This article was originally published in Enforce *(Volume 12, Issue 1)*

Enforce
The Insurance Policy Enforcement Journal

How Insurance Companies Admit and Deny Coverage at the Same Time: *The Multiple SIR Problem*

By David E. Wood and John L. Corbett

Many cost-conscious businesses purchase errors and omission insurance policies with high self-insured retentions, or SIRs, as a way of keeping premiums down. Unlike a first-dollar policy, in which the insurance company has a duty to defend from dollar one even if the policyholder is financially responsible for an initial indemnity layer, a policy with an all-loss SIR often imposes no duty to defend or indemnify on the insurance company until that SIR has been exhausted by the policyholder's payment of defense costs, judgments or settlements. Given a large enough SIR, the insurance company may end up with no defense or indemnity obligations over the life of the policy. Generally, the higher the SIR, the lower the premium.

The reason why businesses purchase high SIR policies is to plan for that catastrophic liability that might imperil the continued existence of the company. Although the policyholder may have to pay a significant amount to exhaust the SIR and trigger coverage, the insurance company's limits often exceed the SIR many times over. In the big picture, this higher-SIR-lower-premium approach is a win-win proposition for the policyholder . . . so long as when that major litigation comes around, the insurance company agrees that the SIR has in fact been satisfied.

In many instances, exhaustion of the SIR is not a complicated issue. For example, where a service company is sued by a client, the policyholder may spend enough money defending the case to exhaust the SIR, thereby triggering coverage under the E&O policy. In some cases, the policyholder may enter into a partial settlement with one plaintiff out of a number who have made a series of related claims against the policyholder, where the partial settlement is sufficient to exhaust the SIR. In such circumstances, the insurance

---

David E. Wood is editor of *Enforce* magazine and is co-managing shareholder of Anderson Kill's Ventura, CA, office. With more than 28 years of experience in the insurance industry, Mr. Wood devotes his practice to liability and errors and omissions coverage, professional liability insurance, crime coverage, primary excess disputes, and rights of additional insureds. He has written about insurance recovery matters for the *New York Times* and *National Law Journal*, among others, and has appeared on *MSNBC* and *Fox Business Journal* discussing insurance recovery issues.
805-288-1300 | dwood@andersonkill.com

John L. Corbett is an attorney in Anderson Kill's Ventura, CA, office. His practice has focused on insurance recovery in the construction industry, although he also has recovery experience in the telecommunications, health care and Internet industries.
805-288-1300 | jcorbett@andersonkill.com

company's ability to wriggle out of any obligation to defend or indemnify the policyholder may be limited to other coverage defenses, but not breach of the condition that the SIR be exhausted before coverage attaches.

The more difficult scenario is the series of claims alleging injuries to numerous plaintiffs. Although none of the claims is, by itself, sufficient to break the bank, collectively they pose a grave threat to the business. When this happens, insurance companies sometimes rely on an additional avenue for avoiding liability: the assertion that each claim requires the exhaustion of a separate SIR to trigger coverage. Such a coverage posture often places any practical possibility of coverage out of reach, regardless of whether the claims are otherwise covered under the policy.

An insurance company's decision to assert that multiple SIRs must be exhausted involves several considerations. One is the contextual architecture of the policy: the relationship among 1) the SIR, 2) the aggregate limit of liability, 3) the per-claim limit of liability, and 4) the potential liability exposure from the various claims. If some of the claims are reasonably likely to result in a judgment substantially in excess of the SIR, the insurance company may elect not to assert multiple SIRs where the per-claim limit of liability is substantially lower than the aggregate limits of the policy. This is because an assertion of multiple SIRs can result in the applicability of multiple individual limits of liability.

In other situations, the SIR is sufficiently high that none of the claims on its own is likely to exceed one SIR. The existence of multiple claims therefore may present little additional exposure to the insurance company. Although an insurance company asserting a multiple SIR requirement theoretically places multiple per-claim limits in play, in practice the insurance company may have no true exposure, because its defense and indemnity obligations are unlikely ever to be triggered by any of the claims due to their low individual severity. Thus, asserting the existence of multiple SIRs, where the insurance company faces no multiple-limits exposure, may allow the insurance company to admit that coverage exists while avoiding any actual obligation to defend or indemnify the policyholder.

Another key consideration is the extent to which the claims can be distinguished on the basis of factual differences. E&O policies are typically triggered by a "claim" against the policyholder, often defined as a written demand for money or a lawsuit seeking damages arising out of a "wrongful act." In the event of multiple claims, such policies often have interrelated acts clauses deeming multiple claims arising out of the same wrongful act or "interrelated" wrongful acts as a single omnibus claim. Although the exact language differs from policy to policy, the definition of "interrelated wrongful acts" (sometimes called "related wrongful acts") often refers to logically or causally related wrongful acts or a series of same, similar or related wrongful acts. When an insurance company perceives an advantage in asserting that the policyholder must satisfy multiple SIRs, it will be motivated to emphasize the factual and legal differences between the claims, such that they are not "related" or "similar" for purposes of the aggregation clause. (Not surprisingly, insurance companies have been known to make the exact opposite argument — i.e., that differences between the claims are insubstantial — when the parties are litigating the applicable limit of insurance as opposed to the number of SIRs.)

There is a minefield of cases around the country deciding multiple SIR and multiple policy limits issues, with conflicting results. For example, in *Continential Casualty Co. v. Wendt* (11th Cir. 2000) 205 F.3d 1258, the 11th Circuit Court of Appeals concluded that an investment advisor's various misrepresentations about an investment to a series of clients

were "related," and thus constituted a single wrongful act subject to a single SIR and limit, because they were part of a course of conduct "aimed at a single particular goal." *Id.* at 1264. However, in *St. Paul Fire & Marine Ins. Co. v. Chong* (D. Kan. 1992) 787 F.Supp. 183, the district court found that a defense attorney who negligently advised three defendants in a single criminal matter to enter a guilty plea had committed three separate wrongful acts for purposes of coverage. Although his representation of the three individuals involved "highly similar factual situations," the court was persuaded they were not "related" because the attorney had a "separate duty to each client" and rendered "separate services" to each of them. *Id.* at 188.

Other courts have approached this issue with an eye toward public policy. In *American Commerce Ins. Brokers v. Minnesota Mutual Fire & Casualty Co.* (Minn. 1996) 551 N.W.2d 224, American Commerce, an insurance agency, sought coverage under an employee dishonesty policy in connection with a bookkeeper who embezzled more than $190,000 from the company in 155 separate acts over the course of a year. She embezzled the money using two different methods — pocketing insurance premium payments and issuing petty cash checks to herself. The policy provided $10,000 in coverage per occurrence (defined as loss involving "a single act or series of related acts"), subject only to a $250 deductible. Because most of the individual acts of embezzlement well exceeded the deductible, American Commerce argued that each act of embezzlement was a separate occurrence, resulting in 155 occurrences (or up to $1.55 million in coverage above the deductibles). Trying to limit its upper extent of exposure, the insurance company argued that the embezzlement constituted two "series of related acts" under the policy, resulting in only $20,000 in coverage for the entire claim. The Minnesota Supreme Court declined to adopt the policyholder's argument on the number of occurrences — because it saw the likelihood of that argument being misused by insurance companies where most or all individual instances of wrongdoing fall beneath the deductible or SIR. "Thus, while adopting American Commerce's expedient definition of occurrence would benefit American Commerce in this case, it might well have a deleterious effect on the insurance industry as a whole. Future policyholders would be harmed if, as often occurs in cases of petty employee theft, embezzlers steal in amounts below the deductible." *Id.* at 229-30.

Without a Scratch

First, before taking a position as to whether a series of claims triggers multiple SIRs, with or without multiple policy limits, check the applicable case law to see which approach to SIR a state's aggregation courts have adopted. Courts sometimes decide on the outcome that generates the most coverage for the policyholder, and reason backwards in order to hold insurance companies to their duty to deliver the coverage its customer reasonably expected. Other courts apply a different analysis when deciding a multiple SIR issue than they employ when deciding a multiple limits issue. Knowing ahead of time the inclination of the courts that will hear the dispute will help plan the manner in which the claim is presented to the insurance company. Experienced insurance recovery counsel can provide valuable guidance in this process.

Second, where possible, leverage the policyholder's relationship with the insurance company, and more importantly, the broker's relationship with the insurance company, to create a bigger downside for the insurance company if it takes an aggressive stance. If properly incentivized, insurance companies sometimes decide claims based on business rather than coverage considerations. The incentive is the future revenue earned by keeping the insurance relationship in place. Here, having a broker willing to risk a relationship

with an underwriter to get a claim paid is critically important.

Finally, never give up. Insurance companies sometimes take advantage of the policyholder that is unaccustomed to litigating coverage issues and simply wants the claim paid so it can get back to its core business, by making a low-ball offer in hopes that the policyholder has no stomach for a fight. Insurance companies' core business, at least on the claims side, is limiting coverage where possible. Level the playing field by bringing in capable insurance professionals (insurance recovery counsel and the broker) to make clear that the policyholder is serious about the claim. Sometimes the best way to get a claim paid without an expensive fight is to signal a readiness to do battle if required.

About Anderson Kill

Anderson Kill practices law in the areas of Insurance Recovery, Commercial Litigation, Environmental Law, Estate, Trusts and Tax Services, Corporate and Securities, Antitrust, Bankruptcy, Real Estate and Construction, Public Law, Government Affairs, Anti-Counterfeiting, Employment and Labor Law, Captives, Intellectual Property, Corporate Tax and Health Reform. Recognized nationwide by Chambers USA for Client Service and Commercial Awareness, and best-known for its work in insurance recovery, the firm represents policyholders only in insurance coverage disputes — with no ties to insurance companies and has no conflicts of interest. Clients include Fortune 1000 companies, small- and medium-sized businesses, governmental entities, and nonprofits as well as personal estates. Based in New York City, the firm also has offices in Ventura, CA, Dallas, TX, Stamford, CT, Washington, DC, Newark, NJ, and Philadelphia, PA.