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Following Form: Deductibles vs. SIRs

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Liability insurance policies may contain a deductible or a self-insured retention (an "SIR") requiring the insured to bear a portion of loss otherwise covered by the policy. An SIR is similar to a deductible in an insurance policy, with the key difference being control of the defense and settlement. The insured has that control when coverage is within most SIRs, but the insurer has that control when coverage is within most deductible provisions. Other matters addressed by these provisions are whether the provision applies to damages, expense of defense, or both, and what payments are applied to policy limits or not, and the notice and reporting obligations of the parties.

For insurance coverage purposes, how many SIRs or deductibles must be paid by the insured before excess coverage is triggered is an ongoing issue addressed by the courts.

1. *Deere & Co. v. Allstate Insurance Co.*

A recent case from the Court of Appeal of California addresses the issue of whether overlying follow-form excess policies also follow form to the SIR provision found in underlying coverage and what that means for purposes of: 1) the insured's payment obligations; and 2) when excess coverage is triggered.

Deere & Co. v. Allstate Insurance Co.,[1] is a 2019 case relating to SIRs. Deere, a renowned manufacturer of farm equipment, was sued in a number of asbestos products-liability lawsuits. Deere's insurance coverage consisted of numerous primary, umbrella, and excess policies. Deere's primary policies did not cover products-liability claims, and were not implicated in the asbestos lawsuits. Coverage for products liability claims was provided to Deere by a series of excess first-layer umbrella policies, in excess of specific dollar amounts (*i.e.*, SIRs) paid by Deere. An insurance coverage dispute ensued between Deere and its insurers, as to whether the payment of additional SIRs were required at each excess layer to trigger higher- level insurance coverage.

The trial court held that higher-level excess coverage was not triggered until Deere paid any additional SIR at each level of underlying coverage. The trial court also held that excess insurers were not obligated to pay defense costs when underlying cases had been dismissed without payment.

The Court of Appeal reversed. It held that an insured who had paid its SIRs under its first-layer umbrella general liability policies, and exhausted those policies, was entitled to coverage from higher-layer excess policies without having to pay the SIRs again.[2] It reasoned that the higher-layer excess policies followed form *except as to limits of liability* and thus did not follow form as to the SIRs, which were written in terms of liability limits.[3] The Court of Appeal noted that the fundamental purpose of excess insurance is to protect the insured against amounts of loss or damage in excess of the underlying policy limits.[4] Here, the excess policy followed form to the underlying policy, except certain specified terms including the underlying policy limits, consistent with the purpose of excess insurance.

In a second holding, the court addressed an issue sometimes called the "defense without payment" issue. The Court of Appeal held that the excess policies obligated the excess insurers to pay the insured's defense costs in the underlying asbestos exposure cases, irrespective of whether a case had been dismissed without payment by adjudication or settlement, because the cases fell within the scope of coverage of the excess policies.[5]

2. *In re Silicone Implant Ins. Coverage Litigation*

The *Deere* court made its decision in part in relying upon a 2002 Minnesota case *In re Silicone Implant Ins. Coverage Litigation* which addressed deductibles, rather than SIRs.[6] In that matter, the underlying plaintiffs were silicone-gel breast implantees, who allegedly suffered from autoimmune disorders arising from leaks in their silicone implants. Plaintiffs sued the manufacturer of their silicone implants, 3M. Plaintiffs alleged that the leaks caused continued contact between the implantees' cells and silicone. Although the silicone implants were implanted during the policy period, the lawsuits were brought after the insurance policies had expired.

3M settled the suits and then turned to its liability insurers for insurance coverage. Defendant 3M had high-level, excess-layer, occurrence-based insurance policies with several insurers, from 1977 through 1985. The excess-layer insurance policies would pay out but only after 3M had exhausted its underlying primary policies. Under the excess-layer policies, the insurers would indemnify 3M for any amount that 3M was obligated to pay in damages due to injuries or damages that were covered under the policy. The policies applied to injury or damage arising out of bodily injury or property damage caused by an occurrence.

Among other things, the insurers argued that the policies were triggered but only immediately before the underlying plaintiffs exhibited overt symptoms of their diseases, rather than at the time of the implantations. The insurers also argued that 3M's $5,000 deductible in the relevant underlying layer applied to each implantees' claim, *and* that the deductible also applied at each excess layers. The district court held that 3M's insurance policies were triggered when the silicone implants were implanted. Thus, the insurance companies were obligated to indemnify 3M for lawsuits arising from implantations that occurred during the policy period. The district court also found that, because the damages were continuous from the time of implantation, and injuries

continued due to ongoing cellular exposure to silicone, 3M's losses should be allocated on a pro-rata basis between all of 3M's insurance companies. Finally, the district court noted that a single $5,000 deductible applied *each year* (rather than as to each claim), and did not apply to the excess policies. The district court noted that treating an "occurrence" as an event, *i.e.*, the manufacture of the implants, from which multiple claims might arise, was a reasonable interpretation of the policy.

The Court of Appeals affirmed in part. Significantly, as to whether a single deductible applied *each year* (rather than as to each claim), the appellate court disagreed with the district court. The appellate court looked to the plain language and interpretation of the primary policies, which defined occurrence as "an accident, event, or happening, including a continuous or repeated exposure to conditions." The appellate court held that an "occurrence" takes place whenever each complainant suffered the injury, which here occurred shortly after each implantation, and not when the implant was manufactured.[7] As such, the deductible applied on a per claim basis.

The appellate court noted that because the policies were triggered by injuries occurring both around the time of the implantations as well as afterwards, the damages were continuous, requiring allocation pro-rata by time on the risk. The allocation period ended at the time the women filed their lawsuits or died.

Lastly, the appellate court held that the excess policies followed form to the primary coverage, except regarding the limits of liability. Thus, the excess policies did not follow form as to the deductible endorsement, which was written in terms of liability limits.[8] In other words, the deductible only had to be paid on the first layer, but not on higher layers. As such, the deductible only had to be paid one time.

Endnotes

1 *Deere & Co. v. Allstate Ins. Co.*, 32 Cal. App. 5th 499, 244 Cal. Rptr. 3d 100 (Ct. App. 2019), *as modified on denial of reh'g* (Mar. 26, 2019), *review denied* (June 12, 2019).

2 *Id.* at 499.

3 *Id.*

4 *Id.* at 516

5 *Id.* at 520.

6 *In re Silicone Implant Ins. Coverage Litig.*, 652 N.W.2d 46 (Minn. Ct. App. 2002), *aff'd in part, rev'd in part,* 667 N.W.2d 405 (Minn. 2003)

7 *Id.* at 68.

8 *Id.*

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