Excess and umbrella liability insurance tends to be a common source of confusion and apprehension for agents and brokers, due to at least a couple of issues. First, the terminology used can create confusion, since the industry often uses the terms “excess” and “umbrella” somewhat synonymously. Second, this product is a ripe opportunity for agents and brokers to unknowingly fail to prevent or avoid coverage gaps, which can expose them to significant E&O claims.

What are the differences between specific and aggregate excess liability policies?
Specific excess liability insurance and aggregate excess liability insurance are commonly used in connection with self-insured workers compensation programs. Because these types of policies are designed to apply over a self-insured retention rather than a layer of primary insurance, they are structured a bit differently than the more traditional types of excess liability policies.

A specific excess liability policy requires the insured to retain a specified amount of loss from the first dollar for all losses resulting from a single occurrence. The insurer will then pay losses in excess of the retention, subject to the policy limit.

An aggregate excess liability policy (sometimes called a stop loss excess liability policy) requires the insured to retain a specified amount of loss from the first dollar during a specified period of time, usually one year. The insurer then pays for all loss for that period which exceeds the retention, subject to the policy limit.

Are there excess liability policies that combine both of these approaches?
Yes, there are policies that do this, providing the insured with the benefits of both approaches. For example, an insured might incur several moderate losses during a policy period, none of which exceed the each occurrence retention. Under a specific excess liability policy, the insured would not be able to collect for any of the losses. With a combined specific/aggregate excess liability policy, however, if the total of losses for the policy period exceeds the aggregate retention, the insured could collect for that amount over the loss.

Typically, umbrella liability policies contain an SIR (self-insured retention) while excess liability policies do not.
Specifically, how does the SIR apply?
When a loss covered by the umbrella liability policy (i.e., it is not excluded) is not covered by any of the underlying policies, the drop-down coverage is subject to the umbrella policy’s self-insured retention (SIR).

There are two situations in which the SIR does not apply:
1) When the umbrella liability policy is paying in excess of a loss covered by the primary policy; or
2) When the umbrella liability policy is dropping down to pay a loss because the primary policy’s aggregate limit has been impaired or exhausted.

Self-insured retentions can vary from as little as $500 for small businesses to $1 million or higher for large businesses. In many umbrella liability policies the retention does not apply to defense costs.

So the self-insured retention applies just like a deductible?
Not exactly. Self-insured retentions are similar to deductibles in that both represent amounts of loss that the insured must retain; but they also differ significantly. Insureds generally handle all aspects of claims falling within the retention. With deductibles, the insured must still report all claims within the deductible to the insurer, who then makes full payment of the claim to the third-party claimant and seeks reimbursement of the deductible from the insured.

Do umbrella policies contain aggregate limits?
Almost all umbrella liability policies contain aggregate limits that operate like the aggregate limits in the underlying insurance.

In some cases, the aggregate limit applies to all claims covered under the umbrella, while in other cases the aggregate limit in the umbrella applies only to those coverages in the underlying insurance that are subject to an aggregate limit. The Business Auto Coverage Form does not contain an aggregate limit.

What happens if the aggregate limit in the umbrella liability policy is reached before the primary policy’s aggregate limit is exhausted?
This is not a good situation from the standpoint of the insured. Some insurers will allow the insured to reinstate the umbrella aggregate for an
What types of insuring agreements do umbrella liability policies typically have?
Many umbrella liability policies contain a single comprehensive insuring agreement instead of several specific insuring agreements. A common approach is for the insurer to promise to pay the “ultimate net loss” in excess of the “underlying limit” that the insured becomes legally obligated to pay as damages for bodily injury, property damage, etc., which arise out of an occurrence.

An alternative to the single broad insuring agreement approach is the Coverage A/B format. This format combines two insuring agreements, usually called Coverage A and Coverage B. The Coverage A insuring agreement provides excess liability coverage applying over the underlying policies; Coverage B furnishes umbrella liability coverage for claims not covered by the underlying coverage but covered by the umbrella. The SIR applies only to claims covered under Coverage B.

It is important not to confuse the Coverage A/B terminology here with Coverages A and B of the CGL policy. In the CGL, Coverage A covers bodily injury and property damage while Coverage B covers personal and advertising injury.

Some insurers who use the Coverage A/B format make Coverage B available only on a claims-made basis. This is disadvantageous to the insured when the primary liability coverages are written on an occurrence basis. There is much less exposure to potential coverage gaps if Coverage A/B is also written on an occurrence basis.

How do umbrella policies define “occurrence?”
The insuring agreement of an umbrella liability policy commonly utilizes an occurrence as the cover trigger and typically uses the same definition of occurrence that is used in the CGL—i.e., “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

A problem that exists in some umbrella liability policies is that the occurrence coverage trigger applies to all claims. This can cause a coverage problem for the insured in the case of personal injury or advertising injury “offenses” (the coverage trigger in the CGL) which do not meet the definition of occurrence.

How can this situation be avoided?
It can be circumvented by having the umbrella coverage triggered by an occurrence for bodily injury and property damage claims; and triggered by an offense for personal injury and advertising injury claims.

How do occurrence or claims-made coverage triggers apply in umbrella liability policies?
Some umbrella liability policies contain a coverage trigger that differs from the occurrence and claims-made triggers found in most primary liability policies. These umbrella liability policies trigger coverage for bodily injury or property damage based on when the wrongful act takes place, rather than when the injury or damage occurred.

Can you give an example?
With this type of coverage trigger, coverage for injury resulting from a defective product would be provided by the policy in effect when the product was manufactured; not by the policy in effect when the customer was actually injured by the defective product.

What other problems should be avoided?
Gaps in coverage can occur when the umbrella or excess liability policy has a different coverage trigger than the underlying coverage. To avoid this problem, some insurers provide both occurrence and claims-made coverage triggers in their umbrella policies. These policies avoid the potential coverage gap issue by having the coverage trigger for the umbrella coverage the same as that used for the underlying coverage.

So if both the umbrella liability policy and the underlying liability policy have a claims-made coverage trigger, will there be any problems?
Possibly. In this instance, the insured should seek to obtain the same retroactive date and extended reporting period options for both policies. This may be difficult to achieve, however, since the extended reported period provisions of the claims-made CGL form are far more generous than those of most umbrella policies.

How is defense coverage handled in umbrella liability policies?
Defense coverage is among the most important coverages provided by an umbrella liability policy. Like the CGL, some umbrella policies offer defense coverage in addition to their limits, while others provide the coverage within their limits. Having defense coverage included within limits is a significant disadvantage to the insured because the limits may be exhausted much more quickly than if the defense costs were paid in addition to the limits.
In some umbrella policies, defense costs are included within the definition of ultimate net loss, which is then in turn subject to the policy limits. Other umbrella policies, which have separate defense provisions, do not include defense costs within the definition of ultimate net loss.

**Are there any other important issues related to the issue of defense costs?**
Yes, the issue of when the umbrella insurer becomes involved in handling the insured’s defense should be considered. Generally speaking, an umbrella insurer is not obligated to defend unless one of the following situations applies:
1) The underlying policy limits have been paid, and the underlying insurer’s duty to defend has ended; or
2) The underlying policy does not cover a claim, and the umbrella policy is required to drop-down to provide coverage.

An underlying insurer with a defense obligation in addition to its policy limits usually cannot satisfy that obligation by merely tendering its limits and choosing not to be further involved in the claim. Unless the next layer of coverage, whether it is an excess liability policy or an umbrella policy, agrees to assume the responsibility for defense, the underlying insurer will likely be forced to seek judicial approval of its withdrawal from the defense obligation.

**Can you discuss the exclusions typically found in umbrella liability policies?**
Like any other liability policy, an umbrella liability policy contains exclusions restricting the coverage granted by the insuring agreement. While the exclusions found in umbrella liability policies resemble those of the underlying policies, there are some subtle and important differences.

**What are some examples of exclusions that are the same as in the underlying policies?**
Most umbrella liability policies contain a number of exclusions that are the same as, or are very similar to, those in the underlying policies. The effect is that the umbrella policy will essentially cover just like a following form excess policy with respect to the affected loss exposures. Examples of these types of exclusions are:
- expected or intended injury
- workers compensation and similar laws
- war
- damage to your product
- damage to your work
- damage to impaired property or property not physically injured

**What about exclusions which have been omitted from the underlying policies?**
These omitted exclusions can be subdivided into the following two groups:
1) Exclusions which have been omitted because they are simply not needed; and
2) Exclusions which have been omitted in order to broaden the umbrella coverage.

First, because umbrella policies ordinarily cover CGL, commercial auto, and employers’ liability exposures under a single policy form, many of the exclusions and other provisions found in the underlying policies are simply not necessary. Examples include:
- The auto liability exclusion in the CGL
- The loading and unloading exclusions of both the CGL and auto policies
- The CGL exclusion regarding transportation of mobile equipment

Second, the following exclusions are omitted in order to broaden the umbrella coverage:
- The contractual liability exclusions of both the CGL and the auto policies
- The liquor liability exclusion of the CGL
- The employers liability exclusion of accidents occurring outside the US or Canada

**What about exclusions which are less restrictive than their counterparts in the underlying policies?**
In many cases, an umbrella insurer is willing to broaden coverage for a particular loss exposure without covering it entirely. So instead of omitting the underlying exclusion from the umbrella policy, the insurer uses a similar, but less restrictive, exclusion instead. Obviously, when the exclusion in the umbrella policy is less restrictive than its counterpart in the underlying policy, the umbrella policy has the potential for providing drop-down coverage for some losses not covered by the underlying insurance.

**Can you give some examples?**
Here are a couple of examples:
**Watercraft and Aircraft Exclusion**
The CGL policy contains an exclusion of liability arising out of the use of autos, watercraft, and aircraft. In most umbrella policies, the exclusion is limited to just watercraft and aircraft liability, since most umbrella policies typically cover auto liability loss exposures in excess of the underlying auto liability coverage. In addition, many umbrella liability policies narrow the scope of the watercraft/aircraft exclusion to provide broader coverage for aircraft and watercraft than the underlying insurance does.

**Care, Custody, or Control Exclusion**
Many umbrella policies exclude damage to property in the care, custody, or control of the insured. These exclusions vary considerably from policy to policy. In some policies, the exclusion applies to any property in the insured’s care, custody, or control; while in other policies, the exclusion applies only to watercraft or aircraft, or both, while in the insured’s care, custody, or control. In still other policies, the exclusion applies only to the extent the insured is contractually obligated to pay for damage to the property or to insure it.

And finally, what about exclusions that are more restrictive than their counterparts in the underlying policies?
Because they provide drop-down coverage for claims not covered by the underlying insurance, umbrella policies are often viewed as being broader than the underlying policies in ALL respects. In reality, most umbrella policies contain some exclusions which are more restrictive than the underlying insurance.

Can you give some examples?
Three good examples come to mind:

**Pollution Exclusion**
The CGL policy, despite its pollution exclusion, does provide some level of coverage for bodily injury or property damage resulting from pollution incidents, e.g., products and completed operations, smoke and fumes from a hostile fire, and some off-premises incidents. Also, the business auto policy covers various pollution incidents other than those involving cargos of pollutants being transported by the insured’s own vehicles.

Umbrella policies vary in their treatment of pollution claims. Some umbrella policies exclude pollution claims of any kind, subject to exceptions which duplicate to varying degrees the pollution coverage found in the CGL and business auto policies. Other umbrella policies contain total pollution exclusions which are not subject to any exceptions whatsoever. Also, many umbrella policies contain an absolute exclusion of liability arising out of exposure to asbestos.

**Punitive Damages Exclusion**
The CGL and business auto policies of ISO do not typically exclude punitive damages; but many umbrella policies do, either with respect to an explicit exclusion of punitive damages or in the language of the policy’s insuring agreement. When umbrella policies state that they will pay damages but do not define the term “damages,” the policies are usually interpreted to include punitive damages, unless the controlling jurisdiction does not permit insurance to cover punitive damages.

**Cross-Liability Exclusion**
Like the CGL and business auto policy, umbrella policies frequently exclude coverage for suits between fellow employees. In addition, some umbrella policies contain a cross-liability exclusion which removes coverage for lawsuits between ANY insureds, not just fellow employees.

An umbrella policy with a cross-liability exclusion can be problematic for the insured, particularly if the underlying insurance provides coverage for a wide variety of additional insureds.

What types of endorsements are commonly used in excess and umbrella liability policies?
Endorsements modify an existing policy form from one of the basic parts of the policy—i.e., declarations, insuring agreements, exclusions, definitions, limits, who is an insured, conditions, etc.

Basic excess and umbrella liability policy forms tend to be relatively broad, so the common underwriting practice is to tailor the coverage for a particular insured by attaching endorsements addressing the individual risk characteristics of that particular insured.

What impact on coverage does the Maintenance of Underlying Insurance provision have?
The Maintenance of Underlying Insurance provision requires the insured to maintain all required underlying coverages in full force—and at the required limits throughout the policy term—except to the extent that their aggregate limits become impaired or exhausted by the payment of claims. If the underlying insurance is not maintained, the umbrella policy will apply only as though the underlying insurance had been maintained. The umbrella policy will not drop down to pay claims that would have been covered by the required underlying policy.
Any other important issues to be aware of?
Yes, the Maintenance of Underlying Insurance provision often includes a clause which, if ignored, can be very problematic for the insured. The effect of this clause is that the inception and expiration dates of an umbrella policy, and all underlying policies must be concurrent—i.e., exactly the same. In other words, the umbrella policy’s drop-down coverage for depleted underlying aggregate limits is only for occurrences taking place during the coverage period of the umbrella policy. If the policy periods are not concurrent, coverage gaps can result.

Are there any problems which can be encountered when excess liability coverage is layered?
Yes, there are several potential problems. The aggregate limits may vary with the umbrella and excess layers. The umbrella policy, for example, may be subject to a general aggregate limit and a products/completed operations aggregate; whereas some of the excess layers may be subject to a so-called basket aggregate limit, which applies to all coverages.

The excess liability policies may differ regarding the insurer’s obligations for defense. Some excess liability policies may include coverage for defense (usually within policy limits); whereas others may not recognize defense costs in determining whether underlying policy limits have been exhausted.

Whenever excess liability layers are to apply over the first umbrella layer, the excess layers should follow the provisions of the umbrella policy exactly. However, excess liability policies are seldom true following form policies in every aspect of coverage. Even when an excess liability policy states that it is a following form policy, it must be compared with the umbrella policy to determine ways in which the coverage under the excess liability policy is more restrictive than that provided by the underlying policy.

When identifying and preventing potential coverage gaps, and thus, E&O exposures, what important points would you recommend agents and brokers be aware of in placing excess and umbrella insurance?
I would recommend close attention be paid in the following areas:

• Just because the CGL policy and the excess or umbrella liability policies are written by the same insurer, this does not guarantee concurrency of coverage. The coverages should be coordinated, even if both are written by the same insurer.

• Keep in mind the significant differences between self-insured retentions and deductibles with respect to control over claims.

• The ability to reinstate the aggregate in the excess or umbrella liability policy, even at an additional premium, is a very advantageous feature.

• With the Coverage A/B insuring agreement format, it is important that the excess or umbrella liability policy and the primary policies be consistent with respect to having claims-made vs. occurrence triggers.

• Look for consistency between the excess or umbrella liability and the primary policies, including the definitions of bodily injury, ultimate net loss, injury, etc.

• Be wary of an excess or umbrella liability policy which uses only “occurrence” as its coverage trigger; this could create problems with personal and advertising offenses, which do not qualify as occurrences.

• When both the excess or umbrella liability policy and the primary policies are written on a claims-made basis, be sure to achieve consistency with respect to retroactive date and extended reporting periods.

• Be wary of excess and umbrella liability policies containing a cross-liability exclusion, particularly when the underlying insurance provides coverage for a wide variety of additional insureds.

About the Author:
Craig A. Mathre, CIC, CRM, CPCU, CLU, AU, AIC, AAM, ASLI, ARM, ARe
Craig Mathre is vice president/national casualty director for Max Specialty, a new U.S.-based excess and surplus lines arm of Max Capital Group. Craig is an instructor for CIC Commercial Property Institutes, serves on the Education Committees of both NAPSLO and AAMGA, and does freelance work involving insurance education and training.

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