

**National Union Fire Ins. Co. of Pittsburgh, PA. v
Fresenius Med. Care Holdings, Inc.**

2023 NY Slip Op 30165(U)

January 12, 2023

Supreme Court, New York County

Docket Number: Index No. 653108/2016

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.,	INDEX NO.	<u>653108/2016</u>
Plaintiff,	MOTION DATE	_____
- v -	MOTION SEQ. NO.	<u>008 009</u>
FRESENIUS MEDICAL CARE HOLDINGS, INC.,	DECISION + ORDER ON	
Defendant.	MOTION	

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 008) 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 372, 379, 381, 387, 388
were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 009) 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 373, 378, 380, 386
were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Upon the foregoing documents, it is

In this declaratory judgment action, plaintiff moves for summary judgment (motion sequence number 008) and defendant moves for partial summary judgment (motion sequence number 009). For the reasons stated below, both motions are granted in part and denied in part.

Background

This action arises from a 2016 global resolution of a mass tort litigation, wherein defendant Fresenius Medical Care Holdings, Inc. (Fresenius) agreed to pay \$250 million dollars to settle more than 12,000 claims stemming from alleged bodily injuries suffered during the years 2000 to 2016.

Fresenius is a provider of hemodialysis services and products for people suffering from kidney disease. (NYSCEF Doc. No. [NYSCEF] 64, Amended Complaint ¶ 29; NYSCEF 70, Answer with Counterclaims [admits statement].) The mass tort litigation centered around two of Fresenius's hemodialysis products—NaturaLyte and GranuFlo. (See NYSCEF 136, Joint Statement of Undisputed Facts [JSUF] ¶¶ 11, 24.) NaturaLyte is a liquid containing acetic acid, which contributes 4 mEq/L of acetate to a water-based dialysate used in the hemodialysis process. (*Id.* ¶¶ 12-13.) GranuFlo is a powder that contains acetic acid and sodium acetate, which contributes 8 mEq/L of acetate to the dialysate. (*Id.* ¶¶ 16-17.) Both products were cleared by the Food and Drug Administration (FDA) under separate applications. (*Id.* ¶¶ 14-15, 18-19.)

In early 2012, the FDA began an investigation after the leak of a 2011 internal Fresenius notice addressing concerns regarding the correct amount of bicarbonate in the dialysate to avoid alkalosis. (See NYSCEF 168, Depo tr at 90:11-91:15, 97:3-21 [Ronald E. Castle¹]; NYSCEF 136, JSUF ¶¶ 20-21.) Fresenius later issued a notice which stated that “alkalosis is a significant risk factor associated in cardiopulmonary arrest” and “a major cause of metabolic alkalosis in dialysis patients is inappropriately

¹ Castle was employed by Fresenius beginning in June of 2005 as vice president and deputy general counsel for litigation. (NYSCEF 168, Depo tr at 19:25-20:14 [Castle].) Castle is Fresenius' corporate representative. (*Id.* at 132:9-12.)

high dialysate total buffer concentration.” (NYSCEF 139, Important Prescribing Information Notice at 2²; NYSCEF 136, JSUF ¶¶ 20.) The notice additionally noted the difference in total buffer concentration between NaturaLyte and GranuFlo formulations and recommended that physicians individualize their prescriptions to avoid alkalosis in their hemodialysis patients. (*Id.* at 2-3.)

In May of the same year, the FDA issued a “FDA Safety Communication: Dialysate Concentrates and Alkali Dosing Errors with Hemodialysis.” (NYSCEF 136, JSUF ¶¶ 21.) This communication identified the alkali dosing errors and provided, in part, a

“Summary of Problem and Scope:

The FDA received a complaint describing alkali dosing errors that occurred during hemodialysis using dialysate concentrates containing acetic acid and acetate. When metabolized, these potential sources of alkali can contribute to elevated bicarbonate levels in patients undergoing hemodialysis. This can contribute to metabolic alkalosis, which is a significant risk factor associated with cardiopulmonary arrest, low blood pressure, hypokalemia, hypoxemia, hypercapnia, and cardiac arrhythmia”

(NYSCEF 140, Joint Exhibit 4, FDA Safety Communication at 2.)

On June 25, 2012, the FDA issued separate recall notices for NaturaLyte and GranuFlo. (NYSCEF 136, JSUF ¶¶ 22-23; NYSCEF 141, Joint Exhibit 5, NaturaLyte Recall Notice; NYSCEF 142, Joint Exhibit 6, GranuFlo Recall Notice.) The “Manufacturer Reason for Recall” was “Risk of Alkalosis with acetate containing dialysis acid concentrates,” and the FDA determined cause for recall for each product was “Labeling False and Misleading.” (NYSCEF 141, Joint Exhibit 5, NaturaLyte Recall

² Pages refer to NYSCEF generated pagination.
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Notice at 3; NYSCEF 142, Joint Exhibit 6, GranuFlo Recall Notice at 3.) In July 2012, Fresenius began receiving claims and notices of legal actions taken against it, alleging injury or death following dialysis treatments using NaturaLyte or GranuFlo. (NYSCEF 136, JSUF ¶ 24.) Ultimately, more than 12,000 legal actions were filed against Fresenius. (*Id.* ¶¶ 25, 27.)

Fresenius' Insurance Coverage

Fresenius maintained a principal layer of insurance coverage that consisted of “primary” policies written by nonparty Continental Casualty Company (CNA) for consecutive annual periods from October 1, 2002 to October 1, 2013 (CNA Policies). (NYSCEF 136, JSUF ¶ 38.) Although these policies were written through CNA, the CNA Policies were actually a series of “fronting policies,” i.e., where claims and expenses were paid by CNA up front and Fresenius was to reimburse CNA on the back end, dollar for dollar. (NYSCEF 168, Depo tr at 60:19-32:2 [Castle]; NYSCEF 387, tr at 5:18-23 [oral argument, day 2].)

Plaintiff National Union Fire Insurance Company of Pittsburgh, PA (National Union) was Fresenius' umbrella insurance carrier for consecutive annual periods commencing on September 29, 2002 to October 1, 2013³ (NYSCEF 136, JSUF ¶ 40) and provided excess insurance to Fresenius's primary insurance coverage of \$7.5 million per year/per occurrence for bodily injury, with an aggregate limit of either \$15 million or \$20 million annually. (*See, e.g.*, NYSCEF 159, 2008 National Union Policy at 31 [Endorsement No. 1, Schedule of Underlying].) Eleven yearly policies were written

³ The first policy in the sequence had a term of a few days longer than one year, i.e., from September 29, 2002 to October 1, 2003. (NYSCEF 153, 2002 National Union Policy at 3.)

by National Union over this period (National Union Policies) (NYSCEF 136, JSUF ¶¶ 41-51), and the parties agree that, “[a]side from slight variations in the numbering of certain subsections, the relevant policy terms are substantially identical across the eleven National Union policies” (*Id.* ¶ 52.)

The Underlying Litigation

Beginning in July 2012, Fresenius was served with lawsuits filed in various federal and state courts alleging that hemodialysis patients suffered bodily injury or death after receiving hemodialysis treatments using GranuFlo and NaturaLyte. (NYSCEF 136, JSUF ¶ 24.) “On August 10, 2012, [Fresenius] notified CNA and National Union about the GranuFlo and NaturaLyte lawsuits.” (*Id.* ¶ 84.) On March 29, 2013, the United States Judicial Panel on Multidistrict Litigation ordered consolidation of the federal actions in the District Court for the District of Massachusetts. (*Id.* ¶ 25.)

Following the consolidation of the lawsuits, National Union, by its claims administrator nonparty Chartis, sent a Supplemental Reservation of Rights and Request for Information letter, dated September 11, 2013, stating that it had

“no duty to defend or indemnify until the limits of the Scheduled underlying policies, and any applicable self-insured retention, have been exhausted. [Fresenius] has not provided National Union with any information indicating that the underlying coverages or applicable self-insured retentions are exhausted or significantly impaired.”

(NYSCEF 262, September 11, 2013 Letter to Fresenius at 4.) According to Richard Brenton Roberts,⁴ “AIG made a determination at some point that [it]

⁴ Roberts is employed by AIG Claims Incorporated, a company that acts as a claims administrator for AIG member companies, including National Union and Chartis. (NYSCEF 164, Joint Exhibit 27, Depo tr at 12:2-6, 23-25 [Roberts].) National Union is an AIG member company. (*Id.* at 12:23-25.) The underlying litigation was assigned to Roberts sometime in 2013. (*Id.* at 20:12-16.)

would augment or bring in [law firm] Wheeler Trigg pursuant to [its] right in our contract in the policy to assist Fresenius with the litigation.” (NYSCEF 164, Joint Exhibit 27, Depo tr at 62:13-22 [Roberts].) Roberts explained that once he “assumed the handling of the file, ... [w]e had some concerns about the expertise of the current defense team ... we mentioned to Ron Castle and team that we thought it would be beneficial to bring in Mike O’Donnell and Wheeler Trigg on their behalf.” (*Id.* at 64:7-65:17.)

By letter dated April 30, 2014, AIG “confirm[ed] that National Union has retained . . . Wheeler Trigg O’Donnell LLP to associate in for the defense of Fresenius at National Union’s sole expense. This firm is providing advice to Fresenius and assisting Fresenius’s current defense counsel in the [underlying] [l]itigation.” (NYSCEF 265, April 30, 2014 Letter to Fresenius at 3.) The April 30, 2014 letter reiterated that National Union had no present obligation to provide a defense or indemnity to Fresenius under the National Union Policies, but National Union had the right to investigate and participate in the defense of the claims as it deemed expedient and exercised its right to participate in the defense. (*Id.*) AIG paid Wheeler Trigg out of itself. (NYSCEF 164, Joint Exhibit 27, Depo tr at 64:7-9 [Roberts].)

In January and February 2016, settlement negotiations began in the underlying action and the mediator, Professor Eric D. Green, proposed settlement terms for a global resolution of the underlying action. (NYSCEF 136, JSUF ¶¶ 29-31; NYSCEF 146, Mediator Proposal.) On February 15, 2016, National Union agreed, in a series of three emails, to provisionally pay \$220 million of the \$250 million that would be put into

a fund to settle the underlying claims (Settlement Funding Agreement). (NYSCEF 136, JSUF ¶¶ 85-86; NYSCEF 187, Joint Exhibit 49, Settlement Funding Agreement Email at 2.) According to National Union, that agreement to preliminarily fund the global settlement contained a full reservation of rights, including the right to be reimbursed by Fresenius for any monies paid out that exceeded the limits of the National Union Policies. (NYSCEF 187, Joint Exhibit 49, Settlement Funding Agreement Email at 2.)

On August 2, 2016, Fresenius and the claimants' Negotiating Committee for the underlying litigation signed a Master Settlement Agreement (MSA) which provided "the complete and final resolutions of Settled Claims against Fresenius subject to the provisions contained herein for an Aggregate Settlement Amount of \$250,000,000.00 (two hundred and fifty million dollars and zero cents)." (NYSCEF 147, MSA at 5.) With the assistance of Green, the claimants developed a Final Allocation Plan (FAP) for distributing settlement payments to individual claimants. (NYSCEF 148, FAP at 2.) The FAP, dated July 21, 2016, is a part of the MSA. (NYSCEF 136, JSUF ¶ 33.) In November 2017, the \$250 million payment required by the MSA to resolve the underlying litigation was paid. (*Id.* ¶ 34.)

Legal Standards

"Choice of law provisions apply to substantive issues and matters of procedure are governed by the law of the forum state." (*FIA Leveraged Fund Ltd. v Grant Thornton LLP*, 150 AD3d 492, 496 [1st Dept 2017] [citations omitted].) Both parties agree that Massachusetts law applies to this action. Thus, for the purposes of these motions, Massachusetts substantive law applies, and New York procedural law applies.

Pursuant to CPLR 3212, a “motion shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” (CPLR 3212 [b].) To prevail on a motion for summary judgment, the movant must also “show that there is no defense to the cause of action.” (*Rodriguez v City of New York*, 31 NY3d 312, 317 [2018], quoting CPLR 3212[b].) The movant has the burden to come forward with sufficient proof in admissible form to show a court that the movant is entitled to judgment as a matter of law. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) In considering a CPLR 3212 motion, the facts must be construed in the light most favorable to the non-moving party. (*Ortiz v Varsity Holdings, L.L.C.*, 18 NY3d 335, 339 [2011].) Failure to make a prima facie showing of entitlement to judgment as a matter of law requires a denial of the motion; however, once a moving party has made that prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1976] [citation omitted].)

Courts have consistently opined that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial. (*Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last, & Spellane, L.L.C.*, 157 AD3d 479, 481 [1st Dept 2018].)

Discussion

National Union moves for summary judgment on its various claims for declaratory judgment (counts I-III, VII-X), breach of contract claim (count XI), and unjust enrichment

claim (XII).⁵ National Union also moves for summary judgment against Fresenius' counterclaims for indemnity (counterclaim I), breach of contract (counterclaim II), and unjust enrichment (counterclaim III).

National Union asks the court to declare that (i) the settlement payment be allocated across all eleven policy years (2002-2012) based upon the underlying claimant's date of bodily injury; (ii) the claims were caused by two distinct occurrences, that is, NaturalLyte and GranuFlo, and that both are subject to separate Retained Limits; and (iii) National Union has no obligation to indemnify Fresenius under the 2012 policy pursuant to the 2012 policy exclusions. Moreover, National Union seeks summary judgment as to its tenth cause of action for a declaratory judgment that National Union's duty to defend was not triggered until Fresenius paid its share of the \$30 million to fund the settlement in November 2017; eleventh cause of action for breach of the Settlement Funding Agreement for failing to reimburse excess amounts under the National Union Policies; and its twelfth cause of action for unjust enrichment under the Settlement Funding Agreement.⁶ As to the eleventh cause of action, should the court grant National Union's declaratory relief, National Union contends it is entitled to reimbursement in the amount of \$60,984,205, representing 28% of the \$220 million provision settlement payment it funded.⁷

⁵ Counts IV-VI were voluntarily discontinued. (NYSCEF 129, So Ordered Stipulation.)

⁶ National Union does not indicate in its amended complaint that the eleventh and twelfth causes of action were pleaded in the alternative despite both causes of action seeking reimbursement or amounts allegedly overpaid under the Settlement Funding Agreement.

⁷ National Union also contends it is entitled to reimbursement because it had no obligation to indemnify Fresenius under the 2002-2004 policies under its theory that the claims were caused by two distinct occurrences and that its liability is capped at \$50 million under the 2011 policy.

Fresenius moves for partial summary judgment dismissing National Union's: (1) breach of contract claim and claim for prejudgment interest as premature, (2) unjust enrichment claim as duplicative of National Union's breach of contract claim, and (3) declaratory judgment claim concerning the limits of insurance. Fresenius also asserts that it is the party entitled to summary judgment on National Union's claim, in which National Union seeks a declaration that there were two occurrences (Count III), because Fresenius argues, there was actually a single occurrence—Fresenius' alleged failure to warn.

Massachusetts "courts are guided by several principles. Like all contracts, insurance contracts are to be construed 'according to the fair and reasonable meaning of the words in which the agreement of the parties is expressed.'" (*Cody v Connecticut General Life Ins. Co.*, 387 Mass 142, 146 [1982] [citations omitted].) Under Massachusetts law, an insurance policy is a contract that will be enforced as written when its terms are clear. (*Vergato v Commercial Union Ins. Co.*, 50 Mass App Ct 824, 826 [2001].) If the language is clear and unambiguous, the court must give effect to that language without considering the underlying intent of the parties. (*Allmerica Fin. Corp. v Certain Underwriters at Lloyd's, London*, 449 Mass 621, 634 [2007].) A contract "is ambiguous when it can 'support a reasonable difference of opinion as to the meaning of the words employed and the obligations undertaken.'" (*Balles v Babcock Power, Inc.*, 476 Mass 565, 571 [2017] [citation omitted].) Moreover, whether a contract is ambiguous is a question of law and determined by the court. (*Id.* [citation omitted].) "To determine whether the language at issue is ambiguous, [the court] look[s] both to the

contested language and to the text of the contract as a whole.” (*Id.* at 572.) Any ambiguities in the contract language are interpreted against the insurer. (*Allmerica Fin. Corp.*, 449 Mass at 634.)

As the parties agree that there are no material differences in the policy terms, the court refers to the terms of the 2008 National Union umbrella policy.

Allocation of Settlement Payments (Count I and Counterclaim I)

“Trigger of coverage is a term of art whereby the court describes what must occur during the policy period for potential coverage to commence under the specific terms of an insurance policy.” (*A.W. Chesterton Co. v Massachusetts Insurers Insolvency Fund*, 445 Mass 502, 518 [2005] [internal quotation marks and citation omitted].) The court “look[s] to the policy as written” and will not “revise it or change the order of the words.” (*Id.*, quoting *Continental Cas. Co v Gilbane Bldg. Co.*, 391 Mass 143, 147 [1984].) The court will “consider what an objectively reasonable insured, reading the relevant policy language, would expect to be covered.” (*Id.* [citations omitted].) “After the court determines which contracts are triggered by a particular claim or group of claims, it must then determine how to allocate the policyholder’s total liability among the triggered contracts and the policyholder.” (Scott M. Seaman and Jason R. Schulze, *Allocation of Losses in Complex Insurance Coverage Claims* § 4.1 Introduction [2021] [online version].)

National Union seeks summary judgment on Count I, asking the court to declare that the \$250 million global settlement amount be allocated across each policy period based on the settlement payments attributable to bodily injuries alleged to have been suffered in those years. National Union contends that, because each claimant

participating in the underlying mass tort global settlement alleged bodily injury on a specific date, and both the National Union Policies and the CNA Policies provide coverage on a per occurrence basis, the underlying claims should be allocated to the specific year in which the injury occurred. National Union further argues that, once the settlement payments are properly allocated under this framework, only then can the Retained Limits and Limits of Insurance be applied. Accordingly, National Union also seeks summary judgment in its favor on Count III, asking the court to declare that the settlement resolved claims for bodily injuries caused by two distinct occurrences, NaturaLyte and GranuFlo, and thus, two separate \$7.5 million Retained Limits in each policy year must be first exhausted before National Union provides coverage.

Fresenius maintains that only the 2008-2011 National Union Policies are applicable because that is the policy period that corresponds to the one triggering occurrence: Fresenius' failure to warn of the purported connection between acetate, high serum bicarbonate, and cardiopulmonary arrest. Fresenius maintains that it is the occurrence, and not the individual claims, that triggers coverage under particular policies, and once the coverage is triggered, the loss is then allocated pro rata among the triggered policies (i.e., those policies that were in effect after the occurrence).

The "Coverage" provision of the National Union Policies provides:

"We will pay on behalf of the Insured those sums in excess of the Retained Limit that the Insured becomes legally obligated to pay by reason of liability imposed by law or assumed by the Insured under an Insured Contract because of Bodily Injury, Property Damage, Personal Injury or Advertising Injury that takes place during the Policy Period and is caused by an Occurrence happening anywhere in the world. The amount we will pay for damages is limited as described in Insuring Agreement III, Limits of Insurance.

(NYSCEF 159, 2008 National Union Policy at 6.)

Bodily Injury is defined as “bodily injury, sickness or disease sustained by any person, including death, mental anguish, mental injury, shock or humiliation resulting from any of these at any time.” (*Id.* at 22.) An occurrence is defined “as respects Bodily Injury or Property Damage, an accident, including continuous or repeated exposure to substantially the same general harmful conditions. All such exposure to substantially the same general harmful conditions will be deemed to arise out of one Occurrence.” (*Id.* at 26.)

Relying on the policy language, this court rejects Fresenius’ interpretation of the coverage clause. Here, the coverage term of the National Union Policies is plain and unambiguous. Under the terms of the National Union Policies, coverage includes “Bodily Injury . . . that takes place during the Policy Period and is caused by an Occurrence happening anywhere in the world.” Coverage under the National Union Policies not only requires bodily injury caused by an occurrence but also critically requires that the bodily injury take place during the policy period. In view of the policy language, a reasonable insured would expect coverage to begin when a bodily injury takes place during the policy period and is caused by an occurrence, whether that be Fresenius’ alleged failure to warn or injury caused by the hemodialysis treatment.⁸

⁸ The question of allocation does not, according to the policy terms, require the court to determine what the occurrence is. Fresenius’ allocation across the 2008 to 2011 National Union Policies, its interpretation of a single occurrence, and resulting allocation method across the four policies in fact buttresses the court’s conclusions. Even if the court were to accept Fresenius’ interpretation of occurrence, within the context of the coverage definition, a reasonable insured would understand that coverage is triggered when bodily injury takes place during the policy period and is caused by an occurrence. Whether the bodily injury is caused by Fresenius’ product or whether the injury was

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The policy language cannot be read as Fresenius urges the court to read it—that the occurrence, whether it be Fresenius’ failure to warn or the hemodialysis treatment, determines which policy period is triggered. This makes sense because the policy language expressly sets forth the temporal requirement—that is, that the bodily injury caused by an occurrence takes place during the policy period. The approach that Fresenius urges the court to accept places undue emphasis on the occurrence by imputing a temporal aspect that is not necessarily implied and would make that portion of the policy language, “during the policy period,” superfluous. (*Crimmins & Peirce Co. v Kidder Peabody Acceptance Corp.*, 282 Mass 367, 387 [1933] [“All parts of an agreement are to be construed together as constituting a single and consistent arrangement. The intent of parties must be gathered from a fair construction of the contract as a whole and not by special emphasis upon any one part.”].)

Boston Gas Company v Century Indemnity Company, 454 Mass 337 (2009), a case cited by both parties, is instructive. The issue presented to the Massachusetts Supreme Court was how to allocate liability for long-term environmental contamination where a policyholder sues one of its commercial general liability insurers that provided coverage for the risk for only a portion of the time during which the contamination took place. There, the court adopted a “time on the risk” pro rata method of damages for “long-tail claims,” claims that can occur years after the triggering event and the expiration of the insurance policy which frequently arise out of environmental

caused by Fresenius’ failure to warn is irrelevant in determining which policies were triggered.

contamination cases. Significantly, the Court in *Boston Gas* was not tasked with defining what triggered an insurance policy or the allocation time period but opined:

“The ideal method is a ‘fact-based’ allocation, under which courts would ‘determine precisely what injury or damage took place during each contract period or uninsured period and allocate the loss accordingly.’ ‘Although such an allocation is the most consistent with the contract language, the inability to make such determinations or the litigation costs associated with such an exact allocation has caused courts to use various proxies for deriving fair apportionment.’”

(*Boston Gas*, 454 Mass at 367, citing *Seaman and Schulze*, Allocation of Loss in Complex Insurance Coverage Claims § 4:3 [2021].)

The Massachusetts Supreme Court stated that “where it is not feasible to make a fact-based allocation of losses attributable to each policy period, losses should be allocated using the time-on-the-risk method.” (*Boston Gas*, 454 Mass at 372.) That is not the case here. Here, “a fact-based approach [is] more reflective of the parties’ contractual obligations” and there is “‘evidence more closely approximating the actual distribution of ... damage’ than time-on-the-risk calculations[;]” thus, a fact-based allocation should apply where “‘a more accurate estimation’ of the quantum of ... damage that took place during the triggered policy years is ‘feasible.’” (*Peabody Essex Museum, Inc. v U.S. Fire Ins. Co.*, 802 F3d 39, 51 [2015], citing *Boston Gas*, 454 Mass 293, 314, 316.)

The claims that the underlying plaintiffs asserted in the mass tort litigation were not long-tail claims. The claimants could point to a date of exposure and injury. (NYSCEF 136, JSUF ¶ 35.) Because “[i]n the ordinary case of nonprogressive injury, . . . the policy in place at the time the covered damage or injury took place would cover all consequential damages, even those taking place after the policy period.” (*Boston Gas*,

454 Mass at 348; see also *Massachusetts Insurers Insolvency Fund v Medical Liability Ins. Co.*, 2014 WL 2504577, 2014 Mass Super LEXIS 51, *5 [Feb. 3, 2014].) The court holds that National Union's indemnity obligations are under each of the policies.

Fresenius relies on *Boston Gas* to support its view that a fact-based allocation requires an exact determination of what injuries or damages occurred during each contract period, an approach that would raise a host of disputed issues and require individual fact-finding. Implicit in Fresenius' argument is that it is feasible to conduct a more accurate estimation of damages. That the determination would be more timely or costly is insufficient to preclude application of the fact-based allocation method.

Fresenius resists a fact-based allocation by attempting to create factual issues. In opposition, Fresenius argues that National Union inaccurately reported financials for the years 2017-2021, that the Final Allocation Plan was created by the claimants, and that National Union did not know at the time it filed this action how the plaintiffs were allocating the settlement proceeds. These factual issues are not material to the clear and unambiguous language of the coverage terms, and thus, do not raise triable issues of fact. The court does not need to address the factual issue of how to determine the year of the claimants' bodily injuries.

Fresenius also raises legal arguments to defeat summary judgment. It points to the definition of "Loss." According to Fresenius, the policy terms require the insured's approval when a loss is established in a settlement and only an agreed upon settlement can determine the amount of loss. Thus, because the National Union Policies require the insured to sign off, an allocation method that utilizes the claimants' Final Allocation

Plan, not signed by Fresenius, contravenes the National Union Policies' terms. The court is not persuaded by this argument.

The court is not mandating the use of the Final Allocation Plan; rather, the Final Allocation Plan is evidence that a fact-based allocation is feasible. Fresenius' interpretation of the definition of "Loss" is constrained. "Loss" is defined under the National Union Policies as "those sums actually paid as judgments or settlements, provided, however, that if expenses incurred to defend a Suit or to investigate a claim reduce the applicable limits of Scheduled Underlying Insurance, then Loss shall include such expenses." (NYSCEF 159, 2008 National Union policy at 25.) In arguing that only a signed settlement, by the insured, is effective (and thus under Fresenius' theory, the Final Allocation is not in effect and cannot have any role in determining the loss or allocating funds for insurance purposes), Fresenius looks to subsection "J. Legal Actions Against Us" under "Section VI. Conditions" for support. (*Id.* at 20 [emphasis added].) However, Fresenius cherry-picks the language to support its argument. The provision on which Fresenius relies states:

"A person or organization may sue us to recover on an agreed settlement or on a final judgment against an Insured; but we will not be liable for damages that are not payable under this policy or that are in excess of the applicable Limits of Insurance of this policy. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative."

(*Id.* [emphasis added].) By the express terms, subsection J applies when a claimant sues the insurer to recover upon a settlement or a final judgment, which is not the case here. Thus, Fresenius' application of this provision under subsection J is not as broad

as Fresenius reads it and does not preclude the role of the Final Allocation Plan, if any, in the ultimate determination.

Equally unavailing is Fresenius' argument that the portion of the coverage clause "legally obligated to pay as damages by reason of liability imposed by law." Fresenius argues that under Massachusetts law, an insured is liable for damages arising out of its own tortious conduct to trigger liability insurance coverage, and thus, the "by law" portion means that coverage is tied to Fresenius' failure to warn. The court is not persuaded that a reasonable insured would read the coverage provision as Fresenius urges upon the court.

Number of Occurrences (Count III and Counterclaim I)

National Union seeks a declaration that the claims in the underlying mass tort litigation arose from two distinct occurrences, NaturaLyte and GranuFlo, and thus, there are two \$7.5 million "Retained Limits" in each policy year that must be first exhausted before National Union's indemnity obligations begin. National Union argues that the bodily injury claims arising from exposure to NaturaLyte are separate, discrete acts from the claims based on exposure to GranuFlo. Specifically, National Union notes the two products' different chemical compositions, the FDA investigation and underlying mass tort action noted the chemical differences in the two products, the distinction was a focus in the underlying tort action, and GranuFlo claimants recovered larger amounts in the settlement. National Union also contends that the claimants in the mass tort litigation did not limit their causes of action to a "negligent failure to warn," and instead, included other allegations in their complaint, including the negligent design of both NauraLyte and GranuFlo, negligent misrepresentation, breach of implied warranty of

merchantability, fraud, and breach of implied warranty of fitness for a particular purpose. National Union proffers evidence that there were potential issues of confusion between NaturaLyte and GranuFlo and issues with doctors' prescriptions, in the years prior to the inception of the 2008 policy.

Fresenius contends that, under the National Union Policies, the number of occurrences is determined by the insured's conduct, and more specifically, its alleged failure to warn about the purported connection between acetate in its acid concentrates, elevated serum bicarbonate, and risk of cardiopulmonary arrest. Thus, Fresenius asserts that there is only one occurrence based on its own conduct. Generally, Fresenius argues that the claimants' allegations in the underlying tort lawsuit did not distinguish between GranuFlo and NaturaLyte in identifying the cause of their injuries, there were no allegations that Fresenius should have provided different warnings depending on the brand of acetate concentrate, the FDA treated Fresenius' acid concentrates the same and identified a single issue, apparently there is the potential health risks involving the acetate and elevated serum bicarbonate, and in 2013 and 2014, National Union itself recognized that the alleged cause of the claimants' injuries were the same.

The National Union Policies define the term "Occurrence" in two different ways. In the 2002, 2003, and 2004 National Union Policies, an "Occurrence" is defined as:

"an accident, including continuous or repeated exposure to conditions, which results in Bodily Injury . . . neither expected nor intended from the standpoint of the Insured. All such exposure to substantially the same general conditions will be deemed to arise out of one Occurrence."

(See, e.g., NYSCEF 153, 2002 National Union Policy at 9 [section IV.H].)

Starting in October 2005, the National Union Policies issued to Fresenius contained a somewhat different definition of “Occurrence” as respects Bodily Injury.

The definition is as follows:

“an accident, including continuous or repeated exposure to substantially the same general harmful conditions. All such exposure to substantially the same general harmful conditions will be deemed to arise out of one Occurrence.”

(See, e.g., NYSCEF 156, 2005 National Union Policy at 25 [section VII.S].)

Massachusetts courts have held that “the number of occurrences is determined by the cause theory, which construes occurrence ‘by reference to the cause or causes of the injury or damage rather than the number of claims.’” (*RLI Ins. Co. v Simon’s Rock Early College*, 54 Mass App Ct 286, 289 [2002], citing *Doria v Ins. Co. of N. Am.*, 210 NJ Super 67, 73-74 [1986].) Multiple injuries sharing a single cause have been held as one occurrence. (See *Colonial Gas Co. v Aetna Cas. & Sur. Co.*, 823 F Supp 975, 983-84 [D Mass 1993].) In *Colonial Gas*, the court determined, under a substantially similar definition of “occurrence,” that the insured’s installation program of harmful insulation into about 400 homes and causing about property damage across multiple homes was the underlying cause of the property damage and thus a single occurrence for the purposes of insurance coverage. (*Id.* at 983-984.)

In *RLI*, a Massachusetts appellate court analyzed a commercial general liability insurance policy containing a similar definition of occurrence as the one in this case. (Compare *RLI*, 54 Mass App Ct at 291 [defining occurrence as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions”], with NYSCEF 156, 2005 National Union policy at 25.) The underlying litigation in *RLI*, brought by a college’s excess insurer, involved the excess insurer’s

declaratory judgment claims which sought a declaration that all claims arising from the mass shooting incident at the college harming multiple people arose out of a single occurrence. (See *RLI* at 287.) The primary insurer was a named defendant. Generally, the plaintiffs in the underlying action sued the school and its employees for negligence and their allegedly negligent acts or omissions in failing to prevent the school shooter from using his gun. (*Id.* at 291.) Although the parties in *RLI* agreed that, in Massachusetts, the number of occurrences is determined by the “cause” theory, construing occurrence, they disagreed on what constituted the cause. The excess insurer argued that the cause was the shooting whereas the primary insurer argued that the cause was the school and its employees’ alleged negligent conduct in preventing the incident. After the court in *RLI* analyzed a number of cases involving commercial general liability policies, the court concluded that

“when the issue is the number of occurrences, we must look to the ‘cause’ of the injury by reference to the conduct of the insured for which coverage is afforded, and that the ‘cause’ and ‘occurrence’ are indistinguishable Our view is supported by both the terms of the relevant policy of insurance and by decisional law.”

(*Id.* at 290.)

Citing *Washoe County v Transcontinental Insurance Co.*, 110 Nev 789 (1994), the *RLI* Court reasoned that “the underlying claims against the school and its employees are for negligence, it is their allegedly negligent acts or omissions in failing to prevent [the shooter] from using his gun that constitute the occurrence for purposes of determining general liability coverage” (*Id.* at 291.) Moreover, the Court cited cases that arrived at the same conclusion when presented with the issue of how to determine an occurrence, which reasoned “[s]ince the policy was intended to insure [the

college] for its liabilities, the occurrence should be an event over which [the college] had some control. Otherwise, ... the insurer would have no basis for setting premiums *ex ante* and the insurance contract would be illusory.” (*Id.* at 293, quoting *Uniroyal Inc. v Home Ins. Co.*, 707 F Supp 1368 [ED NY 1988] [brackets in original].)

To determine the question of whether there was a single occurrence or multiple occurrences, the court looked to the conduct of the college and its employees. The court found that the definition of “occurrence,” that is, “accident, including continuous or repeated exposure to substantially the same general harmful conditions” was unambiguous and “clearly contemplate[d] the possibility that multiple acts taking place over a space of time may contribute to a single occurrence for purposes of coverage.” (*Id.* at 294.)

The *RLI* Court distinguished a situation where the facts suggested that “any of the acts or omissions on the part of the insured defendants was a ‘discrete’ act of liability so separated by time and location as to warrant the conclusion that each such act resulted in [the shooter] having access to a weapon that he then used to shoot several people.” (*Id.* at 294-95.) The Court looked to *Worcester Ins. Co. v Fells Acres Day School* (408 Mass 393 [1990]) (*Fells Acres*) to distinguish between a single occurrence and multiple occurrences in cases involving failure to supervise underlying litigations.

In *Fells Acres*, an insurance case arising out an underlying litigation claiming sexual abuse allegedly perpetuated at the Fells Acre Day School, the “tort plaintiffs allege[d] numerous discrete acts of abuse, negligence, and breach of duty by several different defendants, some individual and one corporate, at different locations.” (408

Mass at 417.) The *Fells Acres* Court, therefore, found that the facts spelled out more than one occurrence. (*Id.*) In *RLI*, however, the court held that, despite the several negligent acts or omissions by school officials leading to the shooting spree, these events do not give rise to separate or multiple occurrences, but rather “constitute[d] evidence of an arguably inadequate policy of security and student supervision that may have contributed to [the shooter’s] ultimate access to a murder weapon.” (*RLI*, 54 Mass at 295.) The court in *RLI* found that there was only one occurrence. (*Id.* at 296.)

In light of the foregoing, here, there was a single cause to the underlying claimants’ injuries, that is Fresenius’ failure to warn. Although National Union contends that the bodily injury claims based upon exposure to NaturaLyte arose from separate discrete acts than the claims based on exposure to GranuFlo, National Union fails to address or argue in opposition that the definition of occurrence here clearly contemplates “multiple acts taking place over a space of time may contribute to a single occurrence for purposes of coverage” as the court in *RLI* and *Colonial Gas* similarly concluded when considering a similar definition of occurrence. Moreover, National Union does not address the prevailing “cause theory” adopted by Massachusetts courts in determining the number of occurrences.

Instead, National Union principally argues that Fresenius’ alleged negligence with respect to GranuFlo was unique and contributed twice as much acetate and exceeded its alleged negligence with respect to NaturaLyte and exposed dialysis patients to greater risk. Still, Fresenius “designed, manufactured, labeled, promoted, distributed, marketed, and/or sold NaturaLyte and/or GranuFlo.” (NYSCEF 201, Second Amended Master Complaint [underlying action] ¶ 68.) Both products were under Fresenius’ care

and control and the claimants in the underlying litigation alleged that Fresenius has been “aware for years that the warnings and instructions related to NaturaLyte and/or GranuFlo were inadequate.” (*Id.* ¶ 119.) Further, as the claimants alleged in the master complaint, “When too much bicarbonate is delivered to the patient, as can occur with the use of NaturaLyte and/or Granuflo ... [] an electrolyte imbalance can occur.” (*Id.* ¶ 126.) The claimants further allege “[t]he manufacturer of a product used in hemodialysis, such as an acid concentrate, has a duty to advise and/or warn prescribing physicians and/or healthcare facilities of any and all risks, concerns, defects and other safety information regarding said product and its use.” (*Id.* ¶ 127.)

Thus, National Union errs in focusing on the divergent levels of acetate in the two different products where Fresenius’ alleged failure to warn is the cause of the dosing errors. Therefore, this court denies the portion of National Union’s motion for summary judgment that seeks a declaration that alleged injuries from NaturaLyte and GranuFlo were distinct and separate occurrences within any one policy year. For the same reasons, that portion of Fresenius’s motion for partial summary judgment that seeks a declaration that any alleged injuries from NaturaLyte and GranuFlo is one occurrence in any one policy year is granted.

Applicable Limits of Insurance (Count II)

Count II of the amended complaint seeks a declaration regarding the Limits of Insurance under the National Union Policies, specifically the amounts concerning the Retained Limits, the General Aggregate Limit of Insurance for claims for Bodily Injury,

and the Each Occurrence Limit of Insurance.⁹ (See NYSCEF 64, Amended Complaint ¶¶ 82-89.) National Union seeks summary judgment on count II, based upon its theories in counts I and III (declaratory judgment concerning allocation over eleven policies and two occurrences, respectively), that indemnity obligations are subject to two \$7.5 million Retained Limits and a \$50 million Limit of Insurance in each of the eleven policy years at issue. Fresenius argues that, as National Union is no longer pursuing the Products-Completed Operations Hazard declaratory judgment, it is entitled to summary judgment dismissing that portion of count two. Likewise, Fresenius seeks summary judgment dismissing National Union's count two on the basis that there is only one occurrence and therefore one \$7.5 million Retained Limit.

The parties agree that the National Union's indemnity obligations are triggered after losses exceed the \$7.5 million Retained Limit Per Occurrence. (NYSCEF 159, 2008 National Union Policy at 31; NYSCEF 288, Fresenius' mem of law in support of summary judgment at 30; NYSCEF 287, National Union' mem of law in support of summary judgment at 7; NYSCEF 70, answer with counterclaims ¶ 93.) However, the parties diverge on the \$7.5 million Retained Limit Per Occurrence to the extent it differs based on each party's diverging view of the number of occurrences. Therefore, consistent with the court's holding that there is only one occurrence, it follows that there is only one \$7.5 million Retained Limit Per Occurrence.

⁹ Count two in the amended complaint also referenced the "Products-Completion Operations Hazard" Limit of Insurance, however, National Union concedes that this is no longer at issue. (NYSCEF 373, National Union opp brief at 38.)

Applicability of the Exclusions Within National Union's 2012 Policy (Counts VII-IX)

National Union additionally seeks a declaration that three exclusions in the 2012 umbrella policy bar coverage for claims that are attributable to that policy year. National Union argues that any of the three exclusions contained in the 2012 policy operate to bar coverage for claims in that policy year.

The exclusions are contained in Endorsement No. 28 and entitled "Prior Knowledge," "Continuous or Related Acts," and "Pending or Prior Litigation." (NYSCEF 163, 2012 National Union policy at 99 [Section V. Exclusions].) The "Retroactive Date" and the "Continuity Date" are both October 1, 2012. (*Id.* at 97.)

The exclusions included within each endorsement are stated as follows:

"Prior Knowledge

This insurance does not apply to any Claim alleging or arising out of an Occurrence committed on or after the Retroactive Date shown above, if any Insured listed under subparagraphs 2a., 2b., 2c. or 2e. of Paragraph M. of Section VII., any executive officer or director listed under subparagraph 2d. of Paragraph M. of Section VII. or any employee authorized by you to give or receive notice of an Occurrence, knew as of the Continuity Date shown above that such Occurrence could result in a Claim.

Continuous or Related Acts

This insurance does not apply to any Claim alleging or arising out the same Occurrence or series of continuous, repeated or related Occurrences or alleging the same or similar facts, alleged or contained in any Claim which has been reported, or any Occurrence of which notice has been given, under any policy of which this policy is a renewal, replacement or succeeds in time.

Pending or Prior Litigation

This insurance does not apply to any Claim alleging or arising out of any Claim or Suit pending as of the Continuity Date

shown above, or alleging or arising out of or relating to any fact, circumstance, situation or Occurrence alleged in such Claim or Suit.”

(NYSCEF 163, 2012 National Union Policy at 99 [Section V. Exclusions].)

“Claim” is defined as “a demand for money or Suit.” (*Id.* at 99 [amending section VII. Definitions].)

Under Massachusetts law, exclusions from coverage are strictly construed and any ambiguity in the exclusion will be construed against the insurer. (*Hakim v Massachusetts Insurer’s Insolvency Fund*, 424 Mass 275, 282 [1997] [citation omitted].) However, both parties agreed that “[b]eginning in July 2012, [Fresenius] began to be served with lawsuits filed in federal and state courts alleging that hemodialysis patients suffered bodily injury or death after receiving hemodialysis treatments prepared using . . . GranuFlo and NaturaLyte.” (NYSCEF 136, JSUF ¶ 24.) There is no question that the “Pending or Prior Litigation” exclusion applies to preclude the applicability of the 2012 National Union policy, which does not apply to any “Claim alleging or arising out of any Claim or suit pending as of the Continuity Date . . .” because the underlying claims were pending by October 1, 2012.

Fresenius’ argument that the 2012 policy is not triggered and National Union’s claim is moot, based on its theory that the applicable time period is 2008-2011, is rejected for the reasons stated above. Fresenius then argues that, in the event the claim is not moot, multiple factual issues preclude summary judgment. For one, Fresenius argues that individual cases alleging injury during the 2012 policy period would not have been filed yet when it purchased the 2012 policy so were thus not known and also not excludable as pending or prior litigation. Fresenius does not

support its construction of the “Pending or Prior Litigation” exclusion, even construing the language strictly against National Union. The court cannot read into the exclusion a requirement that would conflict with the plain terms that “insurance does not apply to any Claim alleging or arising out of any Claim or Suit pending as of the Continuity Date.” Therefore, summary judgment is granted as to National Union’s count nine and summary judgment is denied as to National Union’s count seven and eight as moot.

Obligation to Reimburse National Union for Amounts That Were Overpaid Under Settlement Funding Agreement and Prejudgment Interest (Count XI)

National Union seeks repayment of any overpayments it made under the global settlement agreement under a theory of breach of contract. In Massachusetts,

“[t]o prevail on a claim for breach of contract, a plaintiff must demonstrate that there was an agreement between the parties; the agreement was supported by consideration; the plaintiff was ready, willing, and able to perform his or her part of the contract; the defendant committed a breach of the contract; and the plaintiff suffered harm as a result.”

(*Bulwer v Mount Auburn Hosp.*, 473 Mass. 672, 690 [2016] [citation omitted].)

The Settlement Funding Agreement provides that Fresenius will reimburse AIG for any funding advanced by AIG, “if and to the extent that it is determined that AIG provided funding beyond that which it was legally obligated to provide.” (NYSCEF 187, Settlement Funding Agreement at 2.) The court agrees with Fresenius insofar that the Settlement Funding Agreement establishes an express condition precedent to any reimbursement and the condition has not been satisfied yet. (*Massachusetts Mun. Wholesale Elec. Co. v Town of Danvers*, 411 Mass 39, 45 [1991] [“A condition precedent defines an event which must occur before a contract becomes effective or before an obligation to perform arises under the contract.” “If the condition is not fulfilled,

the contract, or the obligations attached to the condition, may not be enforced.”] [citations omitted].) There has been no evidence or determination that National Union overpaid under the Settlement Funding Agreement. National Union’s motion for summary judgment on its claims for breach of contract and for prejudgment interest is likewise denied.

National Union’s Obligation to Reimburse Fresenius for Mass Tort Litigation Defense Costs (Count X and Counterclaim II) and Fresenius’ Claim for Unjust Enrichment (Counterclaim III)

National Union seeks a declaration that it was not required to defend Fresenius until the global settlement agreement was funded, i.e., it was not required to defend before November 2017, when Fresenius paid \$30 million to fund the settlement. Under the defense provisions of the umbrella policies, National Union:

“will have the right and duty to defend any Suit against the Insured that seeks damages for Bodily Injury . . . covered by this policy, even if the Suit is groundless, false or fraudulent when:

1. the total applicable limits of Scheduled Underlying Insurance have been exhausted by payment of Loss to when this policy applies and the total applicable limits of Other Insurance have been exhausted
2. the damages sought because of Bodily injury, Property Damage or Personal Injury and Advertising Injury would not be covered by Scheduled Underlying Insurance or any applicable Other Insurance, even if the total applicable limits of either the Scheduled Underlying Insurance or any applicable Other Insurance had not been exhausted by the payment of Loss.

If we are prevented by law or statute from assuming the obligations specified under this provision, we will pay any expenses incurred with our consent.”

(NYSCEF 159, 2008 National Union Policy at 7 [provision A].) “Loss” is defined under the policies as “those sums actually paid as judgments or settlements, provided, however, that if expenses incurred to defend a Suit or to investigate a claim reduce the applicable limits of Scheduled Underlying Insurance, then Loss shall include such expenses.” (*Id.* at 25.) While the term “judgments or settlements” is not defined under the policies, “language in an insurance contract is no different from ... language in any other contract, and we must construe the words of the policy in their usual and ordinary sense.” (*Dorchester Mut. Ins. Co. v Krussell*, 485 Mass 431, 437 [2020] [internal citations, quotations, and brackets omitted].) Provision M under “IV. Limits of Insurance” is also instructive. It provides:

“When the amount of Loss has been determined by an agreed settlement, or a final judgment, we will promptly pay on behalf of the Insured the amount of such Loss falling within the terms of this policy. An agreed settlement means a settlement and release of liability signed by us, the Insured and the claimant or the claimants legal representative.”

(NYSCEF 159, 2008 National Union Policy at 10 [provision M].)

Under Massachusetts insurance law, the duty to defend is broader than the duty to indemnify. (See, e.g., *Lexington Ins. Co. v CareCore Natl., LLC*, 2014 Mass Super LEXIS 200 [Suffolk Cty, July 17, 2014].) “The underlying complaint need only state a claim that gives rise to a possibility of recovery under the policy, rather than a probability of such recovery.” (*Omega Flex, Inc. v Pacific Employers Ins. Co.*, 78 Mass App Ct 262, 266 [2010] [citation omitted].) “An insurer has a duty to defend an insured when the allegations in the complaint are reasonably susceptible of an interpretation that state[d] or roughly sketched a claim covered by the policy terms.” (*Billings v Commerce Ins. Co.*, 458 Mass 194, 200 [2010] [citation omitted].) “Any doubt as to

whether insurance coverage is invoked must be resolved in favor of the insured.” (*Community TV Corp. v Twin City Fire Ins. Co.*, 2002 Mass. Super LEXIS 452 [2002] [citation omitted].) The court notes that these principles apply to primary insurers. In the case of excess insurers, “the duty of defense is contractual[] [and] insurance policies ought to be construed accurately and given the effect their language clearly commands.” (*United Tech. Corp. v Liberty Mut. Ins. Co.*, 1993 Mass Super LEXIS 281, 1993 WL 818913, *16 [1993] [internal quotation marks and citation omitted].)

There is nothing unclear about National Union’s duty to defend, which according to its terms, applies “when [] the total applicable limits of Scheduled Underlying Insurance have been exhausted by payment of Loss.” (NYSCEF 159, 2008 National Union Policy at 7 [provision A].) Only the definition of settlements is at issue. Black’s Law Dictionary defines “settlements” as “An agreement ending a dispute or lawsuit.” (Black’s Law Dictionary [11th ed 2019], settlement.) Here, Fresenius agreed to the MSA as a complete and final resolution of the underlying litigation with the claimants.¹⁰

¹⁰ It is true that the MSA to settle the claims for \$250 million, signed by Fresenius and the underlying Plaintiffs’ Negotiation Committee on August 2, 2016, was not signed by National Union. (NYSCEF 136, JSUF ¶ 32.) However, it cannot be seriously argued that National Union was required to sign the MSA for the MSA to fall under the ambit of “Loss.” For one, the MSA released the claims between the claimants and Fresenius; the underlying claims were not asserted against National Union. Moreover, the Settlement Funding Agreement was agreed to on February 15, 2016 after Green proffered his proposal for a \$250 million settlement (*id.* ¶ 29; NYSCEF 146, Green Proposal for Settlement) was clearly effectuated in order to facilitate settlement of the underlying claims. (NYSCEF 187, Joint Exhibit 49, Settlement Funding Agreement at 2 [“Therefore, although it is AIG’s position that it has no obligation to fund at this time, in order to facilitate completion of the global settlement you outlined in your email yesterday (i.e., \$250 million settlement payment, with an opt out rate of no greater than 3 to 5% of all claimants), AIG will agree to share in the funding of the settlement with the plaintiffs as FMC requests, under a full reservation of AIG’s rights.”].)

(See NYSCEF 147, MSA, Recital 3 at 5.) Taking the ordinary definition of settlements and read together with provision M, it clear that National Union’s duty to defend begins when the “total applicable limits of Scheduled Underlying Insurance have been exhausted” once the claims were settled by payment under the MSA. Further, both parties agreed that this occurred in November 2017 when the “\$250 million payment required by the [MSA] to resolve the Underlying Litigation was paid in accordance with the [MSA].” (NYSCEF 136, JSUF ¶ 34.)

Based on the clear and unambiguous language of the duty to defend provision, the court finds that language expressly provides that National Union’s obligations to defend are triggered only when the limits of the underlying insurance are exhausted by payment of loss which occurred in November 2017.

Fresenius offers a whole host of arguments as to why summary judgment should be denied. Fresenius disputes the meaning of the duty to defend provision for the following reasons. Fresenius argues that exhausting of the primary insurance is merely one trigger of National Union’s duty to defend. Second, Fresenius argues that, pursuant to Section III.E, if National Union’s obligation to defend was triggered at any time, National Union must reimburse for defense costs pertaining to covered claims even if they were incurred before exhaustion of primary coverage. Third, the National Union policies contemplate co-extensive indemnity and defense obligation, that is, when the policies cover a loss, they also cover the associated defense costs at least to the same degree. Fourth, Fresenius opines that National Union’s interpretation of the “exhausted by payment” language defeats the purpose of a duty to defend clause. Finally, Fresenius argues that it continued to incur costs after the settlement was funded in

2017. These arguments are unavailing as the language governing National Union's duty to defend is clear and free from ambiguity.

Then, Fresenius contends that National Union's voluntary participation in the underlying action by hiring Wheeler Trigg raises factual questions. National Union argues that the policies unambiguously provided it with the right to participate in the defense of the underlying litigation at their own expense. The "Defense Provisions" of the policies provide:

"D. Except as provided in Paragraph A. above, we will have no duty to defend any Suit against the Insured. We will, however, have the right, but not the duty, to participate in the defense of any Suit and the investigation of any claim to which this policy may apply. If we exercise this right, we will do so at our own expense."

(NYSCEF 159, 2008 National Union policy at 8 [provision D].) This argument is likewise rejected. The court will not disturb or rewrite the agreement which specifically and unequivocally provides that the underlying insurance must be first exhausted. The court does not read provision D as inconsistent with provision A. Moreover, Fresenius argues that authorities across the country are split as to when an equitable duty to defend on excess carriers apply when the potential scope of liability plainly exceeds the limits of the primary policy. However, a Connecticut Court compared the law in other states on the issue of the equitable duty to defend and found that

It appears that a majority of states to have addressed this issue have held that the excess carrier's duty to defend is not triggered until the policy limit of the primary carrier is exhausted by settlement or tender of payment, even if the claim for damages in the underlying action exceeds the primary carrier's limit and the excess carrier's policy will necessarily be implicated in the action. These decisions emphasize "that the terms of a contract are generally enforced as written, and because there are no equitable considerations which justify departing from the express provisions and obligations of the primary and excess insurance contracts, it is inappropriate for courts to alter the parties' obligations

and economic expectations.....A minority of states have held that the excess carrier's duty to defend is triggered once the excess carrier becomes aware that the claim for damages in the underlying action will exceed the primary carrier's policy limit”

including New York. (*Cambridge Mut. Fire Ins. Co. v Ketchum*, 2012 WL 3544885, at *5 [D Conn 2012].) However, this court is concerned only with Massachusetts case law. Fresenius does not point to any courts in Massachusetts that have adopted this alternate approach.

As a result, the court grants summary judgment to National Union declaring that it is not required to reimburse Fresenius for defense costs until the underlying insurance was exhausted in November of 2017.

Unjust Enrichment Claim (Count XII)

National Union voluntarily discontinued its claim for unjust enrichment, and it is thus dismissed. (NYSCEF 373, National Union opp brief at 38.)

Accordingly, it is

ORDERED that motion sequence number 008 for summary judgment is granted, in part, as to National Union's first cause of action for declaratory judgment concerning allocation, ninth cause of action for declaratory judgment concerning the “pending or prior litigation” exclusion under the 2012 policy, and the tenth cause of action for declaratory judgment concerning National Union's duty to defend. Motion sequence number 008 is otherwise denied; and it is further

ADJUDGED and DECLARED that the settlement amount be allocated across all years in which the settling claimants alleged bodily injuries occurred; and it is further

ADJUDGED and DECLARED that National Union is not obligated to indemnify Fresenius under the 2012 policy based upon the “pending or prior litigation” exclusion;

ADJUDGED and DECLARED that National had no duty to defend until the primary layer of insurance was exhausted, or November 2017; and it is further

ORDERED that motion sequence number 009 is granted, in part, as to Fresenius' motion for summary judgment as to the number of occurrences, to dismiss National Union's breach of contract claim and claim for prejudgment interest, and to dismiss National Union's unjust enrichment claim. Motion sequence number 009 is otherwise denied; and it is further

ADJUDGED and DECLARED there is a single occurrence, that is Fresenius' failure to warn; and it is further

ORDERED that National Union's branch of its motion seeking summary judgment dismissing Fresenius' first counterclaim based on allocation is granted; and it is further

ORDERED that National Union's branch of its motion seeking summary judgment dismissing Fresenius' first counterclaim based on occurrences is denied; and it is further

ORDERED that National Union's branch of its motion seeking summary judgment dismissing Fresenius' second counterclaim based on National Union's duty to defend is granted; and it is further

ORDERED that National Union's branch of its motion seeking summary judgment dismissing Fresenius's second counterclaim based on National Union's obligation to indemnify settlement amounts in excess of \$7.5 million is granted; and it is further

ORDERED that National Union’s branch of its motion seeking summary judgment dismissing Fresenius’ third counterclaim for unjust enrichment is granted; and it is further

ORDERED that the branch of the action relating to National Union’s reimbursement (count XI) is severed and continued.

1/12/2023
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE