

# Gaps in Your Excess Casualty Program Could Cost You



Your organization experiences a significant casualty loss. You reassure your company's leaders and stakeholders that the company is insured with "follow form" excess casualty insurance — meaning that every layer in the program has terms and conditions that match those of the layer below. As the claim progresses you learn that some policies that were thought to be follow form have additional language that changes the nature of coverage throughout the excess casualty program. Suddenly, you're not so sure the loss is covered.

Excess casualty underwriters often offer coverage that purports to be follow form. But when a claim is tendered, the insured discovers that the policies vary significantly. This can raise doubts about whether the coverage will respond in the event of a sizable loss and if the loss is fully insured.

Insurance buyers can gain greater confidence that their excess casualty insurance programs will respond as expected and when they most need it through newly available enhanced follow form policies.

## DEFICIENCIES IN EXCESS CASUALTY PROGRAMS

In an excess casualty program, where several layers of coverage build upon each other, a follow form policy should mirror the terms and conditions of the policy beneath it. Although many insurers stress that their policies are follow form, often they are not. Language in these policies may include additional terms and exclusions, and some policies expressly exclude coverage for specific risks even if they are covered by underlying policies.

These discrepancies could cause excess casualty insurers to deny claims, leaving insureds responsible for covering sizable losses that they thought were insured. Take for instance an insurance buyer with a \$25 million lead umbrella policy and three excess policies that each provide \$25 million in limits above the previous layer. Problems may arise if the underwriters have issued policies with follow form exceptions relating to the follow areas:

- **Duty to defend.** In most cases, an insurer is obligated to defend an insured if a loss could potentially be covered under a specific policy it underwrites, even if there is a question of whether the claim is valid. However, this is not standard across all excess casualty policies. In this example, if the



Enhanced policy forms that are now available to insurance buyers aim to eliminate gaps and conflicting terms and conditions in excess casualty insurance coverage.

insured suffers a loss that exceeds the \$25 million limit of the lead umbrella policy, but the second layer does not include a duty to defend clause, the insured could be left without defense costs coverage beyond the lead umbrella layer. Instead of having defense costs covered for the entire tower, the insured will only have these costs covered until the lead \$25 million is exhausted.

- **Restrictive as underlying provisions.** Some excess policies state that the provided coverage is as restrictive as the layer below. For example, the second layer of coverage adds an exclusion for injuries related to silica dust; the third and fourth layers include the “restrictive as underlying” provision and therefore also exclude silica dust-related injuries. This means that in the event of an injury related to silica dust, only the lead umbrella policy would respond — leaving the insureds with only \$25 million in coverage instead of \$100 million.
- **Negotiated partial settlements.** Excess policies generally are not triggered until the layer below is fully exhausted by actual payment of claims. Imagine you

submit a \$50 million claim to your insurers. The lead umbrella insurer, however, does not believe that the claim is valued at its full \$25 million limits for this loss; it is only willing to pay \$23 million. Absent a “negotiated partial settlement” provision, which would allow underlying limits to be exhausted through a combination of payments made by the insurer and insured, the policyholder may not be able to access coverage beyond the \$23 million extended by the lead umbrella insurer.

## MORE EFFECTIVE FOLLOW FORM COVERAGE

Casualty losses continue to climb. Insurers’ total incurred losses for all liability lines increased from \$122.4 billion in 2008 to \$151.9 billion in 2015, according to data compiled by the Insurance Information Institute (III). In large part, these increasing losses are driven by rising litigation costs, including jury verdicts for auto liability, product liability and medical malpractice claims. And the defense costs and other expenses incurred by insurers to defend



policyholders from this litigation also continue to increase: From 2008 to 2013, defense costs increased from \$16.8 billion to \$19.4 billion, according to the III.

To better address these rising claims costs, insurance buyers should consider enhanced policy forms now available that aim to eliminate gaps and conflicting terms and conditions in excess casualty insurance coverage. These enhancements allow for a single form to be used throughout an excess casualty tower; instead of each excess insurer underwriting coverage on its own policy form, the single form explicitly follows the lead umbrella policy, altered only by easily identified standalone endorsements.

Although this cannot guarantee coverage for any specific loss, the enhanced form's uniformity of coverage helps ensure consistency in how individual layers respond. It helps reduce the ability of individual insurers to deny claims: If the umbrella insurance policy provides coverage for a loss, the layers above also provide coverage, because they use the same terms and conditions. The same is true for any subsequent excess casualty layers that use the same policy form.

This can provide greater contract certainty for insureds — and greater confidence that their excess casualty programs will respond as expected in the event of a sizable loss.



## SPOTLIGHT

## Enhanced Follow Form Coverage: Marsh XSellence

Insurance buyers can now purchase follow form coverage throughout an excess casualty tower using the Marsh XSellence Form. Developed by Marsh's US Casualty Practice in conjunction with leading excess casualty insurers, the enhanced follow form policy offers clear, consistent coverage and contract certainty for buyers.

Available on a claims-made and occurrence basis, the Marsh XSellence form:

- Is explicit as to which policy or policies it follows.
- Provides an affirmative duty to defend where contained in the followed policy.
- Allows the underlying limit to be exhausted by payments made by the underlying insurer, or by a combination of the underlying insurer and the insured.
- Prevents intervening exclusions from impacting the layer written on the form.
- Has no independent exclusions or definitions incorporated into the form.
- Provides for treatment of defense costs to explicitly follow the controlling policy.

For more information on Marsh XSellence, contact your Marsh representative.

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## About This Briefing

This report was prepared by Marsh's Excess Casualty Practice, which advises Fortune 1000 companies and similar insureds on the design and placement of complex excess casualty transactions. The group coordinates global placements in the US and with Bowring Marsh in Bermuda, London, Dublin, and Zurich.

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