

# Deductibles and SIRs: Coverage Issues

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# IS AN SIR “INSURANCE”?

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- **What are the practical implications?**
- **Two typical scenarios:**
  - **Allocation of a long-tail loss (e.g., environmental, latent injury)**
  - **Additional insured coverage (“other insurance”)**

# ALLOCATION AND SIRs

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- **Horizontal v. Vertical Exhaustion**
- **Types of Allocation:**
  - **All Sums**
  - **Pro Rata**
- **Montgomery Ward & Co. v. Imperial Cas. & Indem. Co., 81 Cal. App.4th 356 (Cal. App. 2000)**
- **LaFarge Corp. v. Hartford Cas. Ins. Co., 61 F.3d 389 (5<sup>th</sup> Cir. 1995)**
- **Olin Corp. v. Ins. Co. of N. Am., 221 F.3d 307 (2d Cir. 2000)**

# ADDITIONAL INSURED COVERAGE AND SIRs

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- **Twin contractual protections:**
  - Indemnification
  - Additional insured coverage
  
- **Insurance requirements and use of self-insurance mechanisms:**
  - SIRs
  - Fronted coverage
  - Captive programs

# WHAT IS “OTHER INSURANCE”?

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- “If other valid and collectible insurance is available to the insured for a loss we cover under this policy ...”
- “You go first.”    “No, you go first.”



# MAJORITY VIEW: SELF INSURANCE IS NOT “OTHER COLLECTIBLE INSURANCE”

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- **Back to basics: what is insurance?**
- **Most courts hold that SIRs are not “other collectible insurance”**

# AEROJET-GENERAL CORP. v. TRANSPORT INDEMNITY, 17 CAL. 4TH 38, 70, n. 20 (1997)

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**In a strict sense, “self-insurance” is a “misnomer.”  
“Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event.”**

**“[S]elf-insurance ... is equivalent to no insurance....” As such, it is “repugnant to the [very] concept of insurance....” If insurance requires an undertaking by one to indemnify another, it cannot be satisfied by a self-contradictory undertaking by one to indemnify oneself.**

# TRAVELERS LLOYDS INS. CO. v. PACIFIC EMPLOYERS INS. CO., 602 F.3D 677 (5TH. CIR. 2010)

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**Texas courts have held that for purposes of applying “other insurance” clauses in insurance policies, a self-insurer does not provide “other insurance,” and a self-insurer does not provide “valid and collectible insurance” within the meaning of an “other insurance” clause.**

**Best Buy’s retention of the first \$200,000 of liability under the Pacific policy does not constitute “other valid and collectible ... insurance available to The Centre” within the meaning of the Travelers policy.**



# **FARMERS INS. EXCH. v. ENTERPRISE LEASING CO., 281 VA. 612 (VA. 2011)**

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**We have recognized that there is a distinction between insurance companies and self-insurers. Likewise, there is a distinction between self-insurance and insurance.**

**“Insurance is a matter of contract.”**

**“A necessary element of insurance is the existence of a contract between insurer and insured.” With self-insurance, there is neither an insured nor an insurer. In fact, self-insurance does not involve the transfer of a risk of loss, but rather a retention of that risk, making it the “antithesis of insurance.”**

# U.S. FIDELITY & GUAR v. COMMERCIAL UNION MIDWEST, 430 F.3D 929 (8TH CIR. 2005)

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The term “insurance” generally does not include a SIR under an insurance policy.... “A majority of jurisdictions across the nation subscribe to the ... view of self-insurance as ‘not insurance’ in, inter alia, an ‘other insurance’ context.”

If CU intended its “other insurance” clause to apply to self-insurance or self-insured retentions included within other insurance policies, it could have so stated in its “other insurance” clause, but it did not.

# **“OTHER INSURANCE” CLAUSES ADDRESSING SIRs ARE RARE**

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**“When this insurance is excess over other insurance, we will pay only our share of the amount of the loss that exceeds the sum” of the other insurance and the “total of all deductible and self-insured amounts under all that other insurance”**

# MINORITY VIEW: SELF INSURANCE IS “OTHER COLLECTIBLE INSURANCE”

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**Atchison, Topeka & Santa Fe Railway Co. v. Stonewall Ins. Co.,  
275 Kan. 698 (Kan. 2003):**

**“Among the courts that have decided whether self-insurance is insurance it appears that a slight majority have decided it is not. Sound policy and fairness reasons have been articulated for deciding that self-insurance is insurance. In addition, excess insurance coverage, as Insurers provided to Santa Fe, generally assumes that there is primary insurance coverage.... [T]o hold otherwise allows the insured to “manipulate the source of its recovery and avoid the consequences of its decision to become self-insured. ... We cannot ignore the stated terms of the policies, nor the reality of SIRs as primary insurance where the expectation and intent is to provide excess coverage.”**

# AIR LIQUIDE AMERICA v. CONTINENTAL CAS. CO., 217 F.3D 1272 (10TH CIR., 2000)

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**Air Liquide's decision to self-insure does not relieve it from primary liability simply because the underlying accident was also covered by another insurance policy. Were we to hold otherwise, Air Liquide would receive the double windfall of avoiding significant premium payments under a standard insurance policy and avoiding primary liability for an accident caused by one of its vehicles.**

# ADDITIONAL “FAIRNESS” CASES

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- **State Farm Mut. Auto. Ins. Co. v. Budget Rent-A-Car Sys., Inc., 359 N.W.2d 673 (Minn. Ct. App. 1984)**  
**(“Budget made a risk management decision not to buy coverage for the first \$100,000. To treat Budget as anything other than an insurer for the first \$100,000 would create a windfall for Budget.”)**
- **Hillegass v. Landwehr, 176 Wis.2d 76 (Wis. 1993)**  
**(surveying caselaw and recognizing Wisconsin is in the minority of jurisdiction in considering SIRs to be “other insurance”)**

# WHO PAYS THE DEDUCTIBLE/SIR? “YOU” DO

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- **Defining “You” and “Your”**
- **An additional insured typically is not required to pay an SIR or deductible**

*FORECAST HOMES, INC. v. STEADFAST INS. CO.,  
181 CAL.APP.4TH 1466 (CAL. APP. 2010)*

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**“[Y]ou shall be responsible for payment of all damages and defense costs ... until you have paid self-insured retention amounts and defense costs equal to the per occurrence amount shown in the Schedule ....”**

**“You” means “the Named Insured”**



# PRACTICE TIPS

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- **Avoiding “failure to procure” claims**
- **“Primary and non-contributory” language**
- **Shifting responsibilities via contract**
- **Certificates of insurance**
- **Does your insurance do what you promise?**

**Bottom line: you cannot control ISO but you can control your contract language**