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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

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UNITED HERITAGE PROPERTY AND  
CASUALTY COMPANY, an Idaho  
corporation,

NO. CIV. 1:10-456 WBS

Plaintiff,

MEMORANDUM AND ORDER RE:  
MOTION IN LIMINE

v.

FARMERS ALLIANCE MUTUAL  
INSURANCE COMPANY, a foreign  
corporation,

Defendant.

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Plaintiff United Heritage Property and Casualty Company ("United Heritage") brought this action against defendant Farmers Alliance Mutual Insurance Company ("FAMI"), arising out of FAMI's refusal to accept United Heritage's tender of an insurance-related suit (the "Zarate case") on behalf of its insured, Rentmaster of Rexburg ("Rentmaster"). Presently before the court is FAMI's motion in limine to exclude evidence of or any reference to damages claimed by plaintiff. (Docket No. 88.)

1 Plaintiff seeks to introduce evidence at trial  
2 concerning damages in the form of policy limits paid by plaintiff  
3 on behalf of Rentmaster in the underlying Zarate case. Defendant  
4 argues that evidence relating to plaintiff's policy coverage of  
5 Rentmaster is inappropriate because plaintiff has been reimbursed  
6 for such payments by its own reinsurer. Defendant therefore  
7 moves to prevent plaintiff from offering this evidence pursuant  
8 to Federal Rule of Evidence 402.

9 Federal Rule of Evidence 402 states that:

10 All relevant evidence is admissible except as otherwise  
11 provided by the Constitution of the United States, by act  
12 of Congress, by these rules or other rules prescribed by  
the Supreme Court pursuant to statutory authority.  
Evidence which is not relevant is not admissible.

13 Fed. R. Evid. 402. Defendant argues that evidence regarding  
14 money paid by plaintiff to settle the underlying Zarate case is  
15 not relevant because plaintiff has been compensated for the  
16 payments, meaning that the evidence is not relevant in  
17 calculating damages. Defendant further argues that compensating  
18 plaintiff for the payments would result in a "windfall" for  
19 plaintiff. (Mem. in Supp. of Mot. In Limine Regarding Proof of  
20 Pl.'s Damages at 3 (Docket No. 88-1).)

21 The court has previously held that plaintiff, as  
22 Rentmaster's excess insurance carrier, has the ability to assert  
23 claims for breach of duty to defend and breach of duty to  
24 indemnify, via equitable subrogation, against defendant,  
25 Rentmaster's primary insurance carrier. (Sept. 22, 2011, Order  
26 at 18:9-19:7 (Docket No. 71.)) The only issue before the court  
27 in this motion in limine, therefore, is whether plaintiff's  
28 reinsurance policy affects plaintiff's ability to assert its

1 damages claim.

2 Defendant presents evidence regarding plaintiff's  
3 reinsurance policy to prove that plaintiff is not required to  
4 reimburse its reinsurer for any money that it receives in the  
5 present case. Defendant specifically contends that the policy  
6 only requires plaintiff to reimburse its insurer for salvage  
7 rights and that "there is no mention of reimbursement for  
8 subrogation rights." (Mem. in Supp. of Mot. In Limine Regarding  
9 Proof of Pl.'s Damages at 4.) Defendant argues that because  
10 plaintiff does not have to reimburse its reinsurer, awarding it  
11 damages based on its payments to settle the Zarate case would  
12 result in a windfall for plaintiff.

13 The court has reviewed the reinsurance policy and  
14 concludes that defendant's interpretation of the policy is  
15 mistaken. The relevant portion of the reinsurance policy states:

16 **Article VIII -- Salvage and Subrogation**

17 The Reinsurer shall be credited with salvage (i.e.  
18 reimbursement obtained or recovery made by the Company,  
19 less the actual cost, excluding salaries of officials and  
20 employees of the Company and sums paid to attorneys as  
21 retainer, of obtaining such reimbursement or making such  
22 recovery) on account of claims settlements involving  
reinsurance hereunder. . . . The Company hereby agrees to  
enforce its rights to salvage or subrogation relating to  
any loss, a part of which loss was sustained by the  
Reinsurer, and to prosecute all claims arising out of  
such rights.

23 (High Aff. Ex. A at 6 (Docket No. 88-2).) Although the policy  
24 does not specifically state in a single sentence that subrogation  
25 claims must be credited back to the reinsurer, the article read  
26 as a whole strongly suggests such a conclusion. The article  
27 specifically addresses subrogation, the policy clearly requires  
28 plaintiff "to enforce . . . subrogation" rights and "to prosecute

1 all claims arising out of such rights," and the policy's  
2 definition of "salvage" encompasses any "reimbursement obtained  
3 or recovery made by the Company." (Id.) There would be no  
4 purpose in requiring plaintiff to enforce its subrogation rights  
5 if the proceeds from such rights were not required to be credited  
6 back to the reinsurer. The plain language of the reinsurance  
7 contract therefore suggests that awarding plaintiff damages for  
8 any violations of defendant's right would not result in a  
9 windfall for plaintiff because at least a portion of the monies  
10 would be credited to plaintiff's reinsurer.

11 Defendant fails to provide authority, and this court is  
12 unable to find any, suggesting that an excess carrier's  
13 reinsurance policy functions to prevent it from pursuing  
14 subrogation against the primary insurer. The existence of  
15 plaintiff's reinsurance policy does not change the nature of  
16 Rentmaster's assignment of its claims to plaintiff. The result  
17 of adopting such a policy would be to provide a windfall to  
18 primary insurers that breach their duties in circumstances in  
19 which the excess insurer has the foresight to carry its own  
20 insurance.

21 Even if plaintiff's damages evidence is relevant,  
22 defendant contends that it should be excluded pursuant to Federal  
23 Rule of Evidence 403. Rule 403 provides that, "although  
24 relevant, evidence may be excluded if the probative value is  
25 substantially outweighed by the danger of unfair prejudice,  
26 confusion of the issues, or misleading the jury. . . ." Fed. R.  
27 Evid. 403. Defendant argues that the damages evidence would  
28 mislead and confuse the jury to think that the settlement payment

1 was an out of pocket expense for plaintiff. (Mem. in Support of  
2 Mot. In Limine Regarding Proof of Pl.'s Damages at 4.) As  
3 discussed above, which insurer actually made the payments is  
4 irrelevant for the purposes of the jury trial because plaintiff's  
5 reinsurance policy requires it to pursue subrogation in the  
6 present action. The presentation of such evidence is therefore  
7 unlikely to result in unfair prejudice or the jury being confused  
8 or mislead.

9 IT IS THEREFORE ORDERED that defendant's motion in  
10 limine regarding proof of plaintiff's damages be, and the same  
11 hereby is, DENIED.

12 DATED: February 27, 2012

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15 WILLIAM B. SHUBB  
16 UNITED STATES DISTRICT JUDGE  
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