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Can You Use Other Insurance Proceeds To Meet Your Self-Insured Retention Obligation? Maybe.

Many companies seek to minimize insurance premiums and balance risk by utilizing self-insured retention (SIR) requirements as part of their insurance programs. A SIR is a specific amount of money that must be paid by the insured before an insurer will contribute to the defense or indemnity of a claim covered by a policy. Just how the SIR obligation must be paid, however, is one of the newer battlegrounds between insurers and policyholders and the requirements can vary significantly between policies. Does the policyholder have to pay the SIR from its own funds, or can someone else pay it for them? Can proceeds from another insurance policy be used to fund the SIR? Can insurance proceeds received as an additional insured be used to offset the SIR? Can proceeds received under a contractual indemnification provision be used to pay the SIR? In a fact scenario never before considered, the Supreme Court of Florida just last week answered "yes" to that final question.

In *Intervest Construction of Jax, Inc. v. General Fidelity Ins. Co*., 2014 WL 463309 (Fla. Sup. Ct. Feb. 6, 2014), the Florida Supreme Court responded to a string of litigation by answering two certified questions from the United States Court of Appeals for the Eleventh Circuit Court of Appeals. A general contractor, ICI, was sued by an customer for injuries sustained on a stairway built by ICI's subcontractor, Custom Cutting. The contract between ICI and Custom Cutting required Custom Cutting to indemnify ICI for the customer's claim, but ICI was not an additional insured on Custom Cutting's liability policy.

At the time of the accident, ICI was insured by North Pointe and Custom Cutting was insured by General Fidelity. After a mediation, the injured customer agreed to a $1.6 million settlement of her claim. North Point, as Custom Cutting's insurer, agreed to pay $1 million to ICI on the indemnification claim against Custom Cutting, which then was paid over to the customer. ICI sought to have its insurer, General Fidelity, pay the remaining $600,000 to satisfy the full settlement amount. General Fidelity refused, however, claiming that ICI was required to make this payment itself to meet its policy SIR of $1 million.

General Fidelity argued that the $1 million payment from Custom Cutting's insurer did not reduce the SIR because the payment did not originate from ICI. General Fidelity relied on the text of the policy's SIR endorsement, which included the following type of clauses suggesting that the SIR had to be funded by ICI:

> 3. We have no duty to defend or indemnify unless and until the amount of the “Retained Limit” is exhausted by payment of settlements, judgments, or “Claims Expense” *by you.*
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> ....
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> 6. The “Retained Limit” will *only* be reduced by payments made *by the insured.*
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> ....
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> 14. The payment of the “Retained limits” *by the insured* is a condition precedent for our obligation to pay any sums either in defense or indemnity and we shall not pay any such sums until and unless the insured has satisfied its “Retained limits.”

The U.S. District Court agreed with General Fidelity, but the Florida Supreme Court, in response to the certified questions, did not.

The Florida Supreme Court, like the U.S. District Court, reviewed three California cases dealing with the satisfaction of SIR cases, but found that none of them had policy language similar to that of the ICI policy. Policy language in the distinguished cases either clearly allowed the SIR to be funded by other valid insurance, more specifically required the SIR “to be paid from the Insured’s own account” or specifically stated that “payments made by others . . . do not satisfy the [SIR].” The ICI policy, the Court found, was not like any of those.

The Court noted that language requiring a SIR to be paid from an insured’s “own account” differed from the less restrictive requirement of ICI’s policy, which only required that that it be paid “by you.” ICI paid for indemnity protection as part of its contractual agreement with Custom Cutting and then used that protection to satisfy its SIR. As the Court reasoned, “ICI bargained for and paid for this right to indemnification and, without an express policy provision to the contrary, should be able to use it to satisfy the SIR.” As a result, the Court found nothing in the policy to support General Fidelity’s argument that the indemnification proceeds could not be applied to the SIR.

In further analysis, the Court also found that the common law “made whole” doctrine gave ICI priority over those proceeds rather than General Fidelity. Unless a policy provision states otherwise, the “made whole doctrine” provides that an insured has priority over the insurer to recover its damages first when there is a limited amount of indemnification available. General Fidelity argued that a “transfer of rights” provision in the policy gave it first claim to the indemnification proceeds. The Court, however, found that the transfer provision merely established a subrogation right in the event of payment, it did not address the priority of reimbursement issue or eliminate ICI’s first right to the indemnification proceeds under the made whole doctrine.

SIRs can provide a cost-effective way for a business to balance the cost of coverage with its tolerance for risk and capacity to absorb claim expenses. A policyholder must carefully review the specific requirements and limitations of the SIR endorsement to ensure that it is consistent with its overall risk management strategy. For instance, a company that relies on additional insured endorsements and indemnification provisions to moderate its risk should think carefully before accepting a SIR endorsement that excludes indemnification payments and additional insured proceeds from qualifying as SIR payments. As with most insurance issues, the outcome of every scenario is driven by the language of the policy itself and a review and analysis of those provisions is the starting point of virtually every risk management program.

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