



## Follow Form Excess Liability Insurance: Should the Primary Policy be Considered in Construing the Excess Policy?

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Typically, a commercial policyholder purchases at least two layers of liability coverage, oftentimes from the same insurance carrier, for the purpose of addressing various liability exposures connected to its business. The first layer of liability coverage is commonly referred to as primary, or underlying, insurance (hereinafter referred to as primary insurance), and its function is to serve as the first line of defense and indemnity against a claim caused by an accident, or occurrence, that resulted from an exposure faced by the commercial policyholder (e.g., premises exposure, operations exposure). Generally, the policy limit that applies to this first layer of liability coverage is minimal (e.g., \$12,500). Mishaps are bound to occur in connection with any business, but the vast majority of these mishaps result in small dollar claims. For this reason, the minimal policy limit applicable to the first layer of liability coverage is sufficient with respect to the vast majority of mishaps. Of course, in a large number of cases, a commercial policyholder is threatened with a lawsuit that is groundless, or the amount of damages claimed is inflated. Commercial policyholders usually rely on this first layer of liability coverage to provide defense coverage (i.e., attorney fees and other costs of litigation) so that a proper response to questionable claims is assured. The second, and subsequent layers of liability coverage, is commonly referred to as excess, or umbrella, insurance, and its function is to (1) stand in reserve to back up the primary insurance should the dollar value of a liability claim be unusually large, as may happen were a commercial policyholder to be legally responsible for an uncommon but devastating bodily injury (i.e., additional vertical coverage is provided that attaches when the policy limit in the primary insurance is exhausted), and (2) provide catastrophic coverage in the event that a liability claim is excluded under the primary insurance, but is covered under the umbrella policy (i.e., additional horizontal coverage is provided that attaches when the self-insured retention, or deductible, is met by the commercial policyholder). Thus, an umbrella policy is a type of excess policy that not only provides excess coverage, but also fills the gaps left by the primary insurance, subject to the self-insured retention, or deductible. Indeed, umbrella coverage has been likened to a circus tent because it covers so much; a pure excess policy simply provides greater limits for the primary insurance.<sup>1</sup> Generally, the policy limit that applies to the second and subsequent layers of liability coverage is substantial (e.g., \$2,000,000). Assuming the (1) inclusion of a follow form provision in the excess insurance, and (2) absence of a conspicuous exclusion that is contained in the excess insurance but not the primary insurance, the assets of the commercial policyholder are sufficiently protected in the event that a rare, catastrophic mishap involving serious damages were to occur. Most importantly, defense coverage with respect to serious mishaps is assured because the high policy limit contained in the excess policy precludes the insurance carrier from simply paying the policy limit in a high dollar case for the sole purpose of avoiding the cost of defending a serious liability claim.

### Abstract

*Commercial policyholders customarily rely upon a follow form excess liability policy to address a catastrophic claim. To assure that this policy serves this purpose, a follow form provision customarily is contained in the excess policy. The terms of coverage contained in the primary policy are incorporated by reference into the excess policy, unless a provision to the contrary is contained in the excess policy. In cases in which (1) coverage clearly is provided under the primary policy, and (2) coverage is excluded by implication under the excess policy (i.e., an inference based on policy language, or the lack thereof, suggests that coverage is not available under the excess policy, but it does not contain specific wording that unequivocally indicates coverage is excluded), coverage disputes have arisen. To date, a body of case law, in which the courts have upheld the intent and integrity of follow form provisions, appears to be emerging. Commercial policyholders can indeed rely on a follow form excess policy to address a catastrophic claim in the absence of conspicuous wording to the contrary.*

This article explains how to recognize whether an excess policy is a follow form policy or a stand alone policy; the significance of this distinction is discussed. *Empire Fire and Marine Insurance Company v Nicholas Keifer et al.*, a case in which the court recognized the importance of this distinction, is discussed for illustrative purposes.<sup>2</sup>

## **Recognition and Significance of Follow Form Excess Liability Insurance**

An excess policy that is written on a follow form basis (i.e., the excess policy incorporates and adopts the same commercial liability exposures and exclusions as the primary policy subject, of course, to the respective policy limits) contains a follow form provision. This provision stipulates that, unless a provision contained in the excess policy clearly indicates otherwise (i.e., the excess policy contains policy language that is sufficiently contrary to the policy language contained in the primary policy), the terms, definitions, conditions, limitations, and exclusions in the primary policy are incorporated by reference into the excess policy. While the specific wording contained in the follow form provision may vary somewhat among follow form excess policies, the significance is the same: unless the excess policy contains policy language that is sufficiently contrary, the excess policy is construed to be consistent with the primary policy, and the terms of the primary insurance are adopted into the excess policy. In this way, the layers of coverage are seamlessly integrated, and redundancies in policy language are avoided. The rights and responsibilities of the insurer under the excess policy are then defined by the primary policy, except to the extent that the excess policy has specific wording contrary to provisions contained in the primary policy.

In cases in which (1) coverage is clearly provided under the primary policy, and (2) coverage is excluded by implication under the excess policy (i.e., an inference based on policy language, or the lack thereof, suggests that coverage is not available under the excess policy, but it does not contain specific wording that unequivocally indicates coverage is excluded), the issue arises concerning whether the excess policy was written on a follow form basis. Assuming that the excess policy was written on a follow form basis, a case can be made that the applicable primary policy language should control the excess policy coverage. In other words, in the absence of a conspicuous exclusion contained in the excess policy to the contrary, it should be construed based on a consideration of the applicable primary policy language. While cases of this sort are relatively rare, when such a case does arise, the financial stakes oftentimes are huge. For this reason, the issue concerning whether a primary policy should be considered in construing a follow form excess liability policy in cases of the sort alluded to above is an important issue.

In contrast, assuming that the excess policy is a stand alone policy because it does not contain a follow form provision and was not written on a follow form basis, the excess policy is a self-defining policy without use of or adoption of the definitions, limitations, and coverage terms of the primary policy. While an argument can still be made that the primary policy should be considered in interpreting the excess policy (e.g., the primary policy is an aid in determining the intent of the parties to the contract in the event that the excess policy contains an ambiguous provision, the primary policy should be considered because the policyholder reasonably expected the excess policy to back up the primary policy in the event that the applicable policy limit contained in the primary policy becomes exhausted), the primary policy is not “read into” the excess policy. A stand alone excess policy is interpreted based solely on its own agreements, conditions, definitions, and exclusions. Assuming that the policy language contained in the excess policy is sufficiently clear, coverage may be excluded by implication based on a policy provision, or the lack of a policy provision, contained in the excess policy. In short, a

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stand alone excess policy contains no assurance that it is coordinated with the primary policy such that the excess policy covers the same risk as the primary policy.

### **An Illustrative Case: *Empire Fire and Marine Insurance Company v Nicholas Keifer***

In *Empire Fire and Marine Insurance Company v Nicholas Keifer, et al.*, Nicholas Keifer was operating a Recreational Vehicle/Motorhome that was being pushed across the parking lot with a tow truck so it would be ready for auction the following day.<sup>3</sup> Jason A. Chehi, an employee of Montpelier Auto Auction, was struck by the Recreational Vehicle/Motorhome, resulting in serious bodily injury.<sup>4</sup> In the underlying tort action, damages of \$1,100,000 were awarded based on Nicholas Keifer's negligence in operating the Recreational Vehicle/Motorhome, which qualified as a "covered auto". Nicholas Keifer was not an employee of the auto auction, but was assisting his friend and employee of the auto auction, Clemeth Federspeil, move the Recreational Vehicle/Motorhome.<sup>5</sup> Nicholas Keifer was a permissive user of this vehicle and, thus, he qualified as an "insured" under the primary policy. Nicholas Keifer did not qualify under the definition of an "insured" as expressly defined in the umbrella policy, but the umbrella policy did not contain specific wording unequivocally indicating that Nicholas Keifer did not qualify as an "insured" under the umbrella policy. Given that (1) Nicholas Keifer qualified as an "insured" under the primary policy (i.e., "insured" was defined to include all permissive users of a "covered auto"), and (2) the excess policy contained a follow form provision and was written on a follow form basis, the court ruled that Nicholas Keifer did indeed qualify as an "insured" under the excess policy.<sup>6</sup> The definition of "insured" that is contained in the primary policy, which includes all permissive users of a "covered auto", was incorporated by reference into the excess policy because this policy does not contain specific wording that excludes this category. While the excess policy defined "who was insured" within the policy, the follow form language supplemented the definition of "insured" because this category was not sufficiently contrary to the definition contained in the excess policy. Exclusion by implication by implying that permissive users of a "covered auto" who do not fit within a category under the definition of "insured" contained in the excess policy therefore do not qualify as an "insured" under the excess policy was rejected by the court. A requirement that a permissive user of a "covered auto" who did not fit within a category under the definition of "insured" contained in the excess policy be identified in the declarations of the excess policy as a designated person to qualify as an "insured" under the excess policy is not sufficiently "contrary."

This case is highlighted in this article because it (1) is illustrative in terms of how to recognize and evaluate whether an excess policy was written on a follow form basis, and (2) contains an ample discussion of legal precedent that has upheld the intent and integrity of a follow form excess policy in terms of how it should be applied in cases of the sort alluded to above.

### **Follow Form Criteria**

Assuming that an excess policy contains a follow form provision, the policy should be evaluated based on the degree of coverage coordination between the primary policy and the excess policy, whether an increased limit factor was applied to the rate for primary insurance in determining the excess rate, and how the primary policy and excess policy were handled from an administrative standpoint:

- **Matching of Policy Provisions.** This criterion pertains to whether the excess policy matches the primary policy in terms of the policy period, the identification of the

named insured, the nature of the commercial liability exposure that is addressed, and the exclusions. Thus, in *Empire Fire and Marine Insurance Company v Nicholas Keifer, et al.*, with respect to both the primary policy and the excess policy, the inception date is 3/31/2002, and the expiration date is 3/31/2003, the named insured is Montpelier Auto Auction, liability coverage is provided in the event that the “insured” is legally responsible for “bodily injury” or “property damage” caused by an accident and resulting from “garage operations” and the exclusions are functionally identical – for example, both policies include the WORKERS’ COMPENSATION, EMPLOYEE INDEMNIFICATION AND EMPLOYER’S LIABILITY, and FELLOW EMPLOYEE exclusions.

- **Coordination of Policy Limits.** This criterion pertains to whether both policies include the same insuring agreements, and the policy limit in the primary policy matches the retention amount in the excess policy such that coverage under the excess policy is triggered when the policy limit applicable to the primary policy has become exhausted. In this way, the excess policy backs up the primary policy in the event of an unusually large liability judgment. Thus, in *Empire Fire and Marine Insurance Company v Nicholas Keifer, et al.*, with respect to the excess policy declarations, reference is made to the Schedule of Underlying Insurance, which includes both Garage Operations-Auto Liability Coverage and Garage Operations-Other Than Auto Liability Coverage. The respective policy limits that are identified in the declarations page of the primary policy (i.e., Garage Operations-Auto Liability Coverage - \$12,500 Bodily Injury Limit for each person, \$25,000 Bodily Injury Limit for each accident, \$7,500 Property Damage Limit for each accident; Garage Operations-Other Than Auto Liability Coverage — \$100,000 Bodily Injury and Property Damage Limit for each accident) match the corresponding policy limits identified under the Schedule of Underlying Insurance that is contained in the declarations page of the excess policy. In the excess policy, the insurer promises to provide liability coverage in excess of the retention amount (i.e., the policy limits that apply to the underlying insurance); these policy limits are identified in the Schedule of Underlying Insurance contained in the declarations page of the excess policy. Furthermore, in specifying the maximum amount that will be paid under the excess policy, reference is made to the Schedule of Underlying Insurance. The maximum amount that will be paid under the excess policy is the difference between the applicable policy limit identified in the declarations page of the excess policy, and the applicable policy limit shown in the Schedule of Underlying Insurance. In specifying the maximum amount that will be paid under the excess policy, the insurance carrier contemplates that (1) the primary policy will be maintained by the commercial policyholder, and (2) the excess policy will back up the primary policy in the event that the applicable policy limit contained in the primary policy has become exhausted. Thus, in *Empire Fire and Marine Insurance Company v Nicholas Keifer, et al.*, the maximum amount of coverage available under the excess policy, was \$1,987,500 (i.e., \$2,000,000 — the policy limit identified in the excess policy — less \$12,500 — the applicable policy limit shown in the Schedule of Underlying Insurance).<sup>7</sup>
- **Use of Increased Limit Factor.** This criterion pertains to the method employed for determining the excess rate. Given that (1) a follow form excess policy covers the same exposure as the primary policy, and (2) the likelihood that a loss will pierce the policy limit contained in the primary policy is relatively small, an increased limit factor is applied to the primary rate in determining the excess rate. Application of the increased limit factor to the primary rate results in an excess rate per \$1,000 that is proportionately lower for the excess policy as opposed to the primary policy. This

proportionately lower rate reflects the fact that (1) the coverage is the same under the primary policy and the excess policy, and (2) the likelihood a loss will pierce the policy limit contained in the primary policy is relatively small because most losses are small.<sup>8</sup> Thus, in *Empire Fire and Marine Insurance Company v Nicholas Keifer, et al.*, the intent of the insurance carrier to write the excess policy on a follow form basis is reflected in the rate filing submitted to the State of Ohio Department of Insurance. This rate filing makes reference to the application of an increased limit factor to the manual rate (i.e., the primary rate) in determining the excess rate.

- **Administration of Policies.** This criterion pertains to how the primary policy and excess policy were handled from an administrative standpoint. If these respective policies were (1) issued by the same insurance carrier, and (2) treated as a single unit from an administrative standpoint, a strong inference is created that the excess policy was written on a follow form basis. First, the insurance carrier that issued the excess policy knows all the conditions, definitions, agreements, exclusions and limitations of the primary policy, including changes by endorsement. For this reason, the insurance carrier that issued the excess policy is comfortable from an underwriting standpoint with the concept of incorporating the coverage terms contained in the primary policy into the excess policy. Second, the insurance carrier knows that the respective policies were issued as companion policies that work in tandem to address fully the commercial policyholder's exposure to loss. For this reason, the respective policies are treated as a single unit from an administrative standpoint (i.e., the respective policy numbers are similar, there is one billing for both premiums combined). Thus, in *Empire Fire and Marine Insurance Company v Nicholas Keifer, et al.*, the same insurance carrier issued both respective policies; the respective policy numbers are only one letter different (i.e., the primary policy is Policy Number SB0250526, and the excess policy is Policy Number SU0250526); and the total premium combined for both policies of \$5,872 was billed at one time.

To the extent that, on balance, these criteria are met, one can safely conclude that the intent was to write the excess policy on a follow form basis. To the extent that, on balance, these criteria are not met, one can safely conclude that the intent was to write the excess policy on a stand alone basis.

### **Legal Decision: *Empire Fire and Marine Insurance Company v Nicholas Keifer***

In *Empire Fire and Marine Insurance Company v Nicholas Keifer, et al.*, the policy language at issue under the primary policy pertained to who qualified as an "insured." With respect to "garage operations," "insured" is defined to include "[a]nyone else while using with your [Montpelier Auto Auction — the named insured] permission a "covered auto" . . . except as set forth in WHO IS NOT INSURED." The record clearly established that (1) Nicholas Keifer, the friend of an employee of Montpelier Auto Auction, who was operating the Recreational Vehicle/Motorhome at the time of the accident, was a permissive user, (2) the Recreational Vehicle/Motorhome was a "covered auto," (3) the accident resulted from "garage operations" involving the operation of a "covered auto," and (4) Nicholas Keifer did not fit within any of the categories enumerated under WHO IS NOT INSURED. Given this record, Empire Fire and Marine Insurance Company concluded that Nicholas Keifer qualified as an "insured" under the primary policy, and it paid the policy limit of \$12,500.

The policy language at issue under the excess policy pertained to (1) who qualified as an "insured," and (2) the follow form provision, under which "[u]nless a provision to the contrary appears in our policy, all . . . definitions [including the definition of "insured"]

. . . of the “underlying insurance” . . . will apply to our policy.” According to the excess policy, “[w]ith respect to “garage operations” involving the ownership, maintenance or use of an “auto,” the following are “insureds”: (a) You [i.e., Montpelier Auto Auction]; (b) Your partners . . . ; (c) An officer . . . ; (d) The spouse of (a), (b) and (c) above . . . ; and (e) Only such other individuals who are specifically shown in the Declarations as a Designated Person . . .” Unlike the primary policy, the excess policy did not contain a section entitled WHO IS NOT INSURED.

In ruling that Nicholas Keifer qualified as an “insured” under the excess policy, the court alluded to (1) Empire Fire and Marine Insurance Company’s failure to utilize specific wording that unequivocally communicated that permissive users of a “covered auto” did not qualify as an “insured” unless the permissive user was specifically shown in the Declarations as a Designated Person, and (2) the role of both the primary policy and the excess policy in addressing fully the exposure faced by Montpelier Auto Auction in connection with its business. First, the court alluded to Empire Fire and Marine Insurance Company’s failure to include in the excess policy a section entitled WHO IS NOT AN INSURED under which a permissive user not specifically identified in the Declarations as a Designated Person was excluded. Had Empire Fire and Marine Insurance Company done so, the definition in the primary policy would have been contrary to, or at odds with, the definition in the excess policy and, thus, a coverage dispute would not have arisen. Second, the court alluded to the odd coverage result that would occur were it to exclude under the excess policy a permissive user of a “covered auto” who was not specifically identified in the Declarations as a Designated Person. On the one hand, a rank-and-file employee most likely would not be identified in the Declarations as a Designated Person and, thus, would be excluded under the excess policy.<sup>9</sup> On the other hand, a spouse of an officer or director who is a nonpermissive user of a “covered auto,” an unlikely scenario, (1) would not qualify as an “insured” under the primary policy, and (2) would qualify as an “insured” under the excess policy. This odd coverage result is at odds with the goal of creating a comprehensive liability insurance program that fully addresses the liability exposure faced by the policyholder.

## Supporting Legal Precedent

In *Empire Fire and Marine Insurance Company v Nicholas Keifer, et al.*, the court alluded to two mid-level state appellate court decisions, one of which was unreported, *Empire Fire and Marine Insurance Company v Duran*, 548 P. 2d 422 (Ariz. App. 1976) and *Empire Fire and Marine Insurance Company v Archer*, 2005 WL 3005772 (N.J. Super. A.D.), that upheld the intent and integrity of a follow form excess policy in terms of how it should be applied in cases similar to the case at bar.<sup>10</sup> While the outcome of both of these cases hinged on issues unrelated to the follow form provision, in both of these cases, the respective courts ruled that the follow form provision contained in the excess policy was controlling in terms of whether a permissive user of a vehicle qualified as an “insured” under the excess policy. In both cases, a permissive user of a vehicle clearly qualified as an “insured” under the primary policy; the circumstances under which a permissive user did not qualify as an “insured” under the excess policy were not clearly defined. In both cases, given the absence of specific wording in the excess policy that clearly excluded the permissive user in question, the definition of “insured” contained in the primary policy was incorporated by reference into the excess policy. In *Empire Fire and Marine Insurance Company v Duran*, the excess policy contained a definition of “insured” that specifically neither included nor excluded the permissive user in question (i.e., the excess policy was silent in terms of whether the permissive user in question qualified as an “insured”). In *Empire Fire and Marine Insurance Company v Archer*, the excess policy contained a definition of “insured” that excluded the permissive user in question by implication (i.e., the excess policy was not silent in terms

of whether the permissive user in question qualified as an “insured,” but it required an inference to conclude that the permissive user in question did not qualify as an “insured”).

While case law addressing this specific issue is very limited, a discernible trend appears to be emerging. In the absence of a conspicuous exclusion contained in the excess policy to the contrary, the primary policy language should control the excess policy coverage. Exclusion by implication is not sufficient.

## Conclusion

Given that commercial policyholders customarily rely upon a follow form excess liability policy to address a catastrophic claim, a follow form provision customarily is contained in the excess policy. Under such a provision, the terms of coverage contained in the primary policy are incorporated by reference into the excess policy, unless a provision to the contrary is contained in the excess policy. In cases in which the excess policy is silent, or an inference based on the policy language suggests the existence of an exclusion, insurance carriers have wrongly contended that coverage is inapplicable under the excess policy. In other words, these insurance carriers have wrongly contended that (1) an omission in terms of policy language contained in the excess policy, or (2) the existence of policy language in an excess policy that is different than policy language contained in the primary policy, is sufficient to conclude that the excess policy contains a provision that is contrary to the primary policy. Commercial policyholders have contended that “contrary” means diametrically opposed to, thus, giving rise to a duty on the part of the insurance carrier to unequivocally communicate an exclusion. An exclusion that is contained in an excess policy that is at odds with the primary policy must be conspicuous. In responding to these coverage disputes, to date, the courts have upheld the intent and integrity of follow form provisions. A body of case law appears to be emerging that suggests that commercial policyholders can indeed rely upon a follow form excess policy to address a catastrophic claim, thereby protecting the assets of the commercial policyholder, in the absence of conspicuous wording to the contrary.

## Endnotes

1. In practice, this technical distinction between umbrella and pure excess insurance sometimes is ignored, and the terms are used interchangeably.
2. United States District Court for the Northern District of Ohio Western Division, Case Number 3:05-CV-07369 — James G. Carr (Chief Judge), filed February 15, 2007.

In this article, attention is confined to the interpretation of excess liability insurance policies that contain a follow form provision. The issue concerning whether a primary policy should be considered in interpreting an excess policy is not restricted to these sort of cases, however. For example, this issue can arise in the case of an excess property insurance policy that does not contain a follow form provision. See *Northrop Grumman v Factory Mutual Insurance Company*, U.S. District Court Central District of California, August 16, 2007, CV 05-08444 DDP. In this particular case, a wind-driven storm surge loss caused by Hurricane Katrina clearly was covered under the primary property insurance policy; it was not clearly excluded under the excess property insurance policy. The insurer unsuccessfully argued that its excess policy should be interpreted without considering language in its primary policy, which the court found “illogical.” For commentary concerning this case, see Roberto Cenicerros, “Buyer Wins Fight over Surge Claim,” *Business Insurance*, September 3, 2007, pp. 1, 37.

For a more general discussion of issues pertaining to excess liability insurance, see Douglas R. Richmond, “Rights and Responsibilities of Excess Insurers,” *Denver University Law Review*, Volume 78, Number 1, 2000, pp. 29-123; Scott M. Seaman and Charlene Kittredge, “Excess Liability Insurance: Law and Litigation,” *Tort and Insurance Law Journal*, Volume 32, Number 3, Spring 1997, pp. 653-714.

3. *Id.*

In this declaratory judgment action brought by Empire Fire and Marine Insurance Company, Joseph W. O'Neil and Jennifer N. Brown of Arthur, O'Neil, Mertz, Michel, and Brown Company, L.P.A. represented Nicholas Keifer, from whom a judgment was obtained for \$1,050,000 for Jason A. Chehi and \$50,000 for Danielle Chehi in the underlying tort action. The court ruled that, as a matter of law, Nicholas Keifer qualified as an "insured" under the applicable umbrella policy. In the interest of full disclosure, the author was retained as a consulting expert by Joseph W. O'Neil and Jennifer N. Brown for the purpose of evaluating various coverage issues in this case, including whether Nicholas Keifer qualified as an "insured" under the applicable umbrella policy. The author concluded that Nicholas Keifer did indeed qualify as an "insured" under the applicable umbrella policy.

4. Medical expenses and other items totaling about \$350,000 were paid under worker compensation.
5. Because Nicholas Keifer was not an employee of Montpelier Auto Auction, any immunity of Workers Compensation did not apply to him.
6. The question arises concerning why Empire Fire and Marine Insurance Company resisted paying this claim. The obvious reason is that the financial stakes were huge.

More generally, if the insurers' intent were not to pay this sort of claim, why not change the policy language and make it clear? Only the underwriting executive who drafted the policy can address this question. For whatever reason, the policy language contained in the excess policy rarely matches exactly the policy language contained in the primary policy. An exact match is rare even in those cases where the same insurer issued both the primary policy and the excess policy. Given that such is the case, undoubtedly claims of this sort will continue to be presented under an excess policy. Because unique circumstances (e.g., a friend of an employee performs a task that would be normally performed by an employee) cannot be fully anticipated by an underwriting executive who drafts an excess policy, coverage disputes are bound to occur.

7. Specifying a very low policy limit in the primary policy (i.e., \$12,500), and a very high policy limit in the excess policy (i.e., \$2,000,000) is not at all unusual. The vast majority of third party liability claims filed against the policyholder involve minimal damages and/or are of questionable merit. Excess insurance rarely is applicable even though it customarily is written on the top of a primary policy with a minimal policy limit. The policy limit contained in an excess policy customarily is very high so that the policyholder is afforded catastrophic coverage were a serious mishap to occur in connection with its business.
8. A loading may be added to the excess rate to determine the rate for an umbrella policy. This loading reflects the fact that an umbrella policy provides broader coverage than the primary policy.
9. Of course, if the employee was within the scope of employment, liability would be imputed to the employer — the named insured — in which case coverage would be applicable under the excess policy. In most cases, albeit not all cases, involving permissive use of a "covered auto" by an employee, the use of the "covered auto" by the employee is within the scope of employment.
10. To date, the case law that has addressed this issue is sparse. A legal brief filed with the court in *Empire Fire and Marine Insurance Company v Nicholas Keifer et al.* by counsel representing Nicholas Keifer, Joseph W. O'Neil and Jennifer N. Brown cited only one other case that directly addresses this issue in addition to these two mid-level state appellate court decisions. In *GenCorp, Inc. v American International Underwriters*, 178 F. 3d 804 (1999), the United States Court of Appeals, Sixth Circuit, upheld the intent and integrity of follow form provisions that were contained in a number of excess policies. In this particular case, an endorsement excluding pollution was added to the primary policy subsequent to its issuance. The respective excess policies did not contain a pollution exclusion. The court ruled that the pollution exclusion contained in the primary policy was incorporated by reference into the respective excess policies. Thus, a follow form provision cuts both ways; it may or may not result in coverage for the commercial policyholder under an excess policy.