IN THE MATTER OF THE ARBITRATION BETWEEN

EMPLOYERS' SURPLUS LINES INSURANCE COMPANY,

Petitioner,

v.

GLOBAL REINSURANCE CORPORATION, U.S. BRANCH,

Respondent.

ARBITRATION REASONED AWARD

ALFRED M. WOLIN

ARBITRATOR

In this arbitration proceeding I am asked to review and construe a certificate of facultative reinsurance issued by Gerling Global ("Gerling") to Employers Commercial Union Insurance Company of America ("Employers") . Because I write solely for the parties and not for distribution, brevity whenever possible, will be the keynote. Accordingly, formal citation to testimony or exhibits will be omitted unless necessary for clarification.

BACKGROUND

Due to the participants' familiarity with the facts that undergird this arbitration and the minimally undisputed nature of the conflict, only matters germane to the resolution of the interpretive issues will be recited. Moreover, when appropriate, relevant portions of the pre-hearing briefs have been incorporated into this opinion without attribution.

The underlying insured, Foster Wheeler, manufactured and installed steam boilers that contained asbestos insulation materials. Foster Wheeler was insured by multiple insurers through an array of layered insurance policies. For the policy year in question, 1971 -1972, Liberty Mutual Insurance Company ("Liberty") issued to Foster Wheeler a Comprehensive General Liability policy with a combined single aggregate limit of $1,000,000. On top of this primary layer of insurance was a Comprehensive Catastrophe Liability policy issued by Lumbermans Mutual Casualty Company ("Lumbermans"). This policy covered a policy period from February 1, 1971 to October 1, 1974 and provided occurrence limits of $5,000,000 and aggregate limits of $5,000,000. Employers issued an Excess Umbrella policy , EY-8560-004 ["the 004 excess Umbrella Policy"] to Foster Wheeler and its affiliated companies, effective from February 1, 1971 to February 1, 1972. This policy, like Lumbermans provided $5,000,000 for per-occurrence and aggregate losses. Employer's policy is a follow-the-form policy that sits on top of the Lumbermans' policy

and consists of a cover page. Both policies may be fairly characterized as umbrella policies. Gerling does not dispute that these policies each provide both per-occurrence and aggregate limits for bodily injury and property damage claims arising out of products supplied by Foster Wheeler or its affiliates. Gerling issued Certificate of Facultative Reinsurance No. 71-10791 to Employers. This certificate attached to Employers 004 Excess Umbrella Policy. Certificate 71-10791 consisted of a declaration page which set forth the negotiated intent of the parties as to the reinsurance afforded by that particular certificate and an additional page of standard terms on a pre-printed form. Together, these pages comprise the complete expression of the limit of reinsurance contained in the certificate.

THE CERTIFICATE

A discussion of certain aspects of the certificate is critical to the resolution of this arbitration. Paragraph 5 of the certificate in specified sections delineates the limits of reinsurance afforded .

SECTION 1. TYPE OF INSURANCE	SECTION 2. POLICY LIMITS AND APPLICATION	SECTION 3. COMPANY RETENTION	SECTION 4. REINSURANCE ACCEPTED	SECTION 5 BASIS OF ACCEPTANCE
Excess Umbrella Liability	$5,000,000 excess $5,000,000 combined single limit excess primary insurance	Various	$2,000,000 part of $5,000,000 excess $5,000,000 combined single limit excess primary insurance	Contributing excess.

Moreover, the parties agree that the terms and conditions of the certificate are unambiguous.

The five boxes, or sections, that make up paragraph 5 of the certificate, evidence acknowledgement of the terms of the Employers policy being reinsured and the reinsurance being afforded by Gerling. The first three sections relate to Employers' underlying insurance. Section 1, "Type of Insurance," indicates Gerling's understanding that

it is reinsuring an excess umbrella liability policy. Section 2, "Policy Limits and Application" is an affirmation of the Employers" policy terms and serves as an abbreviation of the much longer declarations page included in the policy. Section 3, "Company Retention," signifies that Employers' retention varies depending upon the nature of the underlying policy that would be implicated by the loss. The final two sections of paragraph 5 relate to the scope of the reinsurance. Section, 4 "Reinsurance Accepted" reflects that Gerling agreed to reinsure a $2,000,000 share or proportion of Employers' $5,000,000 total liability. Section 5 "Basis of Acceptance," reflects the manner in which Gerling is reinsuring Employers. In this certificate Gerling agreed to reinsure Employers on a "Contributing Excess" basis. The phrase "contributing excess" means that the reinsurance will attach on a proportional or pro rata participation basis, excess of primary insurance..

Because of the nature of reinsurance and its attributes of good faith and trust, two other paragraphs are deemed material and central for the arbitrator's consideration. They are paragraphs 9 and 11 of the standard printed form. These clauses are commonly referred to as the "follow" clauses.

> The Certificate, at paragraph 9, provides that Gerling's liability, in reinsurance parlance, is on a "following form" basis and incorporates the terms and conditions of the policy:
> The Company warrants to retain for its own account, subject to other Reinsurance, the amount of liability so specified in Section III of 5 above, and the liability of the Reinsurer specified in Section IV of 5 above shall follow that of the Company and except as otherwise specifically provided herein, shall be subject in all respects to all the terms and conditions of the Company's policy.

(emphasis supplied).

In paragraph 11 of the certificate there is another provision that is unique to reinsurance and is termed "Follow-The-Settlements clause." It provides as follows:

> All claims involving this reinsurance, when settled by the Company, shall be binding on the Reinsurer, who shall be bound to pay its proportion of such settlements, and in addition thereto, in the ratio that the Reinsurer's loss payment bears to the Company's gross loss payment, its proportion of expenses, other than Company salaries and office expenses, incurred by the Company in the investigation and settlement of claims or suits and, with the prior consent of the reinsurer to trial court proceedings, its proportion of court costs and interest on any judgment or award.

REINSURANCE CONSIDERATIONS

Beyond analysis of the facultative certificate is the tacit understanding that no prudent facultative underwriter would agree to bind coverage without having the relevant portion of the cedent's policy. Additionally, it is relevant, but not controlling, if there exists a relationship between the percentage of premium received by the reinsurer and the percentage of loss accepted by the reinsurer. Here, Gerling accepted 40% of Employers first dollar loss in return for 40% of the premium. $2,000,000 part of $5,000,000 excess $5,000,000 in return for $22,000 of the $55,000 premium quantitatively equals 40%.

Generally, follow-the-form clauses as interpreted by black letter law presume that the reinsurance will dovetail with the cedent's policy of liability insurance. This presumption is referred to as a "presumption of concurrency." However, this presumption is not absolute and can be overridden by clear language of limitation in the certificate that would create a non-concurrency as to the limits of liability. When a non-concurrency occurs the specific limits set forth in the certificate control over the general aim of concurrence.

Follow-the-settlement clauses are entitled to the same presumption of concurrency as follow-the-form clauses. The follow-the-settlement clause is designed to give the cedent reasonable latitude to settle claims against it by the primary insured, here Foster Wheeler, and to prevent the reinsurer from contesting the extent of the cedent's liability to the primary insured unless caps or some other limitation would likewise override the follow-the-settlements presumption of concurrency.

THE CLAIM

After the Liberty and Lumbermans policies were exhausted in or about February, 2004 Foster Wheeler made a settlement demand on Employers in the amount of $14,180,984. At the time of the demand Employers had a total of $10,000,000 in excess umbrella liability with Foster Wheeler. This $10,000,000 in coverage consisted of the $5,000,000 at issue in this proceeding and an additional $5,000,000 umbrella policy above a $5,000,000 umbrella policy issued by Home Insurance Company for the period 1970-1971. Because Employers' policies would drop down and would be responsible for first dollar coverage, exhaustion of its policies was a matter of concern. Through negotiation and a combination of Employers' two policies, Employers was able to buy back its two excess umbrella policies for $7,500,000. Of the total $7,500,000 settlement, $3,039,170 was allocated to the cedent's policy of reinsurance. Of that amount, $2,238,890 represented indemnity expense with $800,280 assigned to defense costs. At a 40% participation Gerling was billed $1,479,740[1]. Gerling refuses to pay what Employers has determined to be

[1] The arbitrator is aware that $1,479,740 is 40% of $3,699,350.

Gerling's pro rata share of both indemnity and defense costs. Hence, Employers filed this arbitration proceeding.

THE PARTIES CONTENTION

A. Employers

Employers asserts that the certificate issued by Gerling is concurrent with the follow-the-form and follow-the-settlement provisions of its certificate and that it is entitled to Gerling's 40% participation in the amount of $1,479,740. This figure would include both indemnity and defense participation. The arbitrator has been pointed to Employers' policy declaration item 4(b) entitled "Proportion of Risk Insured" which states as follows:

> Aggregate excess of $5,000,000 each occurrence and in the aggregate which in turn is excess of primary insurance.

A perusal of the declaration page denotes that this policy is subject to all the terms and conditions of the policy issued by Lumbermans. Thus, this policy is a layer of coverage above the Lumbermans policy, which is excess to Liberty's primary policy. The Lumbermans policy is instructive in two respects. First, it contains reference to $5,000,000 in both occurrence and aggregate limits. Second, it provides coverage for "Ultimate Net Loss" by reason of liability. Ultimate net loss as defined in the Lumbermans policy includes indemnity expense and defense costs. Because both policies, Employers and Lumbermans , follow-the-form and follow-the-settlements, Employers maintains they are entitled to reimbursement for Gerling's proportionate share . The term "Ultimate Net Loss" is defined as follows:

> "Ultimate net loss" means the total of the following sums arising out of any one occurrence as to which this policy applies:
> (a) all sums which the insured or any organization as his insurer, or both, become legally obligated to pay as damages, whether by reason of adjudication or settlement, because of personal injury, property damage or advertising liability; and
> (b) all expenses incurred by the insured or any organization as his insurer, or both, in the investigation, negotiation, settlement and defense of any claim or suit seeking such damages, excluding only (1) the salaries of the insured's or insurer's regular employees, (2) office expenses of the insured or any insurer, and (3) all expense included in other valid and collectible insurance.

Employers further contends that the absence of the word "aggregate" in Section 4 of paragraph 5 as contended by Gerling is without merit. Silence can never be operative as a means of limitation and if Gerling wanted to impose a limit on aggregate coverage there were affirmative steps it could have taken. Because Gerling overtly failed to limit its liability it must follow-the-form. Moreover, the inaction by Gerling for approximately thirty-four years reflects its intent to reinsure aggregate liability.

B. Gerling

At the outset of this opinion it was indicated that most of the facts were and remain undisputed. Gerling doesn't quarrel that the Employers and Lumbermans policies provide for aggregate limits nor does Gerling challenge Employers' right to reimbursement for defense costs provided an indemnity payment was made on a given claim. Gerling's challenge focuses on the non concurrency of the reinsurance it accepted, per-occurrence liability only, without the aggregate liability Employers submits Gerling agreed to reinsure. Likewise, Gerling contends a non concurrency exists with regard to reimbursement of

defense costs. Otherwise, Gerling contends there exists a 95% presumption of concurrency between its certificate and the Employers' policy to which it attaches.

In support of its contentions Gerling's theory of defense centers on paragraphs 5,9 and 11 of its certificate. The polestar of Gerling's argument is that the absence of the word "aggregate" in section 4 of paragraph 5 precludes consideration of aggregate limits of liability and that its reinsurance limits apply strictly on a per-occurrence basis. In support of this position Gerling submitted exhibits that contained the word "aggregate." The point being that Gerling knew how to include the term aggregate when it intended to reinsure aggregate limits of liability. Additionally, it rejects the follow-the-form presumption of concurrency based on the exclusionary language of paragraph 9. It submits that the absence of language of aggregate liability is a manifestation of "...except as otherwise specifically provided herein..." Lastly, use of the phrase "combined single limit" is per-occurrence language and negates Employers' theory of aggregate limits of liability. The paragraph 11 opposition to reimbursement of defense costs is bottomed on the specific language of that paragraph, which Gerling states is subject to the condition that an indemnity payment must be made on a specific claim before defense costs attach. This language is manifestly non-concurrent with Employers' ultimate net loss liability theory .

DISCUSSION

The facultative certificate under consideration is ill worded and hardly a paragon of clarity. Nevertheless, through an array of witnesses and exhibits , the intent of the certificate's negociants may be devined despite the fact that they were unavailable due to the passage of time.

It is of interest that neither "per-occurrence" nor "aggregate" appear in sections 2 or 4 of paragraph 5. Gerling argues that without an occurrence, liability does not exist. (emphasis supplied). Therefore the language of occurrence is implied in section 4. Nor does the phrase "combined single limits " found present in sections 2 and 4 of paragraph 5 heighten Gerling's per-occurrence argument . Gerling overstates the significance of this phrase. It has been defined as nothing more than "an expression of bodily injury liability and property damage liability expressed in a single sum of coverage."

While Gerling's arguments are interesting, they are not persuasive for a host of reasons. First, without fear of contradiction, demonstrative evidence indicates that the underwriter possessed a copy of the Employers' policy which followed-the-form of the Lumbermans'policy. Moreover, aggregate liability is a common feature of an excess umbrella policy. Both the Employers' and Lumbermans' policies unambiguously provided aggregate limits of liability as did the Liberty policy prior to its amendment.

The follow-the-form concept and the presumption of concurrency it spawns is a well entrenched method of contract interpretation. In this case the presumption of concurrence remains unrebutted nor does there exist any specific language of limitation vis-à-vis paragraph 9. Silence, as an expression of limitation, strains credulity and is insufficient to preclude aggregate liability. Gerling's expert conceded that there existed various ways for a facultative underwriter to limit liability. Paragraph 5 of the certificate provides space for an underwriter to type in language of limitation of the reinsurance accepted. Similarly, the shorthand reference "Nil Aggregate" could have been easily typed in sections 2 and 4 of the certificate to indicate there is no aggregate liability. Lastly, and the most obvious method of

limitation would be through a typewritten endorsement. None of these methods were used despite their availability. Silence , as previously stated, does not satisfy the ..."except as otherwise specifically provided ..." language of paragraph 9 and create a non concurrency.

Because the arbitrator finds that the Employers' policy is concurrent with Gerling's facultative certificate, Employers is entitled to an award of its indemnity expense and Gerling will be required to pay its pro rata share of that expense. The issue of reimbursement of defense costs turns on whether the concept of "ultimate net loss" contained in Lumbermans' policy and followed by Employers' policy is entitled to the presumption of concurrence. The parties agree that the phrase "ultimate net loss" includes both indemnity and defense costs. They disagree that it applies to the policy of reinsurance. Gerling insists that the certificate's paragraph 11 is the "otherwise specific provision" embraced by paragraph 9 due to its clear limitation on reimbursement of defense costs. Thus, arguably, it is non-concurrent with the Employers' policy. Under Gerling's theory of reimbursement, claims that were dismissed without an indemnity payment, regardless of defense costs incurred on their behalf, are immune from reimbursement of defense costs.

Gerling misreads paragraph 11. The first sentence in its pertinent part provides "All claims involving this reinsurance, when settled by the company, shall be binding on the reinsurer, who shall be bound to pay its proportion of such settlement..." This is typical language of ultimate net loss and the term "settlement" is sufficiently broad to include indemnity payments and costs of defense. Therefore, paragraph 11 as constituted follows-the-form and creates a presumption of concurrence between the certificate and Employers' policy. Gerling suggests that other language contained in paragraph 11 is

language of limitation. A fair reading of that language negates any impact on Gerling's responsibility to contribute its pro rata share of defense costs. Employers is entitled to a proportionate share of its defense costs and Gerling is obligated to pay its proportionate share of those defense costs.

CONCLUSION

This reasoned award does not attempt to reach or evaluate every issue or exhibit presented by the parties. The issues or exhibits unmentioned either lacked substantive value or were unnecessary to this reasoned award. Employers is entitled to an award of $1,762,630.19 as of December 29, 2006 . The issue of attorneys' fees or costs at this time will be taken under advisement. Without appropriate billing records and briefing such a determination would be inappropriate.

ALFRED M. WOLIN
ARBITRATOR

Dated: December 26, 2006