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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TEXAS FARMERS INSURANCE COMPANY, Plaintiff, v. LEXINGTON INSURANCE COMPANY, Defendants.	)	Case No. CV 06-08220 DDP (AJWx) **ORDER GRANTING LEXINGTON INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT AND DENYING TEXAS FARMERS INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT** [Lexington Insurance Company's Motion filed on February 14, 2008] [Texas Farmers Insurance Company's Motion filed on February 22, 2008]

This matter is before the Court on the parties' cross-motions for summary judgment. After reviewing the papers submitted by the parties and considering the arguments therein, the Court grants Lexington Insurance Company's motion for summary judgment and denies Texas Farmers Insurance Company's motion for summary judgment.

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I. BACKGROUND

Janice Kupukaa ("Kupukaa") filed a medical malpractice lawsuit against Kaiser Permanente and various affiliated entities in Hawaii ("Kaiser") for negligent medical care. Kaiser was covered by primary and excess professional liability insurance policies. Ultimately, Kupukaa's action was settled. This case involves a dispute between insurance companies as to each company's obligations to fund settlement of the medical malpractice lawsuit. The following facts are undisputed:

A. The Parties and Policies

The Third Circuit has offered an instructive description of the insurance relationships involved in this case:

> Primary insurers, excess insurers, and reinsurers play different roles in the insurance industry. Both primary and excess insurers provide coverage directly to the insured policy holder. Primary insurance policies describe what kinds of liability will be covered and specify dollar limits. Excess insurers typically track the coverage offered by the primary insurer and also specify dollar limits, but the excess insurer's liability is not triggered until the primary insurer's limit is exhausted.
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> Reinsurers do not provide coverage directly to the insured but issue certificates of reinsurance to the excess or primary insurer, also specifying dollar limits. Reinsurance is purchased by insurance companies to insure their liability under policies written to their insureds. See Henry T. Kramer, The Nature of Reinsurance, in Reinsurance 1, 5 (R.W. Strain ed., 1980). Typically, an insurer who has provided coverage

> against a large loss will cede all or part of that risk to other insurance companies along with a portion of the premiums. Ceding risk increases the insurer's capacity to insure other customers and decreases the likelihood that insurer insolvency will result from any large claim.

North River Insurance Co. v. Cigna Reinsurance Co., 52 F. 3d 1194, 1198-1201 (3d Cir. 1995).

Plaintiff and counter-defendant Texas Farmers Insurance Company ("Texas Farmers") was Kaiser's primary insurer for medical malpractice claims. The policy number was 1180-0002. At times relevant to this action, the policy was reissued for different coverage periods. During the first coverage period from April 9, 1999 to April 9, 2000, the policy had a per claim limit of $5 million. During the second coverage period from April 9, 2000 to April 9, 2001, the policy also had a per claim limit of $5 million. Finally, during the second coverage period from April 9, 2001 to April 9, 2002, the policy had a per claim limit of $1 million. This means that Texas Farmers covered up to $5,000,000 for claims under both of the first two coverage periods, but only covered up to $1 million during the third coverage period.

Ordway Indemnity Ltd. (“Ordway”) was Kaiser’s excess insurer for the policy year April 9, 2001 to April 9, 2002. Ordway's excess insurance policy provided Kaiser with coverage for losses above Texas Farmers' $1 million limit up to $10 million. Ordway is not a party to this action.

Defendant and counter-claimant Lexington Insurance Company (“Lexington”) was Ordway’s reinsurer. Lexington issued a facultative reinsurance[1] certificate for Ordway providing coverage for the same period as Ordway’s excess policy; that is, reinsurance coverage was provided from April 9, 2001 to April 9, 2002. Lexington's reinsurance policy covered the first $4 million of excess above Texas Farmers' $1 million limit. Assuming a $6 million settlement, for example, Texas Farmers would pay the first $1 million, Lexington would pay the next $4 million, and Ordway would pay the final $1 million.

B. Janice Kupukaa's Medical Malpractice Claims

In 2003, Janice Kupukaa filed a medical malpractice claim against Kaiser. Kupukaa had been undergoing diabetes treatment at Kaiser. Kupukaa developed diabetic nephropathy that required dialysis treatment and proliferative diabetic retinopathy that required eye surgery.

On July 9, 2001 and November 6, 2001, Janice Kupukaa underwent two eye surgeries at Kaiser Permanente of Hawaii. After the surgeries, she was blind in both eyes. Kupukaa first utilized Hawaii's administrative process for medical malpractice claims, and later filed a medical malpractice lawsuit in Hawaii state court against Kaiser Permanente of Hawaii, Kaiser affiliates, and Dr. Miller, who was the physician that performed the surgeries. Kupukaa claimed that Dr. Miller was negligent in performance of the surgeries and that the negligence caused her to be blind in both eyes. Texas Farmers agreed to defend Kaiser and hired William Hunt

[1] A facultative reinsurance policy reinsures specific risks ceded to the reinsurer from the reinsured party. See, e.g., Cigna Reinsurance Co., 52 F. 3d at 1201.

as counsel. Soon thereafter, Ordway and Lexington were made aware of Kupukaa's claim.

The lawsuit was moved to binding arbitration. On January 25, 2006, Hunt sent a status report to Kaiser, Texas Farmers, and Lexington. In that report, Hunt stated:

> Although damages are difficult to predict, we estimate the "full value" of the case to be in the range of $1-2 million and the settlement value in the $400,000-$600,000 range. Given that we now have a liability expert to support Dr. Miller's care, we estimate the chance of a defense verdict as 50-60%, particularly given the issues surrounding causation.

(Texas Farmers' Exh. I, at 196-197.) A few days later Lexington entered a note in its Kupukaa claim file reviewing the timeline of her claim and stating that "coverage appears to be in order." (Texas Farmers's Exh. K.)

Although Kupukaa initially asserted negligence for the eye surgeries, she later sought to amend her complaint to allege the additional claim that negligent treatment by Kaiser also caused her to suffer kidney failure and to need dialysis treatment. On May 12, 2006, Kupukaa's attorneys sent a letter to Hunt informing of their intent to file the additional claim. On May 16, 2006, Hunt sent an e-mail to Kaiser and Texas Farmers advising stipulation to the amendment. Kaiser and Texas Farmers agreed, and Lexington was notified of the amendment.

On November 3, 2006, after the arbitration panel denied summary judgment on all claims including a punitive damages claim against Dr. Miller, Hunt sent another status report to

Kaiser, Texas Farmers, and Lexington. On liability issues and settlement value in the case, Hunt explained:

> There are two basic claims, one related to her complete blindness, the other related to her diabetes treatment and need for dialysis. As to the claim for blindness, at present we believe that there is approximately a 30-35% chance of a complete defense verdict, but a verdict in Plaintiffs' favor in this regard would also likely include some percent for contributory negligence, probably in the rate of 15-20%. The defense on the claim for diabetes and dialysis is stronger, we estimate the likelihood of a defense verdict for that claim in the rate of 70-75%, and any plaintiff's verdict on that issue would likely include a percent for contributory negligence, probably in the rate of 30-40%. . . .
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> . . .
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> [W]e believe that the "worst case" scenario would be an award in the range of $5-$7 million. A more likely award assuming Plaintiffs win, would be more related to general damages for Ms. Kupukaa's blindness, and we believe would be in the range of $1,000,000-$1,500,000 although I anticipate Plaintiffs' counsel is unlikely to agree to settle for much less than $2,000,000. Our evaluation does not take into consideration whether a settlement at a larger amount ought to be considered in order to protect Dr. Miller from even the possibility of a punitive damage award. We have asked DPR confidentially to suggest to all parties that a mediation be scheduled, which would presumably occur in December.

(Texas Farmers's Exh. BB.).

C. <u>The Settlement of Kupukaa's Claims</u>

After the status report, Texas Farmers sent a letter to Kaiser, Lexington, and Hunt to inform that its coverage provided a $1 million per occurrence policy limit and that it was willing to tender that amount toward settlement. Lexington decided to seek a coverage opinion, believing the facts underlying Kupukaa’s kidney-related claim to have arisen prior to the reinsurance coverage period under its policy.

On November 21, 2006, Lexington notified Kaiser of its belief that its reinsurance obligations did not extend to the kidney-related claim because the facts underlying that claim occurred before the beginning of Lexington's coverage period. Nevertheless, mediation proceeded with Texas Farmers and Lexington reserving their rights. Kupukaa's case settled for $3.3 million. Texas Farmers, Ordway, and Lexington thereafter entered into a Settlement Funding Agreement, pursuant to which Texas Farmers and Lexington agreed to pay in equal shares the $2.3 million over and above the $1 million already paid by Texas Farmers. Texas Farmers and Lexington further agreed to litigate their disputed obligations regarding the $2.3 million, with the prevailing party being reimbursed their $1.15 million share, plus 10% interest.

D. <u>Texas Farmers and Lexington's Dispute</u>

Texas Farmers and Lexington filed lawsuits against one another both seeking (1) declaratory relief, (2) equitable indemnity, and (3) equitable contribution. The parties have filed cross-motions for summary judgment. Texas Farmers argues that the “follow the settlements” doctrine requires Lexington as a reinsurer to pay its share of the Kupukaa settlement. Lexington argues that its reinsurance obligations were never triggered because Kupukaa's claims, under the terms of Texas Farmers's policy, are deemed to have occurred at a time prior to the effective date of Lexington's reinsurance coverage.

II. LEGAL STANDARD ON SUMMARY JUDGMENT

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and material facts are those "that might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). On the other hand, no genuine issue of fact exists "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). In determining a motion for summary judgment, all reasonable inferences from the evidence must be drawn in favor of the nonmoving party. Anderson, 477 U.S. at 255.

III. DISCUSSION

This case is different from many reinsurance cases, where disputes arise between a reinsurer and reinsured, because it involves a dispute between a reinsurer and a primary insurer that is not the reinsured party. Lexington had a reinsurance policy that covered Ordway, the excess insurer for Kaiser. Texas Farmers was Kaiser's primary insurer, and was not a party to the reinsurance relationship between Lexington and Ordway. In other words, there was no insurance agreement between Texas Farmers and Lexington.[2] The Court must resolve whether Lexington's obligations as a reinsurer were triggered by the settlement of Kupukaa's claims.

A. <u>The Terms of the Policies</u>

1. <u>Lexington's Reinsurance Policy</u>

Lexington's reinsurance certificate provides for the following coverage:

> 1. LIABILITY OF REINSURER AND RETENTION
>
> The liability of the Reinsurer shall follow the terms and conditions off the Company's policy furnished to the Reinsurer at the effective date of the Reinsurance Certificate unless otherwise specifically provided herein by endorsement made a part of this Certificate.
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> . . .
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> 2. CLAIMS
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> . . .
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> c. Upon receipt by Reinsurer of satisfactory evidence of payment of a loss for which reinsurance is provided hereunder, Reinsurer shall promptly reimburse Company for its share of the loss and loss expenses. . . .

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[2]This is not to say that Texas Farmers's status as primary insurer is entirely irrelevant. As will be discussed further <u>infra</u>, Texas Farmers's primary insurance policy supplies the "underlying amount" that must be paid under Ordway's policy before Ordway's excess insurance obligation for a loss, and in effect Lexington's reinsurance obligations, may be triggered.

(Lexington Exh. 4, at 134.)

2. Ordway's Excess Insurance Policy

The "Company" referred to in Lexington's reinsurance policy is Ordway. The Ordway excess insurance policy states in relevant part:

> A. Insuring Agreement - Part A
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> The Company hereby agrees to indemnify the Insured against "ultimate net loss in excess of underlying amounts which is sustained by the insured by reason of liability on account of:
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> 1. "Professional Liability"
> 2. "Managed Care Organization's Errors & Omissions Liability"
> 3. "Miscellaneous Errors and Omissions Liability"
> 4. "General Liability"
>
> to which this Policy applies, caused by an "occurrence" taking place during the Policy Period anywhere in the World: provided, however, that the Company's obligation under this Policy shall not exceed the applicable Limits of Liability set forth in Item 5 of the Declarations.

(Texas Farmers's Exh. B, at 146.)

The Ordway policy's definition of "occurrence" varies with the basis for liability. Relevant here are the definitions of an "occurrence" as applied to "Professional Liability" and "Managed Care Organization's Errors & Omissions Liability." For "Professional Liability," an "occurrence" is defined as "any act, error, or omission which results in injury the furnishing of or the failure to furnish 'professional or technical health services.'" The definition for "Professional Liability" further provides that "any act, error, or omission together with all related acts, errors, or omissions in the furnishing of such services to any one person shall be considered one 'occurrence.'" (Texas Farmers's Exh. B, at 149.) The policy provides a similar definition for "Managed Care Organization's Errors & Omissions Liability," the only difference being that the term "professional incident" is used instead of "occurrence." (Texas Farmers Exh. B, at 149-150.)

The Conditions section of the policy contained a requirement that Kaiser maintain the "underlying amounts" for a loss. Ordway's excess coverage would apply only to an "ultimate net loss" above the "underlying amounts." Kaiser had the option to cover the "underlying amounts" by self-insurance or obtaining primary insurance. Kaiser had Texas Farmers' primary insurance policy with its $1 million per occurrence limitation to satisfy the "underlying amounts" in the event of a loss. The Conditions subsection on "Underlying Amounts" further states: "Nothing in any provision of this policy shall be construed to make Condition M, Other Insurance, apply to the self-insurance maintained or the insurance purchased with respect to any part of the "'underlying amounts.'" (Texas Farmers Exh. B, at 158.) Finally, the subsection provides: "'Underlying Amounts' shall not be reduced or exhausted by payments of any amounts, in settlement of "claims" or in satisfaction of judgments, for which coverage is not afforded by this Policy."

3. <u>Texas Farmers' Primary Insurance Policy</u>

Texas Farmers was Kaiser's primary insurer for the negligence claims. Texas Farmers's policy, although issued on a claims-made form, contains an endorsement that "[t]he coverage afforded by this policy is intended to be on an occurrence basis, notwithstanding any references to claims-made."[3] (Lexington's Exh. 1, Endorsement # 1.) As an occurrence-based policy, Texas Farmers's policy applied to "claims or suits brought as a result of Wrongful Acts . . . , Personal Injury . . . , and/or Occurrences which take place during the Coverage Period and for which coverage is afforded herein. . . ." (Lexington's Exh. 1, Endorsement # 2.)

The policy defined "Interrelated Wrongful Acts" as "Wrongful Acts . . . which are logically or causally connected and have as a common nexus any . . . series of facts, circumstances, situations, events or transactions." 93. This definition is important since the policy contained what is known as a "'deemer' clause": "Any . . . Interrelated Wrongful Acts shall be deemed to have happened at the time of the first Wrongful Act within those Interrelated Wrongful Acts." (Lexington's Exh. 1, at 93.) The purpose of a "'deemer' clause" is to "prevent the 'stacking' of claims, by assigning a claim to a single policy. . . . The clause's effect is to limit each [occurrence] to a single policy year." Liberty Mut. Ins. Co. v. Black & Decker Corp., 383 F. Supp. 2d 200, 212 (D. Mass. 2005).

For the period from April 9, 2001 to April 9, 2002 when Ordway's excess insurance policy and Lexington's reinsurance policy were in effect, Texas Farmers' primary insurance policy covered the "underlying amounts" that Kaiser was required to maintain under

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[3] "A 'claims made' policy is one whereby the carrier agrees to assume liability for any errors, including those made prior to the inception of the policy as long as a claim is made during the policy period. On the other hand, an 'occurrence' policy provides coverage for any acts or omissions that arise during the policy period even tough the claim is made after the policy has expired." In re Feature Realty Litig., 468 F. Supp. 2d 1287, 1295 n.2 (E.D. Wash. 2006).

Ordway’s policy. During that coverage period, Texas Farmers’ policy provided for a $1 million per occurrence limitation.

B. <u>Analysis</u>

The parties propose very different approaches to resolution of this case. In order to resolve the dispute, the Court must address each party’s arguments in the context of relevant insurance law and policy language.

Texas Farmers argues that Ordway’s policy, and Lexington’s policy to the extent its terms follow Ordway’s policy, are controlling. Facultative reinsurance certificates often include a “follow the form” provision whereby a reinsurer essentially adopts the terms of the reinsured’s policy and agrees to reinsure risks covered by the reinsured’s policy. A “follow the form” provision “create[s] a large measure of symmetry between the scope of coverage of the reinsurance agreement and the scope of coverage of the policy or policies being reinsured”; if there is coverage under the reinsured’s policy, then there should be coverage under the reinsurer’s policy pursuant to the “follow the form” provision. <u>See</u> 14 Holmes' Appleman on Insurance 2d § 102.5 (2000). Here, there can be no dispute that Lexington’s policy contained a “follow the form” clause, as the policy provided that Lexington was obliged to “follow the terms and conditions off [Ordway’s] policy.” (<u>See</u> Lexington Exh. 4, at 134.) This establishes that Lexington agreed to reinsure any risks covered by Ordway’s excess policy.

Texas Farmers contends that Lexington’s policy language also required that Lexington “follow the settlements.” In addition to “follow the form” provisions, facultative reinsurance certificates often contain “follow the fortunes” or “follow the settlement” clauses whereby a reinsurer is required to indemnify the reinsured for any losses, whether by way of settlement or judgment, arguably within the terms of the underlying policy. See, e.g., Mentor Ins. Co. (U.K.) v. Brannkasse, 996 F.2d 506, 517 (2d Cir. 1993).[4] In support of its argument, Texas Farmers points to language in Lexington's policy, including the "follow the form" provision already discussed and the provision that states, "[u]pon receipt . . . of satisfactory evidence of payment of a loss for which reinsurance is provided hereunder, [Lexington] shall promptly reimburse [Ordway] for its share of the loss and loss expenses. . . ." (Lexington Exh. 4, at 134.) It is unclear to the Court whether such language constitutes an express "follow the settlements" clause.[5] Notwithstanding this ambiguity, the Court questions whether the "follow the settlements" doctrine is dispositive under the circumstances here.

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[4]In articulating the distinction between these various types of clauses, one court explained:

> Following form simply obliges the reinsurer to indemnify the ceding company fully within the scope of the reinsured risk when the claim falls within the scope of that risk as a matter of law (subject to exclusions explicitly delineated within the certificate of reinsurance); the follow the fortunes/settlements doctrine vests in the ceding company the right to decide what the scope of coverage actually is when the cedent's policy is subject to more than one reasonable interpretation, and to make adjustments and settlements in conformity with its interpretation.

Aetna Cas. & Sur. Co. v. Home Ins. Co., 882 F. Supp. 1328, 1349 (S.D.N.Y. 1995).

[5]Texas Farmers notes that at least some courts have considered a "follow the form" provision itself sufficient to make the "follow the settlements" doctrine applicable. (See Texas Farmers' Mot. 17, citing Christiania Gen. Ins. Corp., 979 F.2d at 280 (2nd Cir. 1992). However, Ninth Circuit authority has required an express "follow the settlements" clause, or evidence that such a provision was implied. National Am. Ins. Co. v. Certain Underwriters at Lloyd's London, 93 F.3d 529 (9th Cir. 1996).

The "follow the settlements" doctrine "prevents facultative reinsurers 'from second guessing good-faith settlements and obtaining de novo review of judgments of the reinsured's liability to its insured.'" National Am. Ins. Co. v. Certain Underwriters at Lloyd's London, 93 F.3d 529, 535 (9th Cir. 1996) (citing Cigna Reinsurance Co., 52 F.3d 1194, 1199 (3d Cir. 1995)).[6] The doctrine aims to promote settlement by insulating from legal challenge a reinsured's reasonable and good-faith decisions; "[i]f the ceding company knew that its settlement decisions can be challenged by every reinsurer, there would be little incentive to settle with the insured." Commercial Union Ins. Co. V. Seven Provinces Ins. Co., 9 F. Supp. 2d 49, 57 (D. Mass. 1998). A reinsurer required to "follow the settlements" has no basis to challenge a reinsured's settlement unless it is "fraudulent, in bad faith, or the payments are 'clearly beyond the scope of the original policy' or 'in excess of [the reinsurer's] agreed-to exposure.' North River Ins. Co. v. Ace Am. Reins. Co., 361 F.3d 134, 140 (2nd Cir. 2004) (citing Christiania Gen. Ins. Corp. V. Great Am. Ins. Co., 979 F.2d 268, 280 (2nd Cir. 1992)).

This case does not present a dispute between the reinsurer and the reinsured where the reinsurer, if subject to a "follow the

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[6] See also Commer. Union Ins. Co. v. Swiss Reinsurance Am. Corp., 413 F.3d 121, 124 (1st Cir. 2005) (explaining that "follow the settlements" clauses are "designed to give the cedent reasonable latitude to settle claims against it by the primary insured and to bind the reinsurer (in some measure) from contesting the extent of the cedent's liability to the primary insured"); British Int'l Ins. Co. V. Seguros La Republica, S.A., 342 F.3d 78, 85 (2nd Cir. 2003) (finding that the doctrine "binds a reinsurer to accept the cedent's good faith decisions on all things concerning the underlying insurance terms and claims against the underlying insured: coverage, tactics, lawsuits, compromise, resistance or capitulation").

settlements" clause, is required to abide by the reinsured's reasonable and good faith settlement decisions. It thus does not present the usual circumstances where a reinsurer will be considered bound to "follow the settlements." Lexington raises no dispute regarding coverage under Ordway's excess policy, but rather, whether that coverage was triggered. Ordway provided Kaiser with a stand-alone excess insurance policy, meaning its terms and conditions did not "follow the form" of Texas Farmers' primary insurance policy. Ordway, and accordingly Lexington, had no obligation to follow the form of Texas Farmers' policy or Texas Farmers' settlements for that matter. Lexington is allowed to challenge Texas Farmers' allocation decisions, where Texas Farmers was not the reinsured party. The Court finds that the "follow the settlements" doctrine does not control the analysis under the circumstances here.

Lexington contends that Texas Farmers' primary insurance limit was never exhausted, and therefore, the excess insurance that Lexington reinsured was never triggered. More specifically, Kupukaa's kidney-related and eye-related claims were based upon "interrelated wrongful acts" as defined under Texas Farmers' policy. "Interrelated wrongful acts" under the policy are treated as a single occurrence.[7] In accordance with the "deemer clause" in Texas Farmers' policy,[8] the "interrelated wrongful acts" are deemed

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[7]Although the language in the policy refers to treating the "Interrelated Wrongful Acts" as a single claim, (Lexington's Exh. 1, at 66), the Court reads this language in light of the policy's endorsement that it is an occurrence-based policy. Thus, "interrelated wrongful acts" are a single occurrence.

[8]"Any . . . Interrelated Wrongful Acts shall be deemed to have (continued...)

to have occurred in 2000 at the time of the initial wrongful act. Notably, for the coverage periods spanning the year 2000, Texas Farmers' policy provided a $ 5 million per occurrence limit. Lexington concludes that Texas Farmers was obligated to fund the entire $3.3 million Kupukaa settlement because it had a $5 million per occurrence limit in effect at the time the wrongful acts were deemed to have occurred.

Texas Farmers does not address Lexington's arguments regarding its own policy terms. Texas Farmers instead focuses on the "follow the settlements" doctrine, which the Court has already indicated does not decide the issue here. Considering the relationship between excess insurers and primary insurers, however, helps resolve the issue. "In the context of liability insurance, the insurer providing [primary] coverage has the primary duty to defend and indemnify the insured, unless otherwise excused or excluded by specific policy language." St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co., 111 Cal. App. 4th 1234, 1253 (Ct. App. 2003) (citations omitted). An excess insurer's liability does not attach until the primary insurance limits are exhausted. Iolab Corp. v. Seaboard Surety Co., 15 F.3d 1500, 1504 (9th Cir. 1994). To determine whether excess insurance coverage is triggered, a court should look first to the terms of a primary insurer's policy to determine whether its policy limits have been met. If Texas Farmers' primary insurance limits were not exhausted by the

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[8](...continued) happened at the time of the first Wrongful Act within those Interrelated Wrongful Acts." (Lexington's Exh. 1, at 93.)

settlement under the terms of its policy, therefore, the excess insurance policy would not be triggered to fund the settlement.

After reviewing the language of Texas Farmers' policy, the Court finds that the "interrelated wrongful acts" underlying Kupukaa's claims were deemed to have occurred in 2000. Texas Farmers acknowledges that it is undisputed the kidney-related claim and eye-related claim were "interrelated wrongful acts" in its Statement of Genuine Issues in Opposition to Lexington's motion. (See Texas Farmers's Opp'n to Lexington's Mot., Statement of Genuine Issues, Uncontroverted Fact No. 9, at 6-7.) Furthermore, Texas Farmers does not dispute that wrongful acts bearing on the kidney-related claim occurred in 2000. Accordingly, the Court finds that the settled claims in the Kupukaa case, based upon the unambiguous language of Texas Farmers's policy, are deemed to have occurred before the April 9, 2001 to April 9, 2002 coverage period.

During the policy period applicable to Kupukaa's claims, Texas Farmers had a $ 5 million per occurrence limit. This means that Texas Farmers was on risk up to $ 5 million for settlement of Kupukaa's claims, which are considered one occurrence under the terms of Texas' Farmers policy. Where Texas Farmers was on risk for $ 5 million per occurrence during the period applicable to Kupukaa's claims, the Court need not reach the terms of Ordway's policy. To reiterate, an excess insurer's liability does not attach until the primary insurance limits are exhausted. Iolab Corp., 15 F.3d at 1504. Here, under the plain terms of Texas Farmers's policy, its primary insurance limit of $ 5 million was applicable. That limit was not exhausted by the $ 3.3 million settlement. Therefore, the Court concludes as a matter of law that Texas Farmers must fund the full Kupukaa settlement.

Texas Farmers argues, in light of this holding, that there remains an issue of fact with respect to the allocation of settlement amounts between the kidney-related claim and eye-related claim. Texas Farmers indicates the Kupukaa action was settled solely on the basis of the eye-related claim, and that it would have proceeded to trial on the kidney-related claim but for the presence of the eye-related claim. (See Declaration of Louise Samuel, Texas' Farmers Exh. VV, ¶ 15.) Even assuming these facts to be true, Texas Farmers remains the party responsible for funding the settlement. The reasons that Texas Farmers decided to seek settlement or the precise allocation of that settlement to the various claims are irrelevant to the analysis here.

Based upon the terms of Texas Farmers' policy and undisputed facts in the record, the facts underlying the kidney-related claim and eye-related claim were deemed to have occurred in 2000. This means any settlement of those claims must be allocated to one of the policy periods in effect during the year 2000, both of which had $ 5 million per occurrence limits. In settling both the kidney-related and eye-related claims, the relevant facts are that Texas Farmers settled claims that, under its policy, were considered a single occurrence and deemed to have occurred in 2000 when there was a $5 million per occurrence limit. Texas Farmers drafted the terms of its policy, and as the drafter, it must live with the unambiguous terms of that policy. Cf. Bergt v. Ret. Plan for Pilots Employed by MarkAir, Inc., 293 F.3d 1139, 1145 (9th Cir. 2002) (stating the principle that the insurer, as drafter of policy language, has ambiguities resolved against it); see also AIU Ins. Co. v. FMC Corp., 51 Cal.3d 807, 821, 274 Cal. Rptr. 820, 799 P.2d 1253 (1990) (same).[9] Accordingly, the Court finds that Texas Farmers must reimburse Lexington as it is responsible for funding the settlement.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Lexington's motion for summary judgment and DENIES Texas Farmers' motion for summary judgment. In accordance with the terms of the parties' Settlement Funding Agreement, Texas Farmers must reimburse Lexington its $1.15 million and 10% interest.

IT IS SO ORDERED.

Dated: April 21, 2008

DEAN D. PREGERSON
United States District Judge

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[9] Texas Farmers' arguments for equitable relief are similarly unavailing because its policy terms determine the outcome.