

Primary and Noncontributory

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Primary and noncontributory is such a ubiquitous term that it is unlikely anyone involved in commercial insurance or risk management has escaped its grasp. Whether attempting to comply with the demand or determining whether someone else's insurance is primary and noncontributory, you are drawn into the fracas.

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A Search for Meaning

The term is rarely defined in either an insurance policy or the underlying contract that imposes such an obligation. And there does not appear to be any well-settled understanding of the phrase. The purpose of this article is to try to move toward a more common understanding of primary and noncontributory.

Additional Insured

As context is significant, it is important to start by recognizing that primary and noncontributory concerns additional insured coverage. That is, the contract I have with you requires me to purchase liability insurance and to include you on my policy as an additional insured.

But not only have I agreed to include you on my liability insurance as an additional insured, the coverage I have agreed to provide to you as an additional insured must also be primary and noncontributory. Of course, it would be helpful (read necessary) to understand exactly what primary and noncontributory means.

A Likely Story

Unlimited Liability Insurance

Some have posited that primary and noncontributory means that the insurance I am providing to you is without limit. In other words, noncontributory means I have agreed to provide you liability insurance so that your liability insurance would *never* respond, regardless of the size of the claim.

While I understand this as a possible interpretation, it does not seem to be a very compelling one. Typically, the very same clause that requires me to provide you with primary and noncontributory coverage also requires that I purchase a certain minimum limit of liability. To, on the one hand, require a certain minimum limit and, on the other hand, contend that noncontributory means that no limit is meant to apply cannot be easily reconciled—particularly when these apparently conflicting contractual terms are used in the same paragraph.

Further, in those cases in which the damages have far exceeded primary insurance limits available, there is no evidence that any additional insured has argued, or that

any court has found, that noncontributory means that the additional insured's own insurance will never be implicated.

Noncontributory and Contribution

Contribution—In General

This legal term usually is in reference to joint tortfeasors as well as joint and several liability. Joint tortfeasors means that two (or more) people are both liable to the same injured party for the same accident. Joint and several liability means the persons at fault are liable to the injured party both together (jointly) and separately (severally). The result is that the injured person may recover some or all of his or her damages from both or either of the persons who are liable.¹

For example, person A is injured in an auto accident due to the combined fault of person B and person C. Person B and person C are each tortfeasors. Because both share in the negligence, each is also a joint tortfeasor. Joint and several liability permits person A to recover all damages from either person B or person C (or from both). Should person A recover all damages from person B, person B would have a right of contribution from person C to recover more than his or her proportionate share of liability to person A. Similarly, person C would have the same right of contribution against person B if person A recovered all damages from person C.²

Contribution—In Insurance

Noncontributory as included in "primary and noncontributory" is generally understood to mean that contribution will not take place—there will be no contribution. Put differently, "noncontributory" is casual shorthand that is to mean contribution will not be sought. But to what, exactly, is contribution referring here?

Arguably, this is a prime source of confusion. In the context of two insurance policies applying to the same insured for the same accident or claim, contribution is *not referring to allocation of fault*. In other words, contribution should not be viewed as an attempt to "divvy up" the relative percentages of fault between the additional insured and the named insured (or any other insured). Rather, as the Court of Appeals of California explained:

In the insurance context, the right to contribution arises when several insurers are obligated to indemnify of [sic] defend the same loss or claim, and one insurer has paid more than its share of the loss or defended the action without any participation by the others. Where multiple insurance carriers insure the same insured and cover the same risk, each insurer *has independent standing* to assert a cause of action against its coinsurers for equitable contribution when it has undertaken the defense or indemnification of the common insured. Equitable contribution permits reimbursement to the insurer that paid on the loss for the excess it paid over its proportionate share of the obligation, on the theory that the debt it paid was equally and concurrently owed by the other insurers and should be shared by them pro rata in proportion to their respective coverage of the risk. [Emphasis added]

Reliance Nat'l Indem. Co. v. General Star Indem. Co., 72 Cal. App. 4th 1063, 85 Cal. Rptr. 2d 627 (1999)

This view of the meaning of contribution is further reinforced by the other insurance condition in a commercial general liability (CGL) policy form.

If two or more CGL policies share coverage for the *same insured* for the *same accident or claim*, the policy method of sharing is either contribution by equal shares or contribution by limits.

Thus, when two insurers *concurrently* provide coverage for the same insured for the same accident or claim, and one insurer pays more than its share of damages on behalf of the insured, the insurer paying more than its share has a right to contribution against the other insurer(s) to recover the amount it paid that exceeds its proportionate share.

Contribution—Equitable and Contractual

The insurer's right of contribution, according to the Court of Appeals of California, is an equitable right; thus, the insurer's right to contribution is based on the principle of fairness and derived from common law:

The purpose of this rule of equity is to accomplish *substantial justice* by equalizing the common burden shared by coinsurers, and to prevent one insurer from profiting at the expense of others. [Emphasis added]

Id.

In addition, the term *contribution by equal share* or *contribution by limits* in the CGL other insurance condition provides the insurer a *contractual* right of contribution.

Contribution—An Independent Right

Of great import here is that the right of the insurer to contribution, whether the right stems from equitable principles or from insurance contract wording, is clearly an independent right of the insurer—*independent* of the rights of any insured.

Releases and Waivers of Subrogation

The implications of this are great: if the insurer's right to contribution is not derived from the rights of the insured, advocating a mutual release between insureds or a waiver of subrogation endorsement is almost certainly unproductive in preventing contribution.

To explain: a release of one insured against another does *not* affect an insurer's independent right of contribution; the insurer is not bound by any such release or waiver of rights between insureds. Similarly, a waiver of subrogation endorsement means only that the insurer will not "step into the shoes" of its insured to pursue recovery. But since the insurer's right of contribution is *not* derived from its insured's rights, waiving subrogation is an ineffective way to prevent contribution by the insurer.

Noncontributory

Of course, when an insurer seeks contribution, the insurer is exercising its own right, *a right separate and distinct from any insured's rights*, to recover from other insurers. Whether the insurer can take the rights of its insureds, or the insureds have extinguished their rights against another, is beside the point.

What should now be evident is that noncontributory has nothing at all to do with allocation of fault among insureds but instead is concerned only with *preventing* an insurer from seeking its equitable or contractual independent right of recovery from other insurers.

Priority of Coverage

Primary and noncontributory is actually about the *priority of insurance coverage*—which policy will respond as *primary* insurance and which policy will respond as *excess* insurance. In other words, whose policy will be first and whose will be second.

Other Insurance Condition—General (Pre-1997)

The Insurance Services Office, Inc. (ISO), CGL policy provides that if my CGL policy included you as an additional insured, my policy was primary—my policy would go first. But it does not end there.

Since you also had your own CGL policy, which was also primary to you, my insurer's obligation to you is limited:

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected *unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.* [Emphasis added]

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Since *both* of our policies were primary to you as an insured (at least prior to 1997), my insurer had a right to share with your insurer by contribution. The introduction of the term noncontributory was intended to remedy this problem; noncontributory was merely an inelegant attempt at having my insurance company agree that it would not seek its independent right of contribution against your insurance company.

The goal was rather simple: even if both of our policies applied on a primary basis, you wanted my insurance to be first (primary) and your insurance to be second (excess).

Other Insurance Condition—1997 and Later

In 1997, ISO introduced a mandatory endorsement to the CGL (which has been incorporated into the July 1998 and later editions of the ISO CGL) that changed the other insurance condition.

What has changed is *your policy*; if other insurance is available to *you* covering you by endorsement as an *additional insured*, then your insurer deems your policy to be *excess* to the policy listing you as an additional insured. Problem solved. As my insurer can no longer consider your policy primary, my insurer's obligations to you are no longer affected.

Thus, if you and I both have ISO CGL policies (1997 or later), and they include ISO additional insured endorsements, then the priority of coverage issue that was our original concern no longer exists; the amended other insurance condition sets the priority of coverage the way we wanted it. Noncontributory has outlived its usefulness in this example as my insurer's right of contribution no longer exists against your insurer as your policy is excess. My policy will be first (primary) for you as an additional insured, and your CGL will be second (excess) to my policy.

Despite the clear priority or order of coverage that has been included in the ISO CGL policy forms since 1997, the demand for primary and noncontributory is still standard fare, regardless of the 1997 change.

Non-ISO Additional Insured Endorsements

My example above is predicated on the use of two ISO CGL policies using ISO additional insured endorsements. Unfortunately, my example often does not match reality. Insurers writing accounts that routinely demand use of additional insured endorsements, such as insurers that provide a market for construction, have been writing their own proprietary additional insured endorsements for several years.

In almost every case, the insurer's proprietary additional insured endorsement also changes the ISO other insurance condition or otherwise changes the priority of coverage. While the substance of these proprietary additional insured endorsements often varies dramatically, here is a fairly typical change to the priority of coverage:

This insurance is excess over all other insurance available to the additional insured whether on a primary, excess, contingent or any other basis. But if required by "written contract," this insurance will be primary and non-contributory relative to the insurance on which the additional insured is a named insured. [Emphasis added]

If my policy includes the above wording, and I have agreed to add you as an additional insured, coverage for you as an additional insured will be excess over your own CGL policy unless you also require primary and noncontributory in our written contract.

So while primary and noncontributory is not necessary when both policies are post-1997 ISO CGL policies with ISO additional insured endorsements, primary and noncontributory still has an important role in establishing the priority of coverage in the hundreds of proprietary additional insured endorsements issued by insurers.

Excess Liability—One Step Beyond

The Requirement

So far, primary and noncontributory has been considered only in situations when more than one CGL policy would apply. What happens when you have required me to include you as an additional insured on a primary and noncontributory basis not only on my CGL but also on my excess or umbrella liability policy?

This excess liability primary and noncontributory requirement is often a bit veiled; the requirement may be that I am required to provide a minimum of \$5 million of insurance. However, most do not purchase a \$5 million limit under a CGL; in my example I have purchased a \$1 million CGL with a \$4 million excess or umbrella policy. But remember, I have agreed to provide you with additional insured coverage on a primary and noncontributory basis for all \$5 million of coverage.

Vertical and Horizontal Exhaustion

Most umbrella policies' other insurance conditions are entirely different from the CGL. A typical umbrella other insurance condition might state:

This insurance is excess over any other insurance, whether primary, excess, or contingent, unless the insurance is specifically written to be excess of this insurance.

It should be clear that a typical umbrella has no intention of responding before any primary policy available to any insured, including a primary policy available to the additional insured.³

In the priority of coverage argument, "vertical exhaustion" means that my CGL and my umbrella respond first and before your CGL and umbrella; "horizontal exhaustion" means that my CGL is first, and then your CGL will respond second, before my umbrella; then both of the umbrella policies may share in payment of the balance of the loss.

As most claims do not exceed the primary policy limits, there is minimal caselaw on this issue, which is often described as "vertical versus horizontal" exhaustion. However, the caselaw that does exist is decidedly mixed. Where vertical exhaustion has been found to apply, the courts often look outside the policies and rely on the intent of the indemnity provision in the underlying contract to determine the priority of coverage. The U.S. Court of Appeals for the Eighth Circuit made the following observation in finding vertical exhaustion:

We think this potential circuitry of action is significant, in that it reveals the true nature of the parties' obligations and relationships with each other. RLI will ultimately be liable for the \$ 10 million because of Cheyenne's *promise to indemnify Wal-Mart* and RLI's contractual-liability coverage in its policy covering Cheyenne. To prevent such wasteful litigation and to *give effect to the indemnification agreement between the parties*, we hold that RLI cannot recover against National Union or Wal-Mart. [Emphasis added]

Wal-Mart Stores v. RLI Ins. Co., 292 F.3d 583 (8th Cir. 2002)

Those cases that follow the horizontal exhaustion look only to the policies' terms. For example, the New York Appellate Court, First Department made this observation in finding horizontal exhaustion:

An additional line of arguments by plaintiffs is also unavailing ... that J & A will ultimately be entitled to indemnification for its liability on that claim under the coverage for contractual indemnification.... The possibility of this scenario playing out in the long run does not, however, have the effect, at this stage, of negating the priority of coverage among the applicable policies arising from the terms of those policies. The rights and obligations of the insurers are governed by their respective insurance policies, not the underlying trade contracts among the insureds. After all, United's position is not based on a claim to be subrogated to J & A's rights, but on the priority of coverage established by the terms of the relevant insurance policies.

Bovis v. Great Amer. Ins. Co., 855 N.Y.S.2d 459 (App. Div. 1st Dept. 2008)

Conclusion

Primary and noncontributory is usually an attempt to establish the order or priority of coverage; it is not concerned with allocating percentages of fault. Noncontributory generally means that an insurer has agreed not to seek its *independent* right to contribution when two or more insurers apply to the same accident for the same insured. In this context, noncontributory appears to be shorthand for the insurer giving up its right of contribution.

Waiver of subrogation and similar approaches to prevent contribution may fail as the right of contribution is independent of any insured's rights. As subrogation is derived solely from an insured's rights, the insurer would likely retain its right of contribution.

Primary and noncontributory is likely redundant when two ISO CGL policies with ISO additional insured endorsements both apply to the same accident and same insured as the post-1997 ISO CGL policy already sets the priority of coverage in the other insurance condition; if you are an additional insured by endorsement on my policy, my policy is primary and your policy is excess.

However, non-ISO or proprietary additional insured endorsements may change the priority of coverage in a manner not intended by the parties unless the underlying contract requires primary and noncontributory. While this may be viewed as unwelcome, it is reality of the marketplace.

Finally, imposing primary and noncontributory on excess or umbrella policies is inherently problematic; the other insurance condition of most umbrella policies may well thwart any such attempt. Further, the caselaw on this matter of "vertical versus horizontal" exhaustion is mixed and unresolved in most states.

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¹As many states do not recognize joint and several liability, this entire example has limited applicability.

²Some states have joint tortfeasor statutes, which prescribe the sharing of damages—which may not be in the same proportion as fault. In our example, a joint tortfeasor statute may hold B and C liable for 50 percent of damages to A, even though B might be 70 percent at fault and C 30 percent at fault.

³Some insurers are willing, on a limited basis, to amend the excess or umbrella other insurance condition so that its umbrella does apply before the primary CGL of the additional insured.

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