



WHAT HAPPENS WHEN YOU FINALLY REACH MILLIONAIRE ACRES

HOW A FEW WORDS CAN TRIGGER MILLIONS MORE IN INSURANCE COVERAGE

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In 1860, Milton Bradley originally introduced *The Game of Life*. Players moved around a board, hoping to someday reach “Millionaire Acres.” Of course, back then, a million dollars meant much more than it does today.

In the more serious game of risk transfer, it has been quite common for a general liability policy to have a damages limit of \$1 million. Like dollar figures everywhere, those limits have been creeping up by the millions. And above that, an excess layer or two of coverage is not uncommon.

On the other side of the coin, an insured’s business contracts have changed as well. Parties seeking additional insured status demand higher and higher limits, and

often the question of “how much coverage did the insured agree to provide?” can no longer be answered “the contract requires a million dollars in coverage.”

Aside from specifying outright higher limits like “\$2 million” or “\$3 million” in general liability coverage, a few simple words can potentially multiply a \$1 million limit into something much more. These phrases appear in the insured’s contracts with third parties, in that part of the contract that requires additional insured status for another party. They are simple prefaces like “at least,” “no less than,” or “a minimum of” (for purposes of this article, we’ll call these terms

the “escalating phrases”). As a result, a contractual requirement to procure “a minimum of \$1 million in liability coverage” – while technically satisfied by a \$1 million policy – could present additional exposure on policies with higher limits.

In an industry accustomed to the phrase “a million dollars in coverage,” the addition of these words can be a pitfall for the unwary. While it may be common to ignore these escalating phrases, several courts have not.

THE POLICY LANGUAGE COMPARED TO THE INSURED’S CONTRACT

Generally speaking, an insurance policy is a stand-alone contract between the insurer and the insured. But a common exception exists in instances where the in-

insurance policy incorporates another document, such as another contract entered into by the insured, by reference to it.

Many additional insured endorsements simply add insureds where required by contract. Other endorsements have the same language, but go further to add that the coverage provided will be capped at either the policy limits or by the amount required by the insured's contract. Clearly, the intent is to limit additional insured coverage to the amount the insured agreed to provide in its contract. At first blush, this would appear to neutralize the escalating phrases, but upon further review, this condition generally does not.

The courts have found that these escalating phrases expose the insurer for the entire policy. In one example, an appellate New York court compared a contract that required "minimum general liability limits of \$500,000" to such an additional insured endorsement. The additional insured argued that the plain language requiring "a minimum" of \$500,000 also triggers any coverage above that, in this instance a \$1 million general liability policy. The carrier argued that the figure that appeared in the contract was \$500,000, and that the additional insured endorsement capped the limits for additional insureds to the coverage amount required by the contract. The court found the terms were clear; but at worst, the limitation was ambiguous and thus interpreted in the insured's favor. As a result, what may have looked like a \$500,000 insurance requirement turned into a \$1 million requirement.

In a similar example, a California court reviewed a subcontract that required the general contractor to have additional insured coverage "of not less than \$300,000" per occurrence. The carrier argued that "not less than" meant that a coverage limit below that was unacceptable, but that \$300,000 satisfied the subcontract. The court disagreed, finding that the subcontract language did not support a restriction on the terms of the policy, because "the subcontract only sets a floor, not a ceiling, for coverage." Under this interpretation, when the subcontract set forth a "minimum" limit, the endorsement that agreed to provide that limit really doesn't have a limit at all.

The 2013 standard additional insured endorsements introduced by Insurance Services Office, Inc. (ISO) place some limitations on additional insured coverage. One of the new limitations is that the insurance afforded to the additional insured will not be broader than that required by the contract or agreement. That's fine, as long as the contract or agreement specifies a cer-

tain sum. Otherwise, the new endorsement is still susceptible to the same argument.

It would appear that absent a specific, stated policy limit for additional insureds, that any policy endorsement, by its plain language, would support this interpretation that exposes the policy limits for additional insureds. In that regard, even language that limits coverage to whatever is required by contract, where the contract contains escalating phrases, only sets a minimum floor for the coverage limit.

WHAT ABOUT EXCESS POLICIES?

When you think about it, if a contract sets a minimum for coverage, the argument could be made that if no limit applies at all, then coverage is triggered up through any applicable excess policies. Here, the courts generally agree, but are not unanimous.

One court heard the same arguments on a contract requiring "at least \$250,000 in coverage," but with a twist. One carrier issued a general liability with a \$1 million limit, as well as an umbrella policy with a limit of \$5 million. The certificate of insurance listed the additional insured party "as an additional insured as their interests may appear." The carrier included an argument that this limitation supported a \$250,000 cap. Like the other courts, the Illinois court found no limitation on coverage, and in this instance, the "policies themselves provided up to \$6 million in coverage, and contained no language limiting coverage for additional insureds." There, the addition of the simple words "at least" in the insured's contract resulted in the significant movement of the coverage limit from \$250,000 to \$6 million.

Similarly, another court looked at a contract that required "at least \$4 million per occurrence" and contained the common proviso that "this limit may be provided by a combination of primary and umbrella/excess policies." The underlying policy provided \$1 million in coverage, but the excess policy had a \$9 million limit. Although the court recognized that other primary policies would be triggered prior to the excess policy, the excess policy was still triggered for its entire limit; whether or not that limit would be reached was another story.

On a slightly different issue, a subcontractor was required to include the general contractor as an additional insured, with a limit of \$2 million per occurrence, with no escalating phrases. The underlying carrier's policy set a \$1 million limit, which applied first. So far, so good. The excess carrier argued that its contribution was limited to another \$1 million, for a total of \$2 million, in

accordance with the contract; in other words, the excess carrier's obligation would be offset by the underlying carrier's contribution. But the excess policy indicated that it provided "the minimum limits of insurance required in the contract or agreement." By the plain language, the terms of the excess policy agreed to provide a minimum of \$2 million, which was the amount required by the contract. The court held that "the average insured could reasonably expect \$2 million in coverage" under the excess policy, ruling against the excess carrier.

But at least one court has ruled that the underlying policy fulfills the contractual obligation. There, a drilling contractor was required to procure liability coverage "with limits of not less than \$100,000," and that "no other insurance shall be carried at the expense of the joint account." The drilling contractor purchased a number of policies, including a \$1 million general liability policy and a \$1 million excess policy. A large loss occurred, and the owner sought additional insured status. The Texas court found that the first policy must provide coverage up to its \$1 million limit, but that the excess policy was not reached. They reasoned that the excess policy added insured "only to the extent of" the contractual obligations, and that the contract did not require "excess" insurance. Moreover, the underlying policy "wholly fulfilled" the contractual obligation to procure insurance. Nevertheless, the court appears to have glossed over the "not less than" language.

CONCLUSION

Overall, there appear to be several reasonable arguments that an additional insured can make to increase available insurance coverage, if the magic escalating phrases appear in the contract. It may be that the value of these little words is often overlooked, but a sampling of the case law on the subject suggests that this is an argument well worth pursuing by the additional insured.



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