

## FIRST CIRCUIT INTERPRETS AN EXCESS INSURER'S OBLIGATION TO "FOLLOW FORM"

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In a ruling likely to be applied far beyond the construction defect case in which the issue arose, the US Court of Appeals for the First Circuit, in *Insituform Technologies, Inc. v. American Home Assurance Co*, recently vacated summary judgment against an excess insurer on grounds that the excess insurer's policy did not "follow form" to the primary policy. The decision, which insists on a strict interpretation of the "following form" doctrine, can be applied to instances in which the primary and excess policies differ.

The Appeals Court's ruling was based on a careful reading of the excess policy language and refused to extend excess CGL coverage based on a loose interpretation of the "following form" doctrine. The ruling relieved American Home Assurance Co. of the obligation to indemnify its insured, Insituform, for approximately \$7.7 million spent to repair, and then replace, sewer lines in Boston.

### Background

Insituform performed repair work on sewer pipes. Despite its work, the pipes leaked. On a subcontract originally worth \$1 million, Insituform spent nearly \$7 million to attempt to repair, and then ultimately replaced, the sewer pipe. Insituform's primary general liability insurer agreed to indemnify it on the basis of a "contractor rework coverage amendment" which overrode the primary policy's typical exclusions for "your work" and "your product." Insituform's excess insurer, American Home, denied coverage, citing the "your work" and "your product" exclusions in its policy. Insituform then sued American Home, asserting that the "contractor's endorsement" in its policy obligated it to follow form to the primary policy and provide coverage co-extensive with the primary policy. The District Court agreed, finding that ambiguous language in the contractor's endorsement meant that whenever the primary policy provided coverage for hazards described in the contractor's endorsement, the excess policy was obligated to provide coverage for the same hazards.

### The First Circuit's Ruling

- The First Circuit commented that the only apparent basis for coverage under the primary policy was the "contractor rework coverage amendment," which was not present in the excess policy. The excess policy here had its own "lengthy set of coverage provisions and exclusions."
- Because the excess policy did not contain the endorsement under which Insituform's repair and replacement claims could be covered, there was no coverage under the excess policy.
- The court rejected the argument that the excess policy should provide coverage under the "following form" doctrine, which, it noted, is a "loose term" and is not applicable in this case because the excess policy did not "follow [the] form of the [primary] policy in all respects." Instead, the court analyzed the specific language of the excess policy and determined that there was no separate basis for coverage under the excess policy.

- Insituform argued that the excess policy’s “contractor’s endorsement,” which did not apply in circumstances where the primary policy provided coverage for bodily injury or property damage to which it pertained, should be read broadly to mean that any hazard described in the contractor’s endorsement should be covered if that hazard was covered under the primary policy. The First Circuit rejected this interpretation, noting that the contractor’s endorsement “*negates* liability for the named hazards over and above existing exclusions elsewhere” and that the endorsement only “*limit[s]* these *new* negations wherever [the primary policy] would provide coverage.” It does not, the court observed, “crease new liability . . . inconsistent with the other basic coverage and exclusion provisions.”
- The Court vacated the district court’s grant of summary judgment to Insituform and remanded the case for dismissal of the complaint.

## Conclusion

The Court refused to apply the doctrine of “following form” loosely. It concluded that an excess insurer was not obligated to indemnify its insured for construction-related defects solely because those defects were covered under an endorsement that was present in the primary policy but not the excess policy. This decision could be applied in many areas in which the coverages provided under primary and excess policies differ in significant ways.

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