

IN THE SUPREME COURT OF FLORIDA

Case No. SC11-2320

INTERVEST CONSTRUCTION OF JAX, INC., a Florida corporation,
and ICI HOMES, INC., a Florida corporation,

Appellants,

vs.

GENERAL FIDELITY INSURANCE COMPANY,
a foreign corporation,

Appellee.

ON DISCRETIONARY REVIEW OF CERTIFIED QUESTIONS FROM THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
Case No.: 10-12613-GG

APPELLEE'S ANSWER BRIEF

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I. STATEMENT OF THE CASE AND THE FACTS

A. Nature of the Case

The issue in this case is the operation of the terms of a general liability insurance contract entered into by Appellee General Fidelity Insurance Company¹ and its insureds, Intervest Construction of Jax, Inc. and ICI Homes, Inc. Those terms apportion the risk between the parties, and raise the question of how payments made by each party to satisfy a settlement reached with the injured victim of faulty construction by ICI, Katherine Ferrin, are to be apportioned, and how an indemnity payment on behalf of the third-party tortfeasor, Custom Cutting, Inc., by its insurer, North Pointe Insurance Co., is to be applied. The terms of the contract, which are the sole basis upon which this determination can be made, include an endorsement requiring that coverage for ICI be subject to a self-insured retention (“SIR”),

¹ General Fidelity Insurance Company will be referred to as “General Fidelity.” The injured party, Katherine Ferrin, will be referred to as “Ferrin.” Appellants Intervest Construction of Jax, Inc., and ICI Homes, Inc. are related companies, which, for the purposes of this litigation, have a common interest. They will be referred to collectively as “ICI,” or “the Insured.” The General Fidelity policy issued to ICI will be referred to as “the Policy.” The indemnitor Custom Cuttings, Inc. will be referred to as “Custom Cuttings” or “The Tortfeasor.” Custom Cuttings’ liability insurer, North Pointe Insurance Co., will be referred to as “North Pointe.” All emphasis is counsel’s unless otherwise noted.

Doc. 11, Exh. 3, of one million dollars.²

B. Statement of the Facts

General Fidelity generally accepts ICI's Statement of the Facts and accepts "Appellant's Record Excerpts" as the relevant documents subject to the following reservations.

As further set forth in the Stipulation of Facts (Doc. 11) ICI and General Fidelity did not agree as to which party was entitled to payment of the indemnification funds from Custom Cutting (Doc. 11 ¶ 14-15). Therefore, the parties agreed that the payment would be treated as having been made to both of them, with the money being held in trust by ICI's attorneys until settlement with Ferrin was complete. The parties reserved their rights as to how the indemnity payment *should have* been credited, the issue in this case (Doc. 11, ¶ 16).

General Fidelity asserts that the facts of the actual settlement payment, while not correctly characterized by ICI, are in any event irrelevant, since this case is about how the indemnity payment should have been treated under the terms of the policy, not how it was treated in the settlement agreement, which preserved the parties' rights. The Joint

² General Fidelity accepts "Appellant's Record Excerpts" as the pertinent record for this appeal. Specific documents in the "Record Excerpts" will be referred to as "Doc. ___", with further specific references as appropriate.

Stipulation of Facts (Doc. 11) filed December 24, 2009 sets forth the circumstance giving rise to this dispute.

The SIR Endorsement, which is at the base of this litigation, states in pertinent part:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY

**SELF-INSURED RETENTION
Per Occurrence**

**Self-Insured Retention: \$1,000,000 Per Occurrence
Including Loss Adjustment Expense**

In consideration of the premium charged, it is agreed the insurance afforded by the policy to which this endorsement is attached is subject to the following additional terms, conditions and provisions. *In the event of a conflict between any of the terms, conditions or provisions of the policy and this endorsement, this endorsement will control the application of insurance to which the policy applies.*

Unless otherwise specified, all terms used in this endorsement have the meaning set forth in the policy.

1. The Self-Insured Retention, shown above, applies to each and every “occurrence” or offense made against any insured, to which this insurance applies, irrespective of the number of claims which may be joined in to any one “suit” or claim.
2. Our total liability will not exceed the Limits of Insurance as specified in the policy Declarations, Coverage Parts or endorsements. *The Limits of Insurance will apply only in excess of the Self-Insured Retention, hereinafter referred to as the “Retained Limit.”*

3. *We have no duty to defend or indemnify unless and until the amount of the “Retained Limit” is exhausted by payment of settlements, judgments, or “Claims Expense” by you.*

* * *

6. *The “Retained Limit” will only be reduced by payments made by the insured.*

* * *

11. With respect to any claim payable under this insurance and subject in whole or in part to the “Retained Limit” as provided in this endorsement, we will have the right, but not the obligation to assume the control of said claim and to pay any part of or all of the amount of any such loss including “Claims Expense” within the “Retained Limit” on behalf of and for the account of the insured to affect settlement of said claim. Amounts paid by us pursuant to this paragraph will be *reimbursed* to us by the insured within ten (10) days from the date of our written request to the insured. *We will have the right to make partial recoveries from the insured when partial settlements or “Claims Expense” are incurred by us within the “Retained Limit” as provided by this endorsement.*

* * *

14. The insolvency, bankruptcy, receivership of the insured, or any refusal by or inability of the insured to satisfy its obligations pursuant to this endorsement will not reduce the “Retained Limit” as set forth in the endorsement, nor will it require us to pay any amounts within the “Retained Limit.” *The payment of the “Retained limits” by the insured is a condition precedent for our obligation to pay any sums either in defense or indemnity and we shall not pay any such sums until and unless the insured has satisfied its “Retained limits”.*

* * *

All other terms and conditions of the Policy remain unchanged.

* * *

ICI incorrectly characterizes the facts of the settlement agreement reached at the mediation, in an attempt to use the facts of the settlement to establish that the settlement payment from North Pointe was a payment from ICI, the very issue reserved for this litigation.

ICI asserts, without any support in the record, that it “objected to [the settlement] procedure but agreed under protest so the Ferrin case could be settled.” App. at 2-3.³ Of course, both parties took opposing positions, and the settlement and reservation of rights preserving this litigation resulted as set forth in the Stipulation of Facts, ¶ 14-16 (Doc. 11). General Fidelity objects to the characterization given to the settlement discussions, which are privileged, and, in any event, irrelevant.

The parties agreed that the indemnity payment was, for the purposes of settlement, to be characterized as a payment to both parties to be held in escrow until the settlement was complete (Doc. 11, Exh. 4, ¶2). The parties agreed to settle the underlying case and reserve their rights with respect to coverage for resolution in a subsequent litigation, which in fact has taken

³ References to Appellants’ Brief in this Court will be referred to as “App. at___.”

place. Doc. 11, ¶16. Therefore, any reference to the terms of the settlement as lending support to the argument advanced by ICI is inconsistent with the settlement itself. The terms of the policy, and not the procedure in implementing the settlement, are determinative of the outcome of this litigation.

C. COURSE OF PROCEEDINGS

This case was originally filed by ICI in the Circuit Court in and for Duval County, Florida. General Fidelity removed the case to the Federal District Court for the Middle District of Florida. The parties filed cross-motions for summary judgment based on stipulated facts.

The district court judge correctly determined that the Policy provided no coverage until the “‘Retained Limit’ is exhausted by *you* [the insured].” (Emphasis added by the court.) The district judge noted, “the ‘Retained Limit’ will *only* be reduced by payments made *by the insured*” and that “payment of the ‘Retained Limit’ *by the insured* is a condition precedent to [Defendant’s] obligation to pay any sums in defense or indemnity.” (Emphasis added by the court.) *See*, Doc. 11, ¶ 6, Exh. 3.⁴ The district court properly refused to rewrite the insurance contract and vitiate the policy

⁴ The “Retained Limit” is the dollar value limit of the “Self-Insured Retention (the “SIR”).

endorsement requiring payment of the self-insured retention by the insured and instead substituting a duty on General Fidelity to pay amounts within the self-insured retention.

On Appeal, the 11th Circuit Court of Appeals was asked to reverse the determination that the district court made based on the language of the Policy. The Court was asked to decide that the indemnity payment from North Pointe qualified as *a payment by the insured* that would satisfy the requirement that ICI pay the SIR of \$1,000,000.00. Alternatively ICI asserted that it was entitled to the Tortfeasor's indemnity payment under the "made whole" doctrine. Doc. 11 ¶ 14-16. In turn, the 11th Circuit Court of Appeals has, as discussed below, certified two questions to this Court.

D. DISPOSITION BELOW

The District Court, Schlesinger, J., found that the Policy required ICI to pay the one million dollar SIR without application of any indemnity payment. The Court further found that the indemnity payment received from the Tortfeasor should be applied to any payment by General Fidelity in excess of the SIR first. Judge Schlesinger therefore granted General Fidelity's motion for summary judgment, and denied that filed by ICI. Since the parties had agreed to split payment of the settlement amount in excess of the amount paid by North Pointe while reserving their rights, that excess

being \$600,000.00, judgment was entered for General Fidelity in the amount of \$300,000.00 plus costs and interest. Doc. 29.

ICI appealed the District Court's decision to the 11th Circuit Court of Appeals. After argument by the parties, the Court of Appeals determined that the case turned on undecided issues of Florida law, and certified the following questions:

1. Does the General Fidelity Policy allow the insured to apply indemnification payments received from a third-party towards satisfaction of its \$1 million self-insured retention?

2. Assuming that funds received through an indemnification clause can be used to offset the self-insured retention, does the transfer of rights provision found in the General Fidelity policy grant superior rights to be made whole to the insured or to the insurer?

II. SUMMARY OF ARGUMENT

A

With all due respect, General Fidelity asserts that the Court of Appeals has phrased its certified questions in a manner that does not directly state the issues before this Court. General Fidelity would respectfully restate those questions as follows:

1. Does the General Fidelity Policy allow the insured to apply indemnification payments received from a third-party toward satisfaction of its \$1 million self-insured retention?

2. Assuming indemnification payments received from a third-party cannot be used to offset the self-insured retention, does the allocation

of risk in the General Fidelity policy grant superior rights to indemnification payments to the insured or to the insurer? (Emphasis added.)

The reason General Fidelity has amended the Court of Appeals' questions is that those questions conflate the issue of the source of funds for ICI's SIR payment with the issue of the right to indemnity payments from North Pointe. The language of the policy treats those issues as entirely separate, and to be applied one at a time, regardless of the actual mechanism for settling a particular claim. If indemnification from North Pointe can be used to satisfy payment of the SIR, then the Court of Appeals' second question is moot. The issue of indemnification by the tortfeasor, under the policy terms, only arises after the issue of payment of the claim has been resolved. The issues of payment of the SIR and indemnity from third-parties are addressed in two different parts of the policy. Allowing indemnity payments to be used to satisfy the SIR would render the separate provision dealing with the rights of the parties to the policy as against third-parties superfluous and meaningless. The actual mechanism utilized by the parties in settling this case, as emphasized by ICI in its brief, is in fact irrelevant.

B

Presuming that the indemnity payment cannot satisfy the SIR, ICI then seeks to invoke the "made whole doctrine" in support of its position that the indemnity payment should first be applied to any payment made by

ICI. In fact, that doctrine does not apply to the facts of this case for several reasons.

The courts have recognized that the “made whole doctrine” is a default rule, which is subject to statutory enactments and contract terms. It cannot be invoked, as ICI has attempted to do, to override policy terms.

In essence, the “made whole” concept is based on a specific allocation of risks under an insurance policy. In most cases, primary liability is allocated to the insurer, and therefore any excess payment by the insured, such as when the limit of coverage is insufficient, must be reimbursed first. Where, as here, the Insured has contracted to retain the initial risk, it only makes sense that if the parties to the insurance contract achieve any recovery from a third-party, that payment becomes the property of the insurer to the extent of any payment in excess of the SIR.

The SIR endorsement clearly allocates the risk of payment of the first \$1,000,000 to ICI. It is clear that the Policy requires ICI to bear the risk of losses within the \$1,000,000 self-insured retention. Therefore, it follows that General Fidelity has the first right to reimbursement from any indemnity payments received from third parties, such as Custom Cuttings’ insurer, North Pointe.

C

Even if ICI, as a practical matter, had the indemnity payment from North Pointe in its physical possession, had used the payment by North Pointe to pay the first \$1 million, and had been able to compel General Fidelity to pay the subsequent \$600,000, General Fidelity would still have the right to recover its payment from ICI as reimbursement for its payment, a right also granted by the policy. This provision addresses the situation, alleged to have occurred here, where an indemnity payment from a third-party is used, along with a payment from the insurer, to satisfy the claim of an injured party. Even in this situation, ICI could not keep the indemnity payment as having been used to satisfy the SIR, since the policy grants General Fidelity the right to reimbursement where indemnity was made before payment of the SIR by ICI.

ARGUMENT

A. The policy requires ICI to pay the SIR with its own funds

The district court properly refused to rewrite the insurance contract and vitiate the policy endorsement requiring payment of the self-insured retention by the Insured, and instead imposing a duty on General Fidelity to pay amounts within the self-insured retention.

The very purpose of the SIR is to require the ICI to make payment of

its own funds prior to any liability arising under the General Liability policy. The fact that payments from Custom Cutting may have passed through ICI's hands does not make such payments the property of ICI. Such an application of the Policy terms would render them meaningless as referring only to the mechanism in which payments were executed, and not to the substantive rights of the parties.

In general, it has been held that self-insured retentions, as opposed to deductibles, render a policy of liability insurance excess to the self-insured retention, and therefore no duties under the liability policy arise until the retention has been paid.

For example, in *Beloit Liquidating Trust v. Century Indemnity Co.*, 2002 WL 31870525 (N.D. Ill.), the court was dealing with a general liability policy where the Self-Insured Retention Endorsement "expressly limits the defendant's liability to ultimate net loss in excess of plaintiff's retained limit." The court held that the Self-Insured Retention Endorsement made it clear that no coverage began until the SIR's exhaustion, and that therefore such exhaustion was required not only with respect to the duty to indemnify, but with respect to the duty to defend as well.

The 11th Circuit also has had the opportunity to examine the nature of a self-insured retention under Florida law. *State National. Ins. Co. v.*

Lamberti, 362 Fed. Appx. 76, 2010 WL 200832 (11th Cir. 2010). In that case, which dealt with the applicability of the SIR to a specific coverage and the number of times it could be applied, the Court stated in a footnote: “[a]n SIR is similar, but not identical, to a deductible. A deductible is deducted from the overall policy limits, whereas the SIR is not. Also, unlike with a deductible, *the insurer is not liable until the insured has paid the whole of its SIR*” 362 Fed. Appx. at 78, 2010 WL 200832 *1.

This case concerns the method in which the SIR in ICI’s policy can be satisfied. The District held, correctly, that under the terms of General Fidelity’s policy, the SIR could not be satisfied by an indemnity payment from Custom Cuttings’ insurer, North Pointe. The District Court rejected the fundamental argument advanced by ICI: that based on some strained interpretation of the Policy, the payment from North Pointe to settle the underlying Ferrin’s claim somehow constituted a payment from ICI.

ICI actually agrees with most of the District Court’s decision. ICI agrees with the Court’s reading of the Policy, the law applicable to the Policy’s SIR provisions under Florida law, and the analysis utilized by the Court. ICI’s sole argument with the District Court seems to be that the Court, in having applied the correct law to the correct facts, nonetheless reached the wrong conclusion. In making this argument, ICI resorts to

reliance on irrelevant facts not referenced in the District Court's decision and to legal argument not supported by the cited legal authorities

ICI has never argued that the terms of the SIR are ambiguous or that "the terms of the policy have more than one reasonable interpretation. ..." *Swire Pacific Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 165 (Fla. 2003). Under those very terms, ICI cannot apply the payment by North Pointe to satisfy the SIR. General Fidelity's policy is not implicated "unless and until the amount of the 'Retained Limit' is exhausted by payment of settlements, judgments, or 'Claims Expense' *by you*" Doc.6, Exh. 3.

As in its Statement of the Issues and Statement of the Case, ICI tries in its Argument to characterize the agreed settlement between the parties as facts upon which the District Court should have determined coverage. App. 7. In its Brief, ICI states that "[The Custom Cutting payment belonged to ICI until it was paid to the underlying plaintiff." App. 7. [The payment by ICI's counsel] constituted payment of the settlement by ICI and was a 'payment made by the insured' pursuant to the terms of the SIR." App. 7. This is simply an improper characterization of the payment by North Pointe to ICI's counsel *in trust* on behalf of ICI and General Fidelity. As discussed above, the Settlement Agreement reserved the parties' rights. It cannot provide a basis to establish rights.

Again on pages 15-17 of its Brief, ICI attempts to rely on the facts of the settlement as somehow relevant to the legal rights of the parties under the Policy, rights which were specifically reserved by the Settlement Agreement. General Fidelity simply cannot fathom how ICI can advance its argument on the basis of a settlement designed to preserve the parties' rights.

In any event, the exact issue facing the Court in this case has been addressed by several decisions from California, applying the same rules of construction used in Florida. One very similar case is *Travelers Indemnity Co. v. Arena Group 2000, L.P.*, 2007 WL 935611 (S.D. Cal.). In that case, personal injury suits were brought against Arena Group when a marquee on its building fell onto the plaintiffs. Arena was an insured under its own primary and excess policies, and under a tenant's policy as an additional insured pursuant to an indemnity agreement. The claims were settled, with Arena's own carriers each contributing. The carrier with the "additional insured" coverage, Crum & Forster, also contributed, but the issue of whether Arena Group or Crum & Forster were liable to pay an additional \$500,000, the amount of the SIR in C & F's policy, was reserved for litigation, just as in this case.

The C & F policy contained an SIR provision which stated that the "Retained Amount is the responsibility of the Insured and is to be paid from

the Insured's own account." Arena argued that this amount had been satisfied by payments made on its behalf by the other carriers.

The court held that the SIR had not been satisfied, saying that provisions in policies requiring the insured to pay the claim itself are valid:

Because the Policy unambiguously requires the Insured to pay the Retained Amount from its "own account," the Court concludes that payments made by Arena Group's other insurers to Doll and Snow do not satisfy the retention.

2007 WL 935611 at *5. In the instant case, General Fidelity's policy states:

3. We have no duty to defend or indemnify unless and until the amount of the "Retained Limit" is exhausted by payment of settlements, judgments, or "Claims Expense" by you (ICI).

* * *

6. The "Retained Limit" will only be reduced by payments made by the insured.

The policy also states:

14. The insolvency, bankruptcy, receivership of the insured, or any refusal by or inability of the insured to satisfy its obligations pursuant to this endorsement will not reduce the "Retained Limit" as set forth in the endorsement, nor will it require us to pay any amounts within the "Retained Limit." *The payment of the "Retained limits" by the insured is a condition precedent for our obligation to pay any sums either in defense or indemnity and we shall not pay any such sums until and unless the insured has satisfied its "Retained limits".* [Emphasis added.]

In this case, the \$1,000,000.00 was paid by North Pointe, not ICI. The payment by North Pointe cannot satisfy the SIR. While the language in the C & F policy referred to the insured's "own account," it is clear the meaning is the same.

Likewise, in *Forecast Homes, Inc. v. Steadfast Ins. Co.*, 2010 WL 95091 (Cal. Ct. App.), a general contractor, Forecast, was sued for construction defects. It had required its subcontractors to defend and indemnify Forecast and have Forecast named as an additional insured under their policies. When Forecast was sued, it tendered the defense to the subcontractors' carriers.

The carriers did not accept the tender of the defense. They asserted that their policies each contained an SIR, which could only be satisfied by payment by the named insureds, the subcontractors, which had not happened. Forecast said it could pay the self-insured retentions itself.

The court disagreed. It said that under the policies' terms, the named insured was required to pay the SIR out of its own funds, and if it did not, coverage was not triggered. *Forecast* could not pay the SIR itself. The facts of this case refute one of the main arguments made by ICI, that the characterization of the payment from North Pointe as a payment to ICI

solves the SIR problem, because at that point the money would belong to ICI. In *Forecast*, the contractor made essentially the same argument, that if the checks had been made out differently, the payment would have appeared to come from the named insureds. The reasoning of that court defeats this argument, however, because the court recognized that the insurance policy was a contract that reflected specific risk allocations, and was not about the characterization of payments or the order in which checks were issued.

ICI points out in its brief that since the time when the Eleventh Circuit certified this case to the Supreme Court, a subsequent California case, *National Fire Ins. Co. v. Federal Ins. Co.*, 2012 WL 13669 (N. D. Cal. Jan 4, 2012) has again taken up the subject of self-insured retentions. According to ICI, *National Fire* shows that *Forecast* was dependent on the language in the policy at issue, and that the result was different where the policy language was different. General Fidelity agrees with this statement.

What General Fidelity disagrees with is that the differences in policy language in *National Fire* are pertinent here. Federal's policy specifically provided, among other things, that the bankruptcy of any other **insurer** of its insured would not increase its exposure. The court found that inherent in this statement was that in the absence of bankruptcy, the existence of other insurance could affect Federal's coverage. In this regard, General Fidelity's

policy is like that in *Forecast*.⁵

Moreover, *National Fire* turns very much on the peculiar facts of the case. The tortfeasors were both insured under National Fire's policy, and issues regarding "other insurance" were applicable. Here, no issue of "other insurance" exists. Further, factual issues existed regarding the apportionment of liability between the settling tortfeasors. The Court denied both insurers' motions for summary judgment. *National Fire* simply does not provide any guidance in this case.

Finally, in *Insurance Co. of the State of Pa. v. Acceptance Ins. Co.*, 2002 WL 32515066 (C.D. Cal), the court again enforced a provision in an SIR requiring that the insured, and not some other party, pay the SIR. Once again, the court found that the parties had allocated the risk by contract, and additionally, as in this case, the SIR endorsement specifically controlled over any conflicting provisions in the basic policy.⁶

In this case, the District Court carefully analyzed the California cases. The Court correctly concluded that the means by which an SIR could be

⁵ General Fidelity policy, Doc. 2, Exhibit A, form CG 0001 12 04, p. 10 of 15 states: "Bankruptcy or insolvency of the Insured or of the Insured's estate will not relieve us of our obligations under this Coverage Part." No mention is made of the insolvency of any other insurer, as in *National Fire*.

⁶ "In the event of a conflict between any of the terms ... of the policy and this endorsement, this endorsement will control..."

satisfied depends on the policy terms, and that here the policy required ICI to use its own funds.

While California seems to be the primary locus for decisions on this issue, other courts have addressed the meaning of self-insured retentions.

In *Koch Development Co., Inc. v. Clarendon America Insurance Co.*, 2008 WL 215214 (E.D. Mo.), a complex case involving an attempt to force payment from an insurer whose policy contained an SIR, the court stated:

The insured and the insurer, Clarendon, in the instant case agreed to an insurance policy providing, in the section defining “Self-Insured Retention,” that the “Self-Insured Retention shall be primary or underlying to such insurance as is afforded by this policy. The Insured shall pay 100% of such Self-Insured Retention before this policy applies.” This language is clear and unambiguous: the insured must pay or be obligated to pay amounts in satisfaction of the \$100,000 SIR before Clarendon’s duty to indemnify its insured arises. This construction is consistent with relevant case law. *See, e.g. U.S. Fidelity & Guarantee Ins. Co. v. Commercial Union Midwest Ins. Co.*, 430 F. 3d 929, 937-38 (8th Cir. 2005) (defining SIR “as ‘[t]he amount of an otherwise-covered loss that is not covered by an insurance policy and that usually must be paid before the insurer will pay benefits’ ”) (*quoting* Black’s Law Dictionary 1391 (8th ed. 2004)) (alteration in original); *United States v. Baxter Int’l, Inc.*, 345 F.3d 866, 894 n. 20 (11th Cir. 2003) (same quote but citing the 7th edition of Black’s Law Dictionary); *Pac. Employers Ins. Co. v. Domino’s Pizza, Inc.*, 144 F.3d 1270, 1276-77 (9th Cir. 1998) (“*It is well recognized that self-insurance retentions are the equivalent to primary liability insurance, and that policies which are subject to self-insured retentions are ‘excess policies’ which have no duty to indemnify until the self-insured retention is*

exhausted.’ ”). See also Geisner v. Budget Rent A Car of Missouri, 967 S.W.2d 95, 96 (Mo. Ct. App. 1998) (discussing a SIR endorsement requiring that an amount provided in the insurance contract be satisfied prior to reaching other exposure limits).

Clearly, ICI is trying to avoid the consequences of having chosen a policy with an SIR, and instead is trying to make the coverage provided by General Fidelity primary.

Two Florida cases, both decided by the same judge in federal bankruptcy court, lend further support to General Fidelity’s position. The case *In Re Apache Products Company*, 311 B. R. 288 (M.D. Fla. 2004) (applying Alabama law) provides a discussion of issues surrounding an SIR, referring to case law from various jurisdictions. Ultimately, in that case, the court found that the insurer had no duty to defend or indemnify until the SIR had been exhausted by payment by the insured. Just as in this case, the SIR in that case specifically stated that no coverage existed until the SIR had been exhausted, and therefore it operated as the primary layer of coverage, the bankruptcy of the insured notwithstanding.

This same court looked at a similar issue in the case of *In Re OES Environmental, Inc.*, 319 B. R. 266 (M.D. Fla. 2004). The court referred back to its analysis in the *Apache Products* case, where it had held that there was no duty to defend or indemnify until the SIR had been satisfied. The

court distinguished the *OES* case, noting that this SIR provision did not require exhaustion as a precondition to coverage, but simply provided that the SIR be “borne by” the insured. In that situation, the court held, the SIR was comparable to a deductible that simply provided a threshold for the duty to make payment. The court held the policy provided coverage, whether the SIR had been paid by the insured or not.

These cases stand for the proposition that whether an SIR is to be treated as a deductible or as a layer of coverage depends entirely upon the language of the SIR. Here, the language unambiguously makes payment of the SIR by ICI a condition to the existence of coverage under the General Fidelity policy. Since ICI did not pay the SIR, General Fidelity’s policy coverage was never triggered. *See also* OSTRAGER & NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 13.13 at 1176, 1178 (15th ed. 2010) (A self-insured retention endorsement “*effectively transforms the policy from a primary policy into an excess policy covering only amounts in excess of the ... self insured retention.*”) Thus, like an excess insurer, an insurer providing coverage in excess of a self-insured retention has no duty to defend until the self-insured retention is exhausted.

This continuing dichotomy, that sometimes an SIR is addressed as the primary layer of coverage, and other times as a deductible, based on the

Policy language, is addressed in WINDT, 3 INSURANCE CLAIMS AND DISPUTES § 11:31 (5th ed. 2010). That author notes that various cases have analogized an SIR to both a deductible and the primary layer of insurance. The author notes, however, that the “position of a primary insurer over a retention or deductible can be analogized to the position of an excess insurer over a primary policy,” *id.*, citing *Travelers Indemnity Co. v. Overseas Ace Hardware, Inc.*, 550 So. 2d 12, 13 (Fla. 3d DCA 1989), *appeal dismissed* 557 So. 2d 867 (Fla. 1990) as well as cases from other jurisdictions. In *Travelers*, the court found that where a policy provided that it was excess over a primary policy, and there was a shortfall in the primary coverage, the insured had to bear the risk. “*Primary insurance can be in the form of a separate policy to cover the deductible limit in the catastrophic policy, or simply self-insurance by the purchaser.*” *Id.* at 13.

B. The policy gives General Fidelity priority in indemnity from third-parties

An essential reason why indemnity cannot be used to satisfy the SIR in the first instance is that indemnity is addressed as a separate provision in the Policy. If ICI could use an indemnity payment to satisfy the SIR, then any rights granted to indemnity payments would be meaningless.

In this context, other cases that do recognize the ability of a payment from some other source to satisfy the SIR must be examined to determine

whether or not the utilization of such payment by the insured is otherwise inconsistent with the policy. Every specific type of “other payment” has to be examined in light of the Policy’s terms. Where the right to indemnity is specifically discussed as a separate topic from satisfaction of the SIR, it must be treated as a separate topic. To do otherwise would be to defeat the language of the Policy.

Plaintiffs make much of *Bordeaux, Inc. v. American States Ins. Co.*, 186 P.3d 1188 (Wash. Ct. App. 2008), which, though factually quite similar to the instant case, addresses a fundamentally different issue, and in any event provides an analysis inconsistent with Florida law.

Bordeaux developed a condominium and was subsequently sued by the condominium association for construction defects. Bordeaux tendered its defense to its two primary insurers, American Safety and Steadfast. American Safety and Steadfast each issued primary CGL policies to Bordeaux with \$100,000 SIRs for one-year terms between September 30, 2000 and September 30, 2001 and September 30, 2001 and September 30, 2002, respectively.

At mediation, all of the parties agreed to a settlement of \$630,000. American Safety and Steadfast agreed that their indemnity obligations would be allocated at 60% and 40%, respectively, after Bordeaux satisfied its

obligation to pay its SIR. American Safety contended that the \$105,399 Bordeaux paid in defense costs satisfied only the Steadfast SIR and that it expected Bordeaux “to pay an additional \$100,000” to satisfy the American safety SIR or “it would withhold benefits under its policy.” *Bordeaux* at 692. Bordeaux paid the additional \$100,000, but sued American Safety for its recovery.

The court allowed Bordeaux to recover the \$100,000 from American Safety. In doing so, the court explained that the American Safety policy obligated American Safety to pay covered damages above \$100,000. The policy said “nothing about whether or not Bordeaux’s obligation to pay the American Safety SIR is satisfied when it fulfills a similar obligation under another policy.” *Id.* at 698. Further, the defense costs paid by Bordeaux “were necessarily related to damages covered by both the American Safety and [Steadfast] policies.” *Id.*

The court further explained that American Safety had no right to apportion defense costs between the two policies. Consequently, Bordeaux was entitled to reimbursement of the second \$100,000 payment.

The issue decided, therefore, was whether a payment by the insured of one SIR could also serve to satisfy an SIR under a different policy. The court said it could. Nothing in that case dealt with an indemnity payment, or

any type of payment from a third-party otherwise addressed in the policy.

Even assuming that *Bordeaux* addresses an issue analogous to the present case, the reasoning in that case, even if correctly stating Washington law, does not state the law in Florida. In *Bordeaux*, the court made much of the fact that an SIR could not be considered “insurance,” since insurance involved transfer of risk, while an SIR involved retention of the risk. Therefore, the court applied general principles of insurance law, which give the insured a right to be “made whole” prior to its insurer.

Under Florida law, however, the correct analysis is to apply the policy terms. Whether or not an SIR is “insurance” in some theoretical sense, the issue here is that the SIR, as defined in the policy, provides that the primary risk be borne by the insured. The Florida cases, cited in *Bordeaux*, do not hold anything different. To the contrary, they do not involve policy interpretation at all.

For example, *Zinke-Smith, Inc. v. Florida Ins. Guar. Ass'n*, 304 So. 2d 507, 509 (Fla. 4th DCA 1974), cert. denied, 315 So. 2d 469 (1975)) is purely based on statutory construction, not on interpretation of policy language. “Merely because an employer who secures compensation in accordance with Section 440.38(1)(b), F.S. is known as a ‘self-insurer, does not convert such employer into an ‘insurer’ as the same is defined and

considered in the insurance code.” 315 So. 2d at 509.

Likewise, *Young v. Progressive Southeastern Ins. Co.*, 753 So. 2d 80, 85–86 (Fla. 2000) is also not on point. In that case, the issue was the meaning of “insurance” in the Uninsured Motorists Statute. The Court held that under the statute, a self-insured party was not, in fact, insured.

Once again, however, that case did not involve interpretation of policy terms, it involved statutory interpretation. There is nothing in Florida law that prevents parties to an insurance policy from defining that the primary risk is borne through self-insurance. Again, whether or not an SIR is insurance for the purposes of a particular statute is irrelevant.

ICI argues that the “made whole doctrine,” which is applicable in certain subrogation situations, gives it priority to the ownership of the indemnity payment, no matter the policy language. In fact, this doctrine mandates the conclusion that General Fidelity is entitled to the benefit of North Pointe’s payment.

In support of its argument based on the “made whole doctrine” under Florida law, ICI cites *Shonau v. Geico General Ins. Co.*, 903 So. 2d 285, 287 (Fla. 4th DCA 2005) and several other cases, and concludes that its right of contractual indemnity under the subcontract, Doc. 11, Exh. 2, means that those indemnity funds belong to ICI, and therefore can satisfy the SIR. ICI

asserts that it can satisfy the requirement that the “ ‘*Retained Limit*’ will only be reduced by payments made by the insured” by applying a payment made by Custom Cuttings’ insurer, North Pointe.

The “made whole doctrine” is not as broad as ICI alleges based on the cases it cites in its brief. In *Cagle v. Bruner*, 112 F.3d 1510 (11th Cir. 1997) the court specifically stated: “We hold today that the make whole doctrine is a default rule in ERISA cases.... Because the make whole doctrine is a default rule, the parties can contract out of the doctrine.” 112 F.3d at 1521. This is not an ERISA case, and the parties have established their rights by contract.

Florida Farm Bureau Ins. Co. v. Martin, 311 So. 2d 827, 830 (Fla. 1st DCA 1979), which recognizes the “made whole” doctrine is not pertinent, because it deals with the situation where the total of all funds was insufficient to cover a loss, and there was no self-insured retention: “. . . [I]t has been held that the cause of action (against the tortfeasor) is indivisible and the owner of the policy should be first to make good his own loss; where either the insurer or the insured must to some extent go unpaid, *the loss should be borne by the insurer for that is a risk the insured has paid it to assume,*” quoting *Garrity v. Rural Mutual Ins. Co.*, 253 N.W.2d 512, 514-515 (Wis. 1977). In this, which involves an SIR, General Fidelity has *not*

been paid to assume this risk. To the contrary, insureds such as ICI obtain an SIR to *reduce* their premium and not pay for this risk.

Likewise, *Humana Health Plans v. Lawton*, 675 So. 2d 1382 (Fla. 5th DCA 1996) another “made whole” case, turns on the interpretation of the statute governing reimbursement of health insurers, not policy language. Finally, *Monte de Oca v. State Farm Fire & Cas. Co.*, 897 So. 2d 471 (Fla. 3d DCA 2004) supports General Fidelity’s position. In that case a settlement apportioned some of the payment for tort injuries to the insured. The court held that, under those circumstances, the insured was *not* entitled to recover its deductible from the insurer’s subrogation recovery to the extent of its own liability payment. *Monte de Oca* at 473. Since in this case payment was made by and/or on behalf of ICI of \$600,000 for its own exposure, ICI is not entitled to be “made whole” to the extent of that payment. Whether or not ICI bore some independent liability in tort was never determined.

In *Shonau, supra*, the principal case relied on by ICI, the court recognized that where the insurer, as here, has a specific provision in its policy assigning it the right to pursue a tortfeasor, the right of indemnification is transferred to the insurer, and any recovery obtained by the insurer is not subject to the “made whole doctrine,” and belongs to the insurer. This assignment gives General Fidelity the right of indemnity

against Custom Cuttings. While ICI goes to great length to try to demonstrate that General Fidelity has no right to indemnification from Custom Cuttings or its insurer, the assignment in the Policy specifically provides otherwise.

ICI has once again referenced the timing of the settlement payment as somehow creating rights when it cites *BP Products North America, Inc. v. Giant Oil, Inc.*, 545 F.Supp.2d 1257 (M.D. Fla. 2008) as support for its position. *BP* simply stands for the proposition that contractual indemnity provisions can provide for indemnity rights that arise before a judgment is entered against the indemnitee, such as the duty to defend.

Neither ICI nor General Fidelity actually filed suit against Custom Cuttings. Since the “made whole doctrine” only applies to such situations, *see, e.g., Shonau*, it has no application in this case. (In *Shonau*, the court actually held that the insurer was not required to reimburse the insured for its uninsured loss, where the insurer had pursued the suit against the tortfeasor.) In any event, the “made whole doctrine” is always subject to the terms of the policy, which here include the assignment of subrogation rights, the existence of a self-insured retention, and the provision in the SIR endorsement providing for reimbursement, as discussed below. *See* RUSS & SEGALLA, COUCH ON INSURANCE, § 223:147 (3d ed. 2010).

The Policy specifically assigns the right to any indemnity payment to General Fidelity. It states:

SECTION IV- COMMERCIAL GENERAL LIABILITY LIMITS

* * *

8. Transfer Of Rights Of Recovery Against Others
To Us

If the insured has rights to recover all or part of any payment we have made under this Coverage part, *those rights are transferred to us*. The insured must do nothing after loss to impair them. At our request, the insured will bring “suit” or transfer those rights to us and help us enforce them.

The District Court specifically addressed the hypothetical situation posited by ICI that had it paid the SIR, General Fidelity would have paid \$600,000, and the indemnity payment from the subcontractor could have been pursued at a later date. The District Court addressed this possible situation in a footnote on p. 8 of its Order (Doc. 25), noting that even in this scenario, “Plaintiff still would not have exhausted the SIR as required by the Policy” since the rights to the indemnity payment were transferred to General Fidelity under the Policy language. This is also completely consistent with the entire Policy, which repeatedly emphasizes that the risk of paying the first \$1,000,000 of any covered claim always rests with ICI. The owner of this transferred right is determined by the allocation of the risk. Since ICI bears the primary risk, the first right to indemnity belongs to

General Fidelity.

Once again, ICI seeks to base its argument not on what the District Court ruled, and not on the language of the Policy and how it should have been applied, but rather on a characterization of the settlement agreement. Once again, this argument entirely misses the point, since the settlement agreement preserved the rights of parties to litigate how the indemnity payment *should* have been credited, not on how the settlement agreement functioned.

For example, Section “C” of ICI’s brief, beginning on p. 15, is completely addressed to the “ownership” of the payment from North Pointe at the time of the settlement. ICI devotes three pages (p. 15 - 17) on how the timing of the actual settlement payment is the determining factor in deciding whether the indemnity payment satisfied the SIR. The District Court, quite properly, did not base its decision on the timing of payments under the settlement agreement, but rather, as was correct, on the rights of the parties as determined by the Policy language. Not only has ICI addressed a totally irrelevant non-issue, but it has failed to address the sound reasoning of the District Court, which found that the totality of the Policy required that ICI itself pay the \$1,000,000, and that any additional payment made by General Fidelity above the SIR would be satisfied first by any indemnity recovery.

The “Transfer of Rights” provision in the policy, which is separate and apart from the SIR, does not in and of itself establish any priority of recovery, as discussed above. The 11th Circuit asked specifically in its second certified question whether the provision gave the right to be made whole to ICI or General Fidelity. This question is misplaced.

As noted in its restatement of the certified question, the issue in this case is how the SIR allocates the risk, not how the “Transfer of Rights” provision is to be read. The very silence of the “Transfer of Rights” provision indicates that the right to indemnity is based upon the allocation of rights under the policy.

In a traditional policy, the insured does not assume the primary risk. If there is a deductible or a shortfall in coverage, the insured is entitled to be “made whole,” as the cases cited by ICI indicate.

Here, however, ICI is clearly and unambiguously allocated the primary risk. In this context, the “Transfer of Rights” clause would be rendered inconsistent and meaningless if it were read to contradict the allocation of risk by the SIR. Under this policy, and interpreting this policy language, it is General Fidelity, and not ICI, that is unambiguously entitled to be “made whole.”

C. To the extent that General Fidelity made any payment within the SIR, it is entitled to be reimbursed

Even if an indemnity payment were to be made to ICI, General Fidelity would be entitled to recover this payment (up to the amount General Fidelity paid in excess of the SIR) under the concept of “reimbursement.” The policy specifically grants General Fidelity this right, and this right has been recognized under similar facts in a number of prior cases.

In essence, this concept is based on the apportionment of risks under the Policy. Where, as here, the Insured has contracted to retain the initial risk, it only makes sense that if it achieves any recovery from a third-party, that payment becomes the property of General Fidelity to the extent of any payment in excess of the SIR. Thus, if the money is in the Insured’s possession, General Fidelity is entitled to reimbursement of any payment it was required to make.

In the hypothetical situation where ICI has paid the SIR, and General Fidelity has paid the additional \$600,000, and afterward ICI recovers the \$1,000,000 indemnity payment, then according to ICI, General Fidelity can have no rights to indemnity.

What ICI has failed to address is the right to reimbursement, which is specifically granted in ¶ 11 of the Self-Insured Retention Endorsement, quoted above. In pertinent part, that section states: “We will have the right to

make partial recoveries from the insured when partial settlements or “Claims Expense” are incurred by us within the “Retained Limit” as provided by this endorsement.” In other words, when the insured has not paid the full SIR because of an indemnity recovery, General Fidelity may seek reimbursement to the extent that the SIR has not been satisfied.

This right to reimbursement, which is separate from subrogation (primarily due to timing), has been recognized when granted by policy language. *See, generally*, RUSS & SEGALLA, COUCH ON INSURANCE, § 226:20 (3d ed. 2010). As COUCH states in footnote 88: “ ‘Reimbursement,’ a contractual undertaking, allows the insurer to recover payments directly from its own insured upon its insured’s recovery of the loss from a third party,” *citing* *Perreira v. Rediger*, 778 A. 2d 429 (N.J. 2001). Therefore, no matter what the timing of any indemnity payment, General Fidelity is still entitled to recover any amount within the self-insured retention.

The right to reimbursement can be applied to deductibles, and most importantly in this case, to SIRs. *See, generally*, RUSS & SEGALLA, COUCH ON INSURANCE, § 226:133 (3d ed. 2010). *See also* *Royal Indem. Co. v. Wyckoff Heights Hospital*, 953 F. Supp. 460 (E.D. N.Y. 1996) (Insurer could recover \$250,000 from its insured after the settlement of a case where the insured had only paid \$750,000 of its \$1,000,000 self-insured retention).

ICI undertook the risk of paying its liability up to \$1,000,000 when it decided on a policy with an SIR. While ICI had a right of indemnity against Custom Cuttings for the negligence of Custom Cuttings, the right to pursue that claim was assigned to General Fidelity under the policy. The parties allocated the risk on this basis, and the premium was charged and collected based on this allocation. Since General Fidelity's risk was above that undertaken by ICI, and since General Fidelity was assigned the rights to indemnity and reimbursement, it has the right to apply any funds received from the indemnitor, Custom Cuttings, to the amount it would otherwise have been required to pay, in this case, \$600,000.

Finally, and consistent with the logic of the allocation of layers of risk, “[i]n cases where the insurers’ coverage ‘is in the nature of layers, *the excess carriers should recover under subrogation before the primary insurers can be reimbursed.*’ ” *Travelers Cas. & Sur. Co. v. American Int’l Surplus Lines Ins. Co.*, 465 F. Supp.2d 1005 (S.D. Cal. 2006).

This case comes down to the simplest of analogies. A father is at a baseball game with his son. The son wants an ice cream cone, which costs \$1.00, but only has \$0.50. His father gives him \$1.00 and his son buys the cone. Who gets the change? The father, of course. His son gets to eat the ice cream cone. Moreover, should his father insist, the son would be

required to reimburse his father \$0.50 at a later date.

CONCLUSION

The District Court was correct in holding that an indemnity payment from North Pointe could not be used to satisfy the SIR. The District Court was also correct in holding that in the event of an indemnity recovery after payment of the claim, General Fidelity was entitled to be made whole before ICI. Final, the District Court was correct that even if ICI had obtained the indemnity payment, used it to satisfy the first \$1,000,000.00 in tort liability, and General Fidelity had paid the balance, General Fidelity would be entitled to reimbursement of its payment.

This Court, in answering the questions posed by the 11th Circuit should make clear that the Policy requires that an indemnity payment cannot be used to satisfy the SIR, and further that General Fidelity should be the first party to be made whole by any indemnity payment after payment of the claim, whether by a direct payment from the indemnitor or by reimbursement from ICI.

This Court should inform the 11th Circuit that under Florida law, the decision of the District Court for the Middle District of Florida granting summary judgment to General Fidelity should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email and U.S. Mail to W. Braxton Gilliam, IV, MILAM, HOWARD, NICANDRI, DEES & GILLIAM, 14 East Bay Street, Jacksonville, Florida 32202, on this 2nd day of February, 2012.

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**CERTIFICATE OF COMPLIANCE
REGARDING TYPE SIZE AND STYLE**

Appellee certifies that the text of this Initial Brief complies with the font requirements set forth in Fla. R. App. P. Rule 9.210.

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