The Rights and Duties of Insurers and Insureds under Self-Insured Retentions

By Seth Lamden and Iain A.W. Nasatir

As in prior hard insurance markets, the economic fallout of the COVID-19 pandemic is likely to bring an increase in self-insured retention (SIR) insurance programs. Equally, the increase in bankruptcies will likely produce many debtors unable to pay their SIR obligations. Unlike under a deductible insurance program, where the insurer's defense and indemnity obligations arise at dollar one, an insurer's defense and indemnity obligations under an SIR program typically do not arise until a specified amount of covered loss has been incurred by or on behalf of the insured. Under an SIR arrangement, the interests of the insurer and insured often are aligned with regard to claims that can be resolved completely within the SIR. When losses threaten to exceed the SIR, however, the interests of the insurer and insured can diverge. This article discusses some of the coverage disputes that can arise under an SIR insurance program, such as whether the SIR has been satisfied; whether the insured's inability to satisfy the SIR relieves the insurer of its obligations; whether an insured must comply with an insurer's demand to settle a claim within the SIR; and whether the insured has engaged in improper conduct in exhausting the SIR.

What Is a Self-Insured Retention?

An SIR is "a dollar amount specified in a liability insurance policy that must be paid by the insured before the insurance policy will respond to a loss."[1] Thus, under a liability policy that is subject to an SIR, "the insured (rather than the insurer) would pay defense and/or indemnity costs associated with a claim until the SIR limit was reached. After that point, the insurer would make any additional payments for defense and indemnity that were covered by the policy."[2]

SIR provisions are sometimes confused with deductibles, which are "amount[s] the insurer will deduct from the loss before paying up to its policy limits . . . [that] will be subtracted from each covered loss in determining the amount of the insured's loss recovery."[3] But "unlike a deductible, 'the excess insurer's [defense] obligations [under a policy with an SIR] do not arise until after the amount of the self-insured retention has been paid.'"[4]

In effect, an insured with an SIR serves as its own primary insurer, i.e., it assumes the responsibility to defend itself and pay any losses that fall within the SIR. The insurer that issues such a policy is, in effect, an excess carrier: it does not defend, and it generally has no obligation to indemnify, until the SIR is satisfied.

SIR provisions have become increasingly common in recent years, and this trend undoubtedly will continue as the economic consequences of the COVID-19 pandemic continue to unfold. Many liability insurers are increasing premium rates, being more selective in risk acceptance, and limiting exposure. An effective way for an insurer to limit its risk exposure is to issue coverage in excess of an SIR—the policy only has to respond to larger, rarer, more significant claims. In this regard, SIRs can simplify underwriting and allow coverage to

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be offered at a lower premium cost than policies that require the insurer to defend and indemnify on a first-dollar basis.

Insurers may also find SIRs desirable because they involve a cooperative sharing of risk. If the insured is liable to pay (and has to defend itself against) the first part of any potentially covered loss, the insured will have a substantial incentive to undertake loss avoidance measures. By contrast, an insured that knows its insurer will be paying any loss, on a first-dollar basis, may have less incentive to minimize or avoid potentially covered risk.

Insureds, meanwhile, may find SIRs desirable for their own reasons. Among other things, these provisions allow the insured—rather than an insurer—to manage the initial defense of a claim. This can be useful, for example, if an insured wants to deter frivolous small-dollar litigation as part of its business model and is prepared to assume the costs of aggressively litigating these cases, whereas an insurer might have an incentive to settle these small-dollar claims to avoid litigation costs. Insureds that face frequent claims within their retention often retain third-party administrators to manage these claims.

Tensions That Can Arise under an SIR Arrangement

Claims that threaten to exceed the SIR, or do exceed the SIR, can create tensions between insurers and insureds. One obvious tension involves the question whether an SIR has been properly satisfied so as to require an insurer to assume responsibility for the insured's defense. For example, if a policy has a per-occurrence SIR, the insured and insurer may disagree as to how many "occurrences" are implicated by a tendered loss. Because of this disagreement, the parties may also disagree on whether the insured has to satisfy one or multiple retentions before the insurer's obligations are triggered.

Tensions also arise when an insured is unable (or unwilling) to satisfy the SIR with its own funds and looks to other sources to meet these obligations. Some insurers permit this. Others do not. They prefer that insureds keep their own "skin in the game" and share directly—with their own funds—in the risk of loss.

Another source of tension arises when an insured is bankrupt, or insolvent, and unable to satisfy the SIR. In these cases, insureds—or, in some cases, the claimants who are trying to access the policy proceeds—may seek to have the SIR forgiven in part or in full. The insurer may view this as contrary to the parties' intent when the provisions were underwritten.

Finally, tensions may arise in settlement discussions. Under policies with SIR provisions, the insured is responsible for defending the claim, but it knows that its liability will be capped at the amount of the retained limit. It knows the insurer will pay for any judgment or settlement beyond that amount. If a claimant offers to settle with the insured for an amount at or near the retention, the insured may have an incentive to roll the dice. It may decide to try the case, knowing that its own exposure will not increase further with an adverse judgment and its exposure may decrease, perhaps to zero, if it can avoid liability altogether. These tensions are exacerbated by the fact that an insured, in contrast to an insurer, has no generally recognized good faith obligation to consider an excess insurer's interests in engaging in settlement discussions.[5]

To alleviate these tensions, many SIR policies have reporting requirements—similar to excess policies—that require an insured to report to the insurer claims that meet a threshold deemed likely to exceed the retention. These policies also give the insurer "the right, but not the duty" to associate in the defense and settlement of these claims. Once an insurer invokes that right, the insured has a duty to cooperate. For example, the insured may not refuse to convey the insurer's proposed settlement terms to the plaintiff,[6] and the insured may not refuse to contribute its retained limit to allow the insurer to enter an otherwise reasonable settlement within the insurer's layer.[7]

Disputes under SIR Provisions

The insurance industry has not adopted standardized SIR policy language. Different insurers use different language, calibrated to their own specific concerns and underwriting considerations. The result is that courts have found themselves called upon to interpret and construe SIR provisions with varying language and (arguably) different purposes and intent. The body of case law that has emerged illustrates how some of the tensions discussed above can give rise to coverage disputes.

Insureds may not have a duty to settle within the SIR. Absent policy language to the contrary, courts typically hold that an insured defending itself within an SIR has no duty to accept a settlement within the SIR. In one of the earliest reported decisions to address this issue, the California Supreme Court held in *Commercial Union Assurance Cos. v. Safeway Stores, Inc.*, that an insured defending itself under an SIR has no implied duty to its excess insurer to accept a settlement within the SIR, even if the insured knew or should have known that its potential liability could reach the excess insurance policy above the SIR.[8] The coverage lawsuit in *Safeway Stores* was brought by an excess insurer seeking to recover from its insured the amount of a judgment that the excess insurer was required to pay above the insured's SIR. The excess insurer claimed that the insured was required to reimburse the excess insurer for the amounts that the excess insurer paid above the SIR because the insured rejected a reasonable settlement offer within its SIR. The excess insurer brought a two-count lawsuit against the insured alleging negligence and breach of the duty of good faith and fair dealing.[9]

The *Safeway Stores* court held that the trial court had correctly dismissed the excess insurer's lawsuit because: (1) the excess policy at issue did not expressly require the insured to settle within the SIR; and (2) an insured has no implied duty to accept a settlement offer that would avoid exposing the excess insurer to liability. In so ruling, the *Safeway Stores* court distinguished California cases imposing a duty on a primary

TIP: The interests of the insurer and insured often are aligned with regard to claims that can be resolved completely within the SIR but can diverge when losses threaten to exceed the SIR.

insurer to accept a reasonable settlement within its limits to avoid exposing an excess insurer to liability.[10] According to the *Safeway Stores* court, cases involving an excess insurer against its primary insurer are based on the theory of equitable subrogation, i.e., that the excess insurer can step into the shoes of its insured and assert a bad faith failure to settle claim against its primary insurer to recover amounts that the excess insurer was required to pay in excess of the primary limits. Because such cases are predicated on the excess insurer asserting the insured's bad faith failure to settle claim against the primary insurer in an equitable subrogation action rather than a separate, independent duty owed to the excess insurer, they do not apply to claims brought by an excess insurer against its insured.[11]

In further support of its holding, the *Safeway Stores* court stated that an insured's implied covenant of good faith and fair dealing to its insurer does not encompass a duty to settle, in part because an excess insurer can have no reasonable expectation that its insured would accept a settlement offer to protect the excess insurer from liability exposure.[12] As the *Safeway Stores* court explained, where "the policyholder is self-insured for an amount below the beginning of the excess insurance coverage, he is gambling as much with his own money as with that of the carrier."[13] As such, "the excess carrier has no legitimate expectation that the insured will 'give at least as much consideration to the financial well-being' of the insurance company as he does to his 'own interests' in considering whether to settle for an amount below the excess policy coverage."[14] In fact, "the primary reason excess insurance is purchased is to provide an available pool of money in the event that the decision is made to take the gamble of litigating."[15]

Courts outside of California also have held that a self-insured party does not assume the duties of a primary insurer and, therefore, is not required to accept a settlement to protect its excess insurer from liability.[16] In one such case decided under Texas law, the court in *International Insurance Co. v. Dresser Industries, Inc.*,[17] rejected an excess insurer's position that a self-insured party had a common-law duty to settle within the amount of self-insurance to protect the excess insurer from liability. Following the California Supreme Court's decision in *Safeway Stores*, the *Dresser Industries* court observed that the nature of excess insurance explains why a self-insured party has no duty to settle to protect its excess insurer from liability: "the primary reason excess insurance is purchased is to provide an available pool of money in the event that the decision is made to take the gamble of litigating."[18] Accordingly, concluded the *Dresser Industries* court, "when deciding whether to try a lawsuit, an insured need not subordinate its own financial interests to that of the excess insurer."[19]

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Policy language may require an insured to settle within the SIR. None of the preceding cases contained policy language that required the insured to settle within the SIR. However, such clauses do exist and have been found to be enforceable. For example, a Florida appellate court found that pursuant to the following policy provision, an insured would be liable to its excess insurer for the portion of an underlying judgment in excess of the SIR if the insured rejected a reasonable settlement offer within the SIR:

> The Insured shall have the obligation to provide at its own expense adequate defense and investigation of any claim and to accept any reasonable offer of settlement within the Self-Insured Retention. In the event of failure of the Insured to comply with this clause, no loss, cost or expense will be paid by the Company.[20]

Insurers may have the right to associate in the defense. Many excess policies issued above an SIR give the excess insurer the right to "associate" in the defense of an underlying claim. Often, such policies state that the excess insurer's right to associate in the defense arises only when an underlying claim is likely to involve the excess policy.[21] This right, once invoked, requires an insured to cooperate with the excess insurer in the defense of the claim,[22] which can include making joint decisions regarding defense strategy.[23]

Some insurers may be protected from liability if the SIR defense is ineffective. Although rare, some excess policies contain provisions that protect an excess insurer from liability due to an insured's ineffective defense of the underlying case. For example, in *State National Insurance Co. v. County of Camden*, the U.S. District Court for the District of New Jersey considered whether the following policy provision relieved an insurer of its duty to indemnify the amount of a judgment in excess of an SIR due to the insured's allegedly inadequate defense of an underlying suit:

> The NAMED INSURED shall be obligated to
> A. provide an adequate defense and investigation of any action for or notice of any actual, potential or alleged damages, and

B. accept any reasonable offer or settlement within the NAMED INSURED'S self-insured retention,

and, in the event of any NAMED INSURED'S failure to comply with any part of this paragraph, the company shall not be liable for any damages or costs or expenses resulting from any such occurrence.[24]

Although the court found that disputed issues of fact precluded it from ruling on whether the insured had complied with this condition, it also held that the insurer bore the burden of providing that it was prejudiced by the insured's allegedly inadequate defense to avoid its coverage obligations.[25]

How Do SIRs Work in Bankruptcy?

When insurance worlds and bankruptcy worlds collide, strange things happen. This is particularly true with respect to the application of SIRs when the insured entity has filed for bankruptcy. Almost always, when the insured entity becomes a debtor, it is unable to fulfill many of its contractual obligations, including obligations arising out of its insurance policies, such as the obligation to fund the applicable SIR. As a result, the debtor-insured can be at loggerheads with its insurer on how claims will be handled. The insurer agreed to the SIR (frequently in $500,000 and $1,000,000 amounts with either no aggregate or a high aggregate) with the reasonable expectation that its insured would pay its share. The insurer priced its policy accordingly. As far as the debtor is concerned, the SIR is out of its hands, as it is no longer worrying about the past but trying to have a future. But this failure to fund the SIR leaves both claimants and the insurer in a difficult position. The debtor and the claimants (who are most affected) will argue that the failure to pay the SIR does not relieve the insurer of its obligation to indemnify. Further, they may argue that the insurer must drop down and absorb the SIR as its own obligation. The insurer, on the other hand, can argue that it has no obligation to indemnify until the SIR is paid, or if it does, it is after the SIR limit. Below we analyze, in reverse chronological order, the decisions dealing with these two conflicting points of view.

Cases concluding insurance exists even when the SIR is not satisfied. *Rapid-American Corp. v. Travelers Casualty & Surety Co.*[26] is a relatively recent case in which the bankruptcy court found that notwithstanding explicit policy language requiring actual payment of the SIR by the insured (and the failure to pay the SIR because of the insured's bankruptcy), the insurer was required to pay amounts over the SIR. Despite "unambiguous exhaustion language," the court examined the "bankruptcy clause" in New York Insurance Law section 3420 and its mandate that a policy must contain language complying with section 3420 (and failure to do so results in that section being implied into the policy).[27] As a matter of public policy expressed by this statute, the court found that the insurer could not be relieved of its obligations. However, the court rejected the argument that section 3420 was intended to relieve the insured of all of its obligations, such as paying the SIR, and in particular focused on language in the SIR provision that permitted the SIR to be exhausted by a party other than the insured (e.g., a difference-in-conditions (DIC) insurer). Because the insured could have paid the SIR through some other mechanism, such as DIC insurance, the intent of the policy was to have the SIR obligation survive even if the insured became insolvent, such that the insurer was not liable for the SIR itself.

Among the tensions between insurers and insureds under an SIR arrangement are those that arise in settlement discussions and when an insured is bankrupt.

A similar result was reached under Ohio law in *Sturgill v. Beach at Mason Ltd. Partnership*.[28] In this case, the SIR provision stated: "Satisfaction of the 'self insured retention' as a condition precedent to our liability applies regardless of insolvency or bankruptcy by you."[29] The policy also contained a bankruptcy provision similar to New York Insurance Law section 3420, although Ohio had neither an insurance statute nor any case law dealing with the obligations of an insurer when its insured was in bankruptcy (unlike New York, for example). The district court cited to other jurisdictions that required the insurer to be responsible for post-SIR liability and specifically rejected the argument that the failure to have a bankruptcy provision in its state insurance law (and therefore a stated public policy on SIR liability) had any impact since the policy did have a bankruptcy provision.

In *Pinnacle Pines Community Ass'n v. Lexington Insurance Co.*,[30] there was no Arizona state statute or case law providing public policy guidance with regard to a failed SIR obligation caused by the insolvency of the insured. Instead, the district court relied upon the bankruptcy provision contained in the insurance policy itself to require the insurer to provide coverage per the policy, but permitted any SIR obligations that were unpaid to be set off against the insurer's obligations, rather than the insurer dropping down to the SIR level.

The Eighth Circuit Court of Appeals overruled a lower court decision holding under Wisconsin law that the failure to pay an SIR relieved the insurer of its obligations. In *Gulf Underwriters Insurance Co. v. Burris*,[31] the SIR provision allowed the insurer to pay the SIR and be reimbursed by the insured. It also anticipated bankruptcy and stated that the contract was executory, and the failure to pay the SIR entitled the insurer to terminate the contract for a material breach. However, SIR language contemplated cancellation rather than termination in another part of the policy, creating an ambiguity. As an initial matter, the court rejected the executory language provision as an impermissible attempt to improve one creditor's position (the insurer's) over another's, especially where the premium had been paid and the policy period expired. Noting that Wisconsin had a direct right of action statute and a bankruptcy provision in its insurance code, the court concluded that Wisconsin had a public policy that would void the SIR if it was construed to void coverage if unpaid. The court did not require the insurer to drop down, however.

The First Circuit Court of Appeals, applying Rhode Island law, also relied on public policy to negate the impact of the failure to pay the SIR. In *Rosciti v. Insurance Co. of Pennsylvania*,[32] the policy in question required the "complete expenditure" of the SIR but also contained a bankruptcy provision. The lower court had rejected the application of the bankruptcy provision and the relevance of the Rhode Island direct action statute to find the insurer to be free of any payment obligations. The First Circuit overruled, finding the bankruptcy provision unambiguous and public policy in favor of requiring the insurer to comply with its obligations under the policy. It rejected the insured's argument that public policy required the insurer to drop down.

One of the earlier decisions on SIRs is *In re Vanderveer Estates Holdings, LLC*.[33] The policy contained an Illinois choice of law provision and required the SIR to be paid before any coverage would be provided under the policy, as a condition precedent. The Illinois insurance code had a bankruptcy provision, as did the policy. The court concluded that existing Illinois state case law that followed Illinois public policy required the insurer to meet its obligations under the policy. The court examined bankruptcy law and determined that the policy was not an executory policy and that the insurer was not entitled to a priority position as a creditor (such as having an administrative claim for the SIR).

Under Indiana law, a bankruptcy court decided that the failure to pay an SIR did not invalidate insurance coverage. In *In re Federal Press Co.*,[34] the excess insurance required the insured to pay its retention of $300,000 per occurrence, $800,000 in the aggregate before its insurance obligations of $10 million were triggered. The policy also contained a bankruptcy insolvency clause, and a condition precedent clause that the insured comply with all provisions of the policy before the insurer's obligations were triggered. The court found those two clauses contradictory and reviewed whether the insurer had suffered any prejudice as a result of the failure to pay the retention. Because the insured had paid its premium in full, maintained a loss fund to cover any retention until filing for bankruptcy, and disclosed its weak financial position and likely failure to satisfy the retention requirement in the future, the court concluded that the insurer had not suffered any prejudice due to the insured's nonpayment of the retention.

Cases concluding there is no insurance when the SIR remains unsatisfied. Some cases have concluded that insurance is not triggered when the SIR has not been satisfied. In *Pak-Mor Manufacturing Co. v. Royal Surplus Lines Insurance Co.*,[35] the court construed an explicit payment of the SIR obligation as a condition for coverage in the policy that also contained a bankruptcy provision. However, this bankruptcy provision, besides providing that the insured's bankruptcy would not relieve the insurer of its obligations, also provided that the insurer's obligations would not be increased in the event the insured was in bankruptcy and unable to pay its SIR. The court emphasized that other decisions requiring the insurer to provide coverage where the SIR went unpaid were driven by the state statutes with bankruptcy provisions. Because Texas law had no such restrictions, carriers under Texas law were free to contract as they pleased, including eliminating their liability under the SIR. Unless the SIR was satisfied, the insurer had no obligation to pay anything. Interestingly, the court drew a distinction between the SIR being paid and the SIR being satisfied, noting all the debtor-insured needed to demonstrate was a credible obligation to pay the SIR. This analysis provides an opportunity for some creative bankruptcy strategizing.

Similar to the previous case decided under Texas law and at approximately the same time, *Associated Electric & Gas Insurance Services Ltd. v. Border Steel Rolling Mills, Inc.*,[36] held that the insurer was relieved of its obligations under the policy when the SIR went unsatisfied. The district court acknowledged that there were no Fifth Circuit Court of Appeals or Texas state court rulings on point and that the policy contained a bankruptcy provision. However, the court stressed that the underlying limits language stated that "the policy shall be excess over the stated limits of the underlying insurance . . . whether collectible or not . . . and regardless of insolvency," and the stated limits included the insured's SIR limits. As a result, it concluded that the insurer had no liability absent payment of the SIR, notwithstanding insolvency.[37]

Factors to consider for enforcement of an SIR in bankruptcy. A number of specific factors affect the analysis of how the SIR will be handled in a bankruptcy. On the one hand, courts are reluctant to accept the insurer's argument that the failure to satisfy the SIR relieves the insurer of all of its obligations under the policy, including the obligation to pay losses above the SIR. On the other hand, courts are also reluctant to force an insurer to "drop down" and pay the SIR as well as losses above the SIR.[38]

Specific considerations in reaching a decision include (1) whether the SIR language requires actual payment of the SIR as a precondition to coverage (as opposed to simply a "credible obligation" to pay the SIR or the ability of anyone to satisfy the SIR, such as a DIC insurer); (2) the existence of a state insurance law requiring an insurer to perform notwithstanding the insured's bankruptcy; (3) the existence of a state law providing for a third-party direct right of action against an insurer; or (4) a provision in the policy requiring the insurer to perform notwithstanding the insured's bankruptcy.

Deciding the applicable state law can make all the difference; however, a discussion of conflict of laws is beyond the scope of this article. In Texas, and arguably any state where there is no bankruptcy provision in the state insurance code (e.g., Ohio and Louisiana), the insurer can argue that it has no obligation to provide insurance where the SIR remains unpaid. In the states other than Texas, and others covered by the citations above, the insurer cannot make such an argument. The insurance practitioner is advised to check the policy for choice of law provisions (unusual) and for statutory endorsements indicating the insurer's position on applicable law. Finally, the insurance practitioner should consider which state's public policy is most implicated in the situation and might arguably sway the choice of law analysis concerning interpreting the insurance policy. ◀

Notes

1. *Self-Insured Retention (SIR)*, IRMI Glossary, https://www.irmi.com/term/insurance-definitions/self-insured-retention (last visited Oct. 12, 2020).

2. *Id.*

3. *Deductible*, IRMI Glossary, https://www.irmi.com/term/insurance-definitions/deductible (last visited Oct. 12, 2020).

4. Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Lawyers' Mut. Ins. Co., 885 F. Supp. 202, 206 (S.D. Cal. 1995).

5. *See* Commercial Union Assurance Co. v. Safeway Stores, Inc., 610 P.2d 1038, 1042 (Cal. 1980) (holding that "a policy providing for excess insurance coverage imposes no implied duty upon the insured to accept a settlement offer which would avoid exposing the insurer to liability").

6. N.Y.C. Hous. Auth. v. Hous. Auth. Risk Retention Grp., Inc., 203 F.3d 145 (2d Cir. 2000).

7. Harbor Ins. Co. v. City of Ontario, 282 Cal. Rptr. 701 (Ct. App. 1991).

8. 610 P.2d at 1040.

9. *See id.*

10. *Id.*

11. *See id.*

12. *Id.* at 1041–42.

13. *Id.* at 1042.

14. *Id.* (citation omitted).

15. *Id.*

16. *See, e.g.*, Royal Surplus Lines Ins. Co. v. Coachmen Indus., Inc., 18 Fla. L. Weekly Fed. D 828 (M.D. Fla. 2002) ("The weight of authority establishes that a retained limit does not generally convert an insured into a primary insurer."); Emp'rs Mut. Cas. Co. v. Key Pharm., Inc., 871 F. Supp. 657, 666 (S.D.N.Y. 1994) ("[W]e decline to recognize, under New Jersey law, a common-law duty giving rise to a cause of action by an excess insurer against its insured for failure to settle a lawsuit below the threshold of the excess policy.").

17. 841 S.W.2d 437 (Tex. App. 1992).

18. *Id.* at 444 (quoting *Safeway Stores*, 610 P.2d at 1042).

19. *Id.*

20. Nat'l Cas. Co. v. Green, 711 So. 2d 609, 609–10 (Fla. Dist. Ct. App. 1998).

21. *See, e.g.*, Doctors Co. v. Am. Int'l Specialty Lines Ins. Co., No. A123003, 2011 Cal. App. Unpub. LEXIS 1107, at *8 (Feb. 14, 2011) (discussing excess policy stating that the insurer had "the right to effectively associate with [the insured] in the defense of any Claim that appear[ed] reasonably likely to involve [the insurer] including, but not limited to, negotiating a settlement").

22. Inst. of London Underwriters v. First Horizon Ins. Co., 972 F.2d 125, 127 (5th Cir. 1992); *In re* Feature Realty Litig., 634 F. Supp. 2d 1163, 1175 (E.D. Wash. 2007).

23. Harbor Ins. Co. v. City of Ontario, 282 Cal. Rptr. 701 (Ct. App. 1991).

24. 10 F. Supp. 3d 568, 578 (D.N.J. 2014).

25. *Id.* at 582.

26. No. 13-10687, 2016 Bankr. LEXIS 2224 (S.D.N.Y. June 7, 2016).

27. Section 3420 provides: "No policy or contract insuring against liability for injury to person . . . shall be issued or delivered in this state, unless it contains in substance . . . [a] provision that the insolvency or bankruptcy of the person insured, or the insolvency of the insured's estate, shall not release the insurer from the payment of damages for injury sustained or loss occasioned during the life of and within the coverage of such policy or contract."

28. No. 1:14-cv-0784, 2015 U.S. Dist. LEXIS 142490 (S.D. Ohio Oct. 20, 2015).

29. *Id.*

30. No. CV-12-8202, 2013 U.S. Dist. LEXIS 34103 (D. Ariz. Mar. 12, 2013).

31. 674 F.3d 999 (8th Cir. 2012).

32. 659 F.3d 92 (1st Cir. 2011).

33. 328 B.R. 18 (Bankr. E.D.N.Y. 2005).

34. 104 B.R. 56 (Bankr. N.D. Ind. 1989).

35. No. SA-05-CA-135-RF, 2005 U.S. Dist. LEXIS 34683 (W.D. Tex. Nov. 3, 2005).

36. No. EP-04-CV-00389-KC, 2005 U.S. Dist. LEXIS 32198 (W.D. Tex. Sept. 27, 2005).

37. *See also In re* Kismet Prods., Inc., No. 04-25167, 2007 Bankr. LEXIS 4719 (N.D. Ohio Aug. 28, 2007) (applying Ohio law and concluding that the insurer had no liability where the SIR was unpaid); Hadley v. Centex Landis Constr. Co., 990 So. 2d 68 (La. Ct. App. 2008) (same).

38. Financial insolvency clauses can negate the SIR obligation. Some policies provide that the retention requirement is waived where the insurer cannot pay the retention because of financial insolvency.