notice is so important because a lot of clients, we start out with some wishful thinking that this claim isn't going to be that large. And you'd be surprised the number of times a seemingly small claim morphs into a very large one once the litigation gets up and running. So, I totally agree, putting all carriers on notice right at the outset, very important.

On the point that you made with communication. Again, a lot of our clients have large, self-insured retentions, for example, on DNO policies where they have to incur costs and then once that self-insured retention is satisfied, you start getting into the primary and up the tower it goes. I'm a very big fan of providing those defense cost invoices all the way up the tower as they're being incurred.

These are ways to really lay the groundwork later when the excess carrier wants to come in Monday morning quarterback, when you've got a solid record showing that they've been getting the status update reports from defense counsel, they've been getting the bills as they've been incurred. Our clients are really now starting to back those excess carriers into a corner because they've been in the loop from the very beginning and they won't be surprised, but you're also actually taking arguments away from them by giving them that information as the claim proceeds.

So why is the primary insurer's position going to be so compelling?

Eric Jesse: There's the reality here we alluded to earlier, which is insurers don't willingly pay claims and they don't pay claims that they think are covered. So if a primary insurer is stepping up, they're providing a defense, they're paying the defense costs, they're paying contributing settlement dollars. That is strong and frankly persuasive evidence that coverage truly exists. And I think that as a practical matter, a court will very likely be persuaded that there is coverage and that the excess insurer is taking the wrong position.

Lynda Bennett: So let's talk about some recent case law. I mean, part of the reason that we're having this discussion as well, not only that, our clients are starting to experience disputes on their own claims, but we're starting to see the case law in this area really develop. I like to describe it as there used to be a gentleman's agreement all the way up the tower. And as these policies have gotten more complex and claims activity has increased over the years, we're seeing carriers, excess carriers push back. So that then leads to case law. So what's going on the legal landscape with this issue, Eric?

Eric Jesse: Yeah. So as we see excess carriers trying to push back on a primary carrier's position, there has been this development of law and what we're seeing in many cases, there's been some policy holder friendly cases out there where the excess insurer has essentially alleged that the primary carrier improperly tendered their limits. And so because they improperly tendered their limits, the excess carrier is layer is never triggered. But what courts are saying in response to that is they're essentially rejecting that improper erosion argument. And there's a recent case out of the ninth circuit of the access reinsurance case, which is a strong case for policy holders, where the court

recognized again, number one, that primary carriers are not just easily going to turn over their policy proceeds. And what the excess carrier needs to show if they want to try and show improper erosion is a very high standard fraud or bad faith on the part of the primary insurer. But absent that, the excess carrier is not going to be in a position to second guess the primary carrier. Now, from the policyholder perspective, we haven't seen courts go so far as to say that an excess carrier is bound by a primary insurer's position, but at least you have cases like this access case that is really boxing in the excess insurer's ability to second guess the primary carrier.

Lynda Bennett:

And I think a lot of these cases are really driven by public policy determinations. Courts want to encourage parties to settle cases. And I think courts that have been presented with these types of finger pointing, "Oh no, I'm not up yet," or, "Hey, I get to look at this with fresh eyes." Courts readily recognize that that's going to create uncertainty and risk in entering into settlements. So I think a lot of the courts want to facilitate and encourage parties to settle. And so an excess insurer is going to have to have a very strong case to make for why the primary insurer essentially behaved irrationally in accepting the claim. And something short of that, I don't think we're going to see courts really step too far back from that because then parties won't be able to settle or they're not going to be as inclined to settle because it's going to create risk. Policy holders are not going to get the full coverage that they're entitled to.

So Eric, what are some of the steps, if any, that a client can take when they're first negotiating their policy to limit an excess insurer's ability to evade the follow form obligations in the policy language?

Eric Jesse:

Exactly. So like I said, this isn't a policy, even though it's a couple pages long, you can't put it on the shelf. What you need to do is look at the terms and conditions, make sure sometimes an excess carrier will try and tack on additional exclusions onto the policy, so try and push back against that because an additional exclusion, the coverage isn't as seamless. There's going to be things like retroactive dates that could be different from the primary policy and the retroactive date. The way that works is it typically is incorporated into a prior acts exclusion where the policy isn't going to cover conduct before that particular date. So again, make sure those dates are as far back as possible and that they're aligned with the primary policy. And then the other point is just making sure that the excess carrier is required to acknowledge the exhaustion of underlying limits, basically by payment or the incurrance of liability or loss from any source, whether it's the underlying insurer that pays a third party or the insured. Those are some of the key ways to make sure you have that seamless coverage.

Lynda Bennett:

And I think that the other thing our clients need to recognize, many of them are large corporate policy holders. You do have the ability to negotiate, particularly with excess insurers, you get a boilerplate standard form, what is promised to be a follow form coverage, which we've just explained why that isn't always the case. But understand that you need to work closely with your broker. You need to work closely with experienced coverage council to start. If there are these differences, those that you've outlined, Eric, differences in notice requirements, participation of defense, retroactive dates, you need to work with the broker to say, no, I want true follow form. So you can have the

excess policy amended to say, we are following the underlying policy on all material terms and conditions other than the policy limit, and you have to demonstrate that the primary policy or the underlying policy has been properly exhausted and then we'll pay. And so I think that's some that, that's like a basic thing that not every client understands. When you get that excess policy, you can negotiate those terms too, not just at the primary level.

Eric Jesse:

Absolutely. And another thing that I'm taking a look at when I'm reviewing a follow form policy is how it deals with sub-limited coverage in the primary policy. Because a lot of times this follow form excess policy won't follow form to the sub-limited coverage in the primary policy. So again, that's an area where we want to make sure that there is true follow form. And if there is a sub-limit in the primary policy, for example, sometimes you're able to actually get the excess carrier to agree to provide its own sub-limited limit above the primary carrier sub-limit. So those are things that we're always looking out for to make sure, again, the excess policies provide as seamless coverage as possible because that's where the policy holder will have strength in pushing back against an excess carrier that's trying to deviate from what a primary carrier is willing to do.

Lynda Bennett:

All right. So to recap this issue, we heard a lot of our bedrock principles here on Don't Take No for an Answer. Number one, the words of your policy matter. Number two, read your policy as you're negotiating it, and don't just put it in a drawer. Number three, when you have a claim, come in, early notice all the way up the tower, crucially important. Early and often communication as the claim is proceeding. Really, really important. And finally, and most important of all, if an excess carrier is telling you, "No, I'm not going to pay this claim." Don't take no for an answer.

So thank you, Eric for joining me today on a cutting-edge or a developing issue. Appreciate your insights as always.

Eric Jesse:

Happy to be here, as always. Thank you.

Kevin Iredell:

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