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Colo. Justices Say Insolvency Can't Trigger Excess Coverage

By **Zach Dupont**

Law360 (September 21, 2026, 8:06 PM EDT) -- The Colorado Supreme Court ruled that an umbrella or excess policy issuer isn't liable to drop down and provide first-dollar coverage when a scheduled underlying insurer becomes insolvent, according to the justices' opinion, issued Monday.

The unanimous **ruling** from the justices comes after a Colorado federal judge sought an answer through a certified question of law request on whether A.R. Wilfley & Sons Inc., a pump manufacturer for mining and industrial operations, is entitled to coverage from its umbrella and excess insurance provider, Federal Insurance Co.

Wilfley filed a lawsuit against Federal Insurance and two other insurers in Colorado federal court in 2023 claiming that its umbrella and excess insurers must provide coverage to defend the manufacturer in underlying litigation after Wilfley's final general policy insurer became insolvent and could no longer pay.

The justices' opinion, written by Justice Carlos A. Samour Jr., said that Wilfley continues to defend against numerous lawsuits accusing the company of causing bodily injury from exposure to asbestos in its products. The opinion said that coverage of the lawsuits was supplied by its primary insurers until the general liability policies ran dry for all of its insurers but one, Reliance Insurance Co.

The problem, the justices noted, was that Wilfley couldn't collect coverage from Reliance because the insurer became insolvent. Wilfley attempted to extend coverage of the underlying litigation to its umbrella and excess liability insurers, but Federal denied coverage, leading to Wilfley's lawsuit.

Wilfley claimed that the insurers have a duty to defend and indemnify the underlying lawsuits because the term "not covered" in the agreement includes stepping into the shoes of a primary insurer that can no longer provide coverage due to its insolvency. In response, Federal filed counterclaims against Wilfley and claimed it has no duty to defend or indemnify because "not covered" in the agreement only includes claims not covered by a policy from a scheduled general insurer and doesn't extend to claims a general insurer can't pay.

Although the U.S. District Court for the District of Colorado initially rejected Wilfley's interpretation, it withdrew its initial order and submitted the question of law request to the Colorado Supreme Court. The justices' opinion said the court opted to submit the question of law request because it noted a potential conflict with the Colorado Court of Appeals' 1989 ruling in Deisch & Marion P.C. v. International Insurance Co. and because the court anticipated the case will end up in the Tenth Circuit and "guidance from this court on an unsettled point of Colorado law would be valuable."

The justices opted for Federal's interpretation of the dispute, stating that there is "only one reasonable reading" of the agreement.

"Federal, in its role as an umbrella/excess carrier, did not agree to defend Wilfley against claims for which a scheduled underlying insurer provided coverage," the opinion said. "Nor did Federal agree to indemnify Wilfley before the underlying coverage had been exhausted."

The justices said Wilfley's interpretation would essentially nullify the "collectibility" portion of the agreement because the manufacturer's interpretation would encompass collectibility entirely into the term "covered."

"But that interpretation veers away from the intent the parties expressed in the federal policies," the opinion said. "Those policies draw a purposeful distinction between the existence of coverage through a scheduled underlying insurer such as Reliance and the collectibility of coverage from an unscheduled insurer."

The justices noted that their ruling is "beating a drum many others have beat before," citing similar rulings from courts across the country such as the Fifth Circuit's decision in Mission National Insurance Co. v. Duke Transportation Co., the 11th Circuit's decision in Garmany v. Mission Ins. Co. and the Tenth Circuit's decision in Scott's Liquid Gold, Inc. v. Lexington Insurance Co.

At the conclusion of the opinion, the justices addressed the Colorado Court of Appeals ruling in Deisch, finding that Wilfley's use of the case is an attempt to "cram a square peg into a round hole by attempting to fit a four-decade-old court of appeals decision into an analytical framework for which it was never designed."

In Deisch, a law firm sought payment from an umbrella and excess insurer for defending a manufacturing company in court after the primary insurer went into receivership and was unable to pay legal fees incurred by the law firm during litigation.

The opinion said the panel ruled in favor of the law firm "in strikingly cursory fashion," finding that the umbrella and excess insurer benefited from the work conducted by the law firm and that it would have been "inequitable for [the umbrella and excess insurer] to retain the benefit of the law firm's work product without paying for it."

The justices said that "with a similar wave of the hand," the panel concluded that the primary insurer's insolvency triggered the umbrella and excess insurer's duty to defend.

"The division offered no justification for allowing non-collectibility to transform an occurrence covered by a scheduled underlying policy into one 'not covered' by that policy," the justices wrote. "What's more, it appears to have welded coverage and collectibility into a single concept."

The justices said that because the "contractual detour was unnecessary to the division's holding … it is dictum with all the dials turned to eleven." The opinion added that regardless, the court isn't bound by the findings in Deisch, so "to the extent it is incompatible with this opinion, it is now overruled."

The justices answered the certified question with a "no" and returned the case to Colorado federal court for further proceedings consistent with their ruling. Two other insurers listed as defendants in the litigation, National Union Fire Insurance Co. of Pittsburgh and United States Fire Insurance Co., never entered appearances in the appeal.

Counsel for both parties did not respond to requests for comment Monday.

Wilfley is represented by Bradley A. Levin, Robyn Levin and Kerri J. Anderson of Levin Sitcoff PC and by Nelson A. Waneka of Western Slope Law.

Federal is represented by Greta A. Matzen of Nicolaides Fink Thorpe Michaelides Sullivan LLP and by Jonathan D. Hacker of O'Melveny & Myers LLP.

The case is A.R. Wilfley & Sons Inc. v. National Union Fire Insurance Company of Pittsburgh, PA et al., case number 25SA265, in the Colorado Supreme Court.

--Editing by Lief Nielsen.