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Self-Insured Retentions: Whose Money Really Counts?

By **Blake Dillion** (May 8, 2018, 2:51 PM EDT)

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Insurers often claim that only the named insured can satisfy the policy's self-insured retention, or SIR, and that payments by other people don't count, or that the SIR must be satisfied before an additional insured or judgment creditor can access the policy benefits, but the insurers do not always get their way. Money paid by an additional insured, or even another insurer, may count towards satisfying the SIR, and the insurers owe certain obligations to their insured's additional insureds and judgment creditors based on the policy language and statutory obligations. The good news is that courts often look for reasons to allow other parties to satisfy the SIR and are reluctant to relieve insurers of their policy obligations due to the named insured's insolvency or inability to satisfy its SIR.

Insurers Want to Limit Who Can Satisfy the SIR so They Don't Have to Pay Out Policy Benefits

Insurers try to keep additional insureds and other insurers from accessing policy benefits by arguing that only the named insured can satisfy the SIR. SIR policy language usually describes who may satisfy the retention amount, i.e., "[w]e have no obligation or liability under such Coverages unless and until the applicable Self–Insured Retentions as described in the Schedule are exhausted by payments you make.... You must pay all self-insured retention expenses." This language uses terms like "you" and "your," which are defined to mean only the named insured. Courts have struggled with what it means when a payment is "made by you" and in what circumstances is a payment "on behalf of" or "for the benefit of" enough. For example, does requiring that the payment be made by the named insured necessarily impose a requirement on where the named insured gets the money? Insurers argue that it does.

Insurers Apply a Narrow Reading of Who Can Satisfy the SIR

Insurers typically apply a narrow reading of the language of the SIR provisions to argue that only a named insured can satisfy the SIR. To do this, insurers rely on the court's decision in Forecast Homes v. Steadfast Insurance Co. which held that the policy language made it unambiguously clear that only the named insured could satisfy the SIR and that satisfaction of the SIR was a condition precedent to coverage.[1] The policy language, however, was extraordinarily restrictive:
[I]t is a condition precedent to our liability that you make actual payment of all damages and defense costs for each occurrence or offense, until you have paid self-insured retention amounts.... Payments by others, including but not limited to additional insureds or insurers, do not serve to satisfy the self-

insured retention. Satisfaction of the self-insured retention as a condition precedent to our liability applies regardless of insolvency or bankruptcy by you.[2]

The Forecast Homes court concluded that this restrictive language "plainly provides the named insured must pay the SIR."[3]

Courts Have Rejected the Insurers' Narrow Interpretation of Who Can Satisfy the SIR

Courts, however, have rejected such a narrow interpretation of the policy language. Any policy provision that limits the coverage reasonably expected by the insured must be conspicuous, plain and clear to be effective.[4] Applying this standard, courts have found that the policy must expressly prohibit payments from others from satisfying the SIR, and any ambiguity about who can satisfy the SIR is resolved in the insured's favor.[5] For example, in Vons Companies Inc. v. United States Fire Insurance Co., the court stated "if the policy terms either permitted the use of other insurance to cover the SIR amount, or were at least ambiguous on that point, then the insured could exhaust the SIR in that manner."[6]

Even where insurers contend that policy language is not ambiguous, courts appear hesitant to extend Forecast Homes:

Policy Language	Case and Holding
With respect to bodily injury, or property damage, or personal injury or any combination therof, the company(s) liability shall be only for the ultimate net loss in excess of the insured's retained limit as specified in item 8(a) of the limits of liability section of the schedule as the result of any one occurrence ...	McKinley Insurance Company v. Swiss Reinsurance America Corp.[7] Despite this language, the court stated that "[t]here is no requirement, absent a contrary contractual provision, that a named insured pay an SIR amount out of its own pocket. Payments by other insurers may satisfy an SIR."[8]
"[w]e have no obligation or liability under such Coverages unless and until the applicable Self–Insured Retentions as described in the Schedule are exhausted by payments you make.... You must pay all self-insured retention expenses."	National Fire Ins. Co. of Hartford v. Fed. Ins. Co.[9] The insurance policy did "not clearly require the hotel to satisfy the SIR out of its own pocket. Accordingly, there is no bar to National's argument that the hotel can be deemed to have satisfied the SIR through the payments made by National on its behalf."[10]
The LIMITS OF INSURANCE as set forth in Item 3 of the Declarations shall apply excess of a Self–Insured Retention (hereafter referred to as the "Retained Limit") in the amount of [$25,000] and you agree to assume the Retained Limit. The Retained Limit, or any part of it, shall not be insured without our prior written approval.	Centex Homes v. Lexington Ins. Co.[11] Court rejected the carrier's argument that only the subcontractor could satisfy the SIR because its SIR Endorsement stated "you [defined as the subcontractor] agree to assume the Retained Limit."[12] Since there was no other limiting language, and the phrase "you agree to assume" does not expressly limit who can satisfy the SIR, payments made by the additional insured could satisfy the SIR.[13]

The bottom line is that it comes down to policy interpretation, courts will often look for reasons to allow payments by other parties to satisfy the SIR. So, if the insurer says the named insured must pay the SIR out of its own pocket, be skeptical; the SIR language is likely not as restrictive as the insurer says it is.

Accessing The Policy Benefits Of Insolvent Insureds Without Satisfying The SIR

Insurers also try to avoid providing coverage by arguing that the SIR has not been satisfied and never will be satisfied because the insured is insolvent. Insurers will use this tactic to keep additional insureds and judgment creditors from accessing policy benefits by arguing that the satisfaction of the SIR is a condition precedent to coverage. However, not all policy language requires that the SIR must be satisfied before the insurer has a duty to defend and an additional insured's or judgment creditor's right to indemnification is often protected by statute. Similarly, judgment creditors and additional insureds are not precluded from accessing policy benefits when the named insured is insolvent.

Satisfaction of the SIR is Not Always a Condition Precedent to the Duty to Defend

Insurers contend that the duty to defend is not triggered until the named insured satisfies the SIR. To support this position, Insurers rely on General Star Indemnity Co. v. Superior Court where the court found that the policy gave the insurer the right, but not the duty, to defend and only reinstated the duty to defend once the SIR was exhausted.[14] The California Court of Appeal, however, stated that "there is no such general rule that is applicable without regard to the particular provisions of the policy."[15] "Instead, the impact of a policy reference to a 'self-insured retention' or 'retained limit' on the duty to defend will depend on the language of a particular policy."[16] In Legacy Vulcan, the court noted that the SIR in General Star expressly stated that the insurer had no duty to defend unless the retained limit is satisfied, but distinguished the endorsement at issue by explaining that the language did not condition the duty to defend on satisfaction of the SIR.[17] And absent such an express limitation on the duty to defend, the court concluded that the duty to defend was not limited by the presence of a retained limit provision.[18]

In a subsequent case, the Court of Appeal held that an SIR which does not expressly make payment of the SIR a condition of the insurer's defense obligation is only a limitation on the insurer's duty to indemnify against covered damages.[19] This means, an additional insured may be able to access an insolvent insured's policy benefits without satisfying the SIR, though any recovery from the insurer may be reduced by the amount of the unpaid SIR.

A Judgment Creditors Right to an Insolvent Insured's Policy Benefits is Protected by Statute

Insurers are unable to deny judgment creditors access to an insolvent insured's policy benefits. The standard commercial general liability form includes an insolvency clause that provides as follows: "Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part." And many states have statutes with similar language. For example, the California Insurance Code provides that any insurance policy issued in California must contain "a provision that the insolvency or bankruptcy of the insured will not release the insurer from the payment of damages for injury sustained or loss occasioned during the life of such policy."[20] If the policy does not contain this language, the law will construe it as if it did.[21]

Courts have typically relied on this language to hold that an insolvent named insured's inability to satisfy its SIR does not relieve the insurer of its obligations under the policy. For instance, the policy at issue in Phillips v. Noetic Specialty Insurance Co. had this language and the court found that requiring payment of the SIR to trigger coverage was contradictory to the language of the policy.[22] Courts appear reluctant to allow an insurer to avoid its obligations solely on the basis that its insolvent named insured can never satisfy the policy's SIR. The practical reality is that where the named insured is insolvent and

unable to pay the SIR, courts have found a workable solution: the coverage available to the additional insured is the policy limit minus the outstanding SIR amount.[23]

What Do I Do if an Additional Insurer Relies on an Unsatisfied SIR to Deny Coverage?

First, make sure you read and understand your insurance policy. If you are unsure about any part of the policy, talk to your attorney or your insurance broker. It is important to know what your policy does and does not provide.

Second, recognize that even if the policy language on its face appears to unambiguously require the named insured to pay, courts are hesitant to enforce this requirement. Tender the defense of your action to the carrier and don't let the carrier tell you there is no coverage because the named insured hasn't paid the SIR. On the indemnity side, carriers are wrong to hide behind the SIR and deny coverage. So, don't take no for an answer; lay out the opportunity for the insurer to settle within limits and document that the insurer is hiding behind the named insured's unpaid SIR.

Ultimately, even if the language of the policy requires the named insured to pay the SIR out of its own pocket, an additional insured may still be entitled to coverage. An additional insured shouldn't be required to litigate without the assistance of the bargained for policy benefits.

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[1] 105 Cal. App. 4th 1466, 1470-72 (2010).

[2] Id. at 1472

[3] Id. at 1480.

[4] Legacy Vulcan v. Super. Ct., 185 Cal. App. 4th 677, 688 (2010).

[5] Vons, 78 Cal. App. 4th at 62.

[6] 78 Cal. App. 4th 52, 62 (2000).

[7] 757 F. Supp. 2d 952 (N.D. Cal. 2010).

[8] Id. at 958.

[9] 843 F. Supp. 2d 1011 (N.D. Cal. 2012).

[10] Id. at 1017.

[11] No. SACV 13-00998-DOC, 2014 WL 6673481, (C.D. Cal. Nov. 24, 2014).

[12] Id. at *7.

[13] Id.

[14] 47 Cal. App. 4th 1586, 1590 (1996).

[15] Legacy Vulcan, 185 Cal. App. 4th at 694.

[16] Id.

[17] Id. at 695.

[18] Id. at 697.

[19] American Safety Indemnity Company v. Admiral Insurance Company, 220 Cal. App. 4th 1, 4 (2013).

[20] Calif. Ins. Code § 11580(b)(1).

[21] § 11580(a).

[22] 919 F. Supp. 2d 1089, 1098-99 (S.D. Cal. 2013).

[23] See Phillips, 919 F. Supp. 2d at 1098.