

Can You Climb the Excess Tower and Enjoy the View From Up There?

2021 Annual Meeting
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Beth Bradley, Tollefson Bradley Mitchell & Melendi, LLP

Margo S. Brownell, Maslon LLP

Marilyn B. Fagelson, Murtha Cullina LLP

Gary L. Gassman, Cozen O'Connor P.C.



AMERICAN COLLEGE
OF COVERAGE COUNSEL

2021 Annual Meeting

Background:

- Critical Products, Inc. (“CP”) is facing thousands of asbestos bodily injury claims alleging exposure to asbestos-containing products from the 1950s through the 1990s.
- Critical Products has proof of its annual occurrence-based GL primary and excess policies for most of the years from 1956 to 1986.
- Generally, the primary carriers have been defending and indemnifying CP.
- Some umbrella carriers have stepped in to defend and indemnify where the primary policies have been exhausted through the payments of settlement or judgments.
- There have been some rumblings among other umbrella and excess carriers about the proper exhaustion of primary and umbrella carriers.

Question #1:

One group of plaintiffs has made a demand that exceeds the primary limits in the applicable years. In one tower, the defending primary has agreed to offer its limits toward settlement. The primary has advised the insured, the next layer, and counsel for the plaintiffs.

Is the primary exhausted and relieved of a defense obligation?

- A. No, unless the plaintiffs accept the limits in settlement of some or all claims.
- B. Yes, if it tenders limits into the court registry.
- C. Yes, if it sends a check to the excess/umbrella.
- D. Yes, if it sends a check to the plaintiffs' counsel

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Question #2:

One defending primary, with multiple years of coverage, determined there are sufficient occurrences within its policy periods and paid its limits in settlement of the underlying claims. The excess insurers are challenging exhaustion on the basis that the primary used the wrong trigger theory, based on choice of law and the primary is not exhausted.

Can the excess insurers contest the exhaustion or are they bound by the primary insurer's coverage determination?

- A. They are bound if the excess policy is following form
- B. They can challenge if the coverage determination is unreasonable
- C. The excess insurer is never bound by the primary's coverage determination
- D. The excess insurer is not bound by the coverage determination, as to its own policy, but cannot contest the primary's determination

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Question #3:

- CP is facing one claim valued in excess of \$3M.
- The primary insurer agrees to contribute \$750,000 of its \$1M limit in exchange for a policy release and the policy being deemed exhausted.
- CP agrees to this deal with the primary.
- The language of the excess policy requires payment of the “full amount of the underlying insurer’s limits of liability” for exhaustion.

Does CP’s below-limits settlement qualify as proper exhaustion of the primary policy?

- A. Yes, because courts follow the policy rationale favoring the efficient resolution of disputes between the insured and insurer, regardless of policy language.
- B. Yes, as long as CP pays “the gap.”
- C. Yes, because post-*Qualcomm* this would be considered “ambiguous” language.
- D. No, based on the plain language of the excess policy.

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Question #4:

- **CP is being sued by a plaintiff in a high-dollar claim that includes exposure to an asbestos product that CP never manufactured.**
- **Liability is questionable.**

Which of these scenarios requires the appointment of independent counsel?

- A. Defense costs erode primary limits. CP and excess insurers want case settled, but primary wants to send message to other potential claimants discouraging other lawsuits.
- B. Some portions of case are likely covered but others are not. CP wants to fight. In the interest of protecting CP's assets and capping exposure, the insurers want to settle.
- C. Primary and excess policies are duty to defend but expressly provide that defense costs are only covered if they are incurred with respect to a covered claim, and policies contains an allocation provision.
- D. Policy is eroded by defense costs and the amount of defense costs and liability exposure combined is likely to exceed the available limits of liability.

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Which of these scenarios requires the appointment of independent counsel?

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Some portions of case are likely covered but others are not. CP wants to fight. In the interest of protecting CP's assets and capping exposure, the insurers want to settle. **B**

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Policy is eroded by defense costs and the amount of defense costs and liability exposure combined is likely to exceed the available limits of liability. **D**

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Question #5:

Critical Products would like to negotiate a formal “coverage in place” agreement with all of its carriers.

What factors will have the greatest impact in determining Critical Products’ bargaining position as to whether it must contribute to the defense and indemnity of the asbestos claims and by how much?

- A. Which state law is applicable to coverage of the claims.
- B. Whether Critical Products has settled/bought back any of its policies.
- C. Whether the parties agree as to the meaning of the terms of the policies, such as whether an exclusion applies to the asbestos claims.
- D. All of the above.

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Question #6:

- In one tower, the umbrella policy provides defense outside limits.
- Directly above the umbrella is a quota share layer where Policies A & B each have a 50% share.
- Policy A follows the umbrella, but Policy B provides for defense inside limits.

How and when can CP access the layer above the quota share?

- A. Only after both Policy A & B exhaust through payment of indemnity – i.e. CP must pay the share formerly attributed to Policy B until Policy A exhausts.
- B. The next layer must take over Policy B's share once Policy B exhausts.
- C. Beats me.

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Questions?
