The ABCs of SIRs

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Self-insured retentions ("SIRs") are frequently treated as an afterthought in coverage disputes, viewed like simple deductibles to be dealt with quickly and quietly after the core coverage issues are decided. To the contrary, however, SIRs are often much more complex risk transfer vehicles that can lead to significant disputes with primary carriers over whether, and at what point, does responsibility for defense and indemnification of certain claims shift from insured to carrier.

It cannot be stressed enough that SIR endorsements ***are not standard.*** Most are manuscript, and the material terms vary from carrier to carrier and insured to insured. Accordingly, practitioners should take caution against extrapolating "general rules" or "black letter law" regarding SIRs. Reliance on caselaw may be appropriate under certain circumstances, but extra care should be taken to ensure that SIR provisions being construed in the opinion are similar to those at issue.

I. THE BASICS – WHAT IS A SIR?

A. Differentiate from a Deductible.

Many courts and commentators have played fast and loose with the terms SIR and deductibles over the years, often using the terms interchangeably. In fact, it has been repeatedly noted that SIRs are simply large deductibles. *See, e.g.,* Allan D. Windt, INSURANCE CLAIMS & DISPUTES §11.31 (2009); *State Farm Mut. Auto. Ins. Co. v. Winney*, 923 P.2d 517, 519 (Kan.Ct.App. 1996).

While a SIR, depending on its precise terms and conditions, can "walk and talk" like a deductible, this is not automatically correct across the board. There typically are some regularly-observed distinctions between the two transfer vehicles. First, a deductible is usually advanced by the insurer on the part of the insured, and then collected or credited against the insured when payment of the claim is made. *See, e.g.,* Windt, INSURANCE CLAIMS & DISPUTES §11:31 (2009), *National Union Fire Ins. Co. of Pittsburgh, PA v. Lawyers' Mut. Ins. Co.*, 885 F.Supp. 802, 206 (S.D.Cal. 1985). Second, under an SIR, the insured usually defends itself until the retention is exhausted, unlike a deductible where the carrier's defense obligation, if triggered, exists at the outset of the claim assuming compliance with proper notice provisions. *See, e.g., U.S. Fire Ins. Co. v. Scottsdale Ins. Co.*, 264 S.W.3d 160, 173 (Tex.App.—Dallas, 2008, reh'g overruled August 13, 2008).

Again, it should be strongly noted that the general differences between SIRs and deductibles derive from standard language found in both types of provisions. There are an abundance of manuscript provisions that have the effect of bringing the two vehicles closer together, or driving them further apart in terms of the relative rights and obligations of both insurer and insured.

B. Are SIRs "Insurance"?

The question of whether SIRs can be properly considered "insurance" can have a significant impact on not only exhaustion of a SIR but also "other insurance" battles between carriers. One view held by courts across the country is that SIRs can be properly viewed as "primary insurance". *See, e.g., H.E. Butt Grocery Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 150 F.3d 526 (5th Cir. 526) ("HEB is its own primary insurer-it must pay a self-insured retention ("SIR") limit of $1,000,000 per "occurrence" as that term is defined in the policy); *Pacific Employer's Ins. Co. v. Dominos Pizza, Inc.*, 144 F.3d 1270, 1276-77 (Cal. 1998) ("It is well recognized that self-insured retentions are the equivalent to primary liability insurance, and that policies which are subject to self-insured retentions are "access policies" which have no duty to indemnify until the self-insured retention is exhausted."); *Atchison, Topeka & Santa Fe Railway Co. v. Stonewall Ins. Co.*, 71 P.3d 1097, 1132 (Kan. 2003) (A SIR is the equivalent of underlying or primary insurance); *National Union Ins. Co. v. Dowd & Dowd, P.C.*, 2 F.Supp.2d 1013, 1015 n.1 (N.D. Ill. 1998) ("A [SIR] is much like a primary insurer in that both are generally obligated to pay the first level of loss and to retain the defense counsel").

Conversely, several courts and commentators conclude that, viewed properly, SIRs do not constitute "insurance". *See, e.g.,* Windt, INSURANCE CLAIMS & DISPUTES §11:31 (2009). In arriving at this conclusion, several courts have analyzed what constitutes the essentials of an insurance transaction:

> [A SIR] is the antithesis of insurance. The essence of an insurance contract is the shifting of the risk of loss from the insured to the insurer. The essence of self-insurance, a term of colloquial currency rather than of precise legal meaning, is the retention of the risk of loss by the one upon whom it is directly imposed by law or contract.

American Nurses Assoc. v. Passaic Gen. Hosp., 471 A.2d 66, 69 (N.J. App. 1984); *see also Meyer v. Building & Realty Service Co.*, 196 N.E. 250, 254 (Ind.App. 1935).

Accordingly, because a SIR does not involve the insured contracting with a third party to provide defense and indemnity for its loss, it can not be properly characterized as "insurance."

If, on the other hand, the insured holds the retention within the confines of a true self-insurance plan, it arguably becomes a closer call. The characteristics of a self-insurance plan include the following: (1) actuarial analysis and projections of future losses, (2) identification and measurement of possible and actual claims against a self-insured entity, and (3) establishment of a separate fund to pay anticipated claims. Thomas W. Reinard, *The Local Government as Insured or Insurer: Some Risk Management Alternatives*, 20 The Urban Lawyer, 103 (1988). Accordingly, it has been noted that self-insurance (as well as "fronting" policies) can be accurately characterized as insurance, at least for purposes of evaluating liability with other carriers. Windt, INSURANCE CLAIMS & DISPUTES §11:31 (2009).

C. Advantages/Disadvantages.

The most frequently cited advantages and disadvantages to the insured of the SIR are as follows:

- **Advantages**
  - Implementing a SIR leads to decreased premiums given that the retention is assumed by the insured.
  - A SIR endorsement allows the insured to control the defense of matters within the retained limit (i.e., a retention of legal counsel of the insured's choosing, rather than unknown panel counsel selected by the insurer).
  - The SIR permits the insured to settle smaller claims, thereby keeping those claims out of the insured's experience. Furthermore, insureds are generally not obligated to accept a demand for settlement within the SIR (see discussion below).
  - Allocating the responsibility for claims payments and allocated loss expenses in-house provides fresh insight and new perspective on loss control, which can translate into improved loss experience.
- **Disadvantages**
  - Administration of claims within an SIR can be expensive, involving more time and costs than originally planned.
  - Many SIR endorsements contain rather draconian requirements concerning notification of claims settled within the SIR, as well as claims that present the possibility of exceeding the retention and triggering the excess policy above it. Also, a breach of those provisions may result in a forfeiture of coverage.
  - Depending on how tightly or loosely drafted the SIR endorsement may be, there can be considerable uncertainty in the exhaustion of the SIR.

II. SIR EXHAUSTION

One of the thorniest and often-litigated issues arising out of SIRs and the relationship between insured and insurer concern core questions on the manner and method of exhaustion in order to trigger primary coverage that sits above the retention. These issues have an obvious impact on whether an insured or an insurer will have the burden of shouldering the impact of both defense and indemnity costs incurred in connection with the underlying claim. A helpful way to illustrate not only how the courts handle these issues but also some of the guiding principles involved is a discussion of "SIR scenarios".

Again, as a caveat, resolution of most SIR issues will turn on the precise language of the endorsement. As such, a practitioner should be extremely careful in reviewing the language of the endorsement at issue before blindly relying on caselaw that may be easily distinguished based on material terms of the endorsement.

Scenario 1: Which Defense Costs Properly Count Toward Exhaustion?

Underlying Litigation:

On a construction project, an employee of a framing subcontractor sustains serious injury as a result of being struck by a large beam. Plaintiff subsequently sues the general contractor alleging a variety of negligence-related claims, including inherently dangerous activity and inadequate training and supervision.

The Plaintiff later amends his pleadings to include state RICO claims concerning an alleged conspiracy on behalf of the general contractor to hire undocumented workers to avoid paying workers' compensation insurance premium and increase profits.

The Plaintiff retains a leading expert in RICO cases, which prompts the Defendant/GC to retain a high-powered New York firm with commensurate expertise to handle the RICO claim. While costly, Defendant ultimately prevails on a motion to dismiss the RICO claim, thereby paving the way for a favorable settlement of the p.i. claims.

Coverage Dispute:

The general contractor had a $500,000 per occurrence SIR. After exhausting the SIR amount through payment of defense costs (which included defense costs related to dismissal of the RICO claim), the general contractor tenders the claim to the insurer for defense and indemnity. ***The insurer denies claiming that the general contractor could not use the RICO-related defense costs to exhaust the SIR***.

The first step is to *closely* and *carefully* examine the policy language. Here are relevant excerpts from a sample SIR endorsement:

SELF-INSURED RETENTION ENDORSEMENT

1. The total limit of liability of the Company as stated in the policy declarations shall apply excess of the retained limit (herein called the Self-Insured Retention) as stated in the endorsement, and the Named Insured agrees to assume this retained limit:

Self Insured Retention:	$500,000____________	per occurrence
	XXXXX____________	per claim
Annual Aggregate Retention:	N/A________________	

2. The Company's obligation under this policy applies only to the amount excess of the Self-Insured Retention. Your bankruptcy, insolvency, or inability to pay the Self-Insured Retention shall not increase our obligation under the policy.

The Insured shall have the obligation to provide, at his own expense, proper defense and investigation of any claim and to accept any reasonable offer of settlement within the Self-Insured Retention. The Insured's obligation to provide for his own defense is terminated upon the exhaustion of the Self-Insured Retention referenced above.

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Policyholder Arguments:

1. A close reading of the relevant language reveals that the policy is silent on precisely which costs will serve to exhaust the SIR. Accordingly, under principles of *contra proferentem*, the endorsement will be deemed to be ambiguous on this issue, and the court must adopt a reasonable interpretation that any and all costs associated with the defense of the otherwise-covered p.i. claim will serve to exhaust. Under the *contra proferentem* rule, if an insurance policy is ambiguous and therefore susceptible to more than one reasonable interpretation, Texas courts give effect to the insured's interpretation as long as it is reasonable. *See, e.g., State Farm Fire and Cas. Co. v. Vaughan*, 968 S.W.2d 931, 933 (Tex.1998); *Western Heritage Ins. Co. v. Magic Years Learning Centers and Child Care, Inc.*, 45 F.3d 85, 88 (5th Cir. 1995)**;** *For Kids Only Child Development Center, Inc. v. Philadelphia Indem. Ins. Co.*, 260 S.W.3d 652, 655 (Tex.App.—Dallas 2008, pet. denied); *Founders Commercial, Ltd. v. Trinity Universal Ins. Co*., 176 S.W.3d 484, 490 (Tex.App.-Houston [1 Dist.] 2004, no pet.).

2. The retention can be properly viewed as "primary insurance". As with any other primary insurer owing a defense obligation, confronted with a pleading containing at least one covered cause of action, the carrier has a duty to defend the entire lawsuit, including those causes of action that may be otherwise uncovered. *General Star Indem. Co. v. Gulf Coast Marine Assoc., Inc.*, 252 S.W.3d 450, 455 (Tex.App.—Hous.[14th Dist.] 2008, pet. denied); *Stumph v. Dallas Fire Ins. Co.,* 34 S.W.3d 722, 728 (Tex.App.-Austin 2000, no pet.). No Texas cases have deviated from this rule to permit allocation of defense costs between covered and uncovered claims. *See, e.g., Tex. Prop. & Cas. Guar. Ass'n v. Southwest Aggregates, Inc.*, 982 S.W.2d 600 (Austin 1998, no pet.).

Because the negligence claims are covered, the insured can properly use not only defense costs related to the covered claims, but RICO-related defense costs as well.

3. The RICO claims are covered on a "stand-alone" basis; therefore, the defense costs associated with the claim will serve to exhaust. In *Lamar Homes Inc. v. Mid-Continent Cas. Co.,* 242 S.W.3d 1 (Tex. 2007), the Texas Supreme Court cautioned carriers against blanket denial of claims based on labels. The proper test is whether the harm suffered is the natural and expected result of the insured's action. *Id.* at 8. Plaintiff plead that the purpose of the conspiracy was to avoid paying worker's compensation premium and to increase profits. The general contractor could not have expected and anticipated that its alleged conspiratorial conduct would result in Plaintiff sustaining injuries from getting struck by a large beam at a construction site. This is not a case where the harm suffered by the Plaintiff was the object of the alleged RICO conspiracy. One caveat to this argument, however: In *Lamar Homes*, the court states that intentional torts, by their very nature cannot be "occurrences." *Id.* At 8-9.

Insurer Counter-Arguments:

1. Under paragraph no. 1 of the endorsement, the retained limit is tied to the liability limit of the policy. Because the policy is not self-liquidating (i.e., defense costs are outside limits), the liability limits refer only to indemnity, not defense costs. As such, the retention must be viewed similarly; therefore, no defense costs can be used to exhaust. The inherent flaw in this argument, however, is that the insured will have a very difficult time ever extracting a defense obligation if the "triggering event" is limited to payment of indemnity costs through judgments or settlements. Conceivably, it may only arise only after the insured blows through an aggregate SIR (assuming one is in place).

2. The SIR should not be viewed as primary insurance (see discussion above); therefore, the duty to defend analysis is wholly inapplicable. Courts and commentators are in agreement that only payments covered under the policy should be applied to satisfy an SIR. *See* Windt sec. 11.31; *Lafarge Corp. v. Hartford Cas. Ins. Co.,* 61 F.3d 389, 400 (5th Cir. 1995) (court held that non-covered costs could not be applied toward satisfaction of a SIR). Accordingly, only defense costs attributable to covered claims will exhaust the SIR.

3. Even assuming that the SIR is equivalent to primary insurance subject to duty to defend principles, several Texas federal courts and the Fifth Circuit approve of allocating defense costs between covered vs. non-covered claims where there is a ready basis for the apportionment. *See Id.* at 398; *Gulf Chem. & Metallurgical Corp. v. Associated Metals & Minerals Corp.,* 1 F.3d 365, 372-73 (5th Cir. 1993); *Soc. Of Prof. in Disp. Res., Inc. v. Mt. Airy Ins. Co.*, 1997 WL 71146, at *4 (N.D. Tex. Nov. 17, 1999) (memo op.); *Nautilus Ins. Co. v. ABN-AMRO Mortg. Group, Inc.,* 2006 WL 354034, at *11 (S.D. Tex. Dec. 8, 2008)(where claims against insured are not all covered, may be appropriate for insured to bear cost of defending uncovered claims) Here, because a different law firm handled the RICO claims, there is a "ready basis" for the apportionment.

Scenario 2: Multiple Carrier SIR Obligations----Timing of Exhaustion and Condition Precedent Issues.

Underlying Litigation:

The insured is embroiled in costly IP litigation concerning copyright infringement of architectural plans over a 10-year period. Because of the cost of defense and significant potential damages, the litigation presents serious exposure to all of the insured's carriers on the risk during the period in question.

Coverage Dispute:

The insured has multiple primary insurers over that period of time. Infringement occurred in fact, and arguably based on allegations in the pleadings, in each policy period over that 10-year stretch. Accordingly, each insurer's defense obligation was triggered under Coverage B. However, only one carrier is furnishing a defense under reservation-of-rights. To trigger that defense obligation, the insured satisfied a $200,000 per occurrence SIR through defense expenses. Facing mounting defense costs, the carrier files a declaratory judgment suit against all other primary insurers seeking, among other relief, contribution towards past and future defense costs.

The underlying copyright infringement lawsuit is ultimately settled with contributions from various insurers and the insured.

Then, the typical fun ensues, with a flurry of motions and cross-motions for summary judgment on each insurer's defense obligations. Two insurers contend that their respective SIRs have not been satisfied; therefore, no defense obligation has been triggered.

Insurer No. 1:

The policy issued by Insurer No. 1 similarly contains a $200,000 per occurrence SIR by way of an endorsement containing the following pertinent provisions:

> SELF-INSURED RETENTION
> CLAIMS EXPENSES WITHIN SIR – OUTSIDE OF LIMITS
>
> A. The following is added to paragraph A of Section I of the policy and to paragraph A of Section II of the Broad Form CGL Endorsement (if attached):
>
> The company shall only be liable for the **ultimate net loss** over and above the amount stated in the declarations as self-insured retention, subject to the terms, exceptions, limitations and conditions of the policy, or any endorsements thereto. The company shall not be obligated to indemnify the **named insured** after the applicable limit of liability (i.e., **ultimate net loss**) has been exhausted.
>
> Notwithstanding any provisions of the policy or any endorsements thereto to the contrary, with regard to such insurance as if afforded by this policy, it is a <u>condition precedent</u> to the company's liability under this policy that the **named**

> **insured** make actual payment of **ultimate net loss, claims expenses,** and **medical expenses** paid under Section III of the Broad Form CGL Endorsement (if attached), which otherwise would be payable by the company on behalf of the **named insured**, in the amount stated in the declarations and in any endorsements to the policy as self-insured retention.

* * * * *

C. Section V. **Definitions** of the policy is amended as follows:

> **"claims expenses"** means all costs reasonably chargeable to the defense, investigation, adjustment or settlement of claims or suits, excluding the salaries of the **named insured's** employees and the company's employees. Upon payment of the self-insured retention by the **named insured**, the company will pay any remaining **claims expenses** incurred. Any payment the company makes will not reduce the limits of insurance.

> **"self-insured retention"** means the amount that is stated in the Declarations as self-insured retention. **Ultimate net loss, claims expenses,** and **medical expenses** paid under Section III of the Broad Form CGL Endorsement (if attached) are included in and will reduce the **self-insured retention.**

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Insurer No. 1 Arguments:

1. There must be evidence of "actual payment" by the insured of the $200,000 SIR *under its policy*. Stated differently, payment of defense costs to satisfy the defending insurer's SIR is not adequate to trigger a defense obligation under the policy at issue. As such "actual payment" of the SIR has not occurred. Alternatively, the $200,000 paid by the insured should be equally allocated among all carriers with a defense obligation.

2. Assuming that the SIR will be deemed to have been exhausted with proceeds advanced by the insured to settle the underlying litigation, because of the "condition precedent" language, any duty to defend that may otherwise exist was not triggered *until* that payment occurred.

Defending Insurer/Insured Counter-Arguments:

1. Requiring a separate, distinct payment by the insured of the $200,000 SIR is, at best, putting form over substance. The insured did make "actual payment" of "claims expenses" (defense costs). The duty to defend is joint and several. *Tex. Prop. & Cas. Guar. Ass'n v. Southwest Aggregates, Inc.*, 982 S.W.2d 600 (Austin 1998, no pet.). Because Insurer No. 1 has a complete defense obligation, the payment by the insured of defense costs in satisfaction of the defending carrier's SIR "otherwise would be payable [by Insurer No. 1] on behalf of the [insured] per the terms of the SIR endorsement." For the same reasons, the allocation argument fails as well.

2. Assuming the SIR will not be deemed to have been exhausted until the later payment of settlement proceeds by the insured, there is no *temporal element* to the defense obligation being triggered. Consider the following hypothetical: Insured has a $20,000 SIR. While the insurer is considering its options, the insured gets its first bill from defense counsel for $40,000, and later pays. Allowing the insurer to avoid the entire $40,000 based on a "condition precedent" provision permits an inequitable result. Rather, the SIR and the condition precedent should be more appropriately viewed as a credit against incurred defense expenses. The carrier is responsible for the $20,000 difference, but it is not required to pay until the insured first makes payment, thereby giving meaning to the condition precedent language.

A slight alteration to the hypothetical above: What if the insured did not have an SIR under the defending carrier's policy? And further assume that the defending carrier delayed in fulfilling its defense duty requiring the insured to initially pay over $200,000 in defense costs which were ultimately reimbursed by the defending carrier. Do those "fronted costs" satisfy the "actual payment" language of Insurer No. 1's SIR? On the one hand, the defending carrier and the insured can argue that the insured did make actual payment, and that any later reimbursement is irrelevant for purposes of the SIR. Insurer No. 1 will likely argue that reimbursement rendered any "payment" illusory and/or void.

Insurer No. 2:

The policy issued by Insurer No. 2 contains the following pertinent provisions within the SIR endorsement:

> 2. "Self Insured Retention" means the limit of insurance that the insured agrees to assume responsibility for in attempting settlement and/or in payment of all claims resulting from any "occurrence".
>
> * * * * *
>
> 5. The insured has the obligation to provide adequate defense and/or investigation of any claim, and to accept any reasonable offer of settlement within the "Self-Insured Retention". In the event of the insured's failure to comply with this provision, no loss, cost or expense will be paid by us.
>
> * * * * *
>
> 8. Our liability will not be increased by the refusal or inability of the insured to pay the "Self-Insured Retention" involving any claim, whether by reason or insolvency, bankruptcy or for any other reason.
>
> * * * * *

Insurer No. 2 Arguments:

1. Provision No. 5 similarly requires that any duty to defend is not triggered *until* the SIR has been satisfied. In other words, there is an implied condition precedent that the SIR be satisfied before any defense obligation is owed.

Defending Insurer/Insured Counter-Arguments:

1. The policy defines "self-insured retention" as "the limit of insurance that the insured agrees to assume responsibility for in attempting settlement and/or in payment of all claims resulting from any 'occurrence.'" The SIR language in the policy only concerns the indemnity aspect of the policy, *i.e.* paying settlements. As such, any defense obligation is not affected by the SIR itself.

2. The implied condition precedent argument misstates the operative effect of the SIR requirement. First, conspicuously absent from the endorsement is language expressly stating that the insured's obligations to pay the SIR is a condition precedent. Moreover, the provision only calls for the insured to defend and/or accept settlement offers <u>within the SIR</u>. At best, the clear language of the endorsement reflects that the SIR operates as an offset against amounts otherwise owed by Insurer No. 2 under its policies with regard to claims in excess of the SIR. Therefore, the SIR is not a condition precedent that would operate to preclude a defense obligation.

3. Provision No. 8 demonstrates that the SIR requirement does not act as a condition precedent. The provision specifically contemplates the fact that the insured, whether by refusal or inability, may fail to satisfy the SIR. <u>However, it does not state that Insurer No. 2 will have absolutely no liability in such a circumstance</u>. Rather, the endorsement simply states that Insurer No. 2 will have no increased liability in the event of non-payment. For example, under the policy in which there is a $250,000 SIR, this clause simply means that if faced with a $350,000 claim, Insurer No. 2 will never have to pay more than $100,000, regardless of whether the insured refuses or is unable to pay its $250,000 SIR. If the SIR requirement acted as a true condition precedent to any liability, then the endorsement should state that Insurer No. 2 would have no liability whatsoever in the event of non-payment.

III. A FEW INTERESTING TEXAS CASES

A. Primary Carrier Did Not Waive SIRs in Excess Dispute

In *U.S. Fire Ins. Co. v. Scottsdale Ins. Co.*, 264 S.W.3d 160 (Tex. App.—Dallas, 2008, reh'g overruled August 13, 2008), Scottsdale, as an excess carrier, was attempting to recover from U.S. Fire, as the primary, amounts it expended in the defense and settlement of a number of nursing home claims against the insured facility. In addition to a number of other defenses, U.S. Fire contended that any recovery should be offset by the applicable SIR retentions.

Scottsdale argued that U.S. Fire waived the SIR requirement when it wrongfully breached its duties to defend and indemnify the insured for the underlying claims. In support of this argument, Scottsdale cited Texas authority holding that an insurer's breach of it duties will relieve the insured from compliance with certain conditions, such as the "no-action" clause. The Dallas Court of Appeals correctly noted that while a breach by the insurer will excuse the insured from compliance with *certain* conditions, that authority will not extend to the insured's compliance with a SIR. *Id.* at 172-73. Furthermore, the fact that U.S. Fire ultimately paid an amount to settle some of the claims at issue did not constitute waiver of the requirement. *Id.*

B. No Contractual or Common Law Duty on Behalf of Insured to Settle Within SIR

In *International Insurance Company v. Dresser Industries*, *Inc*, 841 S.W.2d 437 (Tex. App.—Dallas 1992, writ denied), the court was confronted with an issue of first impression in Texas: Whether an insured with an SIR owes an excess carrier a duty to settle within the limits of its SIR. The court answered the question in the negative, both as to a contractual and common law duty. *Id.* at 443-45.

It is important to stress that the court's holding, at least as to the contractual duty to settle was based exclusively on a complex written agreement between the insured, its "fronting" carrier, and the excess carrier. Specifically, the court focused on a side agreement which forbade the excess carrier from "coercive or collusive" conduct designed to force a settlement and/or making a demand upon the "primary insurer" (which the court concluded referred to the insured by virtue of the fronting arrangement) to settle a claim within its limits.

With respect to any common law obligation, the court agreed with the rationale articulated by the California Supreme Court in *Commercial Union Assur. Cos. v. Safeway Stores, Inc.*, 610 P.2d 1038 (Cal. 1980) in refusing to recognize a common law claim under these circumstances. The excess carrier clearly accepted the risk of insuring the underlying product liability exposure with full awareness that the insured controlled its own defense and settlement of claims within limits.

The *Dresser* case was later distinguished in *Clarendon Nat'l Ins. Co. v. FFE Transp. Serv., Inc.*, 2004 WL 3210604 (N.D. Tex. 2004). In *Clarendon,* the excess carrier pursued the insured for sums it paid to satisfy an underlying judgment arising out of an automobile accident in excess of the $1 million SIR. Rather than argue that the insured had a contractual or common law duty to settle a claim within the SIR, the excess carrier relied on "notice" provisions in the SIR.

The excess policy contained the following provisions regarding notice of claims:

- The insured must provide immediate notice when there is any claim in which the requested damage exceeds the SIR.
- The insured must provide notice of an occurrence paid or reserved for 25% or more of the SIR.
- If the excess carrier can show that the insured's failure to provide notice prejudiced the defense, no coverage is owed.

Importantly, the policy also provided the excess carrier with the *right* to defend and settle *any* claims. The insured provided notice three months after the judgment was entered in the underlying case. The excess carrier contributed to the settlement, but reserved its rights to seek reimbursement. The excess carrier argued that it was prejudiced by the late notice; therefore, it was not obligated to provide coverage. Citing the basic retention provision concerning the insured's responsibility for the defense until the SIR is exhausted, the insured first contended that the excess carrier was only entitled to notice upon exhaustion of the SIR. The court rejected this myopic view of the endorsement, citing the clear and unambiguous provisions detailed above. *Id.* at *4.

Next, the insured, relying on *Dresser*, argued that it did not owe a duty to the excess carrier to settle; therefore, it could not have been prejudiced. Citing the provisions above, the court distinguished *Dresser* based on the provisions of the contract at issue. Conversely, the excess carrier had a *right* to settle cases within the SIR. *Id.* at *4-5.

The *Dresser* and *Clarendon* opinions provide yet another example of how the courts' analysis turns heavily on the precise duties and obligations set forth in the applicable SIR endorsement.

C. SIR Does Not Transform Primary Policy into Excess Policy for "Other Insurance" Battle

In *Travelers Lloyds Ins. Co. v. Pacific Employers Ins. Co.*, 2007 WL 128316 (S.D. Tex. 2007, the primary carrier for a landlord/additional insured and the primary carrier for the tenant/named insured were locked into an "other insurance" dispute over who had "first dollar" responsibility for defense and indemnification of the landlord in an underlying premises liability suit. Despite the typical language in the landlord carrier's policy making it specifically excess over any coverage afforded to its insured as an AI, the tenant carrier argued that, given ambiguities over construction of the "other insurance" clause, the court should look to the overall pattern of insurance and conclude that it is an "excess" policy given an underlying SIR.

The court rejected that argument, relying on the caselaw and commentary discussed above noting that SIRs should not properly be viewed as "insurance". *Id.* at *6, n. 7.

D. Insured Did Not Satisfy "Per Occurrence" SIR in Multi-Home Construction Defect Litigation

In *Lennar Corp. v. Great American Ins. Co.*, 200 S.W.3d 651 (Tex. App.—Houston [14th Dist.] 2006, pet. denied), at issue was whether multiple carriers for the insured homebuilder had an obligation to provide indemnity for costs incurred in connection with repair and replacement of defective EFIS material on a number of homes.

The insured maintained a $250,000 per occurrence SIR under one of the primary policies. The carrier argued that each separate home constituted a separate "occurrence"; therefore, no coverage was triggered because the insured could not establish that it spent more than $250,000 on any home involved. The insured argued that there was only one "occurrence"—the failure of the EFIS and continued entrapment of water. Applying the well-recognized "cause analysis", the court concluded that the damage to each home constituted a separate "occurrence" to which the SIR applied. Accordingly, the court upheld summary judgment in favor of the carrier.