

When Insurer Insolvency Won't Trigger Excess Coverage

By **Michael Kotula** (October 22, 2026)

Last month, in *A.R. Wilfley & Sons Inc. v. National Union Fire Insurance Co. of Pittsburgh, PA*, the Colorado Supreme Court held that an umbrella insurer did not drop down to defend and indemnify against numerous asbestos bodily injury lawsuits in place of an insolvent primary insurer.^[1]



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When the last of the policyholder's solvent primary insurers exhausted its limits, the policyholder demanded that an umbrella insurer drop down and stand in the shoes of the insolvent insurer. The umbrella policies, however, expressly provided they would only defend and indemnify with respect to an occurrence "not covered by the underlying policies ... but covered by the terms and conditions of this policy."

The court, in its Sept. 21 ruling, joined a national consensus in holding that the phrase "not covered" means "never covered," not "covered but not collectible." It found the asbestos claims were covered by the underlying insolvent policies, even though they were not collectible.

Taken together with allocation case law for long-tail claims, the result of the ruling is that the policyholder must itself pay the benefits provided by the insolvent policy before it may tap the umbrella policies for covered claims.

Case Background

The facts of the case read like countless asbestos coverage cases. A.R. Wilfley & Sons manufactured industrial pumps for over a century. Since the 1980s, Wilfley has been named as a defendant in numerous lawsuits brought by individuals alleging bodily injury from exposure to asbestos in its products. Certain of Wilfley's primary insurers defended and indemnified it against the lawsuits. But after they all exhausted their policy limits, Wilfley faced a dilemma — who, if anyone, would defend and indemnify it in the asbestos lawsuits?

Wilfley tendered the lawsuits to Federal Insurance Co., which had issued umbrella policies to Wilfley that sat above primary policies issued by the insolvent Reliance Insurance Co. Federal agreed to defend at first, subject to a full reservation of rights to deny coverage, and later denied coverage. Wilfley filed suit in the U.S. District Court for the District of Colorado in 2023, asserting claims against Federal.

Wilfley's theory was straightforward — because the benefits under Reliance's scheduled underlying policies became uncollectible due to its insolvency, Wilfley contended its asbestos claims were "not covered" by the policies. It urged the court to require Federal to drop down and supply the coverage Reliance could no longer give.

Federal, however, maintained the policies only afforded excess coverage because the underlying Reliance policies covered the asbestos claims. Federal's position, not surprisingly, was that the phrase "not covered" involved whether the occurrence was within the scope of the underlying policies and did not turn on whether the insurance was collectible.

Summary of Decision

The Colorado Supreme Court aptly examined the structure of an umbrella policy, noting it affords two different coverages — umbrella and excess coverage. The umbrella coverage affords primary coverage when the primary insurance affords no coverage at all, and the excess coverage provides additional limits of insurance over the primary policy once the primary limits have been exhausted.[2] Excess insurance presents less risk to the insurer, which is reflected in the lower premiums charged for the coverage.[3]

The court found the Federal policy language "clear as a Colorado cloudless noon, allowing for only one reasonable reading." [4] It held that Federal, as an umbrella/excess insurer, did not assume the risk to defend and indemnify Wilfley against claims for which the underlying primary insurer afforded coverage.[5]

Wilfley's interpretation of "covered," which included the concept of collectibility, bore no relation to the policy language in the umbrella policies. That policy language made a clear and definite distinction between the existence of coverage in a scheduled underlying policy and the collectibility of coverage from an unscheduled policy.[6]

Scheduled underlying insurance is a policy purchased by the policyholder to serve as a primary policy in this context, while unscheduled insurance is coinsurance that may exist, such as additional insured coverage. The court held that collectibility simply played no role with scheduled underlying insurance.[7]

The court found the Federal policies were based on Wilfley maintaining scheduled underlying insurance, and on Federal sitting above that insurance and affording excess coverage. Wilfley's interpretation would turn Federal into a financial guarantor of every scheduled underlying insurer — something Federal neither agreed to do, nor charged a premium to cover.[8]

In rejecting drop-down, the court observed that numerous courts recognize the phrase "not covered" concerns occurrences that are outside the underlying policy's scope of coverage, not the underlying insurer's ability to pay a claim.[9]

Analysis

Insurance is about allocation of risk. The risk belongs to the insured, but may be transferred to an insurer. The insured decides which insurers it wishes to purchase from, considering their financial condition, price and other factors. Courts also recognize that umbrella and excess insurers provide the insured with the "final tier coverage at a premium reduced to reflect the lesser risk to the insurer." [10]

Insurer insolvency in the long-tail claim context, such as asbestos bodily injury or environmental pollution, creates gaps in coverage when multiple policies issued over time may respond to the loss. These gaps incentivize policyholders to try to fill them with other insurance policies. Frequently, they will argue that an umbrella or excess policy should drop down and take the place of an underlying insolvent primary or excess policy.

The drafters of umbrella and excess policies, however, were not neophytes, unaware of how circumstances can unfold. They anticipated the possibility of insurer insolvency by employing distinct policy language to communicate their intent that the coverage afforded not drop down in the event of an underlying insurer's insolvency.

The starting point for litigating a drop-down issue is identifying the umbrella or excess

policy language that dictates how and when the policy coverage is triggered — what exactly must happen for the policy to respond?

The "not covered" language in the Federal policies in Wilfley, and other language, such as requiring exhaustion "by reason of losses paid thereunder," have both been held to clearly and unambiguously prevent drop down by umbrella and excess policies.

The Wilfley decision joins a growing national consensus enforcing clear and unambiguous anti-drop down policy language in umbrella and excess policies.[11] The "not covered" language, contained in the umbrella policies in Wilfley, has been met with near universal acceptance as a defense to drop down arguments made by policyholders faced with underlying insurer insolvencies.

Other policy language requiring reduction or exhaustion of the underlying policy "by reason of losses paid thereunder" has likewise been held to prevent drop-down in the event of underlying insurer insolvency.[12]

For example, in Span Inc. v. Associated International Insurance Co., the California Court of Appeal examined this language in 1991 and concluded "[b]ecause only payment of the underlying limit will trigger [the excess insurer's] insuring agreement, insolvency of the primary carrier is excluded, indirectly, but unambiguously, as a means of exhaustion of the underlying policy." [13]

The big picture implications of decisions like Wilfley are seen in connection with allocation of loss in long-tail claims. In Public Service Co. of Colorado v. Wallis & Cos., for example, the Colorado Supreme Court, in 1999, adopted a pro rata time-on-the-risk allocation methodology in connection with environmental property damage.[14]

Using this framework, the policyholder bears the pro rata time-on-risk share for periods of no insurance, including for periods of insurer insolvency. With a primary policy, where the defense costs are in addition to limits, the policyholder must bear the defense costs attributable to the insolvent policies, as well as the indemnity costs up to the limits of the policies.

In contrast, in jurisdictions adopting all-sums allocation, the policyholder can simply target insurers in other periods not affected by insolvency and avoid the gaps in coverage, and thereby not dip into its own pocket to pay for the defense and indemnity of the lawsuits.

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[1] -- P.3d --, 2026 CO 64 (Colo. 2026).

[2] 2026 CO 64, P36-37.

[3] 2026 CO 64, P37.

[4] 2026 CO 64, P39.

[5] 2026 CO 64, P40.

[6] 2026 CO 64, P42.

[7] Id.

[8] Id.

[9] 2026 CO 64, P50, citing *Mission Nat'l Ins. Co. v. Duke Transp. Co.*, 792 F.2d 550, 553 (5th Cir. 1986) ("[W]hen an excess insurer uses the term 'covered' or 'not covered,' it is agreeing to drop down only in the event that the terms of the underlying policy do not provide coverage for the occurrence or occurrences in question."); *Garmany v. Mission Ins. Co.*, 785 F.2d 941, 947 (11th Cir. 1986); *Wells Fargo Bank, N.A. v. California Ins. Guarantee Ass'n*, 38 Cal. App. 4th 936, 45 Cal. Rptr. 2d 537, 544-545 (Cal. Ct. App. 1995).

[10] *Bovis Lend Lease LMB, Inc. v. Great American Ins. Co.*, 53 AD3d 140, 148, 855 N.Y.S.2d 459 (1st Dep't 2008).

[11] See, e.g., *Mission Nat'l Ins. Co. v. Duke Transp. Co.*, 792 F.2d 550, 553 (5th Cir. 1986); *Garmany v. Mission Ins. Co.*, 785 F.2d 941, 947 (11th Cir. 1986); *St. Paul Travelers Cos. v. Corn Island Shipyard*, 495 F.3d 376, 386 (7th Cir. 2007); *Pergament Distributors, Inc. v. Old Republic Ins. Co.*, 128 A.D.2d 760, 513 N.Y.S.2d 467, 468 (2d Dep't 1987).

[12] *Span, Inc. v. Associated Int'l. Ins. Co.*, 227 Cal. App. 3d 463, 277 Cal. Rptr. 828, 836 (Cal. Ct. App. 1991); accord *Wells Fargo Bank, N.A. v. California Ins. Guarantee Ass'n*, 38 Cal. App. 4th 936, 45 Cal. Rptr. 2d 537, 544-545 (Cal. Ct. App. 1995).

[13] Id., 227 Cal. App. 3d at 468, 477.

[14] 986 P.2d 924, 940-941 (Colo. 1999) ("Thus, where damages are not reasonably divisible and therefore cannot be precisely attributed to successive insurance policies, the total amount of damages should be divided by the total number of years to yield the amount of damage that is fairly attributable to each year. For example, if an insured's liability for a decade of pollution is one million dollars, then one tenth of the total liability, or \$100,000, is fairly attributable to each policy-year.").